

Case Name: *Liverpool Victoria Insurance Company Limited v Dr Asef Zafar* [2019] EWCA Civ 392 (19 March 2019)

Topic: Expert witness – contempt of court

Full case: [click here](#)

Summary: This is one of a series of cases relating to the duties of an expert witness in court proceedings, which the Upper Tribunal confirmed in *Gardiner & Theobald and Merlin* apply equally to the tribunal system. These duties include an obligation to assist the court on matters within their expertise, which overrides any obligation to those instructing or paying the expert. The expert's report must include a statement acknowledging this duty to the court and must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. The material Practice Direction also requires experts to maintain professional objectivity and independence at all times. These duties apply equally to rating surveyors who provide expert or factual evidence before the tribunals or courts and must be read alongside the relevant professional standards imposed by the RICS.

Commentary: This Court of Appeal case concerned a medical practitioner who was called upon to assess and report on an individual who was claiming compensation for a whiplash injury resulting from a car accident. His initial report to the insurer, following an examination, was that there was no evidence of a continuing medical problem. The expert used a software system to enable reports to be produced in a standard format as soon as possible and many such reports were prepared, enabling the examination and report to be completed within 15 minutes.

Following submission of the report, the claimant complained to his solicitor that it was inaccurate and the solicitor emailed the expert a few days later to request a review of the report and referred to additional symptoms which his client had reported to him (but had not been apparent at the examination). The expert then produced a second report without reference to the first report and without a further examination. The second report was materially different from the first, most notably containing statements that the claimant would not fully recover for at least 6 months. Both reports contained the requisite declaration as to the expert's duty to the court and the usual statement of truth.

Court proceedings for compensation were commenced, based on the second report. Unfortunately for the expert (but not the insurer), the first report was included in the court bundle by mistake. Had this not happened, the court noted that the substitution of the second report would never have come to light. As a result of this turn of events, the court issued directions calling for witness statements.

The expert signed a witness statement on 20 August 2013 to the effect that the correct version was the original report (in the bundle), which had been altered without his knowledge or permission to create the second report. He also asserted that the report had been altered while in the custody of the agents instructed by the claimant's solicitors.

The expert realised a few days later that his statement should not have been made, asserting that he had amended the report himself as it wrongly referred only to the claimant's acute symptoms. This was followed on 22 October 2013 by a new witness statement, saying that the second report was the correct one. Both statements contained a statement of truth.

The insurers commenced proceedings in the High Court against the expert in 2017, seeking his committal for contempt of court. The claim form alleged that the expert had made the statements knowing they were false or was reckless as to whether they were true or false, consequently interfering with the course of justice. In its judgement handed down on 5 October 2018 the court found this to have been proved and, further, that the expert had acted dishonestly in seeking to blame the agent for amending the initial report. The latter was held to be the most serious of the expert's acts of contempt of court, described as "particularly despicable because it sought to cast the blame on an innocent third party". The court also found the claimant's solicitor to have been in contempt of court, in relation to assertions made in his own witness statements which the court said he knew to be untrue. The court based this conclusion on its finding that the solicitor had initiated the process of amendment of the first report, to achieve a better outcome for his client.

The High Court sentenced the expert to a custodial sentence of 6 months, suspended for 2 years. The solicitor was sentenced to 15 months' immediate imprisonment.

The Court of Appeal was asked by the insurer to review the expert's sentence, with a view to converting it to imprisonment with immediate effect.

The Court re-iterated the duty of an expert, which include an obligation to assist the court on matters within their expertise and this overrides any obligation to those instructing or paying the expert. The expert's report must include a statement acknowledging this duty to the court and must state the substance of all material instructions, whether written or oral, on the basis of which the report was written. The material Practice Direction also requires experts to maintain professional objectivity and independence at all times.

The key Practice Direction is CPR 32.14(1), which provides that:

“Proceedings for contempt of court may be brought against a person if he makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.”

The principal penalties for contempt are a fine or committal to prison.

The Court of Appeal was clear that contempt of this nature undermines the administration of justice. Where a false statement is made deliberately or recklessly (not caring whether it be true or false) nothing other than an order for committal to prison will be a sufficient penalty. This applies fully to an expert witness putting forward an opinion without an honest belief in its truth. In this case, the expert lied in his first witness statement and then made a different statement in his second statement, significantly increasing his culpability.

After further considering the facts of this case, the Court of Appeal found that the sentence imposed in the High Court had been unduly lenient. However, having said that a sentence of 12 months to be served immediately would have been appropriate, the court decided not to increase the sentence from the 6 months imposed by the lower court (suspended for two years).

The Upper Tribunal has made it very clear in recent decisions that rating surveyors appearing before it as expert witnesses (even when purporting to provide factual evidence only, para 177 of Merlin) owe the same duty of independence as those appearing in that capacity before the courts. It follows that the duties set out in the Civil Procedure Rules are equally applicable and the key principles are summarised in “The Ikarian Reefer” [1993] 2 Lloyd’s Rep 455.

The duty of full independence may in a strict sense preclude a rating surveyor from appearing as an expert in relation to a property where partisan advice has been given throughout the life of the current (and any previous) list. However, engaging a new expert to act solely in that capacity with no prior knowledge of the subject matter will incur additional costs for a client already smarting from a commuted fee for the Tribunal work, having started the engagement on a strict contingency fee basis, and to form a select group of senior surveyors from the major firms who take on the expert work, even if on the “cab rank” rule formerly applicable at the Bar, may breach the Competition Act.

The 4th edition of the relevant RICS Practice Statement (for surveyors acting as expert witnesses) is under review but the publication date of the 5th edition is unclear. The associated Guidance Note refers specifically to The Ikarian Reefer at GN1.9 - all surveyors acting as expert witnesses will be familiar with the requirements (and for that reason they are not repeated here).

Although at the extremities of expert witness behaviour, the criticism levelled by the Court of Appeal at the hapless individual in Liverpool Victoria must be heeded by all rating surveyors giving expert evidence or opinion. The duty of independence carries with it the associated duty to act throughout with honesty and integrity.

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