Case round-up

By Navjot Atwal

This article summarises two recent cases of relevance to those practicing in travel litigation.

Expert evidence in food poisoning claims: Taylor v TUI UK Limited (unreported) – Newcastle County Court (HHJ Freedman)

The tactical and procedural battle between claimants and tour operators continues to rage in holiday sickness claims.

In this unreported decision, on appeal from a case management decision of a deputy district judge, the Claimant successfully appealed the judge's decision granting TUI permission to cross-examine the Claimant's medical expert at trial.

The case was a standard fast track claim for gastric illness allegedly sustained during a package holiday in Egypt. The Claimant relied on an expert report which supported her case that the illness was caused by contaminated food at the Hotel.

As is common in these cases, particularly following the recent decision of Mr Justice Martin Spencer in Griffiths v TUI UK Limited [2020] EWHC 2268 (QB) – which is itself subject to an appeal to the Court of Appeal, TUI applied for permission to cross examine the Claimant's expert at trial.

In the course of his extempore judgment, HHJ Freedman noted it was implicit in CPR 35.5(2) that the court can direct an expert to

attend a hearing but nevertheless expressed reservations on whether there was actually an express power within the Civil Procedure Rules requiring a claimant to *call* the expert to enable him to be cross-examined[1]:
"What I am very clear about is that the application itself was flawed because there is no power conferred by CPR 28.4 which permits the court, on the application by one party, to compel an expert, instructed by the opposing party, to attend at Trial. Nor was the application, in reality, an application that the respondent be asked to be permitted to call the appellant's expert to give oral evidence at trial. What was being sought was permission to cross-examine the appellant's expert. Plainly, however, for the respondent to be permitted to cross-examine the appellant's expert, the order had to direct that the appellant call his expert to give evidence at trial. I say no more about the court's powers and I am not intending to decide this appeal on the basis that says the court did not have the requisite jurisdiction to make the order; I simply observe that there does not appear to be any express rule permitting the court to make the order sought."

HHJ Freedman then considered the substance of the application, namely whether it was in the interests of justice for the expert to attend the hearing.

In this respect, the judge made reference to the decision in *Griffiths* but considered it relevant that TUI's application had not highlighted any material criticisms of the expert's report:

"…in none of those documents is there any reference, at any point, to anything in Dr Al-Shamas' report which could be said to give rise to some deficiency in reasoning. There is no suggestion of any incorrect assumptions, or misrepresentations of fact, or lack of detail, or lack of consideration of other causes for the gastroenteritis. Indeed, no criticism at all is levelled against Dr Al-Shamas' report."

Against this background, having referred to the requirement under CPR 35.1 to restrict expert evidence to that which is reasonably required to resolve the proceedings, the judge considered it was not in the interests of justice to require the Claimant's expert to attend:

"…It is not enough in the context of a fast track claim, with a value limited to £3,000, merely to assert that unless a defendant is given the opportunity to try and shake or displace the conclusion reached by an expert instructed on behalf of the claimant the judicial process is somehow rendered unfair.

In my judgment there must be something much more specific than that. In other words, if, most exceptionally and unusually, a court is to grant permission for a defendant to be given the opportunity to cross-examine the claimant's expert in these circumstances, it must be demonstrated that there is some flawed or deficient reasoning within the expert's report or some factual inaccuracy which needs to be exposed and need to be clarified before the judge so that the judge can have an opportunity to evaluate the conclusion reached by the expert and reject it, if appropriate"

[1] CPR 35.5(2) provides: '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."

Comment

The decision potentially leaves tour operators in a difficult position. The issue of causation is central to gastric illness claims. Following the decision in *Griffiths,* the primary means by which tour operators have sought to challenge the issue of factual causation is by cross examination of the Claimant's experts.

It is somewhat surprising that no criticisms at all were identified of the expert's reasoning in this case – not even the methodology behind the expert's reasoning. This is, however, unlikely to be the position in many other cases where deficiencies and inconsistencies in the expert's report may be readily identified.

This decision suggests that permission to cross examine such experts should only be granted in exceptional or unusual cases where there are clearly identified deficiencies in the expert's conclusions. However, it is respectfully suggested this sets the bar too high. The key issue is whether cross examination is required in the '*interests of justice*' (as per CPR 35.5(2)). There are likely to be a whole host of considerations in determining whether that threshold is met in any particular case. Whether this decision has much of an impact in other similar cases therefore remains to be seen.

Pleading fundamental dishonesty: Mustard v Flowers [2021] EWHC 846 (QB) – Master Davison

It is an unfortunate fact that many package travel cases give rise to issues of exaggeration and fundamental dishonesty in the presentation of such claims.

This recent decision from Master Davison provides some helpful guidance on the appropriateness of a speculative pleading of fundamental dishonesty in a defence.
The case concerned a road traffic accident. Liability was admitted although causation of the Claimant's injuries was very much disputed.

The Defendant's insurer made an application to amend their defence to plead as follows:

"[…] In the event that the Court finds that the Claimant has consciously exaggerated the nature and/or consequences of her symptoms and losses, the Third Defendant reserves the right to submit that a finding of fundamental dishonesty (and the striking out of the claim pursuant to section 57 Criminal Justice and Courts Act and/or costs sanctions including the disapplication of QOCS) is appropriate."

The Claimant objected to the proposed amendment. It was said said the proposed amendment amounted to an allegation of fraud which was not properly particularised and for which there was no basis in the evidence. This was said to be contrary to Rule 9 of the Bar Standards Board Code of Conduct which requires credible material establishing an arguable case of fraud before such a case can be pleaded.

The Defendant's position was that it was not making a positive averment of dishonesty but was simply alerting the Claimant to the nature of its case at trial – the detail was to be left to cross examination. In essence, the Defendant was saying it was giving the Claimant advance notice of these issues so that she was not ambushed at trial.

At paragraph 19 of his judgment, the Master, having referred to the Court of Appeal's decision in Howlett v Davis [2017] EWCA Civ

1696 and the High Court case of Pinkus v Direct Line [2018] EWHC 1671 summarised the relevant principles as follows:

"*…it is open to the trial judge to make a finding of fundamental dishonesty whether that has specifically been pleaded or not. To put that another way, an "application by the defendant for the dismissal of the claim" pursuant to section 57(1) of the 2015 Act does not require any particular formality. In an appropriate case it could, for example, be made orally and perhaps at as late stage as the defendant's closing submissions. But the factors governing whether the trial judge would then entertain it would be as set out by Newey LJ in Howlett, namely whether the claimant had been "given adequate warning of, and a proper opportunity to deal with, the possibility of such a conclusion and the matters leading the judge to it rather than whether the insurer had positively alleged fraud in its defence". Or, to adopt the language of HHJ Coe's judgment in Pinkus, whether the claimant had had "sufficient notice" of the issues raised and the opportunity to deal with those issues by way of additional evidence, if necessary, including from his experts."*

The Master further noted (at paragraph 20):

"A factor underlying these decisions is that (as was explicitly raised in Pinkus) neither the defendant nor the judge may be in a position to make any conclusions about a party's honesty until that party has given evidence and been cross-examined. That will especially be the case where honesty or dishonesty turns on the distinction between conscious and unconscious exaggeration. It would also not be professionally proper for a defendant's legal representatives to allege fraud or fundamental dishonesty based upon mere suspicion, or upon a mere prospect that that is how the evidence might turn out. So there will be many cases where it would not be practical or proper to require a defendant to have made such an allegation prior to the trial in order to make an application under section 57."

The Master refused permission to rely on the proposed amendment. The Master provided three substantive reasons. First, the proposed amendment served no purpose – the s.57 application could be made without foreshadowing it in the pleading. Secondly, the proposed amendment had no real prospect of success – the expert evidence did not say the Claimant was being dishonest. Thirdly, permitting the amendment would prejudice the Claimant as a plea of fundamental dishonesty would have to be reported to her legal expenses insurers and open up the possibility of avoiding the policy *ab initio*.

At paragraph 24 of his judgment, the Master said this:

"I emphasise that nothing in the foregoing is intended to detract from the modern "cards on the table" approach. Where the defendant does have a proper basis for a plea of fundamental and intends to apply under section 57, then, subject to the direction of the judge dealing with case management or the trial judge, that should ordinarily be set out in a statement of case or a written application and that should be done at the earliest opportunity. What I am intending to discourage are pleas of fundamental dishonesty which are merely speculative or contingent."

Comment

This decision provides a helpful and important clarification on when a pleading of fundamental dishonesty should be made. As set out above, issues of fundamental dishonesty are frequently encountered in package travel cases (particularly those involving complaints of gastric illness).

Contingent and speculative pleas of fundamental dishonesty have been commonly encountered in personal injury cases (including those relating to accidents abroad) – no doubt with a view to raising the stakes and exerting maximum pressure on claimants.

This decision suggests those practices should now stop. However, where there is sufficient evidence to raise the issue of fundamental dishonesty then this should be set out in the pleading at the earliest opportunity.

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