Dedication

Sir Louis Blom-Cooper

1926 – 2018
Acknowledgements

We are extremely grateful to the following who have enabled this research project on expert witness independence and impartiality:

- expert witnesses who completed our survey,
- expert witnesses who attended the focus groups,
- the governors of The Expert Witness Institute (EWI),
- Christine Scott, CEO of EWI,
- Mrs Betty Doyle (former EWI CEO), and
- The Rt. Hon. Sir Anthony Hooper (former EWI Chair).

Many people have provided helpful comments on early drafts of the survey and this report; any errors or omissions are solely attributable to the authors.
# Contents

1. Executive Summary 5
2. Introduction 6
3. The Expert Witness’s Duty to the Court, ‘Woolf Reforms’ and Court Rules 8
4. Survey Method, Materials and Procedure 13
5. Survey Results 15
   - Expert witnesses’ responses about their own independence and impartiality 16
   - Conflicts of interest 19
   - Pressure and concerns 20
   - Exposing a lack of independence and testing expert evidence in a hearing 24
   - How expert witnesses perceive others in their field 25
6. Focus Group Summary 28
7. Discussion 31
   - “Independence” and “impartiality”: Significance, definitions and tests 31
   - The expert witness guarding their own independence and impartiality 33
   - Exposing a lack of independence in court cases 36
   - Arbitrations and a duty of independence and impartiality 39
   - Conflicts of interest and bias 40
8. Conclusion 44
9. Appendices 48

Appendix 1: ‘The Ikarian Reefer’ and other cases
   Appendix 2: Focus Group Agenda

© Cooper & Mattison, 2018
Executive Summary

This research explores the topic of expert witness independence and impartiality as it relates to dispute resolution in England and Wales. The topic was explored via a review of:

- law (cases, procedural rules and guidance) on expert witness duties,
- published articles on expert witness independence/ impartiality,
- the results of an on-line survey circulated to EWI members, and
- contributions of expert witnesses to discussions at two focus groups.

Our conclusions and recommendations are primarily for expert witnesses and those who use their services. In this report, where we use the term ‘expert witness services users’ this includes professional clients such as solicitors, lay clients and counsel.

We concluded this report with a practical checklist for expert witness independence and impartiality as well as several recommendations for further academic research and a review of training and guidance.
Introduction

The Expert Witness Institute (EWI), launched in November 1996, acts as a voice for the expert witness community, supporting expert witnesses from all professional disciplines and lawyers who use their services.¹

On 20th January 2017, The Rt. Hon. Sir Anthony Hooper, then Chair of EWI, requested a research project on behalf of the Governors to mark the 20th anniversary of EWI. It was subsequently agreed between EWI and the first author that the research would focus on expert witness “independence and impartiality” in England and Wales. The research method consisted of:

- a review of published literature and law about or related to expert witness duties, particularly independence and impartiality,
- an on-line survey of EWI members, and
- focus groups to explore issues highlighted by the survey results.

EWI’s request for research on this subject was timely and topical. During the lifetime of this project, the report of a review led by Professor Sir Norman Williams was published and it noted concerns about medical expert witness evidence:

“The role and expectation of expert witnesses is set out in the court procedure rules. There is also guidance from, among others, the British Medical Association and the GMC. Despite this, the evidence that the panel received highlighted problems with the conduct and ability of expert witnesses in cases of suspected gross negligence manslaughter involving healthcare professionals. Although our terms of reference were limited to

¹ [http://www.ewi.org.uk/about_ewi/about_expert_witness_institute](http://www.ewi.org.uk/about_ewi/about_expert_witness_institute) (accessed 20 May 2018)
gross negligence manslaughter, the panel heard evidence of more general concerns about medical experts.”

In addition, recent judgments have highlighted instances of expert witnesses failing to live up to the responsibilities required by the role:

“The duties of an independent expert are set out in the well-known passages of the judgment in The Ikarian Reefer [2000] 1 WLR 603... I was not confident that [the expert witness] was aware of them or had had them explained. For him, it might be said that The Ikarian Reefer was a ship that passed in the night.”

“It is also a matter of concern that in a TCC case, with the sums at stake exceeding 10 million, there should be such a preponderance of partisan experts, all called by the same party.”

In addition, there is this example from the Court of Appeal Criminal Division:

“Put bluntly, [the expert witness] signally failed to comply with his basic duties as an expert. As will already be apparent, he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly.”

---

3 Coulson J in Bank of Ireland & Anor v Watts Group Plc [2017] EWHC 1667 (TCC), paragraph 70.
4 Fraser J in Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC), paragraph 236.
The Expert Witness’s Duty to the Court, ‘Woolf Reforms’ and Court Rules

By way of setting the scene in England and Wales, we first describe:

- the duties of the expert witness as described by senior judges,
- how those duties have evolved in England and Wales in the years since The Ikarian Reefer, and
- how the duty of independence became enshrined in current rules of court procedure.

The often-quoted words of Cresswell J in ‘The Ikarian Reefer’ set out an expert witness’s duties and 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...

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise...An expert witness in the High Court should never assume the role of advocate…”

The expert witness’s responsibility is “very relevant to criminal proceedings and should be kept well in mind by both prosecution and defence”. The list of duties as

6 See also Appendix 1. The Ikarian Reefer was a ship. The facts surrounding her demise were the subject of the dispute in National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer) (No.1) [1993] F.S.R. 563, [1993] 2 Lloyd’s Rep 68.


© Cooper & Mattison, 2018
described by Cresswell J was been cited with approval and added to by the Court of Appeal Criminal Division in *R v Harris* in 2005\(^8\) and *R v Bowman* in 2006.\(^9\)

Relevant passages from the judgments in *Harris* and *Bowman* are included at Appendix 1 of this report. In both cases the Court of Appeal emphasised the duty of the expert witness to give a complete and accurate account of the material on which they rely and to state matters which detract from their opinion. Appendix 1 also sets out an extract from *ICI v MMT* [2018], a first instance judgment from the Technology and Construction Court which is not only a recent reminder of the ‘*The Ikarian Reefer*’ principles for expert witnesses, but also sends a message to the legal advisers who instruct them:

> “No expert should allow the necessary adherence to the principles in The Ikarian Reefer to be loosened... Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence.”\(^10\)

In 1994, a year after the *The Ikarian Reefer* judgment, Lord Woolf was appointed by the Lord Chancellor to conduct a review of civil litigation. “Lord Woolf carried out his task with the assistance of a team consisting of some of the best brains in the Lord Chancellor’s Department and in consultation with working parties on which all branches of the judiciary and the legal profession were represented.”\(^11\)

In 1995 Lord Woolf produced his interim report and in 1996 his final *Access to Justice* report. Lord Woolf’s recommendations reflected his underlying belief that judicial control was needed to prevent litigious excesses.\(^12\) Litigious excesses included the use of expert witnesses. Lord Woolf was in favour of single experts:

---

\(^8\) *R v Harris & Ors* [2005] EWCA Crim 1980.

\(^9\) *R v Bowman* [2006] EWCA Crim 417.

\(^10\) Fraser J in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC), paragraph 237.


\(^12\) Ibid.
“As a general principle, I believe that single experts should be used wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions...”\textsuperscript{13}

But there was strong opposition to it:

“Since the publication of the interim report, resistance to my proposals on single experts has remained particularly strong, and it is clear that the idea is anathema to many members of the legal profession in this country who are reluctant to give up their adversarial weapons.”\textsuperscript{14}

Lord Woolf hoped there would be a shift towards single experts over time:

“Given the strength of opposition to my proposals, it would not be realistic to expect a significant shift towards single experts in the short term. What is needed to initiate such a shift is a clear statement of principle in the rules, coupled with procedures to ensure that parties and procedural judges always consider whether a single expert could be appointed in a particular case (or to deal with a particular issue); and, if this is not considered appropriate, that they indicate why not.”\textsuperscript{15}

Notwithstanding disagreement about the use of single experts, Lord Woolf said there was:

“... widespread agreement with the criticisms I made in the interim report of the way in which expert evidence is used at present, especially the point that

\textsuperscript{13} Woolf, Lord (1996) \textit{Access to Justice}, Final Report, Ch 13, para 19.
\textsuperscript{14} Ibid, para 16.
\textsuperscript{15} Ibid, para 20.

© Cooper & Mattison, 2018
experts sometimes take on the role of partisan advocates instead of neutral fact finders or opinion givers...”\(^\text{16}\)

“There is wide agreement that the expert's role should be that of an independent adviser to the court, and that lack of objectivity can be a serious problem.”\(^\text{17}\)

In the short term, Lord Woolf thought the issues should be addressed by a strengthening of the rules:

“In cases where the option of a single expert is not pursued, it is particularly important that each opposing expert's overriding duty to the court is clearly understood.”\(^\text{18}\)

The “basic premise” of Lord Woolf's new approach was “that the expert's function is to assist the court.”\(^\text{19}\) This was enshrined in the Part 35 of the Civil Procedure Rules introduced for the first time in 1998.\(^\text{20}\) Part 35 includes:

“(1) It is the duty of experts to help the court on matters within their expertise.

(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.”\(^\text{21}\)

\(^{16}\) Ibid, para 5.

\(^{17}\) Ibid, para 25.

\(^{18}\) Ibid, para 27.

\(^{19}\) Ibid, para 11.

\(^{20}\) These new rules replaced the Rules of the Supreme Court 1965 and the County Court Rules 1998.

\(^{21}\) Civil Procedure Rules, Part 35.3.
Later Criminal Procedure Rules were issued and they include similar provisions for expert witnesses. Part 19\(^{22}\) of the Criminal Procedure Rules states:

“(1) An expert must help the court to achieve the overriding objective –
(a) by giving opinion which is –
(i) objective and unbiased, and
(ii) within the expert’s area or areas of expertise...
(2) This duty overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid.”\(^{23}\)

Different courts and tribunals in England and Wales have different rules. Experts must familiarise themselves with the specific rules and guidance relevant to the professional area and court in which they work.\(^{24}\) Tribunals also have their own rules and procedures.\(^{25}\) However, a fundamental principle holds true across the courts and tribunals; an expert witness has an overriding duty to assist the court or tribunal such that their opinion must be independent and impartial.

\(^{22}\) Originally Part 33 in the Criminal Procedure Rules when they were first introduced.

\(^{23}\) Criminal Procedure Rules, Part 19.2.

\(^{24}\) See also for example, Family Procedure Rules 25.3(1) and Family Practice Direction 25B, 3.1 and 4.1(d).

\(^{25}\) See for example, Gardiner & Theobald LLP v David Jackson [2018] UKUT 253 (LC) Case No: RA/3/2017

© Cooper & Mattison, 2018
Survey Method, Materials and Procedure

Design work was completed in January 2018 following helpful feedback from an EWI advisory group including EWI’s acting Chief Executive Officer (CEO) and members of the EWI board. Ethical approval to conduct the survey and the focus groups was sought and obtained on 28 November 2017 and 11 June 2018 from the Department of Psychology, University of Chester.

EWI’s CEO, Christine Scott, arranged for EWI members to be emailed the link to the online survey. The survey was available to complete between 28th February and 8th April 2018, i.e., it was open for some five and a half weeks. EWI then emailed the invitation to the focus groups to all EWI members.

When the survey closed 233 people had responded. 228 of those indicated they were a member of EWI. The invitation to complete the survey went out by email to 882 ‘active members’ of EWI. This represents a response rate of 25.8% in respect of EWI members.

The survey consisted of five sections. The first section contained eight questions about the expert, including area(s) of expertise, number of years acting as an expert witness and number of cases instructed on. The remaining four sections contained 53 questions that related to their experience working an expert witness. The majority of questions were framed as an invitation to respond to a statement by selecting an answer from a 7-point Likert scale ranging from ‘Strongly Disagree’ to ‘Strongly Agree’ or ‘Never’ to ‘Always’. In the final section of the survey respondents

26 Percentages, where expressed, represent the percentage of those responding to the particular question and the question number is identified in the footnote to this text. Percentage total for responses across the Likert scale have been rounded up hence the total percentages for each question may not add up to exactly 100.

27 As described by EWI. The email was sent directly from EWI to its members, not by the authors.
had the opportunity to create their own narrative responses to questions about independence and impartiality.

Preliminary analysis of the 233 responses received was conducted in May 2018 in order to identify topics for two focus groups held in June. EWI members were invited by email to one of two focus groups at the EWI offices in London on 22 June 2018. Five and three expert witnesses attended in the first and second focus groups respectively, each group discussion lasted some fifty minutes. The groups were run by Professor Penny Cooper and were recorded for transcription and analysis. The experts who took part were from a range of disciplines: accountancy (3), medicine (3), aviation (1) and engineering (1). Time spent working as an expert witness ranged from three to twenty-five years. After transcription and to aid analysis, each participant was assigned a unique reference number from 1 to 8; these numbers are used below where participant quotes have been included. A copy of the focus group meeting agenda is included at Appendix 2.

28 More experts were expected at the focus groups but there were some “no shows”.

© Cooper & Mattison, 2018
Survey Results

Of the 233 survey responses in total, 225 identified as being members of an expert witness representative bodies. 228 said they were members of EWI. Just under half of the respondents identified as having an area of expertise which we broadly define as medical. Other non-medical areas of expertise ranged in alphabetical order from accountancy to valuation, including business, land and share valuations. More than half of these experts indicated they undertake civil work. Some worked in more than one area.

The number of years in total acting as an expert witness ranged from one year to fifty years, with the average number of years being 21.42 (SD = 10.40). The approximate number of cases that respondents had been instructed in as an expert witness ranged from two instructions to 20,000, with the average number of cases being 1,500 (SD = 3031.10). How many cases they had worked on in 2017 ranged from 0 to over 2,000, with an average of 87.29 (SD = 209.63).

---

29 Three respondents, although members of EWI, did not identify as having membership of an expert witness representative body.
30 Q3. We defined ‘medical’ as including General Practice, surgery, health care, neurology, psychiatry, psychology as well as those who identified ‘personal injury’ as their area of expertise.
31 Q4.
32 Q5.
33 Q6.
A minority of experts worked as single, jointly instructed experts in cases. Mostly experts were not instructed as a single joint expert (SJE).\(^{34}\)

**Expert witnesses’ responses about their own independence and impartiality**

Almost all experts were agreed that their overriding duty was to the court but there was no overwhelming consensus about where that duty lay in an arbitration.

- \(99.1\% \, (n = 225)\) agreed/ strongly agreed that their overriding duty was to the court when they are instructed as an expert witness in a court case.\(^{35}\)

- \(65.5\% \, (n = 59)\) agreed/ strongly agreed that their overriding duty was to the panel of arbitrators when they are instructed as an expert witness in an arbitration, with \(28.9\%\) being neutral about their duty; only a minority (2.4%) disagreed.\(^{36}\)

The statement which garnered the second highest level of agreement was “Giving a true and complete professional opinion is very important to me.”\(^{37}\) There was also strong agreement, but not to the same level, that the overriding duty is not to those instructing the expert and that their opinions would not be affected if the opposing party had instructed them.

\(^{34}\) Q7.

\(^{35}\) Q10.1.

\(^{36}\) Q12.1.

\(^{37}\) Q9.15.
• 98.2% \((n = 229)\) agreed or strongly agreed that giving a true and complete professional opinion is very important to them.\(^{38}\)

• 90.6% \((n = 211)\) strongly disagreed or disagreed that their “overriding duty as an expert witness is to those instructing me”, whilst 13 (5.6%) agreed that it was.\(^{39}\)

• 91.9% \((n = 233)\) of respondents at least somewhat agreed that their opinions would always be the same if an opposing party in a case were to instruct them on exactly the same terms. A minority of respondents (5.2%) disagreed that their opinion would remain the same, and 3% of respondents neither agreed nor disagreed with the statement.\(^{40}\)

Over half 63.1% \((n = 147)\) disagreed that it was never easy to remain impartial, suggesting that the majority of experts do find it easy to remain impartial, but 31.3% of respondents reported that they do not find it easy (the remaining 5.6% neither agreed nor disagreed).\(^{41}\)

Just over half of respondents (52.3%) at least somewhat agreed that they always find themselves consciously resisting the temptation to assume the role of an advocate, with 35.2% disagreeing with this statement, and 12.4% neither agreeing nor disagreeing.\(^{42}\)

\(^{38}\) 4 respondents (1.7%) strongly disagreed.
\(^{39}\) Q9.16.
\(^{40}\) Q9.9.
\(^{41}\) Q9.17.
\(^{42}\) Q9.7.
Overall respondents demonstrated a high level of confidence in their own opinions although only a little over half often or always cited peer-reviewed published research in their reports.

- 98.7% often or always (48.9% often and 49.8% always) felt confident that the opinion they have expressed is correct.\(^{43}\)
- 53.7% often or always cite peer-reviewed published research in their expert witness reports.\(^{44}\)

There were 198 responses to the question about the best way to ensure that an expert witness’s opinion is impartial.\(^{45}\) There were also 198 responses to the question asking what in respondents’ experience is the biggest threat to expert witness independence. Clear themes emerged, and themes were assigned a shorthand code. Responses were then assigned one of the nine codes. The overall results are set out in table below.

<table>
<thead>
<tr>
<th>Code</th>
<th>Theme</th>
<th>Question 17 - best way to ensure impartiality</th>
<th>Question 18 - biggest threats to independence</th>
</tr>
</thead>
<tbody>
<tr>
<td>EX</td>
<td>Attributes/ approaches of the expert witness</td>
<td>129</td>
<td>61</td>
</tr>
<tr>
<td>LX</td>
<td>Attributes/ approaches of the lawyers or litigants</td>
<td>22</td>
<td>85</td>
</tr>
<tr>
<td>SJE</td>
<td>Single joint or court appointed expert</td>
<td>13</td>
<td>-</td>
</tr>
</tbody>
</table>

\(^{43}\) Q14.1.  
\(^{44}\) Q14.2.  
\(^{45}\) Q17.
<table>
<thead>
<tr>
<th>PX</th>
<th>Existence of (Q17) or lack of sufficient (Q18) professional regulation/ scrutiny</th>
<th>6</th>
<th>3</th>
</tr>
</thead>
<tbody>
<tr>
<td>JX</td>
<td>Scrutiny by judges/ the trial process including cross-examination</td>
<td>19</td>
<td>-</td>
</tr>
<tr>
<td>RX</td>
<td>Insufficient funding/ resources</td>
<td>-</td>
<td>23</td>
</tr>
<tr>
<td>UX</td>
<td>Unanswered (e.g. “Hard to say” / “I don’t know” or the meaning of the response was unclear)</td>
<td>8</td>
<td>17</td>
</tr>
<tr>
<td>MX</td>
<td>Miscellaneous</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>198</td>
<td>198</td>
</tr>
</tbody>
</table>

**Conflicts of interest**

A small proportion (3.9%) agreed or strongly agreed that they were unsure how to identify a conflict of interest when working as an expert witness. 89.3% agreed or strongly agreed that they always know what to do if, after being instructed, they discover a conflict of interest in the case.\(^{46}\)

---

\(^{46}\) Q9.8.
• The majority of respondents (61%) agreed or strongly agreed that they had a systematic approach to checking for conflicts of interest before they are instructed.  

• The majority of respondents (68.3%) rarely or never felt they needed advice or assistance about a conflict/ potential conflict of interest. 24.1% felt they occasionally/ sometimes did.

• The majority of respondents (74.3%) agreed or strongly agreed that they have “never provided expert evidence in a case that has evoked personal discomfort (e.g. due to personal attachments/involvements, or memory of a similar experience to that of a party, etc.).”

• The majority of respondents (75.6%) have rarely/ never turned down a case that evoked “personal discomfort due to personal attachments/involvements or memory of similar experience”.

**Pressure and concerns**

All respondents answered the question “Have you ever felt your independence as an expert witness was compromised?” 89.7% (n = 209) felt it had not, whilst 10.3% (n = 24) felt that it had. Those 24 each gave brief details. Fourteen of those 24 indicated that they perceived they were being pressured to be partial by those using their services (clients, solicitors or counsel). Narrative answers to this question included:

---

47 Q9.11.  
48 Q14.3.  
50 Q14.4.  
51 Q16.
● “Some solicitors try to pressure me into being more supportive than I can be based on the evidence”

● “Sometimes get pressured by Counsel to change opinion”

● “Lawyers often ask me to modify my reports to suit their purpose”

● “Asked to remove information or to put in things claimant wanted! I did not - but have not received any new instructions!”

Over a third of respondents (35.2%) disagreed/ strongly disagreed that they had never perceived those instructing them to be putting pressure on them to be biased in favour of their client.

There were a number of other questions relating to pressure on expert witnesses.

● The majority of respondents (83.3%) agreed/ strongly agreed that they always knew when a matter was outside their area of expertise.53

52 Q9.21.
53 Q9.13.

© Cooper & Mattison, 2018
• 45.1% of respondents at least somewhat agreed that they “always receive sufficient information to provide a true and complete professional opinion in cases that I work on”, but 46.8% disagreed.\(^{54}\)

• 27.5% agreed or strongly agreed that writing an expert witness report is “never stressful for me”, with the majority of respondents (53.1%) indicating that writing expert witness reports is stressful.\(^{55}\)

• 42.3% agreed or strongly agreed that they “enjoy giving evidence in court”.\(^{56}\) The equivalent figure for giving evidence in an arbitration was 36.6%.\(^{57}\)

• The majority (58.4%) at least somewhat agreed that they feel stressed when giving evidence in court\(^ {58}\) compared with 18.8% who agreed they feel stressed when giving evidence in an arbitration.\(^ {59}\)

• 4.4% agreed or strongly agreed that they “dread” being cross-examined in court, with the majority of respondents (62%) claiming that they do not dread being cross-examined.\(^ {60}\) For those describing their experience instructed in an arbitration, 3.4% agreed or strongly agreed that they “dread” being cross-examined.\(^ {61}\)

• 53.2% \((n = 117)\) indicated that rarely or never had cross-examination adversely affected the quality of the evidence they gave in court. Almost a third of respondents (30.5%) reported that cross-examination, at least

\(^{54}\) Q9.10.
\(^{55}\) Q9.12.
\(^{56}\) Q10.2.
\(^{57}\) Q12.2.
\(^{58}\) Q10.3.
\(^{59}\) Q12.3.
\(^{60}\) Q10.4.
\(^{61}\) Q12.4.
sometimes, adversely affected the quality of their evidence.\textsuperscript{62} Similarly, 56.2\% (\(n = 50\)) indicated that \textit{rarely or never had} cross-examination adversely affected the quality of the evidence they gave in an arbitration.\textsuperscript{63}

- The majority of respondents (69.1\%) disagreed or strongly disagreed that they had “never experienced difficulties getting my invoices paid for my expert witness work.”\textsuperscript{64}

- Just over half of respondents (52.9\%) had \textit{never or rarely} experienced unreasonable expectations from a judge in a case.\textsuperscript{65} Similarly, 50\% had \textit{never or rarely} experienced unreasonable expectations from a panel member in an arbitration.\textsuperscript{66}

---

\textsuperscript{62} Q11.3.  
\textsuperscript{63} Q13.2.  
\textsuperscript{64} Q9.23.  
\textsuperscript{65} Q11.1.  
\textsuperscript{66} Q13.1.  

© Cooper & Mattison, 2018
Experts were asked to indicate from a list of twelve, up to three things which caused them “most concern in [their] role as an expert witness”. The top four answers all related to receiving unclear/incomplete/insufficient material or information or unreasonable expectations from those instructing them. The fifth ranked concern was not receiving payment for work undertaken.

---

67 Q15.
**Exposing a lack of independence and testing expert evidence in a hearing**

We explored with respondents whether they thought that either a discussion between the experts or cross-examination will expose an expert witness’s lack of independence.

- The majority (54.1% of respondents) at least somewhat agreed that “If an expert witness lacks independence, a discussion between the experts will always expose this.” 28% disagreed. 68

- Over half of respondents (57.1%) agreed that “If an expert witness lacks independence, cross-examination will always expose this.” 17.2% remained neutral, and 25% disagreed. 69

- The majority of respondents (78%) have rarely/never given concurrent evidence in a court case 70 compared with 46% who have rarely or never given concurrent evidence in an arbitration. 71

- The majority (69.1%) said that the prospect of the expert giving concurrent evidence (“hot-tubbing”) had rarely/never been raised with them before a [court] hearing. 72

- 45.5% said that that the prospect of the expert giving concurrent evidence had rarely or never been raised with them before an [arbitration] hearing. 73

---

68 Q9.18.
69 Q9.20.
70 Q11.5.
71 Q13.5.
72 Q11.4.
73 Q3.4
**How expert witnesses perceive others in their field**

There were a number of questions in the survey about respondents’ perceptions of independence in other expert witnesses they come across in their field. Under a third (29.7%) agreed or strongly agreed with “Expert witnesses I come across in my field give opinions that are uninfluenced by the pressures of litigation”.

18% disagreed or strongly disagreed that expert witnesses they come across in their field frequently include in their reports any facts which detract from their opinion.

Just over half (51.9%) disagreed with the statement that “Expert witnesses I come across in my field never assume the role of an advocate.” While 28.8% agreed.

---

74 Q9.1.
75 Q9.3.
Over a third (38.6%) disagreed with the statement “Expert witnesses I come across in my field always summarise in their reports the range of opinion if there is one”. In contrast, 40.7% agreed that experts summarise the range of opinion, and 20.6% were neutral.

A slight majority of 55.3% (n = 85) agreed that that expert witnesses in court cases are becoming less like “hired guns”. When the same question was asked relating to arbitrations, 34% agreed.

50% (n = 111) of experts had never or rarely perceived the high-value of a dispute to lead to an expert witness losing independence when instructed in a court case, whereas 37.5% (n = 33) had never or rarely perceived the high-value of a dispute to lead to an expert witness losing independence when instructed in an arbitration.

Approximately 4 out of 5 experts have never made a formal complaint about an expert witness on an opposing side because their opinion lacked independence (78.9% agreed or strongly agreed that they had never made a formal complaint). 45.9% agreed/strongly agreed that they had “never thought about making a formal complaint about an expert witness on an opposing side because their opinion lacked independence”.

---

76 Q9.4.
77 Q10.5.
78 Q12.5.
79 Q12.2.
80 Q13.2.
81 Q9.6.
82 Q9.19.
Focus Group Summary

In the focus group discussion there was no clear consensus about the meaning of “independence” and “impartiality” and whether, in this context, they are different from each other. Participant 5 said that “[Independence] means not having any skin in the game” and went on to give examples such as “contingent fee” or “having an equity interest in one of the parties”; impartiality meant “behaving as if you have skin in the game even if you don’t”. Participant 8 thought “independence is very much a frame of mind”. Participant 4 “wouldn’t draw much distinction” between independence and impartiality and participant 6 thought independence is “tied up with impartiality”.

Two participants compared their experience in litigation and arbitration:

“We [in my organisation] don’t treat them any differently, we treat them exactly the same. If you go into the [International Bar Association] documents and read through it, the declaration is slightly different…you put [the expert witness declaration] on the end and sign your life away…”
Participant 1

83 “To give evidence on a contingency fee basis gives an expert, who would otherwise be independent, a significant financial interest in the outcome of the case. As a general proposition, such an interest is highly undesirable. In many cases the expert will be giving an authoritative opinion on issues that are critical to the outcome of the case. In such a situation the threat to his objectivity posed by a contingency fee agreement may carry greater dangers to the administration of justice than would the interest of an advocate or solicitor acting under a similar agreement. Accordingly, we consider that it will be in a very rare case indeed that the Court will be prepared to consent to an expert being instructed under a contingency fee agreement.” – See Lord Phillips MR in Factortame & Ors, R (on the application of) v Secretary of State for Transport [2002] EWCA Civ 932, para 73.
“[The Civil Procedure Rule] doesn’t exist as a framework [for arbitrations] but I find professional experts based in London import the CPR framework into their terms of reference into their reports because it’s useful and it’s very difficult to operate a practise where there is two cultures.... So actually, I find arbitration surprisingly similar to litigation” Participant 5

Some focus group participants perceived cross-examination as the means to test if an expert’s opinion is independent and impartial, so long as the cross-examiner has sufficient knowledge as well as skill.

“The cross-examination requires insight into the alternative view so a barrister in isolation isn’t going to be equipped to essentially explore why an expert is holding a particular view without medical guidance.” Participant 7

Participant 1 said that “a majority of cases are settled out of court” but when a case does go to court “that’s when people get caught out”. However, participant 6 made the point that “where you have a jury and you’re talking a language that the public will understand, I think it’s sometimes very difficult to dig deeply into the basis of why you’re holding that view.” Another participant gave an example of when he felt the cross-examiner lacked the requisite skill to expose a partisan expert resulting in a miscarriage of justice until the case was “turned over on appeal”:

“[The expert witness who gave evidence at the trial] is a bombastic bullshitter, the typical Sir Lancelot Spratt-type84 surgeon who knows everything and tells everybody he knows it. He should have been cross-examined to bits but he wasn’t.” Participant 4

84 A reference to the fictional character of the bumptious chief surgeon, brilliantly portrayed by James Robertson Justice, in the 1954 film Doctor in the House based on the novel by Dr Richard Gordon.
It was also pointed out by participant 5 that where parties have “access to substantial legal and financial resources... things are thoroughly tested” and not all cases have “equality of arms”.

Some participants gave examples of those using their services applying pressure to change their opinion and another participant pointed out that testing the limits of their own expert’s opinion is legitimate.

When discussing how to identity a conflict of interest, a participant described a simple name check to see if the parties were known to the expert or if the expert had acted for one of the parties, another referred to the use of a “checklist” and another said his organisation used a “conflicts management firm staffed by lawyers”. One participant said it was,

“...quite straightforward for me. It’s whether I know the defendant or the doctor... You would expect an expert witness to be aware of the duty to disclose and if they don’t they are naive or they’re concealing.” Participant 7

One participant lamented the lack of feedback from instructing solicitors:

“I would like to say something about feedback, you think you are independent and impartial but you may be deluded... The feedback we get is absolutely minimal; I think you have to be pretty disastrous or at either end of the spectrum and got the result that they really wanted to get or been really bad to get feedback... I really think if you want to improve the system you need to give people feedback.” Participant 6
Discussion

“Independence” and “impartiality”: Significance, definitions and tests

An expert witness is duty bound to provide a complete and honest opinion, uninfluenced by the positions of those engaged in the dispute or any other improper influence. The Civil Procedure Rules express the duty as follows:

“2.1 Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.

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

Expert Evidence – General Requirements, Part 35 Practice Direction, Civil Procedure Rules

The dictionary definition of “independent” includes “Free from outside control; not subject to another’s authority” and “Not influenced by others; impartial”. To be impartial is “Treating all rivals or disputants equally.” Some experts in the focus groups saw a difference between independence and impartiality whilst some did not.

A “useful test of ‘independence’” as described in the Civil Justice Council’s Protocol for the Instruction of Experts in Civil Claims speaks to one aspect of independence, the requirement not to act as “a hired gun” or an advocate for the instructing party:

85 https://en.oxforddictionaries.com/definition/independent (accessed 5 August 2018)
86 https://en.oxforddictionaries.com/definition/impartial (accessed 5 August 2018)
“Experts must provide opinions which are independent, regardless of the pressures of litigation. A useful test of ‘independence’ 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.”

Whilst this test is indeed useful, not least because it expresses an abstract concept in a very practical way, it is not a complete test for independence and impartiality. The test is limited in scope; it focuses on an expert witness’s independence potentially being compromised if they take sides. However, an expert witness’s independence could be compromised in other ways for example, as a result of personal or professional bias towards a particular theory, allegiance to an individual or organisation other than a party in the case or an indirect financial interest in the outcome of a particular case. There are many ways in which an expert witness might have “skin in the game” (to quote one focus group participant) which have nothing to do with who is instructing the expert but nevertheless could lead to a loss of independence or lack of impartiality. We suggest that the test for independence and impartiality could and should go further.

Du describes the expert witness’s duty to meet both individual and professional (‘industry’) standards:

“Each expert witness must follow individual standards, including avoiding irrelevant information affecting his or her opinions; applying reliable methods; employing reasonable analysis; and providing the findings in comprehensive reports (including a precise description of personal

---

background and expert activity). They must also follow industry standards of forensic science regarding objective technical accessible demands, laboratory management and career management.”

In addition to the current “useful test of independence”, an expert witness must carefully consider their methods, analysis and conclusions and satisfy themselves that they have not been improperly influenced. The expert witness must also disclose relevant interests that give rise to an actual or potential conflict of interest. Expert witness independence and impartiality is rooted in the expert witness’s own willingness to act with integrity and transparency.

**The expert witness guarding their own independence and impartiality**

“I always advise the instructing party, at the outset, that my opinion may not coincide with theirs and might not assist their case. I am then free to say exactly what I think. I bear in mind that I might end up in court being cross examined and therefore my report and evidence must stand up.”

Not all experts act with such independence. When a party seeks to rely on expert evidence but the expert is found to lack independence, the consequences can be significant for the expert witness service user as illustrated in *ICI v MMT* [2018]:

“It is, however, the case that my considered conclusion on each of ICI's experts is that their evidence is not sufficiently independent of the party who has instructed them, and that the evidence of their opposite numbers is to be preferred.”

---


89 One response to Q17.

90 Fraser J in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2018] EWHC 1577 (TCC), paragraph 233.
Other cases illustrate how there may be serious consequences for the expert witness as well if they do not comply with their duties. The court can make a costs order against an expert witness\textsuperscript{91} or could report them to their professional body.\textsuperscript{92} In addition, there is no longer expert witness immunity from being sued in negligence.\textsuperscript{93} These potential sanctions and repercussions hang over the expert witness. How can expert witnesses be sure they are complying with their duty to be independent and impartial?

Approximately two thirds of respondents thought ensuring impartiality lay within the expert witness's own control.\textsuperscript{94} Some responses alluded to the "useful test of independence":

- “Ask yourself if you would give the same opinion if instructed by the other side”
- “Write the report as for the other party”
- “Mentally go into the positions of each party, and think, "If I also knew what the expert does, would I feel cheated"
- “Always look at each opinion as if instructed from either side OR just forget about who has instructed you and give you opinion”

Other responses included:

- “Keeping in mind that I may appear in Court before a judge who may criticise my professionalism”
- “Training”
- “Personal integrity”

\textsuperscript{91} Philips v Symes (A bankrupt) (Expert Witnesses: Costs) [2004] EWHC 2330 (Ch).
\textsuperscript{92} Pearce v Ove Arup Partnership Ltd [2001] EWHC 481 (Ch) See also Hussein v William Hill Group [2004] EWHC 208 (Q8).
\textsuperscript{93} Jones v Kaney [2011] UKSC 13.
\textsuperscript{94} Q17.
• “Not discuss the case with anyone”
• “Peer review”
• “Attitude to the job and knowledge of and adherence to CPR35”

Neither training nor accreditation is mandatory for expert witnesses. The Williams Report of 2018 called this a “notable omission”\(^{95}\) The report recommendations included:

The Academy of Royal Medical Colleges, working with professional regulators, healthcare professional bodies and other relevant parties, should lead work to promote and deliver high standards and training for healthcare professionals providing an expert opinion or appearing as expert witnesses.\(^{96}\)

Drawing on the work of Tyler and others,\(^{97}\) we suggest that a belief in the legitimacy of expert evidence is dependent on a perception that expert witness duties are complied with and result in independent and impartial expert evidence. We know from our survey that significant doubts exist amongst expert witnesses about the independence of other experts in their field. We note that another survey of expert witnesses in 2017 found a significant percentage of experts perceived other experts to be ‘hired guns’:

“As in last year’s survey, 46% of \([n=725]\) experts surveyed indicated that they have come across an expert that they consider to be a “hired gun” even though Lord Woolf made clear in the Civil Procedure Rules 1999 that an expert’s duty is to the court and not the side paying.”\(^{98}\)


\(^{96}\) Ibid, page 21.


If experts perceive that “hired guns” still exist, belief in the fairness of the system is likely to be diminished. Some experts might even justify to themselves departing from their duties as a way to even up the playing field. Experts are more likely to comply with their duties, we suggest, if they trust that the system is working as intended. For this to happen, there must be adequate checks and sanctions against “hired guns”. It is necessary that lack of independence and impartiality is weeded out.

**Exposing a lack of independence in court cases**

“Cross-examination, --- the rarest, the most useful, and the most difficult to be acquired of all the accomplishments of the advocate.... It has always been deemed the surest test of truth and a better security than the oath.”

The English Legal System relies on cross-examination, that is confrontational questioning of witnesses in court, as a tool to expose the truth.

“... I have (admittedly rarely) encountered experts who are extremely biased and unprofessional. These cases have settled out of court but I would like to think that such bias would have been exposed in cross-examination. I have complained to my instructing solicitor about these individuals but never yet to their professional body.”

It was notable that only a minority of respondents thought that the experts’ discussions before a trial, or cross-examination by opposing counsel at a trial, would expose a lack of independence.

---


100 One response to Q17.
Court judgments from time to time will name and shame an expert who has not complied with their duty, but these provide only anecdotal examples. In arbitrations, due to the private and confidential nature of the process, if an expert witness breaches their duty it is highly unlikely that this will ever become public knowledge.

“The confidential nature of many arbitral awards and the limited risk to experts’ professional reputations if they give biased opinions in those proceedings”\(^{101}\)

One survey respondent suggested concurrent evidence ("More use of "hot tubbing") as the best ways to ensure impartiality. If matched in terms of knowledge and expertise, another expert giving evidence at the same time is potentially more challenging than a cross-examining barrister. Conversely it could be argued that judge-led questioning (as occurs in hot-tubbing) to a pre-agreed agenda takes the sting out of cross-examination.

In the District Court of Western Australia, concurrent evidence was described as follows:

“In a number of jurisdictions it is now the established practice to lead evidence from expert witnesses who hold contrary views concurrently. Their evidence is usually taken together, after all the factual evidence has been led, so that the range of factual assumptions possibly open on the evidence can be put to them. The practice also involves the parties, the experts and the court agreeing upon a list of issues which are in contention. The oral evidence of the experts is then addressed to each of those issues, and in the

\(^{101}\) One response to Q18.
course of their evidence, it is possible for each expert to directly engage with the other.”  

English court judgments provide anecdotal evidence of experts being heard concurrently, sometimes at the instigation of the court and sometimes in combination with more traditional sequential calling of experts:

“During the trial I decided that it would be useful if the [experts] started with a short period of concurrent evidence (CPR 35PD section 11). This was in order to address certain general questions which I would otherwise have asked the experts during their oral evidence. They were not points addressed to either witness in particular and it seemed to me that the fairest way of dealing with it was to ask them both, hence a concurrent evidence session... It helped me clarify my understanding of some of the economic issues and I am grateful to both experts.”

Whether giving concurrent evidence (hot-tubbing) is a better method than cross-examination for exposing flaws in expert evidence is worthy of further research. We are not aware of any published studies that compare cross-examination with concurrent evidence are mechanisms for exposing expert witness evidence which lacks independence or impartiality. In fact, elsewhere the authors have noted that

102 Yeats DCJ in Wall v Cooper [2006] WADC 8, paragraph 7. In that case the judge noted, at paragraph 6, that the experts had not given evidence concurrently and as a result they were “likes ships passing in the night without knowledge of each other, proceeding on varying factual assumptions, and in some instances, without being directly engaged to respond to a contrary view expressed by other experts. With the benefit of hindsight, it can be said that this is a case in which a less traditional approach to the leading of evidence would have had significant benefits.”

103 Birss J in Unwired Planet International Ltd v Huawei Technologies Co. Ltd & Anor (Rev 2) [2017] EWHC 2988 (Pat), paragraph 58.
there is a dearth of scientific evidence generally on witness questioning techniques.\textsuperscript{104}

\textbf{Arbitrations and a duty of independence and impartiality}

The majority of survey respondents appear to know that their overriding duty is to the court, not to the party instructing them. However, the figure was much lower for arbitrations. The duties placed on the expert witness in an arbitration will depend on the rules adopted by the parties and required by the panel.

Feutrill and Rubins state that a “well-presented expert report [in an international arbitration] should contain...a statement to the effect that the expert is independent and that the opinions expressed in the report represent his honest and truthful opinions.”\textsuperscript{105} However for arbitrations it has been said that expert witnesses do not have to be independent of the party instructing them\textsuperscript{106}; a commentator expressed a view at a roundtable that “very few experts appointed by a party to an international arbitration seemed to be truly independent”.\textsuperscript{107}

Whether a party appointed expert in an arbitration is under a duty to be independent and impartial, will depend on the procedure adopted in the particular case. For instance, The Chartered Institute of Arbitrators protocol (if adopted by the


parties) requires the expert to assist the arbitral tribunal and provide an opinion which is “impartial and objective”. In other cases the parties will agree that the duties as expressed in CPR Part 35 will apply.

Conflicts of interest and bias

“Sunlight is often the best disinfectant and most conflict of interest issues in these circumstances are mostly cured or best cured by being transparent about their existence: it’s the hidden relationship that comes and bites you”
Participant 5

It is the expert’s responsibility to disclose an actual or apparent conflict as soon as possible to their instructing party who should notify the other party/ies and the court. Ultimately, if there is a dispute about it, the court can decide whether a conflict exists and whether the expert’s evidence is admissible or not. “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.”

We submit that transparency is vital to the proper administration of justice; however transparency can only be achieved when expert witnesses understand their duty of disclosure. The recent judgment of Green J (as he then was) in Thefaut v Johnston [2017] is an example of this point in action. The claimant sued on the basis that had she been properly advised she would not have consented to surgery (a ‘discectomy’) and also that the surgery was performed negligently. The judge said this:

---


110 The first claim was made out, the second was not.
“In the specialist field in issue there are a relatively small number of surgeons... In such circumstances there is a high probability that when one of this select group is instructed to act as an expert in a case he or she may know of the Defendant either personally or by repute. This was the case of Mr [G] in relation to Mr [J]... it is my view that Mr [G] would have been far better to get out in the open his personal knowledge of Mr [J]. A concise but accurate and comprehensive paragraph in his report setting out the bare facts of his knowledge of Mr [J] would have sufficed. This would have taken much of the sting out of the cross examination which did, I am bound to say, leave Mr [G] feeling and sounding defensive. The issue here is the appearance of bias.”

In another recent case in The Upper Tribunal (Lands Chamber), the issue of expert witnesses instructed contingency fees was considered and the President said this on the topic of disclosure by the expert witness:

“73. ...A party to a dispute before the Tribunal might wish to oppose an opponent’s reliance upon an expert remunerated by success-related fees because of the risk that poses to the objectivity of that expert and the uncertainty to which it may give rise about whether the expert has disclosed all that he should. An expert is obliged to provide information or knowledge (and not simply documents) which may go substantially beyond the scope of the disclosure obligations owed by his client and any solicitor involved, such “disclosure” generally involving only documents which are or have been in the control of the client.

74. A further consideration which the Tribunal will likely be asked to address is that the requirement for an expert to act objectively and independently applies not just to the stage when he is giving live evidence at

a hearing. It applies to all stages of his involvement in the proceedings. It affects the initial exchange of information by an expert with his opposite number, the discussions they have to identify matters of common ground and the issues upon which they should focus, the preparation of their respective expert reports and further exchanges thereafter leading up to the agreement of a joint statement for the Tribunal. In some cases, an opinion expressed by an expert and the adequacy of the information he discloses may affect the work of experts in other disciplines which depends wholly or in part upon that information and opinion. If there were to be a lack of objectivity in any of these various stages, then it may be said that the administration of justice will be put at risk if that remains undiscovered before the Tribunal’s decision is given. Even if it is discovered, it may also be said that there is a risk of time, work and costs being wasted, additional work becoming necessary and the proceedings delayed.”

The survey respondents on the whole expressed a high degree of confidence in their ability to identify a conflict and respond appropriately. However, the focus group results suggested that conflict checks in practice range from a very simple checking of the parties names to something much more sophisticated. Effective conflict-checking systems for expert witnesses, we suggest, is a topic that merits further research.

Research and practice already tells us that process of litigation itself may introduce bias. One expert who responded to the questions about the best way to ensure impartiality suggested “It might be a good idea for EWs not to be told from which "side" the [instruction] is coming.”112 In the first author’s experience this is indeed how some litigation solicitors approach their potential expert witnesses in order to eliminate the possibility of the expert witness, even subconsciously, tailoring their advice to the perceived interests of the party instructing them.

112 Response to Q17.
Edmond at al. (2015) concluded that “[m]any forensic scientists are routinely exposed to information that is not relevant to their processing and interpretation of evidence. Exposure to this domain-irrelevant information (e.g. about the suspect, police suspicions and other aspects of the case) threatens the interpretation and value of their opinion evidence.”\textsuperscript{113}

Conclusion

Independent and impartial expert evidence is fundamental to the administration of justice and to the perceived legitimacy of a legal system which frequently relies on expert evidence. However, no fool-proof system exists for ensuring that expert witnesses comply with their duty to provide opinions which are independent and impartial. The justice system places its trust in expert witnesses; justice requires expert witnesses to be trustworthy.

We conclude that expert witnesses themselves hold the key to ensuring they express opinions which are independent and impartial. The survey responses tell us that the majority of expert witnesses recognise that this is the case. However a significant proportion of expert witnesses also believe that others in their field give opinions influenced by the pressures of litigation and that their reports are not independent and impartial. Our conclusions and recommendations aim to support and promote a culture of trustworthy experts providing independent and impartial opinions.

EWI aims to ensure that expert evidence is uninfluenced as to form or content by the pressures of litigation. In this report for EWI we suggest a ten-point independence and impartiality checklist for expert witnesses to consider each time they are instructed. Aspects of this checklist could also help courts and expert witness service users to scrutinise the independence and impartiality of an expert witness’s evidence.
Checklist

Has the expert witness...

Duties
1. Agreed in explicit terms with those instructing them that they are complying with *The Ikarian Reefer* principles as well as relevant rules and practice directions?

Conflicts of Interest
2. Checked for conflicts of interest using an appropriate system?
3. Complied with their duty to disclose any actual or potential conflicts?

Instructions and Feedback
4. Agreed timing and content of material to be supplied with their instructions?
5. Agreed expectations for feedback on their draft report?
6. Agreed expectations for feedback on the use to which their report was put?
7. Communicated to those instructing them concerns, if any, about the opposing expert’s duty of independence and impartiality?

Transparency
8. Disclosed their method of analysis?
9. Disclosed, where it exists, the industry standard/s and whether they have complied with it?
10. Disclosed at the earliest opportunity all matters which affect the actual or apparent independence or impartiality of their opinion?

Ensuring impartiality and independence of expert evidence is not solely the concern of expert witnesses, courts and lawyers. We believe that expert witness representative bodies, the professional bodies from which expert witnesses are drawn, expert witness regulators, and academics with an interest in the administration of justice also have a role to play. Therefore, in addition to the above practical checklist we have also made recommendations in relation to training, guidelines and further research.
**Recommendation 1:** Training providers should review whether their training to or about expert witnesses fully supports independent and impartial expert evidence. Such training should go beyond the “useful test of independence”. It should include checking for conflicts and bias, agreeing clear instructions, the expert’s duty of disclosure, the difference between proper and improper testing of or feedback on the expert witness’s opinion by the instructing party, how the opposing expert witness’s independence and impartiality may be tested including expert discussions, cross-examination and hot-tubbing, what to do when there is evidence that the opposing expert’s opinion has been influenced by the pressures of litigation, case law on sanctions for breaches of independence and impartiality, how to write reports that demonstrate independence and impartiality, as well as the “useful test of independence” including its scope and limitations.

**Recommendation 2:** Expert witness representative bodies and the Civil Justice Council should review the guidance on “the useful test of independence” and consider whether it would be helpful to supplement the guidance.

**Recommendation 3:** Academics should conduct further research into (i) expert witness conflict checking practices and (ii) cross-examination as compared to “hot-tubbing” as a mechanism for testing for independence and impartiality.

**Limitations of this study**

The survey was anonymous and we were not able to go behind the responses to obtain more information nor were we able to validate the responses as we relied on self-reporting. We were unable to ensure that respondents interpreted the questions in the same way, i.e., a validated measure / scale of impartiality would be needed for this purpose. Only active experts of EWI were surveyed and the results may not be representative of the wider population of expert witnesses.
It is not possible to say from a study of this sort whether there been what one academic has described as “a gradual shift ...to Lord Woolf’s intended proportionate consensus, motivated by the need for greater efficiency and the reduction of partisanship in matters involving expert evidence”?\footnote{Nigel Wilson (2013) Concurrent and court-appointed experts? From Wigmore's "Golgotha" to Woolf's "proportionate consensus. C.J.Q. 2013, 32(4), 493-507, 506.} A study of this kind could not tell us how many (if any) experts are acting as “hired guns”.

We hope this study has placed a useful focus on expert witness independence and impartiality and provided practical guidance. We believe we have identified several areas for further work to help promote and protect expert witness independence and impartiality.
Appendix 1: The Duties of an Expert Witness

_Harris [2005]_


“271. It may be helpful for judges, practitioners and experts to be reminded of the obligations of an expert witness summarised by Cresswell J in _The Ikarian Reefer_ [1993] 2 Lloyds Rep. 68 at p 81. Cresswell J pointed out amongst other factors the following, which we summarise as follows:

(1) Expert evidence presented to the court should be and seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of advocate.

(3) An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinions.

(4) An expert 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.

(6) If after exchange of reports, an expert witness changes his view on material matters, such change of view should be
communicated to the other side without delay and when appropriate to the court.

272. Wall J, as he then was, sitting in the Family Division also gave helpful guidance for experts giving evidence involving children (see *Re AB (Child Abuse: Expert Witnesses)* 1995 1 FLR 181). Wall J pointed out that there will be cases in which there is a genuine disagreement on a scientific or medical issue, or where it is necessary for a party to advance a particular hypothesis to explain a given set of facts. He added (see page 192):

“Where that occurs, the jury will have to resolve the issue which is raised. Two points must be made. In my view, the expert who advances such a hypothesis owes a very heavy duty to explain to the court that what he is advancing is a hypothesis, that it is controversial (if it is) and placed before the court all material which contradicts the hypothesis. Secondly, he must make all his material available to the other experts in the case. It is the common experience of the courts that the better the experts the more limited their areas of disagreement, and in the forensic context of a contested case relating to children, the objective of the lawyers and the experts should always be to limit the ambit of disagreement on medical issues to the minimum.”

We have substituted the word jury for judge in the above passage.”

*Bowman [2006]*

An extract from the judgment of Gage LJ in *R v Bowman [2006]* EWCA Crim 417, paragraph 177:
“In addition to the specific factors referred to by Cresswell J in the Ikarian Reefer [1993] 2 Lloyds Rep 68 set out in Harris we add the following as necessary inclusions in an expert report:

1. Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.

2. A statement setting out the substance of all the instructions received (with written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.

3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.

4. Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.

5. Relevant extracts of literature or any other material which might assist the court.

6. A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an
acknowledgment that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.

7. Where on an exchange of experts' reports matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.”

\textit{ICI v MMT [2018]}

An extract from the judgment of Fraser J in \textit{Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd [2018] EWHC 1577 (TCC)}, paragraph 237:

“The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Part 35, Practice Direction 35. Every expert should read it. In order to emphasise this point to experts in future cases, the following points ought to be borne in mind. These do not dilute, or change, the approach in \textit{The Ikarian Reefer}. They are examples of the application of those principles in practice.

1. Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number.

2. Where there is an issue, or are issues, of fact which are relevant to the opinion of an independent expert on any particular matter upon which they
will be giving their opinion, it is not the place of an independent expert to identify which version of the facts they prefer. That is a matter for the court.

3. Experts should not take a partisan stance on interlocutory applications to the court by a particular party (almost invariably the party who has instructed them). This is not to say that a party cannot apply for disclosure of documents which its expert has said he or she requires. However, the CPR provides a comprehensive code and it may be that disclosure is not ordered for reasons of disproportionality. However, if documents are considered to be necessary, and they are not available (for whatever reason), then an opinion in a report can be qualified to that extent.

4. The process of experts meeting under CPR Part 35.12, discussing the case and producing an agreement (where possible) is an important one. It is meant to be a constructive and co-operative process. It is governed by the CPR, which means that the Overriding Objective should be considered to apply. This requires the parties (and their experts) to save expense and deal with the case in a proportionate way.

5. Where late material emerges close to a trial, and if any expert considers that is going to lead to further analysis, consideration or testing, notice of this should be given to that expert's opposite number as soon as possible. Save in exceptional circumstances where it is unavoidable, no expert should produce a further report actually during a trial that takes the opposing party completely by surprise.

6. No expert should allow the necessary adherence to the principles in The Ikarian Reefer to be loosened.

It is to be hoped that expert evidence such as that called by ICI in this case, and also in [Bank of Ireland & Anor v Watts Group Plc [2017] EWHC 1667

© Cooper & Mattison, 2018
(TCC)], does not become part of a worrying trend in this respect. There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence.”\textsuperscript{115}

\textsuperscript{115} Fraser J in \textit{Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd} [2018] EWHC 1577 (TCC), paragraph 237.
Appendix 2: Focus Group Agenda

The State of Independence:
Focus Groups 22 June 2018

Introductions (5)
Background and the survey (5)

Perceptions of Expert Witness Independence and Impartiality (10)

- Independence and Impartiality – what do the words mean to you?
- Does it matter if an expert witness thinks that other experts in their field give opinions that are influenced by the pressures of litigation?

Checks and balances (10)

- What are the checks/ tests in the system which protect against lack of independence and impartiality? Do they work?
- What promotes expert witness independence and impartiality?
- Could more be done?
- Have you ever reported/ considered complaining about an expert witness who appears to be lacking independence?

Pressures (10)

- In your experience what pressures (if any) operate on expert witnesses that run counter to their obligations to be independent and to provide impartial opinion evidence?

Conflicts of Interest (10)

- Do you operate a system to check for conflicts of interest?
• How do you know it works?
• How do you know your opinion is independent and impartial?

Closing (5)