Griffiths in the High Court … and Beyond?

Stephen Cottrell

The arguments can be divided into two overlapping issues,

(a) The comments in Wood about needing to exclude alternative sources of infection etc and the difficulty of establishing that a gastric illness acquired on holiday was caused by consuming contaminated food and drink;

(a) The proper approach to expert evidence where the court was presented with the written evidence of a single expert but where that expert evidence is not agreed and the expert does not attend court.

(a) The Wood issue

We submitted that the *obiter dicta* of Burnett LJ and Sir Brian Leveson P were just that – *obiter*. Moreover, they were no more than a statement of the obvious.

The context for Wood was the Court allaying tour operators' fears that this would open the floodgates:

Burnett LJ,

> "[29] *Underlying this appeal was a concern that package tour operators should not become the guarantor of the quality of food and drink the world over when it is provided as part of the holiday which they have contracted to provide. Mr Aldous spoke of First Choice being potentially liable for every upset stomach which occurred during one of their holidays and the term "strict liability" was mentioned. That is not what the finding of the judge or the conclusion that he applied the correct legal approach dictates."*

(a) The Wood issue

What the Court of Appeal actually said:

Burnett LJ

> "[29] … *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.*"

(a) The Wood issue

What the Court of Appeal actually said:

Sir Brian Leveson P,

> "[34] *Neither do I accept the floodgates argument which Mr Aldous advanced. 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 a satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded. The fact is, however, that the judge found as facts that this had been proved in this case and no appeal has been pursued against those findings."*

(a) The Wood issue

What the Court of Appeal meant:

That a person falls ill on holiday is not evidence that they ate infected food. There could be lots of different causes. If lots of other people at the same resort fall ill at the same time, that might be evidence of a common cause and depending upon other factors it could be evidence of food poisoning (although it could be norovirus or some other environmental infection).

As a matter of common sense, if only one person falls ill it will sense be difficult to show food poisoning.

There is no attempt by the Court to impose a legal or evidential test.

(a) The Wood issue

The decision of Martin Spencer J:

NB the Defendant *accepted* that the Court of Appeal was not creating a test:

> "[31] *In relation to her evaluation of the judgments in Wood v TUI, it seems to me that Mr Stevens QC is right when he submitted that Judge Truman was not elevating those judgments to some special test which has no basis in law, and which she found that the Claimant had failed to satisfy, but rather, the test she was applying was no more than Burnett LJ's dictum that, in a case such as this, the Claimant has the burden of proving that his illness was caused by eating food supplied by the hotel which was not fit for consumption, and that this is a difficult test to satisfy when there are competing causes (as there always are when the illness is contracted when on a foreign holiday) and cannot be satisfied simply by proof of the illness*."

(a) The Wood issue

The decision of Martin Spencer J:

> "[31] *However, as I commented at paragraph 15 above, it seems to me that Burnett LJ and Sir Brian Leveson P had in mind, when they stated their dicta, cases where the Claimant was seeking to prove his case from the mere fact of illness, not cases where, as here, stool samples gave evidence of the potential pathogens at work and expert evidence gave an opinion as to which of those pathogens was the actual culprit, and the most likely source of infection. Thus, I endorse the distinction between the quantitative case and the qualitative case referred to in paragraph 21 above, and in a qualitative case such as the present, where an expert says that the great majority of cases of food-borne infective gastroenteritis do not occur in outbreaks, the absence of evidence of large numbers of other guests similarly affected may be of less significance whilst, in a quantitative case, such absence of evidence will be fatal to the case's success*."

(a) The Wood issue

The decision of Martin Spencer J explained:

Very simply,

(i) There is no special test for causation in holiday sickness claims;

(i) As a matter of common sense, proof of gastric illness is not proof of food poisoning;

(i) Multiple claimants might raise a *prima facie* case – this is 'quantitative' evidence **(although NB – surely you would rely on expert evidence in an 'outbreak' case in any event)**;

(i) In the absence of other claimants, expert evidence will get over the evidential hurdles.

(a) The Wood issue

The decision of Martin Spencer J explained:

The first instance decision in Griffths came about because of misinterpretation of Wood. Attempts by Defendants' lawyers to misinterpret Griffiths in a similar way have already begun.

At least one online article has attempted to narrow the scope of Martin Spencer J's comments at [31] to cases in which there is a positive stool sample.

(a) The Wood issue

The decision of Martin Spencer J explained:

The notion that a stool sample is required is BS for the following reasons,

- It assumes some special 'test' for causation in travel sickness claims; there is no such test. The ordinary rules of evidence apply;

- It ignores (as set out above) that the Court of Appeal were not setting out a test a**s accepted by TUI in *Griffiths***;

- It assumes that experts are unable to make a decision as to causation in any given case without a stool sample. In some cases they will need a stool sample, in others they will not.

(a) Uncontroverted Expert Evidence

The position in Griffiths was that both parties had permission for expert evidence in gastroenterology and microbiology.

D failed to serve its gastro evidence and an application for relief was unsuccessful.

It then decided not to serve microbiology evidence.

C had a report from Professor Pennington and answers to Part 35 questions.

(a) Uncontroverted Expert Evidence

The Defendant in fact made some desperate attempts to put further Part 35 questions to Prof Pennington in the days before trial. They had no permission for this and he was ill in an case.

The Defendant's stance was wholly unclear until its skeleton was served the afternoon before trial.

The skeleton argued that Pennington's evidence was 'bare *ipse dixit*' – a somewhat pompous way of saying it was inadequately reasoned.

The circuit judge accepted that argument.

(b) Uncontroverted Expert Evidence

There is not a lot of case-law on this situation.

I would suggest that is not surprising.

CPR 35 envisages early exchange and challenge of expert evidence with issues thrashed out well before trial in a joint statement where there is disagreement.

That cannot happen where a Defendant opts not to instruct its own exert – there can be no dialogue.

The CPR might be thought to envisage cross-examination (if permitted) in cases such as this, but from D's point of view there are two disadvantages to cross-examination – expense and the possibility that the expert might, when challenged, justify his opinion.

(b) Uncontroverted Expert Evidence

The Defendant's preferred approach is not to meet the Claimant's evidence in a pitched battle, but rather to retreat to a safe distance and snipe.

This is a risky tactical gamble.

We suggest that the Defendant should not be surprised when it fails.

(b) Uncontroverted Expert Evidence

The tactical gamble is unsatisfactory and potentially unfair, not only because it does not give the expert a chance to answer criticism, not only because that criticism need not be identified in advance of trial, but also because, we submit, it makes trials more likely in simple cases and is a disincentive from settlement.

(b) Uncontroverted Expert Evidence

The authorities:

In the Supreme Court in Kennedy v Cordia (Services) LLP [2016] 1WLR 597 Lords Reed and Hodge said:

> "48. *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*."

(b) Uncontroverted Expert Evidence

The authorities:

Wessels JA stated in the Supreme Court of South Africa (Appellate Division) in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH 1976 (3) SA352, 371:

> *"An 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 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."*

[Emphasis added].

(b) Uncontroverted Expert Evidence

The authorities:

Clarke LJ in Coopers Payen Limited v Southampton Container Terminal Limited [2004] Lloyds Rep 331 at paragraph 42 said:

> *"… 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*."

We submitted that this was powerful support for our position that the evidence of Professor Pennington should be accepted.

"[32] *If Mr Stevens' test is correct, namely that, to be accepted, the expert report must be (a) complete, in the sense that it addresses all relevant issues which require to be considered, (b) sufficiently reasoned so that its conclusions can be understood, then it would be all too easy to envisage a case in which it would be appropriate to decide the case on the basis that the expert's opinion was wrong. It seems to me that Clarke LJ must have had in mind a narrower test than this and I cannot think that, in so stating, Clarke LJ was assuming that the report would satisfy Mr Stevens' test. Indeed, that test would mean the court rejecting Wessels JA's proviso "except possibly where it is not controverted" in the case of a report which is a bare ipse dixit, despite the Supreme Court's apparent approval of Wessel JA's dictum*."

(b) Uncontroverted Expert Evidence

The decision of Martin Spencer J:

> "[33] *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.*"

(b) Uncontroverted Expert Evidence

The decision of Martin Spencer J:

The judge then set out in detail the requirements of CPR 35.

Having done so he found as follows,

> "[35] *In my judgment, for an expert report to pass the threshold for acceptance as evidence in the case, it must substantially comply with the above Practice Direction. Judged against this standard, it seems clear to me that Professor Pennington's report did comply and, indeed, the Professor may well have had the Practice Direction at the forefront of his mind when he wrote his report.*"

(b) Uncontroverted Expert Evidence

The decision of Martin Spencer J:

He then set out how, in his judgment, the report complied with CPR 35 and, having pointed out the lack of any challenge but also the lack of any opportunity for the expert to expand upon his evidence in, for example, a joint statement, he decided the case as follows,

> "[37] *For the above reasons, in my judgment the learned judge was not entitled to reject the report and evidence of Professor Pennington for the reasons that she did. However strong the criticisms of Professor Pennington's report, and I accept that those criticisms were strong, they went to an issue with which the learned judge was not concerned, namely the weight to be ascribed to the report, that being an issue which would only have arisen if the report had been controverted in the sense set out in paragraph 10 above. By ascribing, effectively nil weight to the report, the learned judge was ruling that the report did not meet the minimum requirements for it to be accepted as evidence in the case, and in that respect I take the view that she was wrong.*"

(b) Uncontroverted Expert Evidence

The decision of Martin Spencer J:

He concluded at [38],

"In my judgment, Professor Pennington went a long way towards substantiating his opinion by his consideration of the matters referred to above and his opinion was not a bare ipse dixit as it would have been had it been a single sentence as envisaged in paragraph 33 above. In fact, I doubt whether any report and opinion from an expert which substantially complies with the Practice Direction to CPR Part 35 could ever justifiably be characterised a mere ipse dixit."

(a) Where Next?

- The Defendant has applied for permission to appeal to the Court of Appeal.

- To date its application is restricted to the expert evidence issue – there is no challenge to the Wood point – hardly surprising given the concession made by D in the High Court.

- If permission is granted, expect more on *ipse dixit*, Part 35, and the policy/cost implications of the competing approaches to expert evidence.

Thank you for listening

Stephen Cottrell

Barrister

Devereux Chambers

29 September 2020