

# Expert Witnesses: Duty and Expectation

28 July 2021

In *Bux v The General Medical Council* [2021] EWHC 762 the Administrative Court has highlighted the duties of expert witnesses to produce independent evidence and the need to avoid conflicts of interest. The summary of case law and guidance, along with Mostyn J's observations, makes the case essential reading for expert witnesses and general litigation practitioners alike.

## BACKGROUND

The case concerned Dr Zuber Bux who authored expert reports in a series of food poisoning cases. Dr Bux's wife was a salaried partner at the firm of his instructing solicitors. The fees earned by Dr Bux were paid into a service company of which he was the 55% shareholder, with his wife owning the remaining 45%. During the relevant period of 2016–2017, Dr Bux produced some 684 reports. These reports were usually the central persuasive evidence in claims brought by holidaymakers who claimed they had become unwell as a result of negligent food preparation in hotels.

The case in question pertains to Mr Bux's appeal against the October 2019 findings of the Medical Practitioners Tribunal (the "MPT") and the MPT's subsequent decision to remove Dr Bux from the Medical Register. The matter was considered at the interlocutory stage by HHJ Gregory in the County Court at Liverpool and heard by Mostyn J in the Administrative Court.

## JUDGMENT

### Independence

Mostyn J was highly critical of the repetitive and seemingly biased reports, stating as follows:

*"The reports were written by the appellant, so far as I can tell, on a boilerplate basis. They were superficial, unanalytical, devoid of any differential diagnoses, and were invariably*

---

*supportive of the claim....It has not been suggested to me that even once the appellant wrote a report which was unfavourable to a claimant.”*

In the judgment, Mostyn J cited in particular [CPR 35.3](#) which contains an expert’s overriding duty to the court and that such duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid. This CPR provision is particularly relevant given the conflict of interest asserted by the MPT with regard to the mutual financial gain available to Dr Bux and his wife.

As per [CPR PD 35 paras 2.1 and 2.2](#) (also highlighted in the judgment):

- Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
- Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.

In reference to expectations Mostyn J was clear that, *“it is axiomatic that the evidence of an expert should be independent, unbiased and objective.”*<sup>1</sup>

The Judgment provides a pertinent walkthrough of the key case law, starting with Lord Wilberforce in *Whitehouse v Jordan* [1981]:<sup>1</sup>

*“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.”*

Lord Wilberforce’s position was further approved by Cresswell J in *Ikarian Reefer* [1993]<sup>2</sup> and Thorpe LJ in *Vernon v Bosley* (expert evidence) [1998].<sup>3</sup>

### **Conflict of Interest**

The Judgment also deals with the conflict of interest arising from Dr Bux’s wife being a partner at his instructing solicitors firm and a co-owner of his service company. Mostyn J notes that an obligation to give an unbiased opinion *“plainly carries with it the obligation to disclose any actual or potential conflicts of interest”*; however there is no explicit reference to this either in the rules or the Practice Directions. Notably, the Court of Appeal has recommended that the Civil Procedure Rules Committee updates

---

<sup>1</sup> 1 WLR 246.

<sup>2</sup> 2 Lloyds Rep 63, 81.

<sup>3</sup> 1 FLR 297.

---

the expert report declaration to include a statement declaring the absence of any undisclosed conflicts of interest.<sup>4</sup>

The current standard terms for the expert report declaration are found in [CPR PD 35 para 3.2. Sub-para \(9\)](#), requiring that the expert:

*“(a) understands his or her duty to the court, and has complied with that duty; and (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.”*

Mostyn J highlighted that the Guidance for the Instruction of Experts in Civil Claims 2014 reinforces the need to avoid conflicts:

*“Before experts are instructed or the court's permission to appoint named experts is sought, it should be established whether the experts... (e) have no potential conflict of interest.”*

It seems fair to say that absent an explicit CPR rule there is sufficient authority and guidance to suggest that expert conflicts of interest should be avoided.<sup>5</sup>

## OTHER CASES

Reinforcing Mostyn J's concerns, the recent judgment in [Beattie Passive Norse Ltd & Anor v Canham Consulting](#) [2021]<sup>6</sup> showed an increasing judicial frustration in this area. Fraser J stated:

*“There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties.”*

In his address to the Expert Witness Institute's annual conference in May of this year<sup>7</sup>, Deputy Supreme Court President Lord Hodge urged expert witnesses to “not allow their instructing solicitors, by whom they are paid, to call the tune.” Referencing a 2019 survey of expert witnesses, Lord Hodge reported that “41% of the respondents indicated that during the preceding 12 months they had come across an expert witness who they considered to be a hired gun.”

---

<sup>4</sup> *Toth v Jarman* [2006] EWCA Civ 1028 at [119].

<sup>5</sup> It is worth noting however that the mere presence of a conflict of interest on the part of an expert witness does not automatically invalidate their evidence in the eyes of the Court (See *Factortame (No 8)* [2002] 3 WLR 1104 at [70]).

<sup>6</sup> *Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs)* [2021] EWHC 1414 (TCC).

<sup>7</sup> <https://www.lawgazette.co.uk/news/lawyers-must-do-better-lord-hodge-criticises-use-of-expert-witnesses-/5108670.article>.

---

As part of a continuing trend of judicial disapproval, the very recent judgment of Smith J in *Dana v Freudenberg* [2021]<sup>8</sup> contained extensive criticism of expert conduct and warnings for instructing solicitors. In this case, the judge found that the conclusions reached by the experts had such little factual support that she excluded the evidence entirely. Smith J issued this stark warning to practitioners:

*“Cases involving experts require careful oversight and control on the part of the lawyers instructing those experts...there has been no such oversight or control over the experts in this case.”*

Smith J went on to say that providing expert evidence is a matter of permission and not an absolute right as per CPR 35.4(1).

### GOING FORWARD

The *Bux*, *Beattie Passive Norse* and *Dana* judgments, along with the comments of Lord Hodge, paint a noteworthy picture for expert witnesses and the solicitors who instruct them. When instructing an expert, solicitors should consult the relevant guidance and ensure that proper instructions do not cross the line into improper influence and that a hands-off approach does not become a lack of necessary oversight.

\* \* \*

Please do not hesitate to contact us with any questions.

### LONDON



Christopher Boyne  
cboyne@debevoise.com



Emma Laurie-Rhodes  
elaurierhodes@debevoise.com



Emily Lodge  
elodge@debevoise.com



Blaise Matthews  
bmatthews@debevoise.com

---

<sup>8</sup> *Dana UK AXLE Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC).