The independence factor

Donna Goldsworthy, **Fiona Campbell** and **Yin Yee Ng** on independent expert evidence

The key factor to expert evidence in the UK is independence. Let us consider this scenario – a claimant engages an expert witness, who provides a biased or 'partisan' expert report. What bearing will this approach have? Expert reports that do not appear to convey the independence of an expert witness run the risk of having a claim struck out.

In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 (TCC), 173 Con. L.R. 137, [2017] 7 WLUK 224, the court acknowledged that 'There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence.'

In taking a biased approach in *Imperial Chemical Industries Ltd*, the court concluded that the claimant's expert evidence was 'not sufficiently independent of the party who has instructed them, and that the evidence of their opposite numbers is to be preferred.'

We will explore an expert's independence factor further in this article, but firstly we give a high-level overview of expert witness requirements in the courts of England and Wales.

THE STANDARD OF PROOF IN CIVIL CASES

In civil proceedings, the claimant must prove their case on the 'balance of probabilities', meaning that the event in dispute was more likely to have happened than not. Usually the balance of probability test is interpreted as a probability of greater than 50%, though expert witnesses may be invited by the court to estimate the probability of a particular matter more accurately.

WHAT IS AN EXPERT WITNESS?

An expert is 'a person who, through specialist training, study, or experience, is able to provide a court, tribunal, or hearing with relevant scientific, technical, or professional information or opinion, based on skills, expertise, or knowledge, that is likely to be beyond the experience and knowledge of the representing lawyers, judge, jury or panel' (per *Jackson and Powell on Professional Liability*).

The main difference between an expert witness and a witness of fact (ie. an ordinary witness) is that the expert can provide an opinion, whereas the witness of fact may only give factual evidence.

The rules on expert witnesses in the courts of England and Wales are governed by Civil Procedure Rules (CPR) r.35.

WHEN IS EXPERT EVIDENCE REQUIRED?

Expert evidence is required when the issues in dispute are beyond the knowledge of the presiding court. In civil proceedings, based on the evidence provided, a decision as to whether an event occurred on the balance of probabilities is decided in lower courts by a single presiding judge, or by three or more judges in higher courts.

Expert evidence is restricted to what is reasonably required to resolve the proceedings at hand (CPR r.35.1), and is provided with the court's permission (CPR r.35.4). In advance, the court requires information that identifies the field in which expert evidence is required and the issues that the expert evidence will address, as well as the name of the proposed expert, where practical (CPR r.35.4).

The court has discretion to exclude expert evidence in certain circumstances – for example, where the facts at issue are within a judge's own understanding and therefore expert evidence is not required.

WHAT EVIDENCE MAY AN EXPERT WITNESS GIVE?

In *Expert Evidence: Law & Practice*, Hodgkinson and James differentiate five categories of evidence that experts may provide. These are:

1. Expert evidence of opinion, on facts adduced before the court;
2. Expert evidence to explain technical subjects or the meaning of technical words;
3. Evidence of fact, given by an expert, the observation, comprehension and description of which require expertise;
4. Evidence of fact, given by an expert, which does not require expertise for its observation, comprehension and description, but which is a necessary preliminary to the giving of evidence in the other four categories; and
5. Admissible hearsay of a specialist nature (see *Expert Evidence: Law & Practice*).

WHAT FORM MUST EXPERT EVIDENCE TAKE?

CPR r.35.5 requires that expert evidence is to be given in a written report, unless the court directs otherwise. Parties who fail to disclose an expert report may not use it at trial or call the expert to give evidence orally, unless the court agrees permission (CPR r.35.13).

An expert's report should refer to material facts and any other sources on which they seek to rely in forming their opinions.

When drafting a report, experts must restrict their evidence and opinions to the instructions received, and to the matters material to the dispute, thereby not providing opinions on matters beyond their area of expertise.

It should be noted that experts do not have immunity to the instructing party from a claim for negligence or breach of duty arising out of their preparation and presentation of evidence for the purpose of court proceedings. An opposing party cannot bring a claim for negligence or breach of duty against an expert.

ARE INSTRUCTIONS TO AN EXPERT PRIVILEGED?

A claim of privilege cannot be made over instructions to an expert, but the court will not ordinarily order disclosure of those instructions, or permit any questioning in court other than by the party who instructed the expert, unless the court is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete (CPR r, 35.10(4) and PD 35.4).

Broadly speaking, instructions provided to an expert in contemplation of litigation, prior to proceedings being issued, will typically be deemed privileged where the expert has been subsequently appointed for the purposes of the court proceedings.

To attract privilege, the expert report must state the substance of all *material* instructions, whether written or oral, on the basis of which the report was written (CPR r. 35.10(3) and PD 35.3.2(3)). The White Book explains that the emphasis on reciting instructions 'serves to reinforce the expert's overriding duty to the court, and ensure that relevant material, whether it supports the case of the party instructing the expert or does not, is before the court so that it can properly carry out its role as trier of fact (CPR r. 35.3)'. It also minimises the possibility of the court ordering disclosure of the expert's instructions or associated documents, which could risk waiving privilege for a substantially important part of the client's case strategy.

In cases where an instructing solicitor decides to obtain advice from an expert privately before proceedings begin (in order to assess the strengths and weaknesses of a potential claim), it seems that CPR 35

and the *Guidance for the Instruction of Experts in Civil Claims* 2014 ('2014 Guidance') do not apply. In *Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136, Hughes LJ concluded that the expert adviser's document would remain safely outside the ambit of a conditional order for disclosure, and likely to benefit from the confidentiality and privilege status.

However, if the client later decides to appoint the expert adviser to produce an expert report in connection with the proceedings, then the usual CPR 35 and 2014 Guidance would apply, and the importance of drafting clear *material* instructions is key to reduce the risk of a court disclosure order.

HOW IS AN EXPERT REPORT QUESTIONED?

Within 28 days of service of the expert's report, parties to proceedings are permitted to ask proportionate written questions to seek clarification of the report (CPR r.35.6). Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert, selected by the court where the parties who wish to submit the evidence cannot agree (CPR r.35.7).

DO EXPERT WITNESSES GIVE EVIDENCE AT TRIAL?

Typically, a court will order experts to meet before the trial date to discuss issues in dispute on which the experts do not agree, following which the experts should produce a joint statement identifying the matters which are agreed and not agreed, along with reasons for any disparity. A court will then need to give permission for the expert to give oral evidence at trial.

WHY MUST AN EXPERT WITNESS BE INDEPENDENT?

As an expert's role is to assist the court, independence is key. Experts must be 'uninfluenced by the pressures of litigation' (CPR Practice Direction (PD) 35 (2.1)), and are duty-bound to provide 'objective, unbiased opinions on matters within their expertise' to resolve the proceedings, not assuming the role of an advocate.

An expert's duty to the court 'overrides any obligation to the person from whom experts have received instructions or by whom they are paid' (CPR 35.3 (2)). A useful test of 'independence' is that the expert would form and provide the same opinion had the instructions been provided

Continued on page 20

Continued from page 19
by the opposing party in the proceedings. In the same vein, an expert also owes a duty to their client to conduct their investigation with due care and diligence.

The duties an expert owes to the court may sometimes conflict with those owed to the party instructing or paying the expert, particularly where their conclusions weigh against the instructing party's pleaded case. In such circumstances, the expert should be resilient to any pressure to alter the report, and if necessary should terminate the engagement to provide expert evidence.

Where a conflict of interest or potential conflict of interest exists, the independence of an expert will come into question and the expert will be scrutinised under cross-examination at trial. The conflict of interest does not necessarily dismiss an expert's evidence, but it may compromise the weight (and credibility) of their evidence, or lead to criticism within the judgment. Therefore, any potential conflicts of interest affecting an expert's independence should be disclosed at the earliest stage.

CASE LAW ON EXPERT INDEPENDENCE

In *Bux v General Medical Council* [2021] EWHC 762 (Admin), the most common forms of conflict of expert interest were identified as:

a) a financial interest in the litigation outcome;
b) some conflicting duty, or
c) a personal (or other) connection with a party which might influence or bias their evidence.

In *Bajaj Healthcare Ltd v Fine Organics Ltd* [2019] EWHC 2316 (Ch), a claim concerning the supply of a chemical under a contract, the defendant's expert declared that he had no conflict of interest. However, he failed to disclose that he had worked as a consultant to the defendant for a number of years, and, in particular, in relation to its use and sourcing of catalysts, which was directly relevant to the claim. There was also evidence that the expert may have been involved in the events giving rise to the claim, even though he denied this. The expert also failed to make clear that he used the defendant's facilities for testing. The court found that the expert's 'serious lack of candour in not disclosing his connection to the defendant in his report is troubling' and that his report should be treated 'with extreme caution'.

The lack of independence can lead to the ultimate sanction of exclusion of the expert evidence. In *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC), the defendant was alleged to have supplied defective automotive parts and instructed a technical expert for their case. In the process of preparing the expert evidence, among other things, the defendant's expert failed to disclose all documents produced during any site visit, and failed to identify the source and details of the data relied on in support of propositions and opinions. The experts also appeared to have communicated directly with the employees and in-house technical specialists, completely 'cutting out' solicitor involvement, which led to serious breaches of CPR 35, PD 35 and the 2014 Guidance.

Smith J held that paragraph 55 of the 2014 Guidance specially contemplates that experts will be instructed by solicitors, and the solicitors are under the duty to ensure the experts understand the relevant rules. The 'free flow exchange of information' between the experts and employees during the joint expert meetings was a grave matter of concern, when the experts should have been in purdah, and should not have communicated directly with the client. The judge concluded by highlighting that in cases involving experts from other jurisdictions who might be unfamiliar with the CPR and 2014 Guidance, it is essential that solicitors who are instructing an expert on behalf of their client provide careful oversight, control and supervision of interactions between the client and expert, adopting a 'gatekeeping' role.

In *Rowley v Dunlop* [2014] EWHC 1995 (Ch), the claimant's expert forensic accountant was also a partner in a firm operated by another partner, who was also a director of a claims management company interested in the claimant's claim. The expert failed to disclose he had a conflict of interest. It was alleged, therefore, that his report was fundamentally flawed.

However, it was found that the expert's partner was paid on an hourly rate and was not financially interested in the outcome of the litigation. The expert's report contained a declaration that he knew of no conflict of interest. On that basis, the court held that there was no conflict of interest and the report was admissible. The risk of any conscious or unconscious bias arising from the expert's connection to the claims management company was to be explored in cross-examination at trial as the issue went to weight rather than admissibility. In its conclusion, the court held that the connection should still have been disclosed.

The court can deem expert evidence inadmissible where an expert has not established their independence or has not complied with its overriding duty to the court.

CAN AN EXPERT BE THE CLAIMANT'S EMPLOYEE?

In *Gallaher International v Tlais* [2007] EWHC 464 (Comm), a dispute between exclusive distributors of certain brands of cigarettes, the expert called was an employee of an associated company of the claimant. The court held that the evidence should be admissible because the fact that the chosen expert was an employee was openly declared. Steps were also taken to second the employee away from his commercial role in order for him to act as an expert witness, and it was clear that the employee fully understood his primary duty to assist the court.

There was also an acknowledgment that there were a limited number of experts in that field and the scarcity of expertise justified the need for the employee to act as expert.

CONCLUSION

Claimants should be mindful when instructing experts - experts should avoid taking a partisan stance. An expert's report should be fully independent, irrespective of any links to the claimant, and support a claim in accordance with the legal principles governing expert evidence.

Both experts and their instructing solicitors should be conscious of ensuring that CPR r.35 is understood. The case law above also highlights the importance of making early disclosure of any conflict of interests to the court as soon as possible, whether actual, potential or perceived.

Where there is a risk of bias, or where there is a conflict of interests, there is a risk of a claim being struck-out; an outcome which would have huge costs implications, and cause irreparable damage to the client's case.

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EXPERT EVIDENCE