Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- When is expert evidence 'uncontroverted'?
- A novel way around limitation
- The liability for costs of a litigation friend

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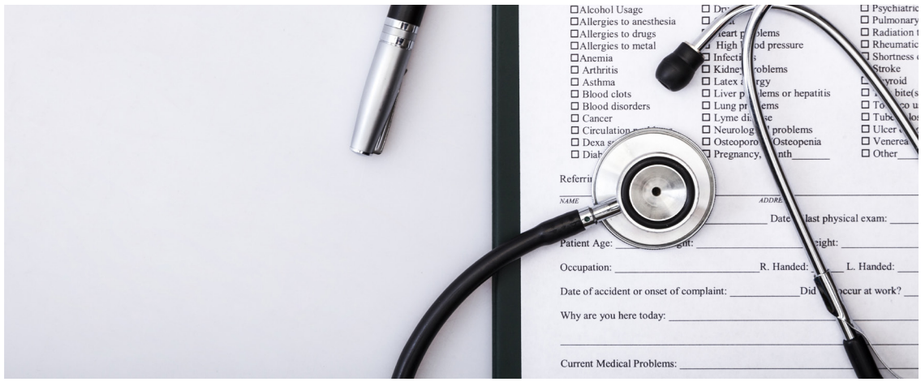


Expert evidence

Griffiths v TUI UK Limited (2020) EWHC 2268 (QB)

The claimant appealed against the decision of a circuit judge dismissing his claim for damages for breach of contract in relation to a gastric illness he suffered whilst on holiday in Turkey. It was the claimant's case that he had contracted his illness as a result of the consumption of contaminated food or fluid at the hotel booked through the defendant.

This appeal raised a fundamental question concerning the proper approach of a court towards expert evidence which was "uncontroverted". Where such evidence was uncontroverted, was 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 was dissatisfied with the reasoning? Or was the court obliged, subject to exceptional circumstances, to accept the expert's conclusions?

The claimant had obtained a medical report from a Dr Thomas which had settled upon the food, drink or fluids consumed at the hotel as being the cause of the claimant's illness.

When the time came for the exchange of further expert evidence relating to causation, the defendant initially indicated that it had no intention of relying on any such evidence. After receipt of the claimant's report from a consultant microbiologist dealing with causation, the defendant applied for permission to rely on a report from a gastroenterologist, and for relief from sanctions. That application was refused with the result that the defendant was left without any expert evidence for the purposes of the trial.

At the trial, the judge heard oral evidence only from the claimant and his wife, although there was also admitted into evidence statements submitted by the defendant from a doctor at the hotel, where the claimant was staying and the Head of Guest Relations and Executive Assistant to the General Manager at the hotel. Additionally, the judge had the defendant's disclosed documents. These documents, together with the witness statements, were all material which the claimant's expert confirmed he had considered in reaching his opinion.

The evidence of the claimant and his wife was accepted in full. Thus, the judge found that the claimant was indeed ill as he had described, and that he had proved the problems he had suffered from then and since. On the issue of causation, the only expert evidence before the judge was the report and Part 35 answers of the claimant's expert.

These were uncontroverted in the sense that the defendant did not call any evidence to challenge or undermine the factual basis for the 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 the expert (who was not called to give evidence).

The trial judge had referred to the judgment of the Court of Appeal in Wood v TUI Travel Plc (2008), in which the court had said:

'… 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.'

On the evidence, she concluded that the burden of proof was on the claimant. It was open to a defendant to sit back and do nothing save make submissions, and if the evidence was not sufficient to satisfy a court on the balance of probabilities, a claimant would not succeed. In this case, the judge was not satisfied that the medical evidence showed, following Wood v TUI, that it was more likely than not that the claimant's illness was caused by ingesting contaminated food or drink supplied by the hotel.

The judge found that the claimant's expert evidence did not provide the court with sufficient information to be able to say that there was a clear train or logic between, for example, the incubation periods and the onset of illness, so that a pre-flight meal consumed by the claimant could be excluded or that the hotel food was a more likely cause; similarly for a 'second' illness suffered by the claimant, it was not said why it was more likely to be a relapse rather than a second infection, especially where the expert had said that it would be unlikely to have all the identified pathogens from one episode of eating contaminated food. It was thus not clear why the eating out in the local town could be discounted.

Allowing the claimant's appeal, the High Court Judge held that in general, where an expert's opinion was disputed, that opinion would carry little weight if, on proper analysis, the opinion was little more than assertion on the part of the expert. Without doubt, the claimant's expert's report was short, indeed one could describe it as "minimalist".

The claimant's microbiologist's conclusion was said by the defendant to come so abruptly, and with so little reasoning, and with so many issues left in the air and unresolved, that his opinion contained within that conclusion amounted to no more than bare ipse dixit. The defendant chose to allow the matter to come to trial, perhaps in the hope that cross-examination of the claimant or his wife would undermine the factual basis for the report and conclusion.

That gamble did not pay off. The factual basis for the expert's report and the factual findings made by the judge were identical. Having thus failed to challenge the factual basis for the report, the defendant was thrown back onto its attack on the substance of the report and its assertion that the opinions were bare ipse dixit.

The test the trial judge applied was no more than that the claimant had 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 was a difficult test to satisfy when there were competing causes (as there always were when the illness was contracted when on a foreign holiday) and could not be satisfied simply by proof of the illness.

The comments in Wood v TUI applied to 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.

There were two questions to be answered: first whether a court was obliged to accept an expert's uncontroverted opinion even if that opinion could properly be characterised as bare ipse dixit and, if not, what were the circumstances in which a court was justified in rejecting such evidence; and, second, whether, in any event, this claimant's expert's report could in fact properly be described as no more than bare ipse dixit entitling the learned judge to reject it despite being uncontroverted.

'…a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare ipse dixit'

In the absence of direct authority on the issue, the appellate judge held that a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare ipse dixit. However, what the court was not entitled to do, where an expert report was uncontroverted, was 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.

For an expert report to pass the threshold for acceptance as evidence in the case, it must substantially comply with Practice Direction 35. Judged against this standard, the claimant's expert's report did comply. The Practice Direction went also to the content, of an expert's report. It was 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.

The judge was not entitled to reject the report and evidence of the expert for the reasons that she did. By ascribing, effectively nil weight to the report, the judge was ruling that the report did not meet the minimum requirements for it to be accepted as evidence in the case.

The expert went a long way towards substantiating his opinion by his consideration of the matters refer red to above and his opinion was not a bare ipse dixit as it would have been, for example, if it had been a single sentence.

The claimant was represented by Irwin Mitchell

The defendant was represented by Kennedys Law

Comment

Whilst this case shows that an uncontroverted report may be rejected by a court, it also acts as a warning that a party always runs a very real risk if it chooses not to rely on evidence from its own expert.

Limitation

Holmes v S & B Concrete Limited (2020) EWHC 2277 (QB)

The claimant's claim for noise-induced hearing loss ("NIHL") had been dismissed by a Circuit Judge. The issue in the appeal was whether the judge erred in failing to find that, the defendant/respondent having been deemed to have been in liquidation continuously since 1995, limitation did not run between 1995 and 4 May 2018, with the result that the action was not statute barred.

The principal issues before the trial judge concerned the date of the claimant's knowledge for the purposes of Ss11 and 14 Limitation Act 1980 and whether he should exercise his discretion to disapply the limitation period under S33 of the Act. The judge decided that the claimant's date of knowledge was mid-2007 and that it would not be equitable for him to exercise his discretion to disapply the limitation period pursuant to S33. There was no appeal against that part of the judgment.

However, the claimant relied upon a further, separate argument: this was that the effect of restoration of the defendant company to the Companies' Register was retrospective and the defendant was therefore deemed to have been in creditors' voluntary liquidation since at least 17 May 1995. The claimant cited Financial Services v Larnell (2005) in which was held that "if [a claim] is not time-barred at the commencement of the bankruptcy or winding-up, it does not become time-barred by the passage of further time thereafter." He argued that, in order for the case to be statute-barred, the claimant would have had to have had relevant knowledge for the purposes of the 1980 Act before 17 May 1992, that was, three years prior to the date since when the defendant was deemed to have been in creditors' voluntary liquidation.

'(T)he effect (of the claimant's argument) would be that the limitation period had never run…'

Dismissing claimant's appeal, the High Court Judge held that the starting point was the relevant provisions of the Companies Act 2006 (Ss 1029, 1030, 1031 and 1033).

In enacting those provisions, Parliament could not have had in mind the effect of Financial Services or its predecessor, the General Rolling Stock (1872) case, as interpreted by the claimant in the present case: otherwise, for a large number of cases such as the present, the restoration of the company to the Register would be automatic, the effect would be that the limitation period had never run, and there would then be no need to direct that the period between the dissolution of the company and the making of the order to restore was not to count for the purposes of the Limitation Act. The decision of the Court of Appeal in Financial Services could and should be distinguished.

In the vast majority of personal injury cases, the liability of the insurance company would fall well within the statutory minimum level of insurance of £2,000,000. Thus, there would generally be no difficulty in satisfying the full claim from the funds made available by the insurance company.

In that case, the claim could be seen to be "outside the liquidation" and therefore to be distinguished from the position in Financial Services. However, in the rare case where the liability of the insurance company might not be sufficient to satisfy the claim, it could be a condition of the order restoring the company to the register that any claim made by the claimant against the company was to be limited to the liability of the insurer pursuant to the policy. In that way, the claim could be kept outside the liquidation and therefore distinct from the situation in Financial Services.

This was also a desirable outcome. It meant that a claimant whose claim was otherwise unmeritorious because he acquired the necessary knowledge more than three years before the issue of proceedings and in respect of whom it would be inequitable for the court to exercise its discretion under S33 Limitation Act 1980 (the situation in the present case) would not gain an unexpected and undeserved windfall by virtue of the application of the rule set down in a 19th century case which was never intended to apply to a case such as the present. Furthermore, the decision of the Court of Appeal in Financial Services was never intended to apply to the situation which had arisen in the present case.

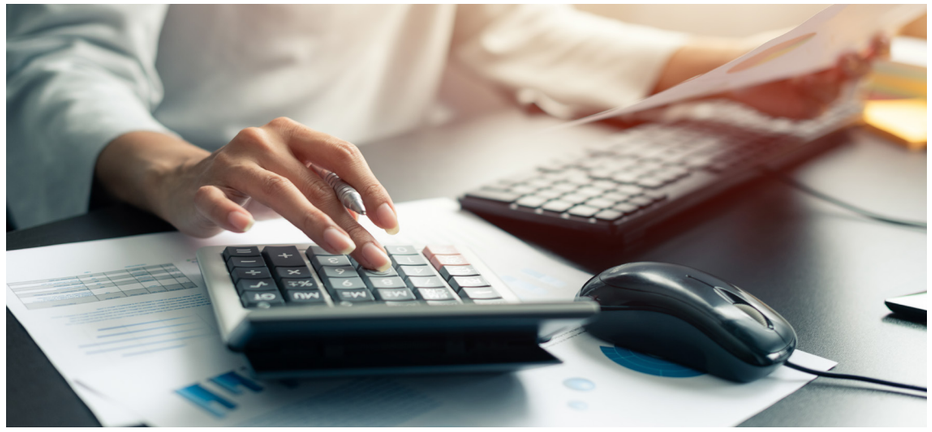
It was unfortunate that, in the present case, the defendant company was restored to the Register without notice of the application being given to the company's insurers who were the ultimate target for the claimant in making his application for restoration, and that the order was made without, apparently, consideration being given to the resolution of any issue between the claimant and the defendant's insurers in relation to a possible defence under the Limitation Act 1980. The Rules Committee should give consideration to a change in the rules, requiring such notice to be given to a relevant insurer when such an application was made for restoration.

The claimant was represented by Baker & Coleman

The defendant was represented by DWF Law LLP

Comment

With a novel argument such as the one run here, the best comment is probably: 'nice try!'



Costs/ liability of a litigation friend

Glover v Barker and others (2020) EWCA Civ 1112

In Insight 122, we reported the first instance decision in this case, in which the judge concluded that costs orders should be made against the appellant who had acted as litigation friend to her children in a dispute involving a family trust. An application had been made on behalf of the children in connection with the 'main' action, but the application had been refused.

Citing authorities ranging in date from 1727 to 1921, the judge concluded that there was "a long line of cases which establish the practice that in the case of an unsuccessful claim by a child claimant acting by a litigation friend, the usual order is that the litigation friend will be ordered to pay the successful defendant's costs".

The Court of Appeal looked at each of the issues to be determined as follows:

Issue (i): Was the judge wrong in his conclusions on the law as to the presumed general liability of litigation friends for costs, and in particular the liability of a defendant's litigation friend?

The jurisdiction to make a costs order against a non-party, whether a litigation friend or any other third party, nowadays derived from S51 Senior Courts Act 1981.

In practice, the court might not often need to consider whether to make an order under S51 of the 1981 Act against a litigation friend of a claimant. By virtue of CPR 21.4(3)(c) and 21.5, a person must give an undertaking as to costs to become a litigation friend without a court order.

Likewise, CPR 21.6(5) barred the court from appointing anyone as a litigation friend who did not satisfy "the conditions in rule 21.4(3)", and one such condition, in the case of a litigation friend of a claimant, was that an undertaking as to costs was given.
A claimant's litigation friend would commonly, therefore, be answerable for costs as a result of having given an undertaking without the court making an order for costs against him pursuant to S51.

The position in relation to costs orders against litigation friends in civil litigation could be summarised as follows:

i) At any rate where a litigation friend had not previously given an undertaking to pay the costs at issue, the power to make an order for costs against a litigation friend derived exclusively from S51 of the 1981 Act;

ii) When deciding whether an order should be made against a litigation friend under S51, the "ultimate question" was "whether in all the circumstances it is just to make the order";

iii) It would typically be just to order a claimant's litigation friend to pay costs if such an order would have been made against the claimant himself had he not been a child or protected party, but it remained the case that the court was exercising a discretion and entitled have regard to the particular circumstances;

iv) There was no presumption that a defendant's litigation friend should bear costs which the defendant would have been ordered to pay if not a child or protected party. That the litigation friend controlled the defence of a claim which succeeded would not of itself generally make it just to make an adverse costs order against the litigation friend. Factors that might, depending on the specific facts, be thought to justify such an order included bad faith, improper or unreasonable behaviour and prospect of personal benefit. If a director caused his company to litigate "solely or substantially for his own benefit" that might point towards a costs order against him. The fact that a litigation friend stood to gain a substantial personal benefit must also be capable of weighing in favour of a costs order against him.

'…the judge was mistaken in thinking that, "the court should apply the general approach that… the litigation friend is expected to be liable for such costs as the relevant party (if they had been an adult) would normally be required to pay''…'

It followed that the judge was mistaken in thinking that, "the court should apply the general approach that, as regards costs, the litigation friend is expected to be liable for such costs as the relevant party (if they had been an adult) would normally be required to pay" and so erred in principle.

In the present case, it was not suggested that the appellant acted in bad faith and she did not stand to gain a substantial personal benefit from her children's application. The application was not so obviously flawed as to justify a costs order against the appellant.

In all the circumstances, should the children be viewed as defendants, costs orders against the appellant would not be appropriate.

Issue (ii): Should the judge have concluded that the children were (or should be treated as) "claimants" for the purposes of CPR 21.4(3) and so have proceeded on the basis that the appellant had given an undertaking in respect of the respondents' costs?

The simple fact was that the appellant never entered into any undertaking. She could not be held liable on an undertaking that was not given.

A further point was that CPR 21.4(3)(c) contemplated an undertaking to pay "any costs which the child or protected party may be ordered to pay". In the present case, no costs order was made against the parties for whom the appellant acted. An undertaking of the kind envisaged in CPR 21.4(3)(c) could not, therefore, have served to impose any liability on her.

Issue (iii): Was the judge wrong to conclude that the children should properly be treated as claimants so as to engage a principle that their litigation friend should be liable for costs?

On balance, the nature and circumstances of the children's participation made it appropriate to apply the approach adopted in relation to defendants' litigation friends rather than that adopted in relation to claimants' litigation friends.

Although it was the children who made the application, the "foundation" for the application was the conduct of others of which the judge disapproved. The main proceedings involving the trust were "deliberately concealed" from the children and the appellant. The application represented an attempt to remedy what had gone wrong.

Initially, the children specifically asked to be joined as defendants. What was at issue in the application was whether the children were bound by a compromise of which they had not been informed in order to prevent

them expressing views on it. Whether or not the children would have been regarded as "claimants" for security for costs purposes, it was the approach governing costs orders against litigation friends of defendants that ought to be applied; and on that basis, the costs orders against the appellant were not appropriate.

Issue (iv): Was the judge wrong to rely on unpaid costs orders in other proceedings when reaching his conclusions on costs?

The conclusions arrived thus far meant that this issue fell away.

Issue (v): Should the judge anyway have held the appellant liable to pay the respondents' costs under the general discretion as to costs conferred by S51 of the Senior Courts Act 1981?

By the time of the hearing, it was common ground that S51 did not provide an independent basis for imposing liability on the appellant: the position was rather that any order against her would be made pursuant to S51. It followed that this issue did not require separate consideration.

The appellant was represented by Candey Ltd

The first respondent was represented by Memery Crystal LLP

The second respondent was represented by Reynolds Porter Chamberlain LLP

The third respondent was represented by Withers LLP

Comment

Although this judgment provides useful clarification of the potential liability of a litigation friend, it will have limited application in personal injury cases, where litigation friends invariably sign undertakings as to costs.

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