Challenging expert evidence in cross-border claims ... where next?

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There is a well-established principle enshrined in the Civil Procedure Rules that the Court should restrict expert evidence to "that which is reasonably required to resolve the proceedings".

In a personal injury claim, the claimant will as a matter of course seek the Court's permission to rely upon a report of a medical expert to consider the nature, extent and cause of an injury suffered as a result of an accident.

For a more modest injury, a report of one or two experts may suffice, but where the injury is more serious a whole suite of expert reports may be necessary. There may also be occasion to obtain expert evidence to address the nature and extent of the duty of care or to consider whether a breach of duty has occurred.

Proportionality will always be a relevant factor and the higher the value of the claim the smoother path will often be to obtain relevant supportive expert evidence. Conversely, the lower the value of the claim, the higher a hurdle may be.

Cross-border claims

Personal injury claims with an overseas element will often have an additional requirement for expert evidence. Claims governed by foreign law will require reports addressing the applicable law; package holiday claims will need a local standards report; and food poisoning claim will need a causation report as well as a local standards report, depending on how the claim is framed. This additional evidence is required irrespective of the value of the claim.

With the Courts serving as the gatekeepers of expert evidence, in lower value claims there will be a tendency for the Courts to keep a tight rein of the expert evidence a party may be permitted to rely upon. For example, in an

ideal world a defendant may want its own Spanish law evidence in a claim governed by Spanish law or its own medical causation evidence in a holiday sickness claim. In a lower value claim it would be standard for a Court not to allow the defendant permission to have its own evidence but limit it to asking Part 35 questions. However, in practice there is a wide range of inconsistence between Judges as to what expert evidence is and is not permitted.

This situation was not ideal, but the party seeking to challenge another party's expert evidence had a joker up its sleeve. The challenging party would cite Kennedy v Cordia (Services) LLP [2016] 1 WLR 597 and the requirement for an expert to "explain the basis of his or her evidence when it is not personal observation or sensation". The argument would develop that, "mere assertion or 'bare ipse dixit' carries little weight".

Thus at trial a Defendant could look to pick apart the contents of an expert report for not being properly reasoned or supported. This tactic was often deployed with devastating results in holiday illness claims, but was also available to be used to attack a poorly drafted local standards report which wrongly conflated local standards with substantive law.

Griffiths v TUI

However, that part of a defendant's arsenal was removed by the judgment of Martin Spencer J in Griffiths v TUI UK Limited [2020] EWHC 2268 (QB). Those who are interested in my earlier observations are welcome to read my earlier article on the case.

In summary, Spencer J held that provided that an expert report is uncontroverted, complied with Part 35 and did not amount to bare ipse dixit, the Court should not scrutinise the rationale for an expert's conclusions and "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."

A report might be considered uncontroverted where the Defendant did not call any evidence to challenge or undermine the factual basis for the report (for example by challenging the claimant's evidence of fact, calling other witnesses of fact or putting in documentary evidence) and where there was no alternative contrary expert opinion. As Part 35 questions were to clarify rather than challenge evidence, the process of putting such questions would not serve to controvert a report.

The implications of Griffiths

The implications of Griffiths were felt in holiday sickness claims and the impact was as seismic as that felt in the months after Wood v TUI Travel Plc [2018] QB 92 was handed down. However effects of Griffiths extend beyond holiday sickness claims to any situation where a party wishes to challenge an expert's opinion.

The response to Griffiths has seen a flurry of applications by defendants to call claimants' experts to be cross-examined or to have permission to have their own expert reports. The results of these applications have varied from court to court. Further, with the Court of Appeal due to hear TUI's appeal in the summer of 2021, some might hold on to hope that the clock might be turned back entirely.

Taylor v TUI

Recently HHJ Freedman, sitting at the County Court in Newcastle heard an appeal in the matter of Taylor v TUI arising from a Deputy District Judge's decision to order that an expert in a holiday illness case should attend trial to be cross-examined by the defendant. This was a modest matter limited to £3,000.

The Court observed that, pursuant to CPR rule 35.5(2) the only basis upon which an expert should be ordered to attend a hearing in a small claims or fast track matter is where it was in "the interests of justice" for him or her to do so.

HHJ Freedman observed that no criticism had been made of the contents of the expert's opinion, which was CPR compliant. He observed the report appeared to be well-reasoned with nothing remarkable or unusual about it.

The Judge below had allowed the application to ensure a 'fair trial', but had not stated explicitly why the trial would be unfair if the expert was not allowed to be cross-examined.

HHJ Freedman observed that:

"In my judgment there must be something much more specific than that. In other words, **if, most exceptionally and unusually, a court is to grant permission for a defendant to be given the opportunity to cross-examine the claimant's expert in these circumstances, it must be demonstrated that there is some flawed or deficient reasoning within the expert's report or some factual inaccuracy which needs to be exposed and needs to be clarified** before the judge so that the judge can have an opportunity to evaluate the conclusion reached by the expert and reject it, if appropriate."

It is evident from this passage that there is a high hurdle for an applicant to overcome. In particular the applicant would need to satisfy a Court that there was some "flawed or deficient reasoning within the expert's report or some factual inaccuracy which needs to be exposed and needs to be clarified".

Thoughts

Save for in the most obvious cases, should HHJ Freedman's judgment be followed, it will be very difficult to persuade a Court to require an expert to attend trial for the purposes of cross-examination in a Fast Track matter.

In order to do so, an applicant may need to incur the costs of their own expert just to prove a failure in the chain of reasoning of an expert.

For example, it may be evident in a Spanish law case that an expert has got an issue of law hopelessly wrong. How would that be communicated to a Judge who is not familiar with Spanish law? If the expert does not acknowledge his or her apparent error in response to written questions, an applicant may have to incur the cost of its own report to highlight the error. In a case of modest value this places a defendant in an unenviable position.

It is of course correct that the Courts have an eye to proportionality. However, claims with a cross-border aspect require additional expert evidence as a matter of course and the Courts also need to have an eye to what is just to allow all the issues in the case to be explored properly. That may be by allowing an expert to be questioned at trial or for a defendant to be permitted to obtain its own evidence.

A more proportionate response in lower value claims may be for a Court to order an expert to be jointly instructed. This may appear appealing on a superficial level, however in a foreign law case, this may prove an inelegant solution as a claimant would be deprived of the opportunity to have a conference with their expert whilst a foreign insurer, presumably with a good understanding of the law, would not suffer the same prejudice. This may result in increased costs as issues may not be narrowed and matters may not resolve so expeditiously.

The ripples caused by Griffiths continue to have very real impact on cross-border personal injury litigation. It will be interesting to see whether the waters calm or become more choppy in the months to come.

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