IN THE COUNTY COURT AT WINCHESTER Claim No. D04YX659

ON APPEAL FROM DISTRICT JUDGE BALL SITTING AT PORTSMOUTH

GARY JONES

Claimant/Respondent

and

TUI UK LIMITED

Defendant/Appellant

JUDGMENT

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1. This is an appeal against the Order of DJ Ball made on 17 January 2020 in which he dismissed the Defendant's application to strike out the expert evidence of Professor Aali Sheen which had been made on the basis that Professor Sheen was not an expert for the purposes of Part 35 CPR.

2. I had the benefit of helpful and detailed written skeleton arguments and oral submissions from Counsel for the parties, Mr David Boyle for the Defendant and Mr Anthony Johnson for the Claimant, for which I am grateful. I have not referred to each and every argument raised by Counsel in their skeleton arguments and their oral submissions, but I have re-read the former, consulted my notes of the latter, and have them all in mind in reaching this decision. I have also read their skeleton arguments (including supplementals) provided for the application before DJ Ball.

3. The claim is a "holiday sickness" claim in which the Claimant claims damages in respect of an alleged bout of gastroenteritis said to have been contracted at a hotel in Mexico in 2016 due to eating contaminated food prepared and served by the hotel in respect of which, pursuant to what was then s4(2) of the Supply of Goods and Services Act 1982, the Defendant is potentially liable.

4. Upon his return from holiday, the Claimant attended his GP and a stool sample was taken which tested negative for *E.coli* O157, *Shigella*, *Cryptosporidium*, *Salmonella* and parasites. Accordingly, there is and was no objective evidence as to what caused the Claimant to fall ill, and that is common ground.

5. The Defendant's case is that the hotel operated a HACCP system compliant with the local, national and state regulations, and the Defendant has provided witness statements from local employees of the hotel dealing with that, and averring that there were no reports of sickness from other guests during the period the Claimant was staying at the hotel.

6. The law on liability is uncontroversial and was set out by Burnett LJ (@ ¶¶29 and 30) and the Sir Brian Leveson, P (@ ¶34), in *Wood v TUI Travel plc* [2017] EWCA Civ 11:

> *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.*
>
> *…*
>
> *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. The fact is, however, that the judge found as facts that this had been proved in this case and no appeal has been pursued against those findings. In any event, although I recognise that tour operators will complain that they are being held liable for events outside their control, there are many ways in which protection from exposure in this area can be achieved.*

[emphasis added]

7. As Mr Boyle also uncontroversially set out, in the substantive claim the Claimant needs to prove:-

   7.1 that he fell ill as alleged;

   7.2 that the illness was caused by the consumption of contaminated (and thus unsatisfactory) food; and

   7.3 that the food in question was provided as part of the package.

8. As a result of the foregoing, causation is obviously a central issue in the claim.

Professor Sheen

9. Professor Sheen is a Consultant General Surgeon. He has no specific qualifications in gastroenterology but he has performed many operations in respect of such complaints and is a treating consultant in his hospital for the condition. He produced a report in support of the Claimant's claim supported by his CV which listed claimed areas of expertise and which the District Judge described as "impressive", as he also described Professor Sheen's clinical and other appointments and achievements. Further, due to his (what the Defendant regards as suspicious) unavailability for trial, he was required to answer detailed Part 35 questions in what is a modest claim. It was those answers that provoked the application to the District Judge. Finally, Professor Sheen provided a witness statement (which was before DJ Ball) in which *inter alia* he objected to a lawyer's assertions about his medical expertise; he set out his experience as a General Surgeon (which is more specific than it sounds), and described how he deals with his medico-legal cases of "holiday sickness" generally, and with the Claimant's case in particular. DJ Ball criticised the brevity of the main report, in particular the lack of a reference to the "difficult and probing questions" the Professor suggested he undertook in relation to this Claimant.

10. Mr Boyle in his skeleton argument at paragraph 8 made reference to Professor Sheen's 2,200+ reports written for Claimants at a higher cost than that a GP would charge; he criticises Professor Sheen for having no training in and having done no research into the cause of gastric disease acquired abroad, and alleges that his "methodology" of determining causation would almost invariably conclude in favour of a Claimant.

11. The Defendant makes no secret of the fact that it wishes to prevent Professor Sheen from continually giving evidence on causation for Claimants in these "holiday sickness" claims because it regards him as not qualified to give such evidence. It is for this reason that it made the application before DJ Ball, and indeed has made at least one other application before a District Judge in respect of another expert witness on the same grounds, at least one that was successful.

The Judgment

12. District Judge Ball gave a reserved judgment which Mr Boyle described as detailed. In it, he gives a brief background to the claim and the application. He then refers to CPR Part 35 and the attendant PD and the Civil Evidence Act 1972. DJ Ball then refers to the leading authority on the issue of expert evidence, namely *Kennedy v Cordia (Services) LLP* [2016] UKSC 6. Acknowledging that the instant matter could be decided on various grounds, DJ Ball accepts that causation is a major issue, and that expert evidence will clearly assist the Court. He then goes on to quote from Professor Sheen's report and refers to the Part 35 questions and answers to which I have already referred, setting out that he has re-read both before writing his judgment (as have I).

13. DJ Ball then cites the considerations set out in *Kennedy* at ¶50 of Lords Reed and Hodge's judgments (with whom the other members of the Supreme Court agreed) which frames his consideration of the issues.

14. The District Judge then refers to Professor Sheen's report, including the history of the Claimant's alleged illness, the procedure undertaken for the report's preparation (a telephone interview) and sets out ¶¶10.1-10.3 of the report containing Professor Sheen's conclusions and correctly identifies what it is the Defendant was trying to establish in the application. DJ Ball goes on to refer to the several sets of Part 35 questions and answers, to which he comments that "*to refer to them as comprehensive would be something of an understatement*", and reminds himself of the limited purpose of Part 35 questions.

15. In paragraph 21, the District Judge went on to consider the test that he had to apply (having decided that this was a proper case for expert evidence): "*whether or not the Claimant has shown that the Professor has the relevant knowledge and experience to give opinion evidence that will assist the Court. If that question is answered affirmatively, then the*

Professor is able to draw upon the general body of knowledge and understanding of the relative expertise." He went on to identify the other aspects of the four-fold test which are not in issue.

16. DJ Ball then goes on to cite Professor Sheen's CV and says: "*There can be little doubt that the Professor has many* [medical] *interests. But merely being interested in an area of medicine (or anything else) does not make one an expert for the purposes of giving evidence. However, there must be a respectable argument that the appointments the Professor has achieved speak of at least some expertise in those areas*". DJ Ball acknowledges Mr Boyle's argument that the Professor initially opined (later 'corrected') that there could be no other reasonable body of opinion as to the cause of the Claimant's (alleged) illness, which, Mr Boyle argued, severely undermined his ability to be regarded as an expert. DJ Ball acknowledged that Mr Boyle's argument that Professor Sheen had done "*no more than to learn on the job*" had "*some force*" and that the Professor's shift in position to acknowledging other opinions which occurred only after having completed joint reports was evidence of him having 'learnt on the job'. Finally, in summarising the Defendant's arguments, DJ Ball recorded Mr Boyle's severe criticism of the methodology used by Professor Sheen in coming to his opinions, and noted that the Professor used a template when preparing his reports.

17. DJ Ball then went on to consider the arguments advanced by Mr Johnson, Counsel for the Claimant. Those arguments were largely the same as advanced on appeal: that the Defendant's approach is misguided; that all of the arguments put forward against Professor Sheen's evidence go to weight rather than admissibility. He had cited *Re M v R (Child Abuse: Evidence)* [1996] EWCA Civ 1317 *per* Butler-Sloss LJ. DJ Ball recorded Mr Johnson's submissions as to the application of the three-fold test set out by Evans-Lombe J in *Barings Bank v Coopers & Lybrand (No. 2)* [2001] Lloyds Rep. 85.

18. DJ Ball noted Mr Johnson's submissions in relation to Professor Sheen's medical practice which included 20 years' experience of treating "*numerous forms of gastroenteritis*" and that he is a tutor and examiner of prospective surgeons. He notes the £880 price tag for the Professor's reports and comments on their brevity in that light.

19. In the following paragraph, DJ Ball went on to acknowledge the breadth and depth of Counsel's arguments, and the desire of the Defendant to weed out unmeritorious cases, but

concluded that the issue was "*relatively straightforward*". He poses the question: "*Is the Professor an expert?*". Answering affirmatively, DJ Ball set out his reasoning:

> *The Professor (or indeed any medical practitioner) presented with a patient describing certain symptoms, and describing certain circumstances that are alleged to have existed at the hotel, is perfectly able to draw upon his clinical experience as a medical doctor and as a General Surgeon and to diagnose that the patient is either likely to be suffering from, or has likely suffered from, some form of gastroenteritis. Further, the Professor is entitled to rely on his own research and that of others in making such a diagnosis. Diagnosis is one thing but opinion evidence as to causation is another. There may be questions as to methodology used by the Professor in coming to his opinions which are set out at paragraph 10 of his report. And there may be questions for the Claimant as to how, or if, he became ill whilst on holiday, but those are not issues for the Professor. Although there may be significant questions for the Professor and for the Claimant, in my judgment the issue is not whether the Professor is an expert upon which the Claimant can rely, but what, if any, weight can or should properly be given to the Professor's expert evidence.*

The Grounds of Appeal

20. Mr Boyle submitted no less than 9 grounds of appeal (14 if you include the subdivisions). However, as Mr Johnson for the Claimant pointed out, these really are several ways of putting three points: the main one is that the Defendant's complaint is that the District Judge, having properly identified that causation was a central issue; having properly identified the legal tests; having properly identified the relevant material, nevertheless failed to distinguish between expertise on causation and a general ability to carry out a diagnosis. The second is that the upshot of the District Judge's reasoning is that anyone with a medical degree could opine on the cause of gastroenteritis which is just not sufficient: he draws the analogy with an optician who, just because he or she can observe that a patient has gone blind, could not validly opine on the cause of that blindness; or a structural engineer being able to opine on the fact that a wall has fallen down, but not why. Thirdly, the Defendant complains that the District Judge gave undue weight to irrelevant areas of expertise of Professor Sheen and failed to give sufficient weight to the lack of relevant expertise.

The Appeal Hearing

The Appellant

21. Mr Boyle took me through Professor Sheen's CV and his expertise being one that related primarily to groin hernias, submitting that there was nothing relating to an expertise in gastroenteritis. He suggested that the Professor had misrepresented his expertise in the order of listing of his areas of interest in the CV. Next, Mr Boyle analysed the report of Professor Sheen, submitting that he had simply made bare assertions and employed circular logic. He carried out a critical analysis of the Part 35 answers, submitting that they were either unanswered or that they revealed an absence of expertise (such as the change of position as to a range of opinion).

22. Referring me to the skeleton argument and supplemental skeleton argument produced in support of the application before DJ Ball, Mr Boyle submitted that there was a critical test: that there was a need for the subject matter of an expert's report to be outwith the experience and knowledge of a lay-person before it can be admitted. And he submitted that Professor Sheen's report coupled with the Part 35 answers did not satisfy that test.

23. In exchanges between Mr Boyle and the Bench, Mr Boyle submitted that a better analogy to the optician/structural engineer analogy referred to above, was that of a medically qualified psychiatrist or dietician trying to opine on causation in a case of gastroenteritis: either could diagnose such a case when a patient reported the symptoms, but neither could identify what caused the attack. In response to the Claimant's argument that GP's are usually used as experts in these cases, Mr Boyle submitted that GP's were probably better suited than a General Surgeon for diagnosis but that does not make either appropriate for the issue of causation. He also drew an analogy of the distinction between a high-street solicitor and a specialist civil advocate.

24. Mr Boyle then turned to what I may describe as his over-arching submission that Professor Sheen had done nothing but learn on the job: the fact that he had produced in excess of 2,200 reports did not *per se* qualify him as an expert: without the relevant training or experience, it was tantamount to him writing the same report 2,200 times; and that it was fallacious for him to argue that, just because he had not been "pulled up" for any of those reports, means that he was an expert.

25. Finally, Mr Boyle argued that DJ Ball had "ducked" the question, despite having correctly identified it: he did not answer the question as to why Professor Sheen was an appropriate expert to deal with causation. In those circumstances, he invited this Court to determine the question afresh which, he submitted, explained his approach to re-running the arguments that had been run in front of DJ Ball, in front of me.

26. As a matter of policy, Mr Boyle argued that the QuOCS regime meant that it was open to, and appropriate for, Defendants to try to prevent unmeritorious claims being supported by unqualified "experts", the costs of which Defendants could rarely recover. And that if the Claimant had chosen to go to the wrong expert for the job in hand, there should be no sympathy for him.

The Respondent

27. Mr Johnson's overriding submission was that this was a case about the weight to be afforded to Professor Sheen's evidence, not its admissibility.

28. He reminded the Court that this was an appeal and not a re-hearing; and moreover it was an appeal of a case-management decision based on an exercise of the District Judge's discretion, and he reminded the Court of the law on such appeals, providing a high hurdle for an appellant to clear.

29. Turning to the application, Mr Johnson submitted that the proper time to have objected to Professor Sheen was at the permission (for expert evidence) stage, not afterwards. Whilst accepting that the Court had the *power* to exclude the evidence it was a jurisdiction that should be very sparingly exercised.

30. Mr Johnson took me through the law as set out in ¶¶14-24 of his skeleton. He submitted that the text cited at ¶20 (from the Introduction to Sweet & Maxwell's *Expert Evidence: Law and Practice*) although not a practitioner's text, was useful shorthand for the correct position. He relied on the 3-stage test as cited by DJ Ball from *Barings*, adopting the test set out in the South Australian case of *R v Boynthon* (1984)38 SASR 45 (which I note was also cited with approval in *Kennedy*).

31. The real crux of the law for the purposes of this application was, submitted Mr Johnson, that set out in *B (A child)* [2003] EWCA Civ 1148 as cited in ¶21 of his skeleton. He

submitted, too, that DJ Ball had been correct to cite *Kennedy*, and had applied the test correctly.

32. On the practicalities and realities of the Defendant's position, Mr Johnson submitted that it was not possible to distinguish between an expert on diagnosis and an expert on causation as such. There was no question of diagnosis in this case: if the Claimant was ill, it had been gastroenteritis; its cause was the only issue on the medical aspects of the case, and the District Judge must have been fully aware of that. He could not have been confusing the two issues, especially since he specifically identified them.

33. All of the points the Defendant raised in the application were, submitted Mr Johnson, points that go to weight all of which he accepted were perfectly valid as such. But they did not affect the *admissibility* of Professor Sheen's expert evidence *per se*.

34. Mr Johnson also relied on Professor Sheen's witness statement and the fact that he *did* have relevant experience in gastroenterology – more than a GP and just as much as a specialist, at least in acute situations: 50% of acute incidents of gastroenteritis are referred to a General Surgeon according to Professor Sheen (and I note that there was no evidence to gainsay that).

35. As regards Mr Boyle's analogies, Mr Johnson submitted that it was just as much about study and experience as it was about formal qualifications. He referred the Court to *Poole v GMC* [2014] EWHC 3791 (Admin), stating that medics take their position as experts very seriously. In relation to "learning on the job", Mr Johnson submitted that, once it is established that Professor Sheen had medical training and experience in gastroenterology, then there is nothing wrong in him gaining experience and advancing his knowledge by carrying out work in the medico-legal sphere.

36. In an answer to a question from me as to what sort of expert this Claimant should have obtained, Mr Boyle explained the medical distinction between two categories of case: the first where there is a pathogen, which cases rarely go to trial because the microbiological evidence speaks for itself; the second, such as this, where there is no identified pathogen, and no contemporaneous medical history where it is a guess as to the pathogen, which could be viral, bacterial, amoebic or parasitic. A locally acquired pathogen may be a likely cause of infection ("traveller's diarrhoea"), but it needs an expert to determine that, he submitted.

He went on to submit that there are so many causative possibilities in this scenario (the most likely being faecal or oral infection) that a real expert on causation was, in the light of the comments in *Wood*, essential.

Discussion and Conclusion

37. As Mr Johnson correctly reminded the Court, this is an appeal. DJ Ball had before him a case-management application whereby the Court was being asked to control the evidence that was to be put before the trial judge. As such, the District Judge was exercising a discretion in the context of a case-management decision. Accordingly, in order to succeed, the Appellant needs to demonstrate that the District Judge took irrelevant matters into account or failed to take relevant matters into account and that in doing so he exceeded the wide ambit of his discretion when refusing to strike out Professor Sheen's evidence (see *G v G* [1985] 1 WLR 647 and *Abdulla v Commissioner of Police for the Metropolis* [2015] EWCA Civ 1260, particularly ¶¶24-25 of the latter authority).

38. The leading authority on expert evidence is *Kennedy*. The first of the four matters that the Supreme Court identified in ¶38 as needing to be addressed regarding expert evidence test was admissibility. As noted above, the Supreme Court went on to approve the test in *Bonython* before identifying, at ¶44, the four "considerations" governing the admissibility of expert evidence. Only the second of those is seriously in dispute in the instant matter, namely whether the witness has the necessary knowledge and experience.

39. DJ Ball identified *Kennedy* and set out the test in respect of knowledge and expertise explained in ¶50 of that authority, as acknowledged by Mr Boyle. He referred to the other major authorities such as *Barings* and *M v R (Child Abuse: Evidence)*. He summarised Counsel's arguments succinctly and fairly. He referred to Professor Sheen's report, his CV and to his witness statement, and identified the factors that he considered supported Professor Sheen's status. He also metaphorically raised an eyebrow at the brevity of Professor Sheen's report when juxtaposed to the fee charged.

40. At ¶31 of his judgment, DJ Ball succinctly and accurately set out the tests as they applied to Professor Sheen, and identified that the critical issue was whether he considered Professor Sheen to have the requisite knowledge and experience to qualify as an expert in this case. He was careful to acknowledge the distinction between diagnosis and causation,

and so it cannot be said that he did not have that distinction in mind. In addressing the issue of causation, DJ Ball correctly identified that there were two aspects to it in this matter: namely (i) whether the Claimant could prove as a matter of fact on the balance of probabilities that he became ill on holiday and whether it was food provided by the hotel as part of the package that caused that illness, which was obviously not a matter for Professor Sheen, and (ii) whether Professor Sheen could satisfy the Court that his methodology in arriving at ¶10 of his report could stand up to scrutiny. He acknowledged Mr Boyle's arguments in relation to methodology by accepting that "*there may be significant questions for the Professor*", and concluded that the criticisms of Professor Sheen went to weight rather than admissibility.

41. That conclusion reflected the "modern view" referred to in Sweet & Maxwell's *Expert Evidence: Law and Practice* ¶¶1-028-1-030 and reflected the submissions made by Mr Johnson below (and in this Court).

42. Did the District Judge err in failing to narrow the tests to be applied by adding the words "on the issue of causation" to the questions he asked himself as suggested by Mr Boyle in ¶¶20 and 21 of his skeleton argument? I do not consider that omission to be an error of law. As Mr Johnson put it, Professor Sheen is clearly in a better position than a lay-person or a judge to deal with the question of both diagnosis and causation of gastroenteritis. He has clinical experience of such illness. Nowhere in the authorities is it suggested that the test of an expert's field of expertise has to be narrowed to the degree of specificity posited by Mr Boyle. Clearly, where it is proportionate and justified, a high degree of causative expertise might be desirable (a consultant microbiologist, perhaps), and the Court would no doubt have the level of specific expertise in mind when assessing the appropriate weight to be given to a particular expert's evidence. But that is not to say that that is the correct question to ask when considering whether a General Surgeon with Professor Sheen's experience and attainments is whether he is specifically an expert "in causation": that is to put a gloss on the test set out in ¶50 in *Kennedy*.

43. The criticism of DJ Ball's judgment set out in ¶22 of Mr Boyle's skeleton argument is not justified. In that section of the judgment, the District Judge was specifically and openly dealing with diagnosis before going on to make the distinction between that and causation, which he did shortly, but separately, by reference to the Professor's methodology. Accordingly, I do not consider that the District Judge did elide the two issues.

44. I do not accept the several analogies provided by Mr Boyle as ones supporting the exclusion of the relevant professionals as capable of giving evidence in their fields. Rather they are analogies that would go to the weight to be given to that evidence, particularly in light of opposing evidence or skilful cross-examination. An optician would have a better idea than a judge as to what might cause blindness; an eye surgeon may have a better idea, but that is a matter of weight and would always be dependent on the facts of an individual case. But in any event, the District Judge was entitled to consider, as he clearly did, that Professor Sheen had enough of the relevant knowledge and experience to take him beyond the threshold whereby he can interpret and rely on published medical material to inform his own opinion.

45. On the question of cross-examination, I note in passing that DJ Ball went on to give permission for Professor Sheen to be cross-examined in this case, and he must have had that in mind when deciding that the Defendant's concerns as to the Professor's methodology and his opinion on causation went to weight rather than admissibility.

46. There is nothing in DJ Ball's judgment to suggest that he took irrelevant matters into account. In order to rely on undue weight being given to one factor or another, the Appellant needs to show that the decision is perverse (see *Abdulla*). In my judgment it does not come close to that. Did DJ Ball fail to take into account relevant matters? The only one factor that Mr Boyle can cite is the failure to add the words "*on the issue of causation*" to his questions, which I have dealt with above.

47. It follows that I do not accept that District Judge Ball erred in exercising his discretion in the way that he did and the Appellant falls far short of persuading me that it can overcome the high hurdle of disturbing a case-management decision on appeal, and the appeal is therefore dismissed.

48. I do not therefore need to deal with the matter afresh as Mr Boyle invites me to. For the sake of completeness, however, for the reasons set out by Mr Johnson in ¶¶52-62 of his skeleton argument, it seems to me that DJ Ball was entirely correct in dismissing the Defendant's application, and for the reasons that he did, in an admirably succinct but thorough judgment and, were I to be dealing with the matter afresh, I would have reached the same conclusion.

Costs

49. I am minded to award the costs of the appeal and of the application below to the Claimant to be assessed on the standard basis if not agreed. I am aware that DJ Ball reserved the costs to the trial judge, but it seems to me that I am seized of the costs both here and below, and I cannot, at present, see a good reason why costs should not follow the event in the usual fashion. I would not, however, be minded to accede to the Claimant's application to have them summarily assessed and paid within 14 days because there may be other developments between now and trial which might justify a set-off or similar. All of these are merely indications, and I would be prepared to have a short telephone or video hearing to hear argument on them should the parties so wish.

50. I invite Counsel to agree the terms of the order and any directions that are required to finally bring this matter to trial and, if possible, the appropriate order as to costs.

HHJ Berkley
28 August 2020