The insider

With one claimant left waiting nearly a year for permission to appeal, Dominic Regan offers some advice to the judiciary for cutting down on delays: try shorter judgments?

I have just learnt that the Supreme Court has granted leave to appeal in *Griffiths v TUI UK Ltd* [2021] EWCA Civ 1442, [2021] All ER (D) 47 (Oct), where the court divided upon the status of uncontroverted expert evidence. At the time of writing, this does not appear on the Supreme Court website.

The poor claimant took his family on an all-inclusive holiday to Turkey as long ago as August 2014. He ended up spending three days in hospital due to acute gastroenteritis. Apart from a solitary meal, he had only dined at the holiday hotel. He sued the travel company and relied upon reports from a gastroenterologist and a consultant microbiologist, one Professor Pennington. The defendant did not adduce expert evidence.

Lord Justice Bean, in as fine a dissenting judgment as I have ever seen, pithily summarised the injustice of the case:

> 'Mr Griffiths must be wondering what he did wrong. He instructed a leading firm of personal injury solicitors, who in turn instructed an eminent microbiologist whose integrity has not been questioned. Mr Griffiths and his wife gave evidence at the trial, were cross-examined, and were found by the judge to be entirely honest witnesses. The eminent expert gave his opinion that on the balance of probabilities Mr Griffiths' illness was caused by the consumption of contaminated food or fluid supplied by the hotel. No contrary evidence was disclosed or called, and the expert was not cross-examined. Yet the claimant lost his case.
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> 'Asplin LJ, with whom Nugee LJ agrees, says at [65] that "as long as the expert's veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so", and that she can see nothing which is inherently unfair in that procedure. With respect, I profoundly disagree. In my view Mr Griffiths did not have a fair trial of his claim. The courts should not allow litigation by ambush. I would therefore have dismissed TUI's appeal' (at paras [98]–[99]).

Quite apart from the affront to justice that this case represents, it is astonishing that a judgment handed down on 7 October last year should only secure permission to appeal almost a year later.

In an era where delay is (rightly) punished, it ill becomes the judiciary to appear to be moving slowly. Sir Geoffrey Vos MR has made it clear that judgments should be delivered within three months at most, no matter how complex the issues. A decision on the papers as to whether to grant leave to appeal ought to honour a similar time scale.

Surely it would help matters along if judgments were shorter. I had cause this month to read a three-member judgment of the Court of Appeal. It was *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163. Lord Denning MR opened as elegantly as ever with: 'In 1964 Mr Thornton, the plaintiff, who was a freelance trumpeter of the highest quality…'. Sir Gordon Willmer said his bit, as did Lord Justice Megaw, who incidentally would fascinate the court by inserting a pencil under the front of his wig, so resembling a Dalek. The important issue about the validity of an exclusion clause printed upon a ticket issued by a machine was seen off in eight pages. A judgment as succinct as it was elegant.

Take your pick

I was intrigued to learn over the summer that there is an informal but established arrangement whereby High Court judges can express interest in a case that they would like to hear. There is no guarantee that their choice will be allocated to them. Given the fabulous range of talent on the Bench, it struck me that this was an admirable mechanism, enabling expertise to be deployed effectively. Poor circuit judges get whatever is thrown at them. The lot of district judges is sheer misery.

Clinical claims

On 23 September I attended a fascinating conference at Peterhouse College, Cambridge. It was a not-for-profit event at which medical experts and lawyers in equal number spoke of developments in their areas of expertise. While it is invidious to single out one of the many speakers, Nicola Greaney of 39 Essex Chambers opened the eyes of almost everyone, especially me, when she identified the multiple challenges faced by paralysed women. Coping with periods and the menopause added so much more to the already grim burden of anyone who is wheelchair-bound. These problems translate into yet more necessary costs, thus increasing the value of liability claims.

Stuart McKechnie KC at 9 Gough Chambers, schedules of loss supremo, is the legal leader on the organising committee. The 2023 conference—which I am definitely attending—will be held on 22 September. See *www.medicolegalpain.com* for more information.

The cost of claims against the NHS is troubling entities like the Medical Defence Union and the government. Alex Hutton KC, who is revered both in costs law and clinical negligence, gave me food for thought when we had a chat over the summer. He pointed out that most of those who together contributed £30m to the Captain Tom NHS fundraising effort would be staggered to learn the total would meet the damages only in respect of just one negligent childbirth case of maximum severity. Many voices say something should be done.

Mandatory ADR

I was fortunate enough to have a few words with Lady Justice Asplin last week. She has responsibility for producing draft rules which will enable the judiciary to order parties to engage in alternative dispute resolution, or 'negotiated dispute resolution' as it has been rechristened in the February 2022 *Commercial Court Guide*. She told me that things were 'going very well', and I expect measures to be in place this time next year. NLJ

Professor Dominic Regan of City Law School, director of training at Frenkel Topping Group & *NLJ* columnist (*@krug79*).