Expert conflicts – the importance of an expert disclosing their history of dealing with the person on whose behalf they are acting

The importance of disclosing any potential conflict of interest on the part of experts is not a new issue and was previously emphasised in Proton Energy Group SA v Orlen Lietuva [2013] but also by the Court of Appeal in the earlier case of Toth v Jarman [2006]. However, most recently, in EXP v Barker [2017] the trial judge and the Court of Appeal were faced with an unusual situation where an expert witness had omitted to mention a close professional connection to the party instructing him. Although the expert was well and truly experienced in his field of work, the Court of Appeal found that non-disclosure of the connection before trial meant that the expert had compromised his approach and that the weight to be accorded to his views must be significantly diminished.

EXP v Barker [2017] EWCA Civ 63

In EXP v Barker the court held that the credibility of expert evidence is likely to be undermined where there is a long term professional relationship between the expert and the instructing party. The burden is on the instructing party to disclose any conflict of interest between themselves and the expert instructed and there is no burden on the opposing party to seek out this information.

Facts of the case

+ The Claimant brought a claim for clinical negligence against Dr Barker, the Defendant, in relation to the failure to identify and treat an aneurysm in her brain in 1999.
+ Both parties instructed experts in the field of neuroradiology. During trial it emerged that the defendant and Dr Molyneux, the Defendant’s expert, had failed to disclose that they had a long-standing professional relationship. The expert had trained the Defendant during the
Defendant’s seven year Radiology Specialist training at a hospital in Oxford. However, no information relating to their professional relationship was contained in the Defendant’s CV or Witness Statement. This information was only discovered at trial. It also emerged that the Defendant had suggested that Dr Molyneux should be the defence expert.

The key issue before the court was “whether the MRI scan in 1999 did indicate the presence of an aneurysm which a reasonably competent neuroradiologist would have identified and reported”.

Dr Molyneux was of the opinion that the MRI scan showed a twisted artery as opposed to an aneurysm. By contrast, Dr Butler argued that the scan clearly showed an aneurysm.

The Claimant succeeded in establishing liability and the Defendant appealed.

One of the grounds of the appeal was that having admitted the expert evidence of Dr Molyneux, the judge failed to evaluate it on its merits and effectively performed a “balancing exercise” between the two experts.

Was Dr Molyneux’s expert evidence admissible?

The Claimant argued that Dr Molyneux’s expert evidence was inadmissible given the previous non-disclosed long standing professional relationship between Dr Molyneux and the Defendant. The judge reluctantly allowed Dr Molyneux’s expert evidence on the basis that a failure to do so would be detrimental to the Defendant. However, the judge noted that failing to provide early disclosure of such an obvious conflict “tends to raise the suspicion that the default was not inadvertent”.

The Court of Appeal upheld the trial judge’s view of Dr Molyneux’s expert evidence emphasising that:

“Our adversarial system depends heavily on the independence of expert witnesses, on the primacy of their duty to the Court over any other loyalty or obligation, and on the rigor with which experts make known any associations or loyalties which might give rise to a conflict”.

The roles of experts

CPR Part 35 and the accompanying Practice Direction provide the framework within which experts and those instructing them must act. Courts have the power to make a cost order directly against the expert where an expert fails to comply with the CPR.
CPR 35.3 provides that it is the duty of an expert to help the court on matters within their expertise and this duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation (PD 35.2.1).

Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate (PD 35.2.2).

The test for independence

The Protocol for the Instruction of Experts to Give Evidence in Civil Claims sets out a useful test for independence. The test is that the expert would express the same opinion if given the same instructions by another 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 or mediators.

Avoiding expert conflicts

Before accepting instructions, an expert should be informed who all of the other parties involved in the case are. An expert will often be sent a retainer letter outlining the details of all parties involved and the expert will then need to confirm that they do not have an actual or potential conflict of interest in accepting the retainer, whether financial, personal or professional. The nature of the relationship between the expert and the party instructing it, including any issues relating to a conflict of interest should be raised without delay.

Comment

Although the subject matter of EXP v Barker [2017] was a medical negligence claim, the judgment reiterates the need for an expert to be independent. Parties should ensure they have investigated any potential conflict before instructing an expert.

Although an expert conflict may not necessarily compromise an expert’s independence and prevent them from giving evidence, it is advisable to be open and honest about any such knowledge or relationship. Any details of a connection between the expert and the party instructing it should be disclosed to the other party or parties and proposed to the court – it is for the court, not the parties, to decide whether the conflict is material.

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