[2020] TLQ 102

GRIFFITHS v TUI*:* WHERE DO WE GO FROM HERE?

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When *Griffiths v TUI* [2020] EWHC 2268 (QB) was handed down earlier this year, it was seen by many as a victory for claimants. Since the Court of Appeal's decision in *Wood v TUI [2018] 2 WLR 1051,* defendants have successfully fought gastric illness claims by challenging the expert evidence provided. If an expert failed to adequately exclude alternative causes of illness when considering causation, or if it could be demonstrated that the factual basis for the expert's opinion was incorrect, judges were often persuaded to, and did, dismiss these claims and place little weight on the expert's report. Consequently, claimants faced an uphill battle when bringing gastric illness claims, particularly if they had become unwell, with no pathogen identified.

Griffiths paved the way for a change in approach. Where expert evidence is CPR compliant and uncontroverted, in that there is no evidence to challenge or undermine the factual basis of the report, nor is there any cross-examination of the expert, *Griffiths* provides that the expert evidence must be accepted by the court. As such, in low value claims where only expert evidence from the claimant is permitted, claimants are more likely to succeed.

What Mr Justice Martin Spencer does not appear to have considered, however, was the impact that his judgment in *Griffiths* would have on the case management of gastric illness claims. Unsurprisingly, defendants now wish to seek their own expert evidence in these claims, regardless of their value, as well as for the experts to be cross-examined at trial. Courts can expect defendants to raise such issues in their directions questionnaires, on the basis that to permit the defendant to obtain their own evidence or to cross-examine the claimant's expert/s will allow them to properly defend the claim. In those cases where trial is imminent or forthcoming, applications seeking the above are currently being made by defendants, some of which have already been heard by the courts.

The success of applications for defendants to have their own expert evidence, or indeed to cross-examine a claimant's expert/s at trial, appears to be dependent upon a number of factors. The overriding objective and proportionality are two of those factors. In fast track claims,

particularly those with a low value, it seems unlikely that a court will consider it proportionate for a defendant to obtain their own expert evidence, as the costs of instructing the expert could be similar to, or indeed exceed, the value of the claim. In those cases which are fast track matters of a higher value, there may be more scope for a defendant to argue that it is proportionate for them to obtain their own expert evidence. Nonetheless, if the matter is close to trial, such an order permitting the same would seem unlikely, particularly if it would result in a trial date being vacated. In addition, the court will also have to consider whether additional expert evidence from the defendant would be reasonably required to resolve the proceedings, pursuant to CPR 35.1. Given the significance of *Griffiths*, it remains to be seen whether it will have an impact on the assessment of what is "*reasonably required*".

However, whether the courts will permit a defendant to cross-examine a claimant's expert/s is another matter. There is a real likelihood of fast track gastric illness claims being reallocated to the multi-track if experts are called to give oral evidence. To call experts to give oral evidence will likely result in trial time estimates of one day being exceeded, which could cause the claim to be reallocated to the multi-track. Despite this, some applications to call a claimant's expert to trial have been successful. Should a defendant make such a successful application, claimant lawyers will no doubt be concerned about the costs of calling the expert to trial and the recoverability of those costs.

As an example of the approach the courts have taken, in one case known to the author, a gastric illness trial had been vacated due to Covid-19, prior to *Griffiths* being handed down. Following the judgment in *Griffiths*, and before the trial in this case had been relisted, the defendant made an application to call the claimant's expert to be cross-examined. Even though the calling of the claimant's expert would lead the case to be reallocated to the multi-track, the court granted the defendant's application. The parties were additionally ordered to provide costs budgets, in spite of the fact they had incurred all costs up to the trial phase. Whilst this seems an unusual judgment, particularly given the proximity to trial, it demonstrates that the courts are sympathetic to the difficulties a defendant has in defending gastric claims post-*Griffiths*. Had the trial been relisted at the time the application was heard, however, it seems likely the court would have taken a different approach.

In light of the above, some lawyers may wonder where they go from here. Should claimant lawyers be agreeing to applications to call expert evidence, or for experts to be cross-examined? Should defendants make urgent applications for the same, in the hope that this gives them a better chance of defending the claim? At this stage, it is too early to say how the courts are universally approaching this issue. Given that these are case management decisions, it is anticipated that judges will vary in their approach to this issue. One thing, however, seems certain post-*Griffiths*: both parties are likely to incur additional costs in dealing with gastric illness claims.

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