

The Thursday Morning Webinar

*Griffiths v TUI UK Limited
[2020] EWHC 2268 (QB)*

The webinar will start shortly

Next week: Nicholas Yell and Lisa Dobie will be tackling issues of consent and material contribution in the clinical context

10th September 2020

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the facts:

- The couple stayed at the Gran Bahia Principe hotel in the Dominican Republic in 2011 on an all inclusive basis.
- They fell ill with food poisoning.
- The judge at first instance found that they acquired their illness through eating food or drinking a beverage provided by the hotel.
- That food or drink was contaminated, which is what caused the illness.

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal:

The Claimants claimed under s.4(2) of the Supply of Goods and Services Act 1982:

“there is an implied condition that the goods supplied under the contract are of satisfactory quality.”

Contaminated food cannot be of satisfactory quality.

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal:

The Defendant denied that s.4(2) was engaged, because the package holiday contract was not a contract for the supply of goods; and denied that property in the food ever passed to the Claimants.

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal:

The Defendant's argument failed on all counts and the appeal failed.

This is the *ratio decidendi* of the decision.

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal:

The *obiter dicta*:

“Whether goods are of satisfactory quality is a question of fact but where food is contaminated with bacteria that causes severe illness it is difficult to imagine that it could be described as of satisfactory quality.”

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal: the *obiter dicta*:

“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.”

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal: the *obiter dicta*:

“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.”

Gastric claims: a recap

Wood v TUI [2018] 2 WLR 1051: the decision on appeal: the *obiter dicta*:

“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.”

Gastric claims: what's new?

Griffiths v TUI [2020] EWHC 2268 (QB): the facts:

- The Claimant stayed at the Aqua Fantasy Aqua Park Hotel in Izmir in 2014 on an all inclusive basis.
- He fell ill with food poisoning.
- The expert evidence of Professor Pennington supported the claim.
- The Defendant raised Part 35 Questions but did not seek to cross examine Professor Pennington.

Gastric claims: what's new?

Griffiths v TUI [2020] EWHC 2268 (QB): the decision at first instance:

- The Claimant's evidence as to his not having eaten outside the hotel prior to falling ill was accepted.
- This underpinned Professor Pennington's report.
- Therefore the factual basis for the report remained unshaken at trial;

BUT...

Gastric claims: what's new?

Griffiths v TUI [2020] EWHC 2268 (QB): the decision at first instance:

- The Defendant's counsel criticised Professor Pennington's report in a number of ways.
- The trial judge referred to the *dicta* in *Wood v TUI* and accepted these criticisms. As a result of them, she held, the reasoning in the report did not hold up to scrutiny, and the claim was dismissed.

Gastric claims: what's new?

Griffiths v TUI [2020] EWHC 2268 (QB): the decision on appeal:

- Spencer J held that the expert report was uncontroverted - that is to say, the factual basis of it had not been shaken, and there was no confounding expert opinion.
- An uncontroverted expert report must be accepted by the court if it meets the minimum standards set out in CPR Part 35.
- Therefore the appeal succeeded, as did the claim.

Gastric claims: what's new?

Griffiths v TUI [2020] EWHC 2268 (QB): the decision on appeal:

- Spencer J accepted that there is a distinction between quantitative claims and qualitative claims.
- The former relies on the occurrence of an outbreak of illness at the hotel.
- The latter relies on stool sampling and an expert report on causation.

Gastric claims: the implications

Griffiths v TUI [2020] EWHC 2268 (QB): the implications:

- The appeal succeeded because the Defendant had not served controverting evidence and had not applied for permission to cross examine Professor Pennington.
- Should Claimants and/or Defendants now apply for permission to rely on expert evidence in these cases?
- Will the courts grant them permission to do so (in this case the court had done so, but the Defendant had not adduced any reports)?

Gastric claims: the implications

Griffiths v TUI [2020] EWHC 2268 (QB): the implications:

- Does the decision mean that in *all* claims where there is expert evidence from one expert, and the factual basis for it is accepted, the expert's opinion must necessarily be accepted?
- How does this align with the decision of the Court of Appeal in *Kennedy v Cordia (Services) LLP [2016] 2 WLUK 287*?
- Will TUI appeal? If so, which part(s) of the decision would they challenge?

Gastric claims: applying *Griffiths*

Turpin v TUI, 28th August 2020, HHJ Walden-Smith: the first of many?

- The Claimants relied on reports from Dr Linzi Thomas.
- The judge at first instance accepted the Defendant's criticisms of those reports, for example that the expert had not considered its audit (which had not been provided to her).
- The judge at first instance relied on the audit score of 100%.

Gastric claims: applying *Griffiths*

Turpin v TUI, 28th August 2020, HHJ Walden-Smith: the first of many?

“It is important that the court does not elevate the dictum in the case to being an inalienable test, but rather acknowledge that it provides sensible guidance as to what might be required to satisfy that burden.”

Gastric claims: applying *Griffiths*

Turpin v TUI, 28th August 2020, HHJ Walden-Smith: the first of many?

- On appeal Her Honour Judge Walden-Smith found that the criticisms of the expert were unjustified.
- The failure of the judge at first instance to place any reliance on the report ran counter to the decision in *Griffiths v TUI*.
- The appeal succeeded, as did the claim.

Gastric claims: applying *Griffiths*

Turpin v TUI, 28th August 2020, HHJ Walden-Smith: the first of many?

As for the audit and its score of 100%:

“it is not appropriate to criticise an expert for failing to comment upon a piece of evidence which they have not been asked to comment.”

“It was a snapshot of how things were on a particular day...from an accompanied visit.”

Sarah Prager

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Many thanks to Jatinder Paul of Irwin Mitchell
for joining us

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be tackling issues of consent and material
contribution in the clinical context