ON THE TENSIONS OF FAIRNESS AND PROPORTIONALITY: THE QUEST FOR COMPETENT EXPERT EVIDENCE AND THE RECENT DECISION IN GRIFFITHS v.TUI UK LIMITED[1]

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Abstract

This paper evaluates the complexities arise in fairness and proportionality in the judicial trails and ordinary legal system. As the time has progressed, the procedure of the courts equally complexes and those concepts which one upon a time considered as simple and straight, now become critical and twisted. Recent development in English judicial system where courts have been facing the problem of adhering with the statutory mandate along with the juridical responsibility of ensuring the reasonableness, fairness and justice. This paper while pointing out the situations of dilemma face by the courts, forward some suggestions as way out.

Key words

Fairness, proportionality, Court

INTRODUCTION

For the academic, it is all too easy to think of the Law as existing in a vacuum; its myriad complexities forming esoteric patterns worthy of study in themselves. For the busy legal practitioner, the Law shifts to become a tool: an occasionally simply, but often overly-complex, jig or frame on which to hang the evidence, so that the judicial observer, and, indeed, the litigant himself, might cast his eye down the line to consider in what shape the case might be. In many cases, that evidence is predominantly factual, and the litigant not only understands it, but personally provides it, explaining what happened, who did what, and when, and how. There may, of course, be a conflict of evidence, and much of the trial process is spent analysing the strength and cogency of the layman's perception of events, testing it by cross-examination, both for internal consistency and by reference to the other evidence available.

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[1] [2020] EWHC 2268 (QB)

Much has been written on the subject of the judicial interpretation and assessment of a witness, a classic example being Lord Pearce's commentary in the case of *Onassis and Calogeropoulos v Vergottis*[2] :

'Credibility involves wider problems than mere demeanour which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness, and motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process and in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'

That analysis is aimed, of course, at lay witness evidence, but there is another type of evidence that goes before the Court: the opinion evidence of an expert. Indeed, when the Court admits opinion evidence, only the opinion of an expert is admissible.

The Duties of an Expert and CPR35

The starting point on the duties of an expert (in both civil and criminal matters) is still, in many jurisdictions, the guidance of Cresswell J in *The Ikarian Reefer*[3] which, in turn, formed the basis of Part 35 of the Civil Procedure Rules 1988 and the accompanying Practice Direction:

"The duties and responsibilities of expert witnesses in civil cases include the following:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation. CPR35.3(2) and 35PD.2.1
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate. 35PD.2.2

[2] [1968] 2 Lloyd's Rep 403, HL

[3] [1993] 2 Lloyd's Rep 68, 81 cited (without case citations) in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6

3. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion. **35PD.2.3**

4. An expert witness should make it clear when a particular question or issue falls outside his expertise. **35PD.2.4(a)**

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report. **35PD.2.4(b)**

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court. **35PD.2.5**

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports. **35PD.3.2(2)**"

CPR35 goes further of course, but of particular note are the following provisions:

35.1 Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.

35.4 (3A) Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.

35.5 (1) Expert evidence is to be given in a written report unless the court directs otherwise.

(2) If a claim is on the small claims track or the fast track, the court will not direct an expert to attend a hearing unless it is necessary to do so in the interests of justice.

35.6 (1) A party may put written questions about an expert's report (which must be proportionate) … [which]

(c) must be for the purpose only of clarification of the report;

unless in any case -

(i) the court gives permission…

The Practice Direction to CPR35 sets out the requirements of Form and Content of an Expert's Report and, in particular:

3.2(6) where there is a range of opinion on the matters dealt with in the report [the report must] (a) summarise the range of opinions; and (b) give reasons for the expert's own opinion.

It follows that in low-value litigation[4], the courts will not only limit the number of experts to one per issue (almost inevitably the expert instructed by the Claimant), but that report will be received by the Court in writing, without the opportunity to cross-examine the expert. Indeed, the only challenge normally permitted to such evidence will be 'proportionate' written questions for the sole purpose of clarification of the report.

Low-value litigation

In personal injury litigation, those expert reports are by and large medical reports, or to give them their full title, medico-legal reports. In certain types of litigation, protocols exist which identify the nature of the 'expert' to provide that first opinion, and they are often (but not always) provided by General Practitioners: Physicians (rather than surgeons) who do not specialise in any particular branch of medicine, but who treat a wide variety of relatively minor medical conditions and refer patients on to more specialist doctors if the need arises. In some cases, a General Practitioner will diagnose and treat. In some, diagnosis is followed by a referral for treatment. In others, a referral is necessary to obtain the diagnosis. Within a community based practice, each General Practitioner might have particular interests, so that patients with a given type of problem, particularly if chronic, might be assigned to an individual with additional knowledge or experience of that particular condition, but as a starting point, the General Practitioner is a jack of all trades. It is that very breadth of experience which renders them useful.

In uncomplicated, low-value litigation, such 'expertise' might well suffice, but, inevitably, as the health issues in question become more complex, so too does the need for particular expertise become more salient. It would be comforting to think that every doctor[5] knew the limits of their expertise and experience. In the medical context, the treating doctor will normally have a reasonable idea of the risks that they face if they get it wrong. They have a patient before them, making a complaint about their health, and their very function is to listen to that patient, assess their complaint, make such investigations as are necessary and provide treatment. In the medico-legal scenario, however, they are being paid to opine, not treat, and whilst one would hope that any opining doctor would know that, it is inevitably easier to pass a patient on to someone more qualified (and get paid to do so) than to express one's ignorance having previously put oneself forward as an 'expert' capable of expressing a medico-legal opinion.

Perhaps the fact that in the medico-legal scenario a patient's health is not the primary concern makes it easier for a reporting doctor to overstep their expertise, particularly if they are aware that theirs is going to be the only opinion in the case. CPR35 questions which go beyond mere clarification (such as those which might suggest that they only ever opine for Claimants and only ever reach supportive conclusions) can be batted back as inappropriate, and rather than accepting their inadequacies, reporting doctors are, whatever their nominal obligations, aware of the need to protect both their clients (not patients) and their own medico-legal reputation.

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[4]The small claims track and fast track encompass the majority of claims where the damages at stake are up to £25,000.

[5]The same could be said of nearly every profession.

The problem does not manifest solely in General Practitioners. Consultants, whilst (and perhaps because) they are aware of their limitations are nevertheless still at risk of the Dunning-Kruger: the cognitive bias leading an individual to assess their cognitive ability as greater than it is. Whilst it is plausible to suggest that some experts are highly conscious that they are opining beyond their expertise, the more likely scenario is that they genuinely believe that their experience and qualifications allows them to offer an opinion, because the alternative is to admit their ignorance.

There are, however, regulatory difficulties which await those who step beyond their expertise, with the General Medical Council occasionally censuring members who choose to opine in cases where discretion would have been the better part of valour. *In Dr Richard Pool v General Medical Council*[6] , the High Court upheld a finding by a Fitness to Practise Panel constituted by the GMC, that the Appellant, a consultant psychiatrist in the private sector working in a secure hospital environment, was not an expert in the field of general adult psychiatry, and should not have offered an opinion on the fitness to practise of a paramedic, "A" in respect of whom he had been asked to opine. Whilst the initial decision to suspend him for 3 months was deemed inappropriately harsh, the decision of his wrongdoing was upheld.

Whilst *Pool* is a salutary warning to doctors about the subject matter on which they might each choose to opine, there are undoubtedly significant financial rewards to producing high volumes of medico-legal reports, particularly when others with similar levels of qualification and expertise are undertaking similar work, and the Protocols in place mandate the type of doctor who should report.

What, then, is a Defendant to do when faced with an opinion with which they do not agree, particularly if it is central to the case (e.g. if it goes to the question of liability)? In a high value claim, it may well seek its own evidence, taking the view that the additional costs to be incurred are warranted, if only to explore alternatives to the views expressed by the Claimant's expert. The Court is, of course, mandated by **CPR1.1(1)** to ensure that litigation is conducted justly and at proportionate cost, and in a high value case, where the evidence goes to the heart of the valuation, a second opinion will normally be justified.

In low-value litigation, however, what is "just" as between the parties may not, of course, be the most cost-effective manner of conducting the litigation and there is an inevitable tension thus created. A Defendant has to decide, in any given case, whether to seek their own evidence (which is not only costly in circumstances where one will probably not recover the costs from the Claimant even if successful, but potentially also leads to an arms race as the Claimant seeks to improve on the existing instruction by getting a more qualified second expert) or seek to undermine the Claimant's doctor by whatever means. Even then, the Court will make a determination of what is 'necessary' under CPR35.1, and, being a Case Management decision (with a wide range of discretion available to the District Judge), such decisions are almost impossible to appeal. In the majority of low-value cases, the cost benefit analysis often falls in favour of attacking the Claimant's poor quality expert evidence, rather than seeking to put forward a positive case the other way.

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[6][2014] EWHC 3791 (Admin), Lewis J.

The Challenges to Expert Evidence

The case of *Kennedy v Cordia (Services) LLP* examined in some detail the potential challenges to expert evidence, and in particular its admissibility. The key section of that judgment, starting at paragraph 38, addresses both the admissibility of the evidence *per se* and the approach that the Court might take to its weight.

As to admissibility, the relevant section starts at paragraph 43:

43. Counsel agreed that the South Australian case of *R v Bonython* (1984) 38 SASR 45 gave relevant guidance on admissibility of expert opinion evidence. We agree. In that case King CJ at pp 46-47 stated:

"Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area[7], and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. **The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.**" (emphasis added)

44. In *Bonython* the court was addressing opinion evidence. As we have said, a skilled person[8] can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence:

(i) whether the proposed skilled evidence will assist the court in its task;

(ii) whether the witness has the necessary knowledge and experience;

(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and

(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence.

In considering the first of those considerations - whether the evidence will assist the court in its task - their Lordships addressed the question of whether the evidence had weight:

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[7] A superficially more generic definition than that set out at section 45 of the Indian Evidence Act, 1872 (last updated 13 March 2020) which references "a point of foreign law, or of science, or art, or as to identify of handwriting [or finger impressions]".

[8] *Kennedy* is a Scottish case, where 'experts' are known as 'skilled people'.

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 Page 16 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.** (emphasis added) Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352, 371:

"[A]n 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."

In short, the subject matter of the opinion has to be outwith the experience of somebody without instruction or experience of those matters, the individual expressing the opinion has to have knowledge (howsoever acquired) which renders his opinion of value in resolving the issues, and the opinion has to be reasoned rather than mere *ipse dixit*[9] .

The question of whether the issue warrants expert evidence, whilst central to *Kennedy* is normally relatively straightforward. The real issues are firstly whether the expert is, in fact, an expert in the matter on which he is opining, and secondly whether that opinion is legitimately expressed.

On the question of expertise, whatever the legal niceties, there is, for the opposing party (normally the Defendant), a practical problem: How does one prove that an 'expert' is not, in fact, an 'expert' before they give evidence and are cross-examined? CPR35 questions which seek to undermine the expert's ability to opine at all are hardly 'mere clarification', and if the doctor refuses to answer (and why would they make those admissions), a Defendant is left with having to make an application which can be won or lost (with additional cost consequences), all within a potentially tight timetabling of the litigation process. A Court is inevitably going to be wary of making any such finding, particularly if it serves to debar a professional from earning money, without giving that professional the opportunity to speak in their own defence. The Court may well harbour the normally legitimate notion that such individuals will act with integrity: after all, to be asked to opine in Court proceedings as an expert should, *prima facie*, be an honour. As with the erection of statues, is it not better that the question asked is why it does not occur, rather than why it does?

Even with compelling evidence to suggest that an expert has overstepped the mark, the Courts are exceedingly loathe to deem their evidence inadmissible at an interlocutory stage. Rather, they much prefer the issue to be determined at trial.

[9]Or, in the language of playgrounds all around the world, "Because I say so."

From a Defendant's perspective, there is a further practical problem: If the Court can be persuaded that the first expert is not, in fact, competent to opine, then the Claimant will almost inevitably seek to substitute an expert who is.[10] The idea of a Pyrrhic victory where one neither defeats the litigation, nor saves money, is not an attractive one.

The alternative, then, is to challenge the quality of the report at trial. This is, to some extent, a high-risk strategy: One of the great variables of civil litigation is, after all, the identity of the trial judge. That said, with a paper report, one can prepare a submission based on its failings (and shamefully few reports actually comply with the full requirements of CPR35), the evidence is unlikely to change against you during the course of cross-examination and might even change in your favour. Defendant advocates have, for years, honed their forensic skills on just such tasks, picking apart the evidence and relying on the burden of proof being on Claimants to prove their case. Submissions can be made to undermine the standing of the writer of the report, and the methodology, and the internal inconsistencies, and the judge can perform the judicial function of weighing up the evidence and making a decision.

This then was the accepted methodology for challenging expert evidence until the decision of Martin Spencer J in *Griffiths v TUI UK Limited*[11], a decision which has potential repercussions not just for the entire system of low-value litigation in England and Wales but for the wider treatment of expert evidence by the Courts.

Holiday Sickness litigation

By way of background to the *Griffiths* case, in January 2017, the Court of Appeal delivered judgment in the case of *Wood v Travel plc t/a First Choice*[12]. The Claimants in that matter sought to recover damages from the Defendant tour operator for gastric illness suffered whilst on a package holiday to the Dominican Republic. Because this was a package holiday, it was subject to the provisions of The Package Travel, Package Holidays and Package Tours Regulations 1992, which make the tour operator liable to the consumer in the UK for any breach of contract by the provider of those package services, even though that provision was in a foreign country. The Claimants successfully argued that the food and drink provided as part of the package had to be of a 'satisfactory' standard, by reason of the term implied by section 4(2) of the Supply of Goods and Services Act 1982[13]. If such food were contaminated so as to make the Claimants ill, that was a breach of contract, irrespective of 'fault' on the part of the Hotel or, critically, the Defendant.

Whilst the Court of Appeal dismissed the Defendant's appeal, both Burnett LJ (as he then was) and The President of the Queen's Bench Division (Sir Brian Leveson), made strong obiter remarks which provided significant solace to tour operators facing a deluge of such claims for compensation, where the costs involved far outweighed the damages at stake.

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[10] c.f. *Edwards-Tubb v JD Wetherspoon plc* [2011] Civ EWCA Civ 313

[11] Handed down on 20 August 2020

[12] [2017] EWCA Civ 11

[13] Now section 9 of The Consumer Rights Act 2015.

At paragraph 29, Burnett LJ said this:

"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. The judge was satisfied on the evidence that Mr and Mrs Wood suffered illness as a result of the contamination of the food or drink they had consumed. Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and that the food was not "satisfactory". It is well-known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an accepted hazard of travel. 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.

30. The evidence deployed in the trial below shows that the hotel was applying standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary."

In a similar vein, the President at paragraph 34 said:

"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."

Whilst one might have expected such words to dissuade litigation, Claimants have, since Wood, pursued their claims with renewed vigour, with supportive 'opinion' from a variety of specialisms (General Practitioners, Gastroenterologists, General Surgeons and the like, although rarely Microbiologists or specialists in Tropical Disease). Undeterred by the lack of positive test for a pathogen in the vast majority of such medico-legal cases (and, indeed, it is probably the modal result in medical investigations too), the argument often advanced that because the majority of cases of Travellers' Diarrhoea where the pathogen is identified are bacterial in origin, and bacterial pathogens are acquired by consumption, on the balance of probability it was food which made Claimants ill in any given case irrespective of the fact that no pathogen was identified on this particular occasion.

Defendants reacted either by seeking to introduce their own evidence, or seeking to undermine the Claimants' experts, either in writing by CPR35 questions, or in cross-examination, or, as set out above, in submission at the end of the trial.

Griffiths v TUI UK Limited

In *Griffiths* the situation was slightly different. The Claimant had tested positive for various pathogens and both parties were given permission to obtain and rely upon expert evidence from both a Gastroenterologist and a Microbiologist: this was not a standard, low-value claim where only one expert was permitted, and the matter was allocated to the Multi Track as having both some value and some complexity. As it happened, the Defendant elected not to rely on Microbiological evidence in the case, and, having found itself in default of the Court's directions for service of their Gastroenterological report, were debarred from relying upon any medical evidence at all.

Nevertheless, the Defendant perceived significant flaws in the Claimant's medico-legal evidence and the case went to trial where, in accordance with CPR35.5, the evidence of the Claimant's Microbiologist, Professor Pennington, was received on paper, consisting both of his report and his answers to CPR35 questions. In effect, whilst the case had threatened to metamorphose into a full-blown fight between experts, it had then retreated in to the entirely typical situation of the Claimant's chosen expert producing a supportive report, the Defendant asking questions which served (they believed) to emphasise the weaknesses in his report, and the evidence being admitted on paper, subject to submissions as to the weight which one could attach to that evidence.

Whilst HHJ Truman was prepared to find that the Claimant had been ill as alleged, she proceeded to dismiss the claim on the basis of a series of criticisms[14] of Professor Pennington's report[15], including the fact that it did not set out the range of opinion. The Defendant asserted that the report's inadequacies meant that it was insufficient to prove causation. They relied, in effect, on the statement of Lord Prosser in *Dingley*: "As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."[16] If the reasoning was the subject of legitimate criticism, they said, then so too was the conclusion, and the Court was the ultimate arbiter.

The Claimant appealed to the High Court, asserting that because the Defendant had not put up any evidence to counter that of Professor Pennington, and had not called him, no matter what criticisms were made of that report it was, in actuality, 'uncontroverted' in the sense referenced by Wessels JA in the *Coopers (South Africa)* case[17]. They drew the Court's attention to the decision of the Court of Appeal in *Coopers Payen Limited v Southampton Container Terminal Limited*[18], where Clarke LJ contrasted the position where an expert (for example a single joint expert) is the only witness on a particular

[14]The Defendant's submissions are set out at paragraph 16 of the Appeal judgment, whilst the Judicial findings are at paragraph 18.

[15]The Claimant did not seek to rely on the reports of Dr Thomas, Gastroenterologist, on the issue of causation.

[16][1998] SC, 548

[17][1976] 3 SA 352

[18][2004] Lloyds Rep 331, 338

topic with the position where the expert's opinion is only part of the evidence. Whilst in *Coopers Payen* there was lay evidence called by the Defendant to controvert the expert, here, they said, there was no other evidence against which to weigh that of Professor Pennington and it should therefore have been accepted. Indeed, the effect of their argument was that it had to be accepted, no matter what its flaws, because it was 'uncontroverted'.

In response, the Defendant submitted that only in specific circumstances should the Court be required to accept expert evidence as uncontroverted[19] : "It is accepted that if agreed or unopposed expert evidence is: (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, and (c) there is no factual evidence which contradicts or undermines the basis of it, there would need to be good reason for not accepting it."

Martin Spencer J, discussing the law, referenced paragraph 48 of *Kennedy* with the following (abridged) analysis:

"29. In general, where an expert's opinion is disputed, that opinion will carry little weight if, on proper analysis, the opinion is little more than assertion on the part of the expert….

30. In the present case, Professor Pennington's conclusion is 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 amounts to no more than bare *ipse dixit*. In those circumstances, it is contended that the conclusion is worthless. If that is correct, it would mean that the evidence adduced by the Claimant was never capable of proving his case on causation: before the matter ever came to trial, the Defendant could have applied for summary judgment on the basis that the Claimant's case, taken at its highest, could not succeed."

Pausing there, it is far from clear how that analysis sits with the line of authority about what constitutes 'no real prospect of succeeding on the claim or issue' [20]. The hearing of an application for summary judgment is not a summary trial and does not involve the Court conducting a mini-trial[21] . There are clear statements of authority in *Three Rivers District Council v Bank of England (No.3)*[22] and one is inevitably drawn to the words of Lord Hobhouse: "The criterion which the judge has to apply under CPR Pt24 is not one of probability; it is the absence of reality."

Leaving aside the cost and time implications of making an application for summary judgment in each and every case where the expert evidence was so poor that the Claimant was never capable of proving his case on causation, the law simply does not permit the Court to engage in the sort of mini-trial and assessment of the evidence which *Griffiths* suggests as a solution.

Martin Spencer J continued:

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[19]Paragraph 23 of the judgment.

[20]CPR24.2

[21]Per Lord Woolf MR in *Swain v Hillman* [2001] 1 All ER 91.

[22][2001] 2 All ER 513, HL

"31. … In those circumstances, in my judgment there are two questions to be answered: first whether a court is obliged to accept an expert's uncontroverted opinion even if that opinion can properly be characterised as bare *ipse dixit* and, if not, what are the circumstances in which a court is justified in rejecting such evidence; and, second, whether, in any event, Professor Pennington'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.

32. In the extract from the judgment of Lords Reed and Hodge in *Kennedy v Cordia* quoted at paragraph 29 above, there is an internal inconsistency or ambiguity. On the one hand, their Lordships suggest that an unsubstantiated *ipse dixit* is worthless. On the other hand, they cite, with approval, Wessels JA in the South African *Coopers* case where he said that an expert's bald statement of his opinion is not of any real assistance except possibly where it is not controverted. So, where it is not controverted, is it worthless or not? In my judgment, the answer is to be found, as submitted by the Claimant, in the judgment of Clarke LJ in *Coopers Payen Limited v Southampton Container Terminal Limited* [2004] Lloyds Rep 331 at paragraph 42 where he 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."

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** (emphasis added)."

Again, pausing there, that is precisely the point. If justice is to be done at a proportionate cost, surely it is better that the Court should listen to what is said and determine whether the evidence before it is logically consistent, taking that evidence as part and parcel of the case as a whole, and then exercising the judicial function to do justice between the parties? The alternative is that in addition to incurring the costs of representation at trial, the parties must also secure the attendance of the expert to ensure that the Court can decide to reject that evidence. Not only does that incur disproportionate costs, but it also requires the Defendant to force the Claimant to prove his case, rather than relying on the burden which underpins all civil litigation - that the Claimant bears the burden of proving his case on the balance of probability. To oblige a Defendant to force the Claimant to strengthen a case which is simply not strong enough is to place an unrealistic burden on each and every Defendant. It requires the Defendant not only to engage and analyse the evidence in every case, no matter how limited its value, but to take costly steps in the litigation with no hope of recovering those costs. The very heart of civil litigation is proportionality, and that falls to be set aside.

Martin Spencer J, however, took a very different approach:

"32… 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.

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*… 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."

He then went on to consider what the 'minimum standards' might be, by reference to the requirements of 35PD and concluded that:

36. It is, in my judgment, of significance that the Practice Direction goes not just to the form, but also the content, of an expert's report. Despite this, it is 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. In my judgment, the law does not so require. Of course, a failure to set out the reasoning might diminish the weight to be attached to the report but, as I have stated, at this stage the weight to be attached to the report is not a consideration: that only arises once the report is controverted.

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.

38. … I take the view that the court below was not entitled to reject the report because of its perceived deficiencies. However … I accept that there were serious deficiencies in Professor Pennington's report as identified by the learned judge which might well have caused the Professor serious embarrassment had the report been controverted…

…It is true that he did not set out his full reasoning, nor explain how he was able to reach that conclusion …

… I am conscious of what the Supreme Court said in *Kennedy v Cordia* (see paragraph 29 above). But, in that dictum, their Lordships referred to the opinion being a bare or unsubstantiated one, thus amounting to an *ipse dixit*. 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*."

The first question is then 'what is substantial compliance with the Practice Direction?' It is clearly different from 'compliance' with the Practice Direction which, it should be noted, is in mandatory terms. 'Substantial compliance' must necessarily be a lower level than 'compliance'; but if compliance is mandatory, how then can 'substantial compliance' suffice? Clearly, the judgment acknowledges that there is a spectrum of putative compliance, ranging from a bare *ipse dixit* with no attempt at explanation, through to a half-hearted attempt or logically inconsistent attempt, well before one gets to compliance. How, then, is one to determine what is 'substantial'? Will anything more than nothing at all suffice?[23]

The vagaries of whether the attempt at compliance is sufficiently substantial would then determine whether the trial judge is even permitted to analyse the report. In other words, if an 'expert' report substantially complies then even if the report, on forensic analysis, is the subject of such strong criticism that it would seriously embarrass the writer to be cross-examined on it, the judge is still not allowed to look behind the conclusion. What if the flaws in the analysis go to whether or not there is substantial compliance? When is that decision to be made?

That, in turn, causes a very real, practical problem, because these issues of compliance or adequacy can only be determined before trial, at an interlocutory stage. Each case is the subject of some judicial scrutiny early in the proceedings when directions are given, but in low-value, standard form, litigation, that scrutiny is most often undertaken on the papers, without the legal representatives or the parties present. That saves cost and time, both of which are at a premium in the quest for proportionate litigation. If the Court gives directions on paper, the dissatisfied party has to pay a Court fee to apply for those directions to be reconsidered, judicial time and lawyer time then has to be expended to determine what should happen. A detailed analysis of whether any given expert report falls to be considered to have been controverted at the time of the directions is impossible. Directions are nearly always made before witness statements are exchanged, or even disclosure of documents has occurred, and will predate any questions under CPR35. One would have to consider whether the report was controverted:

1. Before witness statements were prepared (because the decision to prepare a statement might be made by reference to the need to controvert); and again
2. Before CPR35 questions fell to be asked (because why would one ask questions to allow an expert to strengthen an otherwise fatally weak report?); and then again
3. After those questions has been asked and (possibly) answered.

Returning to the analysis in paragraph 33 of the judgment, there is another practical issue which does not appear to be part of the analysis. Until the factual evidence has been called, it is impossible to determine whether the expert report is uncontroverted or not. How is a Defendant to know whether a Claimant will come up to proof? Is a Defendant to be forced to call law evidence to controvert the Claimant's evidence, not

[23] And at what point does the expert run the risk of being sued by his own client, having lost his immunity from suit after *Jones v Kaney* [2011] UKSC 13?

knowing whether the Court will accept or reject the Claimant's case? The judgment in *Griffiths* does not, on its face, address those issues, but if it is correct, then in order to assess the merits of a case before allowing it to go to Court, a Defendant will have to undertake the following secondary analysis:

1. Is the Claimant going to come up to proof, in circumstances where there is every likelihood that the witness statement is a *pro forma* exercise carefully scoped to consider, and hopefully prove, the necessary *facta probanda*? How can one assess the credibility before one goes to Court?

2. Is the Defendant going to call lay evidence in response? Is there now a burden on a Defendant (who must secure and serve his witness evidence well before trial) to investigate and provide some sort of rebuttal to the Claimant's evidence?

3. If the Court prefers the Claimant's evidence to that of the Defendant, does that mean that there can be no controversion of the Claimant's expert's evidence? How, then, before closing the lay evidence in the case, are the parties to know whether or not the expert report, which could legitimately be criticised in its content if it is deemed controverted, can be subjected to criticism or not?

4. Does that mean that in any given the case the expert must be called to be cross-examined, notwithstanding the limited circumstances envisaged by CPR35.5(2), in circumstances where we do not know until the lay evidence has been concluded whether his attendance will be required to controvert his report or not?

It matters not what the issues in the litigation might be. These questions will fall to be asked in respect of every single expert report, whether the litigation pertains to personal injury, a commercial dispute, or into the family or criminal arenas. How is either party to assess whether critical forensic analysis of expert evidence is going to be permitted not just by the parties, but by the Court? And how can such fluidity and ambiguity in the evidence ever be just? The immediately obvious answer would involve disproportionate cost, with both sides potentially getting experts in every case, or the Claimant's expert having to attend for cross-examination. Either scenario obliterates the rationale behind CPR35.

The alternative would lie with the experts themselves, actually complying (and not merely substantially) not just with the letter of their obligations under the Protocols and the Practice Direction but with the spirit of their obligations, supposedly enshrined in CPR35. Those provisions are over 20 years old, and there has been little suggestion that experts are seeking to embrace their obligations of neutrality. And if the Court is not permitted even to investigate the failings of their reports, why should they?[24]

[24]The Defendant has now sought permission to appeal the decision in *Griffiths*.