

Standard bearers

Jonathan Karas QC outlines the desired qualities of expert witnesses

The law puts exacting standards on expert witnesses. The standards are high. This ensures that the courts can put trust in the experts but also that the public can have faith in the legal system in which they play a part.

The law and perceptions

To that end, expert witnesses (i) must be and be seen to be impartial and (ii) must provide independent assistance and unbiased opinions (*National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68). The first requirement deals with the position of the expert. The second with what the expert must do in that position. There seems to be no more than a semantic difference between "impartiality" and an absence of bias.

The dangers of bias

Bias disqualifies a person from acting as an expert witness. The reason is that "[b]ias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect" (per Lord Woolf in *R v Gough* [1993] HL 646 at 672 G-H). Accordingly, the courts do not look at the individual's

by actual bias: the expert must also be seen to be impartial. What constitutes apparent bias has been considered in other contexts. "The question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility" of bias: *R (PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311. "Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach" (*ibid.*). Whether there is a seeming of bias will depend on all the facts of each case.

Consequences of expert witnesses bias & apparent bias

Courts are reluctant to accept the evidence of biased or seemingly biased experts. First, an appearance of bias affects the credibility of witnesses. So, in *Wallshire Ltd v Aarons* [1989] 1 EGLR 147 a chartered surveyor's evidence was not accepted because he appeared to the judge to have "tended to descend into the arena" (see too *Cairnstores v*



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with apparent bias this may vitiate his decision. For instance, in *Primary Health Investment Properties Ltd and others v Secretary of State for Health and others* [2009] EWHC 519 (Admin) it was held that the appeals unit of the NHS Litigation Authority could not properly appoint a surveyor from the Valuation Office Agency to assist it to determine an appeal over the level of "current market rent" to be reimbursed for a surgery where one of the parties to the appeal had been advised and represented by a district valuer from a different section of the Valuation Office Agency (VOA). The connections between the district valuer, which was acting for the PCT at all stages, and the Chief Executive Officer's department of VOA, which was advising the NHSLA as decision-maker in the dispute, were too close for justice to be "seen to be done".

Practical implications

This is not the place to analyse the codes of conduct of the various professions which provide expert witnesses in court. The implications of the above principles, however, have far-reaching consequences regardless of Codes of Conduct. These implications are not always understood.

First, in the context of arbitrations, some professions consider it is possible for the same person to act as expert witness and advocate. This is the view of the Royal Institution of Chartered Surveyors, albeit that they say that "it is always imperative to understand the distinction between the two roles and it is impossible for both roles to be carried out at the same time" and that a surveyor is obliged to "distinguish at all times which role you are undertaking". The problem, however, is not solved if a person acting in two roles distinguishes those roles; nor is it solved if the tribunal will be in practice be able to make the distinction

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state of mind but how his position would be perceived by a reasonable person and whether there is a real possibility that he is biased: see *Re Medicaments (No. 2)* [2001] 1 WLR 700. Protestations of tribunals or experts who assist them that they are professional and impartial do not hold much water in this context given the insidious nature of bias.

When is bias "apparent"?

The requirements suggested in *The Ikarian Reefer*, however, go beyond requiring that the opinions of the expert be untainted

Aktiebolaget Hassle [2002] EWCA Civ 1504). Second, apparent bias of an expert may lead to his evidence being wholly inadmissible as "expert evidence": *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No.3)* [2001] 1 WLR 2337.

Bias of experts appointed to assist the tribunal

Sometimes experts not only act for parties but assist arbitrators or other tribunals. Where a decision maker takes advice from someone tainted

in a particular case. It is how the advocate/expert's roles will be perceived which causes the problem. By acting as an advocate, one is retained to advance one's client's case in that client's interests. In preparing an expert's report one must act impartially and be seen to do so. It is difficult to see how a professional giving expert evidence can properly act as advocate and also avoid the appearance of bias. It is not surprising, therefore that in *Franks v Towse* [2001] EWCA 9 the Court of Appeal upheld a decision of the Lands Tribunal that a surveyor could not appear as an advocate and give expert opinion evidence before the Lands Tribunal.

Second, experts sometimes represent their clients' commercial interests. For instance, they directly negotiate settlements for clients. If and to the extent that expert witnesses are also retained to broker deals, they suffer from the same risks as advocates. They "enter into the arena". What is perhaps worse, it is not uncommon for an expert's initial report to appear to be no more than part of a negotiating position. It is difficult to see how such behaviour is consistent with the standards suggested in the *Ikarian Reefer* case.

Third, experts may wish to act on conditional fee arrangements. It is difficult to see how an expert retained on a conditional fee can properly be seen to be unbiased. The expert will have a direct financial interest in the outcome of the case. An inference of actual bias may be hard to resist. An inference of apparent bias seems inevitable.

Fourth, (and following from the previous two points) a more general financial relationship between expert and client may give rise to an appearance

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of bias. For instance, if a surveyor or his firm also advises a party generally and remuneration depends on the rents receivable from the landlord's estate, this gives him an interest in maximising the rent. The surveyor will have a real incentive

to argue for higher rents in a specific case. He certainly appears to have such an interest. A surveyor in such circumstances would need to be very cautious about holding himself out as independent and not apparently biased in giving evidence about the rent payable to his firm's client.

Discussion

For the legal profession, when retaining an expert to present evidence on behalf of litigants it is important to do more than draw the witness's attention to the requirements of the Civil Procedure Rules. While a connection between client and witness will not always disqualify the witness from performing the role of an expert (each case will depend on the precise facts and connection—see *Field v Leeds City Council* (2000) 17 EG 165), it is appropriate to investigate both the past connection of the witness to the client and to set limits on the role which he will be expected to perform in relation to the litigation and negotiations if the requirement suggested in *The Ikarian Reefer* are to be fulfilled. NLJ

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