Griffiths v TUI UK Limited: Can "uncontroverted" expert evidence be challenged?

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Introduction

This article reviews the recent judgment of Spencer J in Griffiths v TUI UK Limited [2020] EWHC 2268 (QB) which arose from an appeal of the judgment of HHJ Truman sitting at the County Court in Birmingham.

The appeal raised, "a fundamental question concerning the proper approach of a court towards expert evidence which is "uncontroverted". Where such evidence is uncontroverted, is it open to the court nevertheless to examine the contents of the report and the reasoning leading to the expert's conclusions and reject those conclusions if the court is dissatisfied with the reasoning? Or is the court obliged, subject to exceptional circumstances, to accept the expert's conclusions?"

The Court concluded that it was not open for the Court to examine the contents of an uncontroverted Part 35 compliant report and reject an expert's reasoning if considered appropriate.

The claim and procedural background

Given the nature of the illness and injury suffered, the claim was allocated to the multi-track. Upon issue the claimant relied upon a report of Dr Linzi Thomas, Consultant Gastroenterologist, who considered that food or drink consumed at the hotel was the cause of the illness. Notwithstanding this opinion, the claimant sought to rely upon Dr Thomas' evidence only in respect of the claimant's condition and prognosis, despite the fact that she is often instructed to opine on matters of causation in fast-track cases.

At the directions stage both parties were permitted to rely on their own expert evidence in the fields of gastroenterology (in respect of condition and prognosis) and microbiology (in respect of causation).

The defendant elected not to obtain its own expert evidence in either gastroenterology or microbiology. The claimant did however obtain a microbiology report from Professor Pennington.

The factual background

The claimant had booked a package holiday at a hotel supplied by the defendant between 2 and 16 August 2014. He contended that he had first suffered an episode of gastric illness on 4 August 2014, two days into the holiday, from which his condition improved but did not fully resolve and then suffered and further worsening of his condition on 10 August 2014.

It was conceded that he had consumed a burger at the airport and consumed food outside the hotel on 7 August 2014, before the onset of the second onset or worsening of symptoms. Otherwise the claimant contended that all other meals were consumed at the hotel. After the second onset, the claimant attended a hospital when a stool sample was taken which

curiously showed "multiple pathogens, both parasitic and viral". Notably there was not a positive bacterial test, which is so often associated with food poisoning claims.

The first instance judgment

HHJ Truman accepted the evidence of the claimant and his wife in full. Further there was no finding that the factual basis of Professor Pennington's report was inaccurate. Thus the matter fell to be determined by whether the claimant could prove that the illness was caused by a breach of contract.

The issue of causation took centre stage, as it so often does in gastric illness claims. Thus the outcome of the claim turned on the interpretation of the report of Professor Pennington.

HHJ Truman was highly critical of the report and the response to questions and following consideration of Wood v TUI Travel Plc [2018] QB 927 and Kennedy v Cordia (Services) LLP [2016] 1 WLR 597 and dismissed the claim on the basis that the expert evidence was *insufficient. She observed at paragraph 29 of her judgment:*

> *"They certainly do not provide me with sufficient information to be able to say that there is a clear train or logic between, for example, the incubation periods and the onset of illness, so that the pre-flight meal can be excluded or that the hotel food is a more likely cause; similarly for the 'second' illness – it is not said why it is more likely to be a relapse rather than a second infection, especially where the expert has said that it would be unlikely to have all the identified pathogens from one episode of eating contaminated food. It is thus not clear why the eating out in the local town can be discounted."*

Comment on the first instance judgment

In the writer's experience, both the line of attack taken by the defendant tour operator and the judgment of HHJ Truman come as no surprise. Many claims are dismissed where the judge might accept that the claimant was unwell but is simply not satisfied that the expert has appropriately considered and excluded alternative causes of illness or had failed to provide a cogent explanation for the conclusions reached in their report, which so often are that the illness is due to consumption of contaminated food or drink supplied by the hotel.

The argument based on, *inter alia*, excluding alternative causes of illness has its basis in the obiter comments of Burnett LJ and Sir Brian Leveson P who respectively commented that:

> "Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and the food was not "satisfactory". It is well known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an acceptable hazard of travel. Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact

that someone was sick. Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted. Additionally other potential causes of the illness would have to be considered such as a vomiting virus. The evidence deployed in the trial below shows that the hotel was applying established standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary."

"I agree that it will always be difficult (indeed very difficult) to prove that an illness is a consequence of food or drink which was not of satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded."

Further, the argument that a report fails to provide a cogent explanation for the conclusions made, is based on paragraph 48 of the judgment of Lord Reed and Lord Hodge in Kennedy v Cordia which provides:

"An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare ipse dixit" carries little weight, as the Lord President (Cooper) famously stated in Davie v Magistrates of Edinburgh 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless.

Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976 (3) SA 352, 371:

> "[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other
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> competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert."

As Lord Prosser pithily stated in Dingley v Chief Constable, Strathclyde Police 1998 SC 548, 604: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

The Appeal

The basis of the appeal was that HHJ Truman has erred in rejecting the expert evidence of Professor Pennington in the absence of any evidence, whether expert or otherwise, challenging or contradicting his conclusion. It was contended that the evidence of Professor Pennington was uncontroverted and therefore should have been accepted.

Spencer J considered paragraph 48 the Supreme Court judgment in Kennedy v Cordia (Services) LLP (see above) and held that, "where an expert's opinion is disputed, that opinion will carry little weight if, on proper analysis, the opinion is little more than assertion on the part of the expert." It was observed that the factual basis upon which the report of Professor Pennington was based had not been successfully challenged at trial. Thus the defendant's attack was on the *substance* of the report itself and the assertions that the conclusions were bare *ipse dixit*.

Thus it fell to be determined whether a court is obliged to accept an expert's uncontroverted opinion even if that opinion can properly be characterised as bare ipse dixit and, if not, what are the circumstances in which a court is justified in rejecting such evidence; and

When or in what circumstances can a court reject an uncontroverted expert report?

Spencer J considered, at paragraph 10, that the report of Professor Pennington and his Part 35 responses,

> "Were uncontroverted in the sense that the Defendant did not call any evidence to challenge or undermine the factual basis for Professor Pennington's report, for example by calling witnesses of fact or putting in documentary evidence; nor was there any successful attempt by the Defendant to undermine the factual basis for the report through cross-examination of the Claimant and his wife, nor by cross-examination of Professor Pennington. In this sense, and unusually, the evidence of Professor Pennington was truly "uncontroverted"."

Spencer J considered Kennedy v Cordia and found there was, "an internal inconsistency or ambiguity" within paragraph 48. He observed that, "On the one hand, their Lordships suggest that an unsubstantiated ipse dixit is worthless. On the other hand, they cite, with approval, Wessels JA in the South African Coopers case where he said that an expert's bald statement of his opinion is not of any real assistance except possibly where it is not controverted. So, where it is not controverted, is it worthless or not?"

In terms of answering the question put, it was held that:

> "In my judgment, the answer is to be found, as submitted by the Claimant, in the judgment of Clarke LJ in Coopers Payen Limited v Southampton Container Terminal Limited [2004] Lloyds Rep 331 at paragraph 42 where he said:
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> > "… the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong."

The Court went on to hold that:

> "In the absence of direct authority on the issue, I take the view that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare ipse dixit, for example if Professor Pennington had produced a one sentence report which simply stated: "In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel." This would qualify within Clarke LJ's "difficult to imagine" because, in these days of CPR Part 35 and the well-publicised duties of experts, it is difficult to imagine an expert producing such a report. However, what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all. (emphasis added)"

The following conclusions can be drawn from the above passage:

1. "A court would always be entitled to reject a report, *even when uncontroverted,* which was, literally, a bare *ipse dixit*". However, the example given as to what might amount to a bare *ipse dixit* was a one sentence report which simply provided a conclusion without any rationale. Although the quality of claimants' causation reports in gastric illness cases are of variable quality it is inconceivable that a report would be of such low quality to meet Spencer J's test of "bare *ipse dixit".*
2. However, where a report is uncontroverted, the court should not, "subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report".
3. Where a report is "truly uncontroverted" the role of scrutinising the report "falls away" and "All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all," which in effect means whether the report complies with paragraph 3 of the Practice Direction to Part 35.

It was held that the Practice Direction did not just go to from, but also to the content of the report. However, it was correctly observed that,

> "Despite this, it is no part of the Practice Direction that an expert, in providing a summary of the conclusions reached, must set out the reasons for those conclusions and it would be harsh indeed for a court to find that, despite the terms of the Practice Direction, a report failed to meet the minimum standards required for the report to be accepted in evidence because it did not set out the reasoning leading to the conclusions. In my judgment, the law does not so require."

However, it would seem obvious that in light of the judgment in Kennedy it is an essential ingredient of a report that an expert provides reasons for the conclusions made. This appears to be confirmed by paragraph 24 of the judgment of Lord Kerr in the Pricy Council matter of Pora v The Queen [2015] UKPC 9:

> "It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case. (Emphasis added)"

Spencer J addressed this issue by stating:

> "Of course, a failure to set out the reasoning might diminish the weight to be attached to the report but, as I have stated, at this stage the weight to be attached to the report is not a consideration: that only arises once the report is controverted. It may be that, had the Defendant served controverting evidence, Professor Pennington would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement. As it turned out, that step never became necessary because the evidence of Professor Pennington stood alone. Nor did the Defendant seek to challenge the reasoning that might have lain behind Professor Pennington's conclusions by calling for him to be cross-examined, as it had every right to do. In those circumstances, the court must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged."

Thus it would appear that provided that an expert report is uncontroverted and complied with Part 35 and provided that it did not contain "a bare *ipse dixit*, such Court should not scrutinise the rationale for an expert's conclusions "must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged."

Thus it was held that HHJ Truman was not entitled to reject the report for the reasons that she did. Notwithstanding that conclusion it was observed that, "there were serious deficiencies in Professor Pennington's report as identified by the learned judge which might well have caused the Professor serious embarrassment had the report been controverted"

This judgment is remarkable for the following reasons:

1. The burden of proof falls upon the party seeking to rely upon the expert evidence that they adduce. It would appear counter-intuitive to require a defendant to take positive steps to controvert the report before a court may then decide how much weight should be placed on the conclusions contained in that report. If a claimant has adduced a poor report, on what basis should a defendant be sensibly required to adduce either its own expert evidence, witness or documentary evidence to challenge the factual basis of the report (where such disputes exist) and/or to cross-examine the expert. Particularly in fast-track personal injury litigation there will be consider obstacles in a tour operator being given permission to obtain its own expert evidence or to call the expert to trial for cross-examination.

2. Further, given the burden of proof rests on the claimant to prove the cause of an injury or illness, if a defendant is in receipt of what it considers to be a weak report, why should the defendant have to give the expert an opportunity to improve upon the report? Spencer J stated, "It may be that, had the Defendant served controverting evidence, Professor Pennington would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement." In the writer's opinion such fundamental reasoning in support of a conclusion ought to have found its way into the report in the first place. There may be situations where it may be appropriate for an expert to comment further on particular evidence or suggested alternative causes, however generally there can be little excuse for a poorly reasoned causation report in a gastric illness claim. It would certainly be perverse for a court to consider a report to be substandard yet be required to "assume that there is some reasoning which lies behind the conclusion which has been reached and summarised"

3. Although the Practice Direction to Part 35 does not explicitly require an expert report to provide reasons to support the conclusions made therein for a report to be admissible, in the context of the requirement to identify whether a range of opinion exists, paragraph 3(6)(b) requires the expert to "give *reasons* for the expert's own opinion". This would rather imply that an experts reasoning should be integral to his report.

4. In respect to Kennedy v Cordia it is clear that an expert "must explain the basis of his or her evidence" and thus that analysis or lack thereof is something that the court can take into account when considering what weight to place on such evidence. There is nothing said in the first passage of paragraph 48 that places a condition on when a court may scrutinise the reasons provided in an expert report. The citation of the Wessels JA in the Coopers case reiterates the importance of an expert's reasoning in support of his conclusions. Particular weight appears to be placed on the passage, "Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance", however that is then followed by, "Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert." Thus the force of paragraph 48 is that a court could and should evaluate the reasoning of an expert's conclusions and no clear qualifications were placed upon a court as to when they could so scrutinise a report. Further there appears to be no good reason why, on Spencer J rationale, a court can assess the reasoning where both parties have an expert of like discipline but cannot undertake the same assessment of a weak uncontroverted expert report.

5. Further, in respect of Kennedy the question was not simply whether bare ipse dixit was useless but rather the importance of an expert setting out his rationale for his conclusions. Fettering the court's ability to scrutinise such evidence appears to conflict with Kennedy.

6. As to whether the judgment of Clarke LJ in Coopers Payen supports the contention that a court is prohibited from considering the weight of an expert's reasoning in the absence of the report being controverted or the reason amounting to bare *ipse dixit*, it is suggested that insufficient regard was paid to the fact that the case involved a *jointly instructed expert* rather than an expert instructed by one party. There is clearly a distinction between the two situations and in particular the ability to participate in the selection and instruction of the expert.

'Quantitative' and 'Qualitative' cases

Spencer J sought to draw a distinction between a 'quantitative case', whereby the claimant seeks to prove that he was one of many people who sustained food poisoning, and a 'qualitative case', whereby the Claimant seeks to prove causation by calling appropriate expert evidence.

The 'qualitative case' is one where it is alleged that the illness was due to expose to a particular pathogen contained in contaminated food as opposed to forming part of a wider outbreak. It seems however that almost every claim for gastric illness involves, to some degree, a qualitative approach where, "the Claimant seeks to prove causation by calling appropriate expert evidence." Based on Spencer J's judgment it does not appear to be necessary for the claimant to have obtained a positive stool sample for the case to qualitative in nature, but simply that the expert seeks to conclude "that the food provided by the hotel was implicated in the illness".

Indeed it is rare for a claimant to seek to suggest that his illness was due solely to an outbreak and rather the claimant tends to 'keep his options open' in that regard. Thus save for 'true outbreak case' it is very rare for a claimant to pursue a purely 'quantitative case'.

It is the 'qualitative case', which in the author's opinion comprise the vast majority of case, to some degree, where the reasoning in support of an expert's conclusion is of crucial importance to the question of causation.

Implications

We await to see whether permission to appeal will be sought and granted and what the outcome of any such appeal may be. However, in the meantime the implications of Griffiths may be considerable.

Where a claimant has obtained a report, a defendant may only controvert that report by seeking permission to obtain its own like-for-like expert report, obtain other witness or documentary evidence to contradict the report or to call the expert to trial for cross-examination. Otherwise, the defendant would be left with limited lines of attack of an expert report, those being that the factual basis of the report is inaccurate or that the conclusions in the report amounted to pure *ipse dixit*.

By CPR rule 35.1 there is a duty on the court to restrict evidence to "that which is *reasonably required* to resolve the proceedings". Could it now be that a defendant will be able to argue that notwithstanding the usual limits on expert evidence in gastric illness cases in particular and the Pre-action protocol for resolution of package travel claims that it should also be permitted to have its own evidence and/or call the claimant's expert to be cross-examined at trial.

Typically in a fast track personal injury case, the default is that a claimant is permitted to rely upon its own medico-legal report and the defendant is then permitted to put questions to that expert. Only in exceptional cases are both parties permitted to obtain their own medico-legal reports. The reasons for limiting expert evidence are obvious as the value of the cases in question and proportionality need to be balanced with each parties' respective interests.

However, the question of causation in holiday gastric illness cases is most often contested and is often determinative of the success or failure of a claim.

Following Griffiths it would appear that a defendant cannot safely stand back and do nothing once it is in receipt of the claimant's evidence and wait quietly to then attack the contents and conclusions of what it may perceive to be a weak report at trial. In order to "controvert" the report, the defendant must be proactive. This may be more straightforward in multi-track litigation where the defendant is more likely to seek and be granted to permission to rely on its own expert evidence.

However, in the fast-track the implications of CPR rule 35.4 are more likely to be keenly felt, especially in respect of gastric illness cases which in terms of value generally fall comfortably within the fast-track limits, yet unlike the majority of other fast-track injury cases, the issue of causation is far more nuanced and controversial.

It will be interesting to see how tour operators in particular respond to this judgment.