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When is an uncontroverted expert's report still open to challenge?

Griffiths v TUI (UK) Limited (2021) EWCA Civ 1442

This appeal raised the question of whether and if so, in what circumstances, the court could evaluate and reject what was described as an "uncontroverted" expert's report. The question arose in the context of a claim in respect of gastric illness allegedly suffered as a result of consuming contaminated food or drink whilst staying at a hotel in Turkey on an all-inclusive package holiday provided by the appellant/defendant, TUI (UK) Limited ("TUI"). The respondent/claimant suffered a serious gastric illness whilst on holiday in 2014, the symptoms of which persisted after his return home. He made a claim in contract and pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992.

The trial judge had dismissed the claim and ordered the claimant to pay the defendant's costs. She did so on the basis that she was not satisfied that the medical evidence showed that on the balance of probabilities the claimant's illness was caused by contaminated food or drink supplied by the hotel. A High Court Judge (the "Judge") allowed the claimant's appeal and set aside the order in the court below.

A majority allowed the defendant's appeal.

The defendant's first ground of appeal was that the Judge erred in law in holding that where an expert's report was "uncontroverted", the

IN BRIEF

In allowing the defendant's appeal, the Court of Appeal considered the circumstances in which an uncontroverted expert's report might nevertheless be challenged and rejected by the court.

The judgment looks in detail at the minimum requirements for a report to be Part 35 compliant.

court was not entitled to evaluate the substance of the report and that all the court needed to do was to decide whether it fulfilled the minimum standards prescribed by CPR PD 35. By "uncontroverted" it was meant that there was no factual evidence undermining the factual basis of the report, no competing expert evidence and no cross-examination of the expert takes place.

On this issue, the Court of Appeal held that there was no rule that an expert's report which was uncontroverted and which complied with CPR PD 35 could not be impugned in submissions and ultimately rejected by the judge. It all depended upon all of the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim.

If the report of a joint expert covered the relevant issues and the conclusion was supported by logical reasoning and it was the only evidence on the topic, it was difficult to envisage a situation in which it would be appropriate to decide that it was wrong. That did not mean that such circumstances might not exist.

The trial judge did not decide that the report was "wrong" in the sense of expressly rejecting the expert's conclusion. She decided that the report was insufficient to satisfy the burden of proof in relation to causation which fell upon the claimant because of its deficiencies, which she set out.

Furthermore, there was nothing which was inherently unfair in seeking to challenge expert evidence in closing submissions, as was the case here. It might be a high-risk strategy to choose neither to adduce contrary evidence nor to seek to cross-examine the expert but there was nothing impermissible about it. In this case, the closing submissions were to the effect that the expert's report was insufficient to enable the claimant to prove on the balance of probabilities that his illness had been caused by contaminated food or drink at the hotel.

There was no strict rule that prevented the court from considering the content of an expert's report which was CPR PD 35 compliant, where it had not been challenged by way of contrary evidence and where there was no cross-examination. The approach to such evidence all depended on the circumstances. Where the evidence was that of a joint expert, which went to the relevant issues and contained logical conclusions, it was very hard to see that it could be successfully challenged. The same must be true if there were two experts who had produced coherent reports covering the relevant issues and who were agreed. As the authorities provided, it will be rare that expert evidence should be rejected in those circumstances and cogent reasons should be given.

However, everything depended upon the circumstances. A court might reject a report, even where it was uncontroverted, if it was a bare *ipse dixit*. In most circumstances, it was likely that such a report would not meet the requirements set out in CPR Part 35, in any event. However, if the opinion was contained in only a few sentences, there might be circumstances in which such evidence could be accepted. For example, if the sentences contained an opinion as to whether a certain chemical was present in a compound.

It also followed that although CPR PD 35 did not state expressly that reasons were necessary in an expert's report, save where there was a range of opinion, it seemed that it was clear both from the judgments in *Kennedy v Cordia (2016)* and as a matter of common sense, that if the court was to be satisfied as to the conclusion reached, or in a case like this, that the evidence was sufficient to enable the claimant to satisfy the burden of proof in relation to causation, some chain of reasoning supporting the conclusion was necessary, even if it was short. In this case, it would not have taken much to make good the deficiencies which the trial judge identified. If, for example, the expert had answered question 4 of the CPR Part 35 questions that had been put to him by adding just a few

sentences explaining the range of opinions as to sources and causes of infection, the question of whether there were one or two infections, the significance of the meals eaten outside the hotel and where his opinion stood within that range or those ranges, the burden of proof might have been satisfied.

The remaining grounds of appeal

In the light of the reasoning in relation to the first ground of appeal, it was not strictly necessary to consider the remaining grounds. However, the appellate court dealt with them briefly.

The second ground was that the Judge erred in law in holding that the expert's report met the minimum standard required by CPR PD 35 because contrary to the Judge's finding the expert did not provide a range of opinion in response to question 4. The expert's answer to question 4 was no answer at all. He merely set out a statement of the approach which experts would take and stated that he did the same. It did not follow that all experts would reach the same conclusion as this expert or where his opinion fell within the range.

The third ground of appeal was concerned with whether an expert was required to provide reasoning for his conclusion. The Judge held that the law did not require it. Although it was true that reasoning was only referred to under CPR PD 35 para 3.2(6)(b) where there was a range of opinion, it was apparent that in most cases, some reasoning was necessary in order to support an expert's conclusion. Otherwise, it was all but worthless.

The fourth ground of appeal challenged what was described as a rigid test said to have been adopted by the Judge under which uncontroverted expert evidence must be accepted if it met the minimum standards established by CPR PD 35. A rigid test based solely upon whether the requirements of CPR PD 35 had been met was inappropriate. Compliance with CPR PD 35 alone was insufficient to require the court to accept uncontroverted expert evidence. It all depended on the circumstances.

The trial judge was entitled to conclude that the expert's evidence was insufficient to satisfy the burden of proof on the claimant in relation to causation. It was not for this court to interfere, nor was the Judge right to do so.

Nicola Critchley a partner with **DWF** and a member of the costs SFT comments:

'This judgment is of significance at two levels. First, it clearly assists defendants in gastric illness claims in requiring experts to justify their opinions on causation and not simply make unsupported assertions. Secondly, on a wider front, it reemphasises the often ignored requirement for experts to consider whether or not there is a range of opinion and if so what that range is and where they sit within it'.

The full report is available at: Griffiths v Tui (UK) Ltd [2021] EWCA Civ 1442 (07 October 2021) (bailii.org)