

Expert Shopping Considered Again

D (A CHILD BY HER FATHER & LITIGATION FRIEND MR S) V. CHAPMAN & ANOR, QBD (10 NOVEMBER 2017)

KEY POINTS

- Expert shopping should be discouraged however the discretion has to be on a case by case basis.
- There is some authority for drawing a distinction between loss of confidence in an expert and a change of mind.
- There may be good reason for seeking a second opinion and relying on a different expert as in *Edwards-Tubb v. JD Wetherspoon Plc* [2011] EWCA Civ 136
- Such reasons could include where a report is disappointingly favourable to the other side.
- The Court will have regard to the merits of the case, whether the case is of high value and whether complex issues arise such as in this case where causation was a highly controversial issue.
- When giving a party permission to replace the expert witness the discretion is usually exercised on condition that the unfavourable opinions of previous expert witnesses are disclosed.

THE CASE

An action was brought by a Claimant child for serious injuries she sustained in a road traffic accident. She recovered 90% of her claim in a liability trial however it was agreed between the parties that a preliminary issue should be tried as to whether her severe developmental abnormalities had been caused by the accident.

The Defendant's expert suggested that the Claimant's abnormalities were purely coincidental.

The Claimant had cause to instruct three expert witnesses, following the first expert retiring, the second expert agreeing with the Defendant's expert's conclusion and the third expert finally concluding that the brain injury was caused by the road traffic accident and that her disabilities suffered as a result were unlikely to have been coincidental.

The Claimant successfully sought permission to rely upon the third expert's report, subject to there being disclosure of the two previous opinions.

THE ISSUE

The Defendant appealed against the master's decision to permit the Claimant to rely on the third expert report. The Defendant argued that the Claimant was expert shopping and that the master either did not have discretion to permit the new report or only had discretion if he ordered disclosure of the preceding reports first and then re-listed the matter for further consideration of the permission issue.

The master rejected that approach on the basis that the defendants would have had access to privileged material in advance of his order allowing the new report.

THE RELEVANT RULE

CPR Rule 35.4

“(1) No party may call an expert or put in evidence an expert's report without the court's permission.

(2) When parties apply for permission they must provide an estimate of the costs of the proposed expert evidence and identify –

- (a) the field in which expert evidence is required and the issues which the expert evidence will address; and
- (b) where applicable, the name of the proposed expert.
- (c) If permission is granted it shall be in relation only to the expert named or the field identified under paragraph (2). The order granting permission may specify the issues which the expert evidence should address.”

RELEVANT AUTHORITIES

Coyne v. Morgan [2016] EWHC B10 (24 May 2016) – useful judgment containing an analysis of the relevant rules and case law.

Vasilou v. Hajigeorgiou [2005] 1 WLR 2195; [2005] EWCA Civ 236 – concerns valuation evidence in a claim for breach of covenant in a landlord and tenant case.

Edwards-Tubb v. JD Wetherspoon plc [2011] 1 WLR 1373; [2011] EWCA Civ 136 – concerns orthopaedic evidence in a personal injury case.

BMG (Mansfield) Ltd v. Galford Try Construction Ltd [2013] EWHC 3183 (TCC) – this concerned architectural evidence in a construction case.

CONCLUSION

In considering the previous authorities which have dealt with this issue Moulder J concluded that the master had not erred in allowing the claimant to rely on supportive new expert medical evidence, after she had received unfavourable expert reports, on condition that the unfavourable opinions were disclosed. He accepted that the Claimant was expert shopping but that she had good reason to seek a second opinion in such a high value case which was complex and where the causation issues were highly complex.

OPINION

This is another failed attempt by Defendants to level the playing field where expert witness shopping is concerned. It seems unlikely that the Claimant would be ordered to attend a medical appointment of the same discipline as already attended in order to support the Defendant's case. Although the courts do discourage expert shopping it remains clear that the discretion is exercised on a case by case basis, and that such discretion is exercised on condition that previous unfavourable opinions are disclosed.

FIONA ROSS

Fiona Ross's background is in all areas of civil law, but she now specialises in personal injury and has extensive experience in all areas of civil fraud, including employer's liability and household insurance claims, but particularly in relation to road traffic accidents.