Is your expert witness interested enough – or too much?

An expert witness should be disinterested, though not uninterested. But clients often know the expert they want and it is axiomatic that one does not ask an expert about whom or whose views one knows nothing to give what may be crucial evidence.

Courts frequently have to decide how much it is right to rely on evidence from expert witnesses who are closely involved with the client and/or lawyers who instruct them. As a result, there is much guidance on just how disinterested, and interested, an expert should be.

Civil Procedure Rule 35 sets out clearly an expert's duties and what should be in his report. It came into effect on 26 April 1999. As early as July 1999, it was held that when an expert [X – poor X will feature quite a lot in this note, to protect the guilty] does not fulfil his duties to the court, his evidence will not be allowed.

In **Stevens v Gullis [1999] EWCA Civ 1978**, X did not disclose all his material instructions, did not properly set out his qualifications and, having disagreed with the expert report for the other party, merely refused to sign it and did nothing to explain why. Lord Woolf said that "The judge has very properly indicated his view that X is not an appropriate person to give expert evidence in a court having regard to his conduct to which I have referred." Even though the other side consented to X giving evidence, the Court of Appeal upheld the judge's decision. Consent is not good enough to overcome the Court's right – and duty - to manage its own procedure.

Americans often ask whether England has anything equivalent to their 'Daubert' test of whether someone is actually an expert. We do not – as such. A party may present as an expert anybody he wants. However, as Stevens v Gullis makes clear, the Court has power to control whether someone "is an appropriate person to give expert evidence". The Court can, although it will not usually, exercise this power to disbar somebody but will instead simply give less weight to the evidence of the less expert witness.

Case law provides some guidance on how those putting forward the expert can ensure that their choice will command the respect, rather than the derision, of the Court.

An expert must not be under the influence of his client or anyone else. He must be genuinely independent and verify the facts for himself. Thus:

1. In **Bank of Ireland v Watts Group (2017) EW HC 1667**, Coulson J concluded that the claimant's expert "was not a properly independent witness. It was clear that the Bank was his principal

client, providing the vast majority of his work (and fees), and that he had spent most of the last few years acting for the Bank as an expert witness …"

2. In **Arroyo v Equion Energia (2016) EWHC 1699**, Stuart-Smith J said that "… it appeared that there had been considerable co-operation between [the Claimant's experts]… The first effect of this is to cast doubt upon the integrity of the affected reports … More broadly, it casts doubt on the integrity of the expert evidence process as a whole ...” He added that while "The involvement of solicitors may, of course, be a necessary and proper part of organising expert evidence …” nevertheless they cannot get too involved. "… it is apparent that the lawyers have been coordinating the responses (and their physical production) ... So … I am not in a position to conclude that either [X] or [Y] adopted substantive material that was fed to him by [Z] without independently verifying and adopting it."

3. In **Oldcorn v Southern Water Services Ltd (2017) EWHC 62**, one expert relied upon his client's in-house modelling. HHJ McKenna concluded that he could not rely on it as …"the Court has not heard evidence directly from [X] or his colleagues and they have not been cross-examined as to their methodology and the like and there is no report from them supported by the usual expert's declaration."

An expert should not be an advocate for his client; he must be objective. In **Walter Lilly & Co v Mackay (2012) EWHC 1773**, Akenhead J said that X's report "… reads simply as a suggestion to the Court that the claimant has not proved its case … [and] … was worthless and self-fulfilling when he on a largely subjective basis awarded weightings as to the various causes … selected by him or his client as "significant"."

Nor should an expert be pressured by a client. Akenhead J also said that: "… whether he felt, subconsciously, pressured by [X] or not I cannot say. But his arguments were … scraping the barrel …"

An expert should always disclose all relevant connections with the party instructing him. In **EXP v Barker (2017) EWCA Civ 63**, the defendant's expert in a medical negligence case chose not to mention that he had trained the defendant for 2 1/2 years, helped him to obtain foreign placements and become a consultant, co-authored papers with him and been a fellow officer of a relevant professional body. The judge said that this was "a very substantial failure indeed" and that "I must bear powerfully in mind, when I assess the weight that I should give to the evidence, the reservations that I retain about [X]'s independence and objectivity in the case".

The Court of Appeal agreed: "[The judge] was fully entitled to take that view. Indeed, had he decided to exclude [X]'s evidence entirely it would … have been a proper decision."

Experts must know their place. They should not give opinions on the law or the veracity of contentious facts. In **Stagecoach v Hind (2014) EWHC 1891**, Coulson J made clear his disdain for X, who "spent far too much time dealing with matters of law and contentious matters of fact … experts should not embark on this kind of fact-finding exercise, particularly when they perform it so unprofessionally. Matters of fact are for witnesses of fact, not for experts."

Finally, experts who have talked to witnesses and/or seen the locus delicti contemporaneously should (a) make notes, and (b) disclose them. The same judge, in **Wessanen Foods v Jofson (2006) EWHC 1325**, recited that X (the good guy for once) "… attended the Claimant's premises the day after the fire and spoke to a number of the most important witnesses, making a full handwritten note of the salient parts of his conversations. … such notes were extremely important. In this Judgment, where there has been a conflict of evidence, I have preferred what was in those notes to the witnesses' later endeavours to recall what happened and why."

He added, in a salutary reminder of the scope of disclosure, that where such notes are made "they should be made available to everyone at the earliest stage of the proceedings … [they had not been (probably, for once, not X's fault!)] and certainly no later than the time of standard disclosure."

CPB Comment

So don't call your best friend as your expert. Don't use one standard expert who comes to rely on you for his business. Don't lean on an expert who doesn't say what you want. Do use someone who is properly qualified, who knows and obeys the court rules. Try to get your expert out to inspect the scene at the earliest opportunity and to take notes (which are safe to make available). Make sure that your expert has done all his own work, knows his own mind and is co-operative (including with your lawyers but not the extent of allowing them to write his report for him). In short don't be X: be Yise and ensure that your expert's support of your case is genuine and born of true independence!

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