# THE FUNDAMENTAL PRINCIPLES OF EXPERT EVIDENCE

**A PRESENTATION TO THE CONSTRUCTION BAR ASSOCIATION OF IRELAND**

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## INTRODUCTION

As it says on the tin, I have been asked to address the "Fundamental Principles of Expert Evidence" and hope that the following may be of assistance in the consideration of the principles which arise in considering the admissibility of and weight to be given to expert evidence.

In a paper of this length, it is not possible to consider in any depth the case law, of which there is much, concerning the issues of the admissibility of expert evidence and the role of the expert witness in Court. In fact the paper may, it is hoped, be of use by condensing these sources of information. For a detailed consideration, the best place to look, apart from text books and case law, is the Consultation Paper published by the Law Reform Commission in 2008 [LRC CP 52-2008].[1]

## "ORDINARY" WITNESSES -V- EXPERT WITNESSES

The key difference between an expert witness and ordinary witnesses is that "ordinary" witnesses are generally allowed to give only relevant and factual evidence; they are not permitted to express an opinion on their evidence. The rationale for not permitting an opinion to be given in respect of these matters is that the ultimate trier of fact is the Court (or jury) and it is not for a witness to reach a conclusion on the evidence.

As Kingsmill Moore J. stated in ***A.G. (Ruddy) v. Kenny*** [2]

*It is for the tribunal of fact, Judge or jury, as the case may be, to draw inferences of fact, form opinions and come to conclusions*.

The exception which permits the expert to give an opinion evolved over time. Long prior to the introduction of expert witnesses or indeed factual witnesses older methods of trial existed, such as, for example, trial by ordeal, which might involve the party with the burden of proof wrapping his hand in leaves and then holding a hot iron for a set period of time. If he

[1] This paper is <u>not</u> concerned with the rules regarding expert witnesses in personal injuries actions, which are governed by their own rules.
[2] [1951] 94 ILTR 185.

emerged unscathed, his cause was considered just and he had successfully proved his case. If he burned, he lost. [3]

As such archaic means of resolving disputes disappeared, they were replaced by the now familiar requirement that parties prove their case by witness evidence. This, at the time revolutionary concept, led ultimately to a realisation that the resolution of certain disputes of a technical or complex nature might well require expert or specialised knowledge. A response to this realisation was the involvement of a special jury composed of persons knowledgeable in the subject matter in a particular case.

In lieu of a special jury, certain Courts, most commonly in admiralty cases, involved the assistance of assessors or advisers, who were to assist the Court with specialist experience, skill or knowledge which it might not normally possess.

Eventually expert witnesses became a distinct legal entity from other witnesses as they were not required to observe the facts of the case personally in order to be permitted to give an opinion on them in Court. The opinion rule therefore provides the principal legal distinction between ordinary and expert witnesses.

The rationale was explained by Kingsmill Moore J. in ***A.G. (Ruddy) v. Kenny*** as being to "*enable the Trier of fact to come to a proper conclusion on the facts adduced, in other words to draw the necessary inferences from the facts".*

**THE PRECONDITIONS TO ADDUCING EXPERT [OPINION] EVIDENCE**

Ultimately whether a Court will admit expert evidence will depend on the particular issues which a party seeks to prove and whether or not proof of these issues would be assisted by expert evidence. If the issue is one on which the finder of fact is qualified and capable of forming a sound opinion, no expert evidence will be permitted as additional expertise will essentially be superfluous.

[3] Given the concerns often expressed nowadays about the length, complexity and cost of litigation, some may say such forms of trial still have much to recommend them!

Thus, in order to be permitted to adduce expert evidence the party who wishes to do so will need to prove BOTH

- That the evidence is needed in the circumstances, and
- That the person in question is suitable to give expert evidence on the issue.

**IS EXPERT EVIDENCE REQUIRED AT ALL?**

Often it will be obvious that expert evidence is required by reason of the subject matter of the matter before the Court. However, the trier of fact should always consider whether he requires the assistance of an expert at all.

This may have particular relevance in a construction dispute where if the trier of fact is an expert in matters of, for instance, architecture, it may not be necessary to call an expert architect at all, since the trier of fact can be expected to have both the knowledge and experience which the expert witness is tendered to provide.

In order to consider whether the expert is required at all, it is necessary therefore to identify clearly the issue upon which the expert is going to be asked to offer an opinion. This may involve, for instance, a matter of science upon which expert evidence is offered or a matter of practice or custom in which the experience of the witness may be hugely relevant.

Once the issue is identified, the expert should then only be asked to offer an opinion on that issue and should not be asked questions relating to other issues which might well arise in the litigation/arbitration.

Expert evidence may be admitted concerning custom and practice, a feature which was considered in ***McMullan v. Farrell***[4] where Barron J. held that evidence could be admitted about the nature of a solicitor's duty to his client and the everyday practice of solicitors. Relying on an English case, he stated:

[4] [1993] 1 I.R. 123.

*"Clearly if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institution were sanctioned by common usage, evidence of that can and ought to be received."*

Similarly technical or scientific terminology may need to be interpreted for the trier of fact and this evidence will commonly be admitted.

Indeed as the Law Reform Commission observes (paragraph 2.35) *"in construction, intellectual property or patent disputes, the terms at issue are often outside the range of knowledge of the trier of fact and so the aid of experts is needed to explain complex concepts where the parties are in dispute about the meaning of the term."*

A case illustrating the circumstances in which expert evidence will not be admitted is ***R. v. Turner***[5] where the Trial Judge rejected expert psychiatric evidence as to the likelihood of the accused being provoked by his girlfriend's admission of infidelity (this evidence had been tendered to support a defence of provocation to murder). This ruling was upheld on Appeal. Lawton L.J. explained the rationale for rejection as follows:

*"If, on the proven facts, a Judge or jury can form their own conclusions without (expert) help, then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make Judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.*[6]*"*

**PROOF OF EXPERTISE**

The party calling the expert bears the burden of proving the expert's qualifications and credentials as an expert in the field in question. This is normally done by way of preliminary

[5] [1975] 1 AER 70. O'Flaherty J. approved of this proposition in ***DPP v. Kehoe*** [1992] ILRM 481.
[6] See Fennell, The Law of Evidence in Ireland, page 284.

questions during the examination in chief stage of the proceedings after the witness has taken the oath (if witness statements or expert reports are involved the expert may simply adopt his report/statement which will habitually (and ought to) contain evidence of his expertise).

Whether that expertise stems entirely from practical experience or from formal study or a mixture of the two is irrelevant once the person can prove that they have acquired knowledge that gives them an expertise not possessed by the ordinary person; although obviously it will be more difficult to be qualified as an expert without a formal qualification, as it will be more difficult to demonstrate the area of expertise upon which the opinion is offered.

**WHAT EVIDENCE MUST BE ADDUCED BEFORE THE EXPRESSION OF THE OPINION?**

The factual foundation of an expert opinion should be laid either by simply referring to the facts which the party instructing the expert are said by the expert to be facts which he assumes will be proved or the expert himself may seek to prove some facts.

While formerly in order to reach a conclusion, the expert had to rely on admissible prior proved facts (or facts which would be proved), nowadays in reaching a conclusion the expert is permitted to rely on prior studies, statistics and research, academic literature and works of reference in their field of expertise. The authors of such literature or the persons who carried out the studies or experiments need not, ordinarily, be called as witnesses to prove the studies, etc.

Thus, in general an expert need not have observed facts himself in order to express an opinion upon them, though the probative value and weight of the evidence may be affected by this where it would be usual for him to have done so.

Apart from giving evidence as to scientific matters or propositions, the expert may, as was referred to by Barron J. in ***McMullan,*** give evidence as to his experience in the relevant area, as long as that is lengthy and convincing experience.

In ***Daubert v. Merril Dow Pharmaceuticals***[7] the US Supreme Court held that the expert's testimony must rest upon a reliable foundation and be relevant to the task in hand. The short hand for the tests set out is that the expert's opinion must be based on reliable methodology or analysis and not subjective belief or unsupported speculation.

The Law Reform Commission opined that when experts are giving their expert opinion, they are under a duty to ascertain all relevant facts and all essential information of the case, including those facts which may detract from their opinion. They must then ensure that the opinion given is clear, accurate, unbiased and contains all essential information such as the expert's opinion; the material he bases this opinion on; whether or not this information supports the proposition he is being asked to put forward or not; and his thought processes in coming to this opinion.

The expert is expected to disclose whether or not any assumptions have been made in the opinion and any data limitations or shortcomings which may affect the result of the opinion.

**INDEPENDENCE OF EXPERTS**

The fact that an expert witness may be an employee of one of the parties may affect his independence and this should be taken into account when assessing the weight to be attached to his expert evidence, but it does not affect the status of the witness as an expert.

Although one might expect that an expert who has a financial interest in the outcome of the litigation might be disqualified on the basis that his ability to abide by his overriding duty as an expert assisting the Court is compromised by his interest in the outcome of the proceedings,[8] in ***R. (Factortame) v. Secretary of State for Transport***[9] the Court of Appeal in England held that arrangements for contingency fees, depending on the outcome of the litigation, should be disclosed by an expert and although likely to disqualify him, would not automatically do so; it would manifestly go to the weight to be attached to his evidence.

[7] 509 US 579
[8] In a different sphere this might be regarded as a species of objective bias.
[9] [2002] EWCA 932.

**SUMMARY OF WHAT THE COURT EXPECTS**

In ***National Justice Compania Naviera S.A. v. Prudential Assurance Co. Limited***[10] Cresswell J., who was concerned that the experts before him had not fully appreciated their duties, assembled the duties and responsibilities applicable to expert witnesses that had been recognised over the years and stated that they 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 the litigation.

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

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

4. An expert witness 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. In cases where an expert witness who has prepared a Report could not assert that the Report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the Report.

6. If after exchange of Reports an expert witness changes his view on a material matter having read the other side's expert Report or for any other reason, such a change of

[10] [1993] 2 Lloyd's Reports 68.

view should be communicated (through legal representatives) to the other side without delay and, when appropriate, to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of Reports.

**A CODE OF PRACTICE FOR EXPERTS?**

In its Consultation Paper the Law Reform Commission observes that the foregoing tests seem to be generally accepted in the common law world[11] and suggested that it might be worthwhile producing a code of guidance for experts which would:

(a) Emphasise that the main role and function of the expert is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to facts provided in evidence.

(b) Reinforce that the overriding duty of the expert is to the Court.

(c) Emphasise that the expert must give a well balanced, well reasoned and honestly held opinion.

(d) Emphasise that the expert must be truthful, independent and impartial and resist becoming a partisan advocate for his instructing party.

(e) Emphasise the duty to limit contentious issues by resolving matters with opposing experts insofar as possible.

(f) Emphasis the duty to avoid conflicts of interest and if there is one, to disclose it fully.

[11] Although overtaken by Civil Procedure Rules in England which largely replicate them. See also a refinement of same in ***Anglo Group plc v. Winther Browne & Co.*** [2000] EWCH Technology 127. The Law Reform Commission recommended a formal guidance code along the lines expressed by Cresswell J.

(g) Emphasise the duty to keep the opinion within the permitted scope which requires that the expert witness:

- Confine his opinion to matters outside the scope of the expertise of the finder of fact.
- Keep the opinion within the parameters of the area of expertise.
- Give only an opinion on the issues involved in the case in question.
- Impart his knowledge to the finder of fact to enable the finder of fact to reach his own conclusion, i.e. he should avoid stating a conclusion.

(h) Emphasise that while the expert's overriding duty is to the Court, he should not lose sight of the fact that the also owes a duty to the person instructing him and has to take care to fulfil his role within his area of expertise with care and competence, including a duty to take reasonable care in creating the expert report.

(i) Include a duty to sign the expert's declaration.

**THE AFFIRMATION OF THE EXPERT WITNESS**

Given the above, unsurprisingly, the expert witness will generally

- affirm that he understands that his overriding duty as an expert witness in the proceedings is to the Court.
- confirm that he has no prior connection with any of the parties in the litigation.[12]
- confirm that he has no financial interest in the outcome of litigation.
- State that he has disclosed the sources of research, or facts upon which his opinion is based

**COOPERATION BETWEEN EXPERTS**

A final word should be left to duties of experts outside the Court.

[12] Very often an expert, particularly in certain confined fields, will have some knowledge of the parties who are the subject of the arbitration/litigation. This does not disqualify the expert, but he should disclose it.

Tomlin J. in ***Graigola Merthyr Co. Limited v. Swansea Corporation*** stated

> *"Long cases produce evils ... in every case of this kind there are generally many 'irreducible and stubborn facts' upon which agreement between experts should be possible and in my judgment the expert advisers of the parties, whether legal or scientific are under a special duty to the Court in the preparation of such a case to limit in every possible way the contentious matters of fact to be dealt with at the hearing. That is the duty which exists notwithstanding that it may not always be easy to discharge."*

The rationale for this is that trials should take no longer than is necessary to do justice in a particular case and that matters which are not truly in issue should not be taking up the time of the Court.

Commercial Court Rules and developments in litigation generally would suggest that there is also an obligation on an expert to cooperate with the other expert in an effort to narrow the issues and perhaps to produce a report of agreed propositions so that the Court is only concerned with matters which are not agreed.

The concern of the Irish Courts in this respect is increasingly expressed from the Bench and is perhaps best encapsulated in the following passage from the judgment of O'Donnell J. in **Emerald Meats –v- Minister for Agriculture**[13]**,** where, speaking for the Supreme Court, he stated

> *"The details of the experts reports in this case are now only of historical significance in this Appeal because the Trial Judge rejected both hypothesis put forward by Emerald's expert to justify the figure of €20.2m ... By the same token, the Judge rejected the contention made on behalf of the Department that Emerald had suffered no damage beyond that compensated for already in the award of damages made by Costello J. ...*

[13] [2012] IESC 48; 30 July, 2012

*The result is that the extensive expert's reports provided just after the commencement of the Trial were relevant to the hearing only in the sense that they were rejected and are almost completely irrelevant to the Appeal. Much of the 17 day hearing before the High Court was taken up with an analysis of the various hypotheses contained in these reports. In the end, however, the critical piece of evidence which underpinned the Judge's assessment of damages was the third of three very short "alternative views" provided by the Department's experts only on the eleventh day of the Trial.*

*... If Court time is to be used efficiently it means that only those disputes which really require judicial determination should reach the point of consuming both the time in Court for the hearing of evidence and the time out of Court for its assessment, analyses and adjudication by a Judge of Trial, and if necessary, on appeal. In theory, expert witnesses owe a duty to the Court to provide their own independent assessment. It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the Court's determination. If this process functions properly, there should not be wide and unbridgeable gaps between the views of experts. Where there are differences, those should be capable of identification along with the relevant considerations so that the particular issue or issues which require judicial determination should be capable of ready exposition. Ideally, all of this should occur outside a Courtroom and well in advance of the Trial. It is not merely that the resolution of disputed issues in a Trial forum is an expensive and often frustrating process of determination; it is also that the early identification of the real areas in dispute may encourage parties to come to their own resolution which is likely to be more satisfactory to them, and certainly cheaper. It is important that experts, and particularly accountancy witnesses, do not simply accept their client's instructions as to certain matters and then construct calculations on the basis of those instructions. If that is all that is done, then the expert report is no more than the provision of a very expensive calculator. The Court is entitled to expect that such experts will apply their critical faculties and their*

*expertise to the case being made by their clients. Furthermore, experts who are willing to provide such realistic advice to their clients are entitled to expect that the Courts will, where appropriate, identify, and be critical of, exaggeration and lack of realism when that is detected. ... It was partly because the figures proffered by both sides did not fit comfortably with what could be observed of the nature of the business and its prospects that the Court was driven to the limited and undoubtedly somewhat rudimentary analysis which is now the focus of this Appeal."*

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