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## **EXPERT EVIDENCE: THE REQUIREMENT OF INDEPENDENCE**

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Expert evidence should be the independent product of the expert and uninfluenced by the pressures of litigation (CPR Part 35).

*It's easy to be independent when you've got money. But to be independent when you haven't got a thing – that's the Lord's test.*

Mahalia Jackson (1911-1972)

### **Introduction**

It is well known that the evidence given to the Court by expert witnesses is required to be independent and uninfluenced by the parties. In giving that evidence, the expert owes an overriding duty to the Court. These two related propositions are, perhaps, easy to state in the abstract; however in practice they pose more difficult questions of degree. What sorts of interest will cause an expert's evidence to become unacceptable to the Court? How and when should the parties and the Court take action in response to a potential conflict of interest? What consequences flow when it is determined that an expert has not complied or cannot comply with the duty? In this article we seek to throw some light on these issues by considering the duty of independence enshrined in the Civil Procedure Rules 1998 ("CPR") and by reviewing the relevant case law, including the more recent judgment of the Court of Appeal in Toth v Jarman<sup>2</sup>. It will be seen that the Court has adopted a significantly more proactive stance to assessing potential conflicts which, in turn, requires experts and the parties to turn their minds to these issues, and make suitable notifications, at an early stage in proceedings. Further, the Court has emphasised its own role in taking the ultimate view as to whether a potential conflict is

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material and how it wishes to treat the affected evidence, even against agreement reached by the parties.

### **The Duty of Independence under Part 35 CPR**

In Lord Woolf's Access to Justice Reports<sup>3</sup>, which led to the introduction of the CPR, particular concern<sup>4</sup> was expressed about the failure of experts to maintain their independence from the parties by whom they had been instructed. Lord Woolf put it thus: "*Most of the problems with expert evidence arise because the expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide the independent expert evidence which the court is entitled to expect.*"<sup>5</sup>

This concern existed despite the House of Lords having set out clearly the guiding principle in the early 1980s in Whitehouse v Jordan<sup>6</sup>. In that case, Lord Wilberforce said this:

*"While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation."*

As a result, the CPR was framed so as to impose on an expert an overriding duty to the Court. Lord Woolf considered that this would "*re-affirm the duty which the courts have laid down as a matter of law in a number of cases, notably Whitehouse v Jordan*"<sup>7</sup>. The duty is to be found in CPR Rule 35.3 and takes the following form:

*(1) It is the duty of an expert to help the court on the matters within his expertise.*

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<sup>2</sup> [2006] EWCA Civ 1028; [2006] 4 All ER 1276; [2006] Lloyd's Rep Med 397; [2006] 91 BMLR 121; Times, 17 August 2006.

<sup>3</sup> Lord Woolf, "Access to Justice": Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (June 1995) Chapter 23; and Final Report to the Lord Chancellor on the Civil Justice System in England and Wales (July 1996) Chapter 13. See also White Book §35.0.2.

<sup>4</sup> The concern was not simply that of Lord Woolf. For a further judicial view see, for example, Abbey National Mortgages plc v Key Surveyors Nationwide Ltd and others [1996] 3 All ER 184 at 191, per Sir Thomas Bingham MR: "*For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend . . . to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.*" See also the survey of clinical and educational psychologists (May 1996 edition of The Psychologist) which found improper pressure on experts from solicitors.

<sup>5</sup> Interim Report, *ibid*, Chapter 23, §5.

<sup>6</sup> [1981] 1 All ER 267; [1981] 1 WLR 246.

<sup>7</sup> Final Report, *ibid*, Chapter 13, §29.

*(2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.*

Those duties are underlined by the practice direction to Part 35 (PD35)<sup>8</sup>, which goes on to state:

*1.2 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.*

*1.3 An expert should assist the court by providing objective, unbiased opinion on matters within his expertise, and should not assume the role of an advocate.*

A Protocol for the Instruction of Experts to give Evidence in Civil Claims appears as an Annex to PD35 and was approved by the Master of the Rolls<sup>9</sup>. It is intended to assist with interpretation of the rules. The Protocol confines its application to experts who are instructed to give opinions which are relied on for the purposes of court proceedings, whether or not they have previously advised in the background<sup>10</sup>. The Protocol reiterates the need for experts to provide opinions which are independent, regardless of the pressures of litigation and suggests a rule of thumb: “*a useful test of ‘independence’ is that the expert would express the same opinion if given the same instructions by an opposing party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates.*”<sup>11</sup>

In addition to the above, the Academy of Experts provides a Code of Practice and of Guidance directed, primarily, at experts but also those instructing experts. These documents were taken into account when the Protocol referred to above was drafted. The Academy’s Code of Practice<sup>12</sup> was approved by the Master of the Rolls and Chairman of the Civil Justice Committee on 22 June 2005. The key provisions of that code which deal with independence are:

- A prohibition on doing anything which compromises or impairs (or is likely to compromise or impair) the Expert’s independence, impartiality, objectivity and integrity<sup>13</sup>.

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<sup>8</sup> See §§1.1 to 1.4.

<sup>9</sup> Dated June 2005, entry into force: 5 September 2005.

<sup>10</sup> Protocol for the Instruction of Experts to give Evidence in Civil Claims at §5.1.

<sup>11</sup> Ibid. at §4.3.

<sup>12</sup> The Code of Practice for Experts, published by The Academy of Experts (22 June 2005).

<sup>13</sup> Ibid. at §1.

- A prohibition on entering into any arrangement which could compromise the expert's impartiality or make his fee dependent on the outcome of the case, including a prohibition on accepting any benefit other than his fee and expenses<sup>14</sup>.
- A prohibition on accepting instructions in any matter in which there is an actual or potential conflict of interest. However, notwithstanding this rule, if full disclosure is made to the judge or to those appointing him, the expert may in appropriate cases accept instructions when those concerned specifically acknowledge the disclosure. Should an actual or potential conflict occur after instructions have been accepted, the Expert shall immediately notify all concerned and in appropriate cases resign his appointment<sup>15</sup>.

The Academy's Code of Guidance for Experts and for those Instructing Them<sup>16</sup> reiterates these provisions at §2.1(1).

### **General Principles from the Case law: The Ikarian Reefer**

The seminal case which went some way to clarify the general duties of an expert remains the pre-CPR case of National Justice Compania Naviera SA v Prudential Assurance Company Limited (The "Ikarian Reefer")<sup>17</sup>. In that decision, Cresswell J set out a summary list of what he saw as the duties of an expert. Even after the introduction of the CPR, these remain<sup>18</sup> the starting point in any enquiry into expert duties and are therefore extracted in full (with emphasis added):

*The duties and responsibilities of expert witnesses in civil cases include the following:*

1. *Expert evidence presented to the court should be, and should be seen to be, **the independent product of the expert uninfluenced as to form or content by the exigencies of litigation** (Whitehouse v Jordan [1981] 1 WLR 246, 256, per Lord Wilberforce).*
2. *An expert witness should provide **independent assistance to the court** by way of **objective unbiased opinion** in relation to matters within his expertise (see Polivitte Ltd v Commercial Union Assurance Co plc*

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<sup>14</sup> Ibid. at §2.

<sup>15</sup> Ibid. at §3.

<sup>16</sup> Code of Guidance for Experts and for those Instructing Them, published by The Academy of Experts (1 July 2004).

<sup>17</sup> [1993] 2 Lloyd's Rep 68

<sup>18</sup> For a recent example, see the decision of the Court of Appeal in Meadow v General Medical Council [2007] QB 462, per Sir Anthony Clarke MR at §21 and §71.

*[1987] 1 Lloyd's Rep 379, 386, per Garland J and In re J [1990] FCR 193, per Cazalet J). An expert witness in the High Court should never assume the role of an advocate.*

*3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (In re J).*

*4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*

*5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (In re J). In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report (Derby & Co Ltd v Weldon The Times, 9 November 1990, per Staughton LJ).*

*6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.*

*7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice).<sup>19</sup>*

The Court of Appeal in the Ikarian Reefer<sup>20</sup> case endorsed the judge's view of the duties and responsibilities of expert witnesses but added one word of caution. It is not always possible to confine each expert to his area of expertise and where, as in that case, the subject of enquiry was a fire, an experienced fire expert, when assessing the significance of certain evidence, must be entitled to weigh the various probabilities and this might involve making use of the skills of other experts or drawing on his general mechanical or chemical knowledge.

### **Case Law after The Ikarian Reefer**

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<sup>19</sup> Ibid. at p80 – 81.

<sup>20</sup> Judgment of Court of Appeal QBCMF 93/0618/B (8 December 1994) per Stuart Smith LJ (judgment of the entire Court) at p5B of the transcript.

Since the Ikarian Reefer case, a number of decisions have sharpened focus on the expert's independence requirement. The following merit particular attention.

Anglo Group Plc v Winther Brown<sup>21</sup> serves as an example of expert evidence being unacceptable to the Court. HHJ Toulmin CMG QC had cause to consider claims and counterclaims arising out of the purchase of a computer system. He considered the role of experts generally and then said this about independence:

*It needs to be recognised that a failure to take ... an independent approach is not in the interest of the clients who retain the expert, since an expert taking a partisan approach, resulting in a failure to resolve before trial or at trial issues on which experts should agree, inflates the costs of resolving the dispute and may prevent the parties from resolving their disputes long before trial.*<sup>22</sup>

One of the experts in that case had taken the rather ill-advised step of, in 1995, writing an article criticising the House of Lords' judgment in Whitehouse v Jordan and setting out his own formulation of an expert's duties. That view rejected the proposition that an expert was under a duty to the court; rather, he contended that an expert could omit or understate legitimate points that he believes goes against his client. He stated: "*My duty as an expert was simply to help my client win his case on the facts as defined in the statement of claim on truthful expert evidence that I had compiled, examined and presented – nothing more. ... It does not mean that an expert must be impartial as demonstrated by the fact that if asked the same question by either party he would give the same answer*".<sup>23</sup>

The Judge was unsurprisingly highly critical of this expert and said that he could not rely at all on his evidence<sup>24</sup>. The judgment has led one commentator<sup>25</sup> to conclude that:

*An expert advisor who has formed a close bond with the client and given advice upon which the client has already relied may not be able to [act impartially]. Subconsciously, if not consciously, it may be extremely difficult for an expert to make concessions which would, for example, cast doubt on and possibly leave him open to a claim in relation to his original advice to pursue or defend a claim, or in relation to his estimation of the value of that claim.*

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<sup>21</sup> Anglo Group plc, Winther Brown & Co Ltd v. Winther Brown & Co Ltd, BML (Office Computers) Ltd, Anglo Group plc, BML (Office Computers) Ltd [2000] EWHC Technology 127 (8 March 2000)

<sup>22</sup> *Ibid.* at §112.

<sup>23</sup> *Ibid.* at §116.

<sup>24</sup> *Ibid.* at §§122, 124. See also §§58, 117-119.

<sup>25</sup> Jonathan Ross, *Can an expert wear two hats?* New Law Journal of 9 November 2001, p1646 vol 151.

Stanton & Another v Callaghan & Others<sup>26</sup> concerned whether an expert witness should be granted immunity from suit in respect of work done in preparing a report to, and in contemplation of, pending proceedings. In the course of his judgment, Otton LJ stressed that it was important “*not to gloss over the responsibilities and role of an expert witness*” and that it was “*necessary to have a comprehensive understanding of the unique role played by the expert witness*”. After considering the Ikarian Reefer and Lord Woolf’s Access to Justice reports, he held that:

*What these comments demonstrate is that although expert witnesses have duties to their clients, they have also another, overriding, duty to the court, to assist the court in resolving the issues and coming to a just conclusion.*

In Liverpool Roman Catholic Archdiocesan Trust v David Goldberg QC<sup>27</sup>, Evans-Lombe J considered whether to admit evidence given by a barrister, Mr Flesch QC, in a professional negligence action. Evans-Lombe J held that the question of whether particular evidence was admissible as expert evidence was to be decided in two stages:

- (i) examining whether the evidence qualified as admissible expert evidence (viz whether it came within section 3 of the Civil Evidence Act 1972<sup>28</sup> by being evidence of someone who has a sufficient familiarity with and knowledge of a body of expertise governed by recognised standards or rules of conduct capable of influencing the Court’s decision on an issue such that the person’s opinion was potentially of value); and then
- (ii) enquiring whether the evidence actually should be admitted as of assistance to the Court.

In that case, it was accepted that evidence which sought to prove what the law was could not be admitted as expert evidence because that was within the Court’s own expertise<sup>29</sup>. However, Mr Flesch’s report also concerned his experience of dealing with the Revenue in the course of

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<sup>26</sup> Court of Appeal, QBENI 97/1397/1 – 8 July 1998.

<sup>27</sup> [2001] 1 WLR 2337.

<sup>28</sup> Section 3 of the Civil Evidence Act 1972 concerns admissibility of expert opinion and certain expressions of non-expert opinion. It provides: “(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence. (2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived. (3) In this section “relevant matter” includes an issue in the proceedings in question.”

negotiations to settle back tax claims and the proper tactics to be employed in attempting to settle a claim without recourse to litigation. Evans-Lombe J refused to admit that evidence under the second limb of the test set out above because of the relationship Mr Flesch had with the defendant. That relationship was set out: “*they had known each other for 28 years and were good friends, they are also in the same Chambers*”<sup>30</sup>. Evans-Lombe J held that: “... *in my judgment the Court should disregard [Mr Flesch’s evidence] on the ground that Mr Flesch was unable to fulfil the role of an expert witness because of his close relationship with the Defendant.*”<sup>31</sup>

Reliance was placed by the Judge on a statement in Mr Flesch’s report which, whilst asserting that he did not believe that the relationship would affect his evidence, accepted that his personal sympathies were engaged to a greater degree than would probably be normal with an expert witness. The Judge commented:

*“It seems to me that this admission rendered Mr Flesch’s evidence unacceptable as the evidence of an expert on grounds of public policy that justice must be seen to be done as well as done. ... The role of an expert witness is special owing, as he does, duties to the Court which he must discharge notwithstanding the interest of the party calling him see per Cresswell J in the Ikarian Reefer.*

*“I accept that neither section 3 nor the authorities under it expressly exclude the expert evidence of a friend of one or the parties. However, in my judgement, where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted however unbiased the conclusions of the expert might probably be. The question is one of fact, namely, the extent and nature of the relationship between the proposed witness and the party.”*<sup>32</sup>

A case which creates tension with the above decision (or at least the dicta cited in the final paragraph of the quotation above) is that of the Court of Appeal in Field & Another v Leeds City Council<sup>33</sup>. That case concerned a claim by tenants against their local authority landlord for disrepair. The case had a long history and it was expressly noted to be a hybrid case, starting before the entry into force of the CPR but becoming subject to the CPR after April 1999. Upon the entry into force of the CPR an

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<sup>29</sup> Reliance was placed on Midland Bank Trust Company Limited v Hett Stubbs & Kemp [1978] 3 All ER 571.

<sup>30</sup> Op. cit. §6.

<sup>31</sup> Op. cit. §10.

<sup>32</sup> Op. cit §§12, 13.

<sup>33</sup> Court of Appeal, CCRTI 99/0890/B3 – 8 December 1999.

application was made to the Court for directions. Despite both parties in this fast track case<sup>34</sup> having their own experts previously, the District Judge directed an independent surveyor's report. The issue arose as to whether a Mr Broadbent, an employee of the City Council, and an inspector in the Housing Services Claims Investigation section, could be an appropriate expert because of his employee status. It should be noted that Mr Broadbent had not been involved in the particular facts forming the subject matter of the dispute before the Court. It was accepted before the Court of Appeal that the fact of employment itself would not disqualify Mr Broadbent from giving evidence and the Court of Appeal warmly endorsed that concession<sup>35</sup>. However, the Court went on to look at the particular qualities of Mr Broadbent by way of example. In fact, due to the practical course of the litigation, the City Council had instructed an independent expert and that expert would be used<sup>36</sup>. However, the Council pursued the appeal to have the Court's guidance for the future. It was submitted that Mr Broadbent would have been inappropriate because he was engaged in the Claims Investigations Section and hence it would be impossible for him to bring the requisite objectivity to the task. Lord Woolf MR did not dismiss those submissions and recognised that they could, in an appropriate case, have some force: *"From the court's point of view there can obviously be advantages in having an expert who is not employed in Mr Broadbent's role. However, without knowing more about Mr Broadbent's experience and the actual nature of his employment, the judge could not decide whether Mr Broadbent was qualified to give evidence as an expert. He could certainly give evidence as to fact"*<sup>37</sup>. This dicta reflects that the Court did not have very much material going to Mr Broadbent's expertise. Lord Woolf went on to suggest that:

*"If the City Council wishes to use a witness such as Mr Broadbent, it is important that they show that he has full knowledge of the requirements for an expert to give evidence before the court, and that he is fully familiar with the need for objectivity. In the future I would encourage, if a person such as Mr Broadbent is to give evidence, the authority concerned provides some training for such a person to which they can point to show that he has the necessary awareness of the difficult role of an expert, particularly in relation to claims such as these."*<sup>38</sup>

Similarly, Waller LJ, confirmed that there was no assumption that an employee could never give independent evidence, but framed the question in the following terms: *"The question whether someone should be able to give expert evidence should depend on whether, (i) it can be demonstrated whether that person*

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<sup>34</sup> Note that Field was a case in which the value of the dispute was limited and the Court of Appeal was concerned about proportionality in terms of costs; *ibid.* at §22.

<sup>35</sup> *Op. cit.* at §§10, 11.

<sup>36</sup> *Op. cit.* at §20.

<sup>37</sup> *Op. cit.* at §16.

<sup>38</sup> *Op. cit.* at §19.

*has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence.*"<sup>39</sup>

The tension between the Field and Liverpool cases was highlighted by the Court of Appeal in The Queen on the application of Factortame & others v Secretary of State for Transport (No 8)<sup>40</sup>. In that case, the Court considered the position of experts acting on a contingent fee basis. Messrs Grant Thornton had been appointed to give the Court forensic accountancy evidence for the Claimants on the basis that "*Our fees for this work will be 8% of the final settlement received, plus any relevant value added tax*". The Court of Appeal reviewed Field and Liverpool. In respect of the latter, the Court identified the passage<sup>41</sup> where Evans-Lombe J had pointed to what the reasonable observer might conclude. The Appeal Court considered that this had applied to an expert witness the same test of apparent bias as is applicable to the tribunal itself and that this was not the correct approach, not least because it would inevitably prevent an employee from giving expert evidence on behalf of an employer. Whilst disinterest was not automatically a precondition to the admissibility of expert evidence, "*[w]here an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the Judge will have to weigh the alternative choices open if the expert's evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.*"<sup>42</sup>

Whilst, therefore the Court of Appeal did not go so far as finding that the Liverpool case was wrongly decided, it depreciated the use of an apparent bias approach as an automatic bar to expert evidence. What the Court of Appeal did not do, and probably could not have done, is cast any doubt upon Lord Wilberforce's comments at the end of his judgment in Whitehouse v Jordan, from which judgment Evans-Lombe J had derived the reasonable observer test. Lord Wilberforce himself did not go so far as to develop any such test but referred to the need for an expert to be **seen to be** independent. This must, in our view, remain a requirement of the test of independence, not least because Lord Woolf has himself accepted that the Rules seek to reaffirm the Whitehouse dicta<sup>43</sup>.

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<sup>39</sup> Op. cit at §26. See also the judgement of May LJ, which noted that the fact of employment may affect the weight that is given to the evidence (§31).

<sup>40</sup> [2002] 3 WLR 1104.

<sup>41</sup> Quoted above.

<sup>42</sup> Op. cit. at §70.

<sup>43</sup> Op. cit. Final Report – see above.

As to contingency fee agreements, the Court in Factortame (No 8) went on to hold that experts giving evidence on such retainers thereby gain a significant financial interest in the outcome. Given that they would otherwise be independent (and that experts often give authoritative opinions on issues that are critical to the outcome of the case), such an interest was highly undesirable. The Court considered that the threat posed to an expert's objectivity by a contingency fee agreement had a potentially far greater detrimental effect on the administration of justice than would the interest of an advocate of solicitor under a similar agreement. The Court therefore considered that it would be in a "*very rare case indeed*" that the Court would be prepared to consent to an expert instructed under such an arrangement<sup>44</sup>. An expert with a financial interest in a case will therefore be in considerable difficulty in having his/her evidence admitted by the Court.

Both Field and Liverpool were also referred to in the important and more recent decision of the Court of Appeal in Toth v Jarman<sup>45</sup>. Toth concerned a claim for damages for nervous shock and psychiatric injury sustained by a father because his five year old son had died due to negligent treatment by the Defendant. The issue of negligence succeeded in that the Defendant was found to have been negligent because he failed to administer an intravenous glucose injection. However the claim failed on grounds of causation; the Judge finding that, on the balance of probabilities, he was not satisfied that the injection would have saved the claimant's life. The Judge's finding on the question of causation was based, principally, on his preference for the expert evidence of a Professor Hull (instructed by the defendant) over Professor Marks (instructed by the claimant). In a wide ranging appeal, covering many issues arising from the scientific detail of the evidence given to the Judge, one of the points advanced by the Appellant was that the Judge's decision ought to be set aside because Professor Hull had a conflict of interest which he had not disclosed.

The conflict of interest was said to arise because Professor Hull was a member of the Cases Committee of the Medical Defence Union ("MDU") who had instructed solicitors and counsel on behalf of the Defendant. The Court of Appeal therefore had to consider a point of general principle: whether the presence of a conflict of interest automatically disqualified an expert. The Court considered that the answer to this question was no: there was no automatic disqualification, rather the key question was whether the expert's opinion was independent<sup>46</sup>.

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<sup>44</sup> Op. cit. at §73.

<sup>45</sup> Op. cit.

<sup>46</sup> Ibid. at §100.

The Court emphasised, however that whilst the expression of an independent opinion is a **necessary** quality of expert evidence, it does not follow that it is **sufficient** in and of itself: “Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible.”<sup>47</sup>

The Court rejected submissions made on the Respondent’s behalf that there was no obligation to disclose conflicts of interest unless there was a request. The Court stressed that if there was a conflict of interest which was “not obviously immaterial” it should be disclosed by the expert to the party instructing him/her and by that parties legal representatives to the other parties<sup>48</sup>.

In Professor Hull’s case, the Court considered that as long as he remained a member of the Cases Committee and that Committee had responsibility for the case, he was in principle subject to a conflicting duty as a member of the committee. The Court further rejected the submission that it was sufficient to say that under the practice of constitution of the MDU, Professor Hull was precluded from attending Committee meetings which covered the instant case because of his role as an expert. The Court stressed that: “The **relevant information should have been made available to the other party and the court**. The likelihood is that the relevant information would not have been known to Mr Toth or to the court without disclosure and explanation, and it plainly raised a question as to a conflict of interest. In such a situation, the expert should disclose such information to enable the court and the other party properly to assess the conflict of interest.”<sup>49</sup>

The Court did not consider, however, that membership of the Cases Committee would automatically disqualify a person from acting as an expert witness. The Court considered that if Professor Hull’s earlier conflict of interest arising out of his membership of the Committee had been a disqualifying interest, it became immaterial when he ceased to be a member in November 2002, well before trial of the case. The Court thereby approved Field.

Finally, the Court examined whether Professor Hull ought to have disclosed his membership of the committee at or about the time of delivering his report. The guidance is important and is extracted in full (with emphasis added):

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<sup>47</sup> Ibid. at §102.

<sup>48</sup> Ibid. at §108.

<sup>49</sup> Ibid.

*We can understand that (in the absence of guidance from the court) a party who calls an expert witness at trial, or serves an expert's report in advance of trial, may be aware of a potential conflict of interest but consider that it is not material and that it therefore need not be disclosed. However, for the future, we do not consider that a party should take the course of non-disclosure. We say this because it is for the court and not the parties to decide whether a conflict of interest is material or not. The court may take a different view from that of the parties as to whether an expert has a conflict of interest which might lead the court to reject the independence of his opinion: see, for example, Liverpool Roman Catholic Archdeacon Trustees Inc v Goldberg (No 2) [2001] 1 WLR 2337<sup>50</sup>. Similarly, in the interests of transparency and of deflecting suspicion, the other party ought to have the information as soon as possible. We do not consider that the parties can properly agree that a conflict of interest which is otherwise disclosable need not be drawn to the attention of the court. A party who is in the position of wanting to call an expert with a potential conflict of interest (other than of an obviously immaterial kind) should draw the attention of the court to the existence of the conflict of interest or possible conflict of interest at the earliest possible opportunity. By the same token, it is obviously desirable for the other party to make any objection that it may have to the admission of expert evidence at as an early a stage in the proceedings as practicable. It follows that, in this case, we consider that Professor Hull's position as a member of the Cases Committee and Council of the MDU should have been disclosed in, or at the time of, his report.<sup>51</sup>*

Finally, the Court went on to suggest that the Civil Procedure Rules Committee should consider extending the requirement for an expert's declaration at the end of his report to include confirmation:

- a) that he has no conflict of interest of any kind, other than any which he has disclosed in his report;
- b) that he does not consider that any interest which he has disclosed affects his suitability as an expert witness on any issue on which he has given evidence; and
- c) that he will advise the party by whom he is instructed if, between the date of his report and the trial, there is any change in circumstances which affects his answers to (a) or (b) above.<sup>52</sup>

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<sup>50</sup> This citation, without apparent disapproval, by a separate division of the Court of Appeal to that in the Factortame (No 8) decision can, perhaps, be seen as support for the result in that case.

<sup>51</sup> Op. cit. at §112. Note how this guidance sits hand in hand with the Academy of Experts' Code of Practice for Experts, op. cit., at §3.

<sup>52</sup> Op. cit. at §120.

The Court of Appeal considered that a conflict of interest for these purposes “could be of any kind, including a financial interest, a personal connection, or an obligation, for example, as a member or officer of some other body. But ultimately, the question of what conflicts of interest fall within this description is a question for the court, taking into account all the circumstances of the case.”<sup>53</sup>

This decision has been applied by the High Court subsequently<sup>54</sup>.

## **Consequences**

It is apparent from the discussion above that one consequence of a determination of lack of independence on the part of an expert is that his/her evidence or proposed evidence will be declared unacceptable to the Court. The evidence, if given, can be disregarded or the expert can be debarred from giving evidence in the first place<sup>55</sup>. The Court of Appeal’s decision in Toth stresses the importance of the issue of independence being ventilated at an early stage of the proceedings in order that the affected party is not left without the opportunity to seek alternative expert evidence.

The consequences are not, however, confined to the parties. The Courts are now increasingly imposing sanctions on those experts who recklessly disregard their duty to give independent evidence. For example, the Court can make costs orders against experts: e.g. Phillips v Symes (A bankrupt) (expert witnesses: costs)<sup>56</sup> and may report them to their professional body for misconduct: e.g. Pearce v Ove Arup Partnership Ltd & others<sup>57</sup>. In that latter case, Jacob J held that:

*Now there is no rule providing for specific sanctions where an expert witness is in breach of his Part 35 duty. Nor is there any system of accreditation of expert witnesses such as is proposed by Lord Justice Auld for forensic scientists (see paras. 129 – 131 of his Review of the Criminal Courts of England and Wales, October 2001). So there is no specific accrediting body to whose attention a breach of the duty can be*

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<sup>53</sup> Op. cit. at §119.

<sup>54</sup> Neil Martin Limited v Commissioners of HM Revenue and Customs [2006] EWHC 2425 (Ch) per Mr Andrew Simmonds QC sitting as a Deputy High Court Judge at §94: “there is no reason in principle why the Revenue, if it so wished, could not have adduced evidence from another experienced tax inspector in order to justify Mr Harrison’s conduct. The fact that such an expert would also be an employee of the Revenue would be no bar to the admissibility of his evidence: Field v Leeds City Council (2000) 17 EG 165; Toth v Jarman [2006] EWCA Civ 1028.” See also Chapman & Others v Aventis Pharma Limited [2008] EWHC 652 (QB) per Beatson J at §§3, 8.

<sup>55</sup> See, for example, Stevens v Gullis [2000] 1 All ER 527.

<sup>56</sup> [2005] 1 WLR 2043.

<sup>57</sup> [2001] EWHC 481 (Ch) (2 November 2001) per Jacob J §§59-61. See also Hussein v William Hill Group [2004] EWHC 208 (QB), per Hallett J; and National Employers Life Assurance Co v Advisory, Conciliation and Arbitration Service [1979] ICR 620, per Browne-Wilkinson J §§40-41.

*drawn. Most (but not all) expert witnesses, however, belong to some form of professional body or institute. I see no reason why a judge who has formed the opinion that an expert had seriously broken his Part 35 duty should not, in an appropriate case, refer the matter to the expert's professional body if he or she has one. Whether there is a breach of the expert's professional rules and if so what sanction is appropriate would be a matter for the body concerned. Prima facie, therefore, I consider it necessary to refer Mr Wilkey's conduct to his professional body, the RIBA. But before I do so it is only right that Mr Wilkey should have an opportunity of being heard. So I intend, unless successful representations are made on behalf of Mr Wilkey in the meantime, to ask the defendant's solicitors, after 21 days from the date of this judgment, to send a copy of it and any necessary papers to the RIBA. ...*<sup>58</sup>

Such an approach is compatible with the recent Court of Appeal judgment in Meadow v General Medical Council<sup>59</sup>, a case which arose from evidence given by Professor Meadow during the criminal trial of Mrs Sally Clark for murder of her two sons. His evidence was to refute the proposition that Mrs Clark's children may have died from sudden infant death syndrome, or cot death. Mrs Clark was convicted; however it was later decided by the Court of Appeal (Criminal Division) that those verdicts were unsafe due to material non-disclosure by the Crown's pathologist. The Court also considered that the appeal would "in all probability" have also been allowed on an alternative ground focused on criticisms of Professor Meadow's evidence. After the trial, Mrs Clark's father made a complaint against Professor Meadow to the General Medical Council alleging serious professional misconduct in respect of the evidence he gave. It was argued, *inter alia*, that Professor Meadow was immune from such proceedings in respect of evidence given in Court. The Court of Appeal confirmed that it was lawful for the GMC to consider and determine the complaint. The Court held that there was no principled basis to extend common law immunity from suit of a witness to fitness to practise proceedings because the purpose of such proceedings was to protect the public: if the conduct of an expert witness raised the question whether that expert was fit to practise in his particular field, then the regulatory authorities should be entitled and might be bound to investigate and determine such proceedings against the expert<sup>60</sup>.

In the course of the judgments, Sir Anthony Clarke MR accepted the submission that the threat of fitness to practise proceedings was in the public interest because "*...it helps to deter those who might be tempted to give partisan evidence and not to discharge their obligation to assist the court by giving conscientious and objective evidence. It helps to preserve the integrity of the trial process and public confidence*

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<sup>58</sup> Ibid. at §61.

<sup>59</sup> Op. Cit. See also Colin Ettinger *Expert Evidence Post Meadows* [2007] JPIL 345.

<sup>60</sup> Ibid. see, in particular, per Sir Anthony Clarke MR at §§45-46, 55-61, and also §§106, 115, 249.

*both in the trial process and in the standards of the professions from which expert witnesses come...*<sup>61</sup> He further rejected the trial judge's suggestion that immunity from suit should be set aside on a case by case basis by the Judge referring the conduct of an expert to his or her professional disciplinary body. The Master of the Rolls considered that this would require a general duty to be imposed on all trial judges to consider whether or not to refer the conduct of an expert to his or her professional body. Whilst trial judges were free to refer experts to their professional bodies in individual cases, there was no general duty on the Judge to consider such a course of action:

*...there is no principled basis upon which trial judges should be charged with the responsibility for deciding whose conduct should be referred to an FPP and whose conduct should not. The judge presiding over a criminal trial has many duties, some of which are very onerous. So too does a trial judge in a civil action of any complexity. Although trial judges have been free in the past (and will no doubt be free in the future) to refer the conduct of an expert to his professional body, it has never been part of a trial judge's duty to consider whether or not to do so. To impose such a duty on all trial judges in both civil and criminal cases seems to me to be inappropriate.*<sup>62</sup>

Thrope LJ considered that where the charge in fitness to practise proceedings related only to the doctor's evidence given during legal proceedings, there was not the same requirement on an appeal court to exercise deference to the evaluation of a panel substantially composed of doctors. He considered that *"It is the judges, in judgments such as The Ikarian Reefer ..., who set the standards that they require of the expert witnesses appearing before them. In my opinion the judges are best placed to evaluate whether and to what extent an expert witness fell below those standards."*<sup>63</sup>

## **Conclusions**

The cases discussed above serve to underline the variety of situations in which an expert can have a potential conflict of interest. The interest can be financial (as in Factortame (No 8)), due to longstanding relationships with a party (Liverpool), due to employment (Field) or engagement as a contractor or expert scientific advisor (Chapman<sup>64</sup>), or due to other potentially conflicting duties by

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<sup>61</sup> Ibid. at §46.

<sup>62</sup> Ibid. at §55. See further at §§56-61 and per Auld LJ at §§115-116.

<sup>63</sup> Ibid. at §280.

<sup>64</sup> Chapman & others v Aventis Pharma Ltd [2008] EWHC 652 (QB). In that case, the Defendant's expert witness Professor Wild had previously been engaged by the Defendant as a scientific advisor and had actually been involved in the investigations which were subject of serious criticism by the Claimants (see §4). Beatson J held, at §9, that *"...in litigation involving pharmaceutical products, experts called for either side often have some involvement with the drug in question. This is because the parties will seek expert evidence from the most experienced and expert scientists, and, given the*

virtue of appointments or other roles undertaken by the expert (Toth). These categories of potential conflict are not closed.

Toth evidences an increasingly proactive stance on the part of the Court to questions of independence, reflective of the Court's enhanced case-management function. As the expert is there to assist the Court, it is the Court which must finally decide whether a potential conflict is material and the consequences to flow from that decision. To assist it do so, the Court of Appeal has emphasised the need for early disclosure of all conflicts save for those which are obviously immaterial.

The Court has therefore sought to strike a balance between the disclosure of every potential conflict of interest, however minor, and those which ought properly to be brought into the open. The threshold it has adopted is that of obvious immateriality: a low hurdle to jump. For a practitioner faced with considering whether a potential conflict reaches that threshold, his/her natural (and perhaps unavoidable<sup>65</sup>) subjective views ought to be suppressed as much as possible. A helpful rule of thumb is perhaps to consider whether, if faced by judicial questioning about why a disclosure was not made, the practitioner in question would be at all professionally embarrassed.

The disclosure of potential conflicts expected by the Court is, firstly, that of the expert who should include such matters in his/her report and thereafter should notify matters to those instructing him/her. Equally, once the party instructing the expert becomes aware of a potential conflict, he/she must notify the other party. That, however, is not sufficient. Practitioners will need to go further and notify the Court even when, upon receipt of the disclosure, the opposing party has agreed to take no point on the issue. This is because ultimately it is for the Court to consider the conflict and to decide how it affects the expert's independence. The Court's view may differ from that taken by the parties. The disclosure therefore needs to take place as soon as possible after the potential conflict has come to the attention of the instructing party. Similarly, any objections by the opposing party need to be made as early in proceedings as possible. Early disclosure allows the parties to reconsider their respective position and take any necessary action at an early stage before trial; for example by applying for permission for alternative expert evidence, or to seek to pose written questions to the expert in

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*specialisation in sciences and the small number of people involved, necessarily such experts will have knowledge of the product. The fact that Professor Wild was involved in the defendant's investigations into Sabril and Vigabatrin is a matter which does put him in a different category from an expert who just has knowledge of a drug from prescribing it. This is particularly so where, as is the case here, the tests which are criticised by the claimants are tests with which he has been involved, either by way of design or participation. It is, however, that involvement over a substantial period which gives rise to the potential conflict and it is that involvement in the acknowledged role as paid consultant that the claimants will wish to rely upon."*

<sup>65</sup> In view of the test of "obvious immateriality".

question to further probe any information that s/he has given<sup>66</sup>. Further, early notification allows the Court to consider determining the independence issue as a preliminary matter. Whilst there are some cases in which such preliminary consideration will be desirable, many of the cases show that it is only after the Court is able to examine the full facts and circumstances that it is able to rule on the acceptability of certain expert evidence.

Whilst the presence of a conflict of interest, will not automatically debar an expert from giving his/her expert evidence, the Court will scrutinise these matters against all the circumstances and facts of the case. Where experts have an interest in the outcome of litigation (e.g. by acting on a contingent fee basis) it is usual that their evidence will not be acceptable to the Court. Close friendships extending over many years with one of the parties have also been found to be sufficient on public policy grounds to debar expert evidence. The Courts have tended to focus upon whether there is a credible case that the evidence given might have been different had the conflict of interest not existed, or had the expert been instructed by another party.

It is equally important for the experts themselves to be familiar with the Court of Appeal's judgment in Toth. Penalties of a draconian nature can be visited upon them personally. Costs orders can be significant in quantum, and the damage done to reputation by an adverse Court judgment and decision by a regulating body are potentially irreparable. In these circumstances, the Court of Appeal must be right that the Civil Procedure Rules Committee consider amending Part 35, and in particular the expert declaration, at the earliest opportunity in order that all experts are fully apprised of the effects of this decision and what is required from them.

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<sup>66</sup> Under CPR r35.6 written questions can be posed to an expert. To do so without the permission of the Court, these must be done once only, within 28 days of the report, and the questions must seek clarification of the report. Where these criteria are not satisfied (for example, where the potential conflict of interest is not mentioned in the expert's report and/or has come to the other party's attention later, e.g. through disclosure), an application can be made to pose questions to probe the independence issue under CPR r35.6(2)(c)(i). The Court's permission is unnecessary where the other party agrees (CPR r35.6(2)(c)(ii)). Should an expert refuse to answer questions properly posed under the rules, CPR r35.6(4) allows the Court to order that the expert's evidence may not be relied upon or that a party may not recover the fees and expenses of that expert. In Chapman (supra) the Claimants sought permission to ask further questions of Professor Wild's remuneration when he previously acted as a paid consultant for the Defendant. On the facts of that case, Beatson J held that "*In light of the material at present before me, I do not consider that these questions are necessary now and before I have heard Professor Wild's evidence to enable me to assess the extent of any conflict or the credibility of his views. The position may change in the light of the evidence given at trial.*" (§11). Precise figures of remuneration were therefore unnecessary at that stage of the litigation (§§9, 11) as it had been accepted that Professor Wild had a long and involved financial connection with the Defendant.