

The Limitations of Challenging Uncontroverted Expert Evidence

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An appeal is currently outstanding from the significant decision made on appeal by the High Court in *Griffiths v TUI UK Ltd* [2020] EWHC 2268 (QB).

The Decision at First Instance

The proceedings arise out of a claim brought by the Claimant against the Defendant for a gastric illness he suffered whilst on a package holiday to Turkey, which was supplied by the Defendant. The Claimant alleged that he developed acute gastroenteritis as a result of the consumption of contaminated food or fluid at the hotel where he was staying as part of the package holiday.

The Claimant relied on evidence from a microbiologist on the issue of causation. The Defendant obtained permission to rely on similar expert evidence but failed to serve a report. The Defendant was left without any expert evidence at trial.

There was no dispute that the Claimant's microbiology evidence was uncontroverted in the sense that the Defendant did not challenge or undermine it by calling or adducing any of its own evidence, and the Defendant did not successfully undermine the factual basis of the Claimant's expert evidence through cross-examination of the Claimant and his witness.

Notwithstanding the Claimant's expert evidence being uncontroverted, the Judge at first instance rejected the evidence of the Claimant's microbiologist essentially finding that the expert had failed, in a number of significant and material respects, to adequately substantiate his conclusion that the Claimant's illness was caused by eating hotel food and that accordingly, those conclusions could not be relied upon and thus the Claimant could not prove his case. The claim was therefore dismissed.

The Claimant appealed.

The Decision on Appeal

The Claimant was granted permission to appeal by Pepperall J. The appeal was heard by Martin Spencer J.

In the course of his judgment, Martin Spencer J cited the following passage from the judgment of Lord Reed and Lord Hodge in the Supreme Court case of *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 611, 612 [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. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung 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.'

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”

One could be forgiven for perhaps thinking, on a first reading of this passage, that the Judge at first instance was entitled to reach the conclusion that she did. It appears however that Martin Spencer J considered the words “*except possibly where it is not controverted*” to be of crucial importance in the present appeal. The learned Judge concluded as follows:

“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 [the microbiologist] had produced a one sentence report which simply stated: “In my opinion, on the balance of probabilities [the Claimant] acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel”...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 fulfills certain minimum standards which any expert report must satisfy if it is to be accepted at all.”

As to the minimum standards that an expert report must satisfy, Martin Spencer J considered those to be prescribed in CPR Practice Direction 35.

For the sake of completeness, Martin Spencer J also found that although there were serious deficiencies in the microbiologist’s report, his opinion could not be characterised as bare *ipse dixit*.

Accordingly, the Claimant’s appeal was allowed.

Comment

This decision supports the proposition that an uncontroverted report, which cannot be characterised as bare *ipse dixit*, cannot be challenged notwithstanding its deficiencies, provided it complies with CPR Practice Direction 35. In these circumstances, the question of the weight to be attached to such a report is not even a consideration before the court. Arguably, provided the report meets the ‘minimum standards’ the court must accept it.

This means parties may be taking a significant risk if they wish to challenge another party’s expert evidence on an issue but choose not to call or adduce their own evidence (expert or otherwise) on that issue.

It is thus evident why this decision has the potential to significantly impact upon the future conduct of litigation.

An appeal by the Defendant is outstanding. We await the Court of Appeal’s decision with bated breath.

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