EXPERT EVIDENCE
LESSONS FROM RECENT CASE LAW

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INTRODUCTION

1. The Courts in this jurisdiction have had occasion in a number of decisions over the past fifteen years to address the proper use and role of expert evidence. The area has also received the benefit of a detailed and exhaustive consultation paper by the Law Reform Commission.[1] That attention has reflected the growth of an industry of professional expert witnesses, the increasing (and not unrelated) tendency of experts to become advocates in favour of their clients, the increasing practice of litigants to deploy and in some circumstances overdeploy expert evidence, the expansion of the range of cases in respect of which experts are deemed necessary by practitioners, and the increasing concern of the Courts at the length of trials in complex litigation, which has been attributed in part to use of multiple experts.

2. That recent case law, and indeed the underlying features of modern litigation practice that prompt it, suggest a number of themes relating to, and indeed key issues in and around the use of expert evidence. Obviously, these questions are of some practical importance in construction disputes, where expert evidence has always had a significant role.

WHAT IS AN EXPERT WITNESS AND WHAT DOES HE OR SHE DO ?

[1] Law Reform Commission Consultation Paper LRC CP 52 – 2008 : *Expert Evidence*.

3. In an article in 1999, Mr. Justice Barr observed how frequent it was that expert witnesses lacked any real appreciation of what their role in a case actually was. He said :

> *They [expert witnesses] are rarely dishonest or deliberately unfair, but they seem to lack a true understanding of their function i.e to assist the Court in arriving at the truth by providing a skilled expert assessment which is objective and fair of matters requiring a specialized appreciation of the particular problem at issue*.[2]

4. In seeking to understand the implication of this, it is important to appreciate that an expert witness is permitted to give evidence of his or her assessment of issues in a case only by way of exception to the general rules of evidence. The general rule is that opinion evidence is not admissible in legal proceedings.[3] The function of a witness is to testify as to his or her knowledge of facts as he or she perceives them, but not to express opinions or draw inferences from those facts.[4] The law provides an exception to that general principle in the case of expert witnesses. [5]

5. That exception permits a person 'expert'[6] in a discipline that is consistent, methodological, cumulative and predictive,[7] to proffer his or her opinion on a matter relevant to proceedings, and draw inferences from primary facts in the case, in expressing such opinions. Whether a particular witness is qualified as an 'expert' is a matter for the Court to determine,

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[2] Barr *Expert Evidence – A few personal observations and the Implications of Recent Statutory Development* (1999) 4 BR 185.
[3] *AG (Ruddy) v. Kenny* (1960) ILTR 185, 190 (per Kingsmill Moore J.).
[4] McGrath *Evidence* (2005) para. 6-01 and 6-02.
[5] See Healy *Irish Laws of Evidence* (2004) para. 12-01 and following : McGrath *Evidence* (2005) para. 6-01 and following and Fennell *The Law of Evidence in Ireland* (2d. Ed. 2004) para. 7-10 and following.
[6] '*persons of peculiar skills and knowledge on the particular subject*, (*McFadden v. Murdock* (1867) EX. IRCL 211) : *'matters which require special study and experience*, (*AG (Ruddy) v. Kenny* (1960) 94 ILTR 185.
[7] Healy *Irish laws of Evidence* (2004) para. 12-16.

but generally the person must have particular expertise, qualification or experience in the area in respect of which he or she testifies.[8] The expert is also freed to some extent from the strict constraints of the hearsay rule by being permitted to give evidence of conclusions drawn and research conducted by others, in supporting the expert's own opinion.[9]

6. However, the scope given to the expert to deviate from the general prohibition on opinion, or for that matter hearsay, evidence is limited to matters relating to his or her area of expertise. The expert cannot express an opinion on matters of law, nor can he seek to conclude on issues of fact arising in the case *except* those issues of fact touching on his or her expertise.[10] Even then, the expert should clearly distinguish in his or her evidence between matters of fact and matters of opinion when giving their expert evidence.[11] Evidence of matters of common knowledge and matters that can be dealt with by the trier of fact by applying common sense and life experience is inadmissible.[12] Questions of whether an account given by a witness of fact is credible, or supported by documentation – for example – are not within the scope of the expert's testimony.

7. These principles of law are all to easily forgotten in a context in which it is understood that experts are instructed in litigation partly because the view is that they have to be, and partly because it is believed that the expert's function is to advocate his instructing client's case. The second of these is wrong, and the first not a reason expert evidence is admissible.

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[8] *Galvin v. Murray* [2001] 2 ILRM 234, 239 (per Murray J.)
[9] Healy *Irish Laws of Evidence* (2004) para. 12-24 : *Southern Health Board v. CH* [1996] 1 IR 219.
[10] *The People (DPP) v. Kehoe* [1992] ILRM 481.
[11] Law Reform Commission Consultation Paper LRC CP 52 – 2008 : *Expert Evidence* para. 2.252.
[12] Law Reform Commission Consultation Paper LRC CP 52 – 2008 : *Expert Evidence*. para. 2.122.

Charlton J. in *James Elliott Construction Limited v. Irish Asphalt Limited*[13] explained the correct position in the following terms :

> *The role of an expert is to elaborate on the principles applicable to an esoteric discipline and to indicate why, as a matter of good sense and as a matter of opinion, a finding of fact ought to be made in one way rather than the other.*

8. The decision of Charlton J. in that case is currently under appeal. However, the outcome of that appeal is unlikely to affect either its significance for expert witnesses in litigation of any kind, nor the lessons it bears for those instructing, or calling, expert witnesses for the purposes of or at, trial. I will return to it at the conclusion of this paper.

THE DUTIES OF AN EXPERT WITNESS

9. In enabling a particular class of persons to thus give evidence of their opinion, the law imposes very specific obligations upon persons holding themselves out as qualified to express expert views. These have been articulated with greater precision and emphasis over the two decades following the identification of the seven guiding principles formulated in the course of the important judgment of Creswell J in *National Justice Compania Naviera SA v. Prudential Assurance Co. Ltd.*[14] Although the decision has not been followed expressly here, the principles underpinning it have been reflected in various statements in the Irish judgements. Those principles have a significant impact on all dealings between lawyers and experts, between opposing experts and between experts and the Court.

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[13] [2011] IEHC 1

[14] [1993] 2 Loyds Rep. 68, 81-82; the principles were usefully reformulated by Toumlin J. in *Anglo Group plc v. Winther Brown* [2000] EHHC 127

10. Notwithstanding the absence of any composite list of duties owed by an expert witness in Ireland, the Law Reform Commission has identified the specific duties of an expert by reference to a series of obligations.[15] I think that these can be reduced to the following five principles :

(a) the over-riding duty is owed by the expert to the Court;

11. Charlton J. in *James Eliott* approved the statement of Lord Cooper in *Davey v. Magistrates of Edinburgh*[16] defining the obligation of the expert as being 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 the facts proved in evidence*. That principle drives many of the other obligations of the expert, and has some important practical consequences. Its most significant effect is the consequent requirement that the expert not offer an opinion which is one-sided, and the resulting principle that the expert's duty to the party who calls him can never over-ride the duty to the Court.

(b) the expert must give an opinion which is well balanced, well reasoned and honestly held;

12. In a decision given in 2000,[17] the Supreme Court approved the following formulation of the function and obligation of an expert witness :

> *Where a witness purports to give evidence in a professional capacity as an expert witness, he owes a duty to ascertain all the surrounding facts and to give that evidence in the context of those facts, whether*

[15] Law Reform Commission Consultation Paper LRC CP 52 – 2008 : *Expert Evidence* paragraph 2.263 and following.
[16] [1953] SC 34, 40
[17] *JL v. DPP* [2000] 3 IR 122, 149.

they support the proposition which he is being asked to put forward or not.[18]

13. The obligation, accordingly, is not confined by the information given to the expert by the party who instructs him. It includes a duty imposed upon the expert to ascertain relevant facts himself, and to identify them in the course of his or her report. In *The People (DPP) v. Allen*[19] the failure of an expert to conduct that research properly resulted in a jury verdict being set aside. In *AW v. DPP*[20] an expert who limited himself to the brief fixed by instructing solicitors was severely criticized by Kearns J. for failing to conduct an overall psychological assessment *in detail and depth*. These are but two of the many cases in which experts have been criticized in the specific context of criminal cases, for failing to conduct a thorough examination of all issues relevant to the case in which they gave evidence. [21] Those criticisms – and the emphasis they entail upon the obligations imposed upon expert – have assumed a very particular prominence in the consideration by the Courts of the evidence of experts called to address the reasons for delay in the making of complaints giving rise to prosecutors for sexual offence,[22] but the principles clearly apply to *all* experts in any litigation.

(c) the expert must give evidence truthfully, independently and impartially and must exercise reasonable care in the presentation of his report;

14. The requirements of independence and impartiality are key and are frequently restated; in *Payne v. Shovlin* [23] Kearns J. emphasized that it was not appropriate for an expert to be a *partisan advocate* but that he or she

[18] *Fitzpatrick v. DPP* Unreported High Court December 5 1997 (McCracken J.).
[19] [2003] 4 IR 295.
[20] Unreported High Court 23 November 2001.
[21] Law Reform Commission Consultation Paper LRC CP 52 – 2008 : *Expert Evidence* paragraph 3.217 fn. 195.
[22] McGrath *Evidence* (2005) para. 6-32.
[23] [2006] IESC 5

fulfilled the function of *mutual fact finders or opinion givers.* The High Court took up the same theme in *Weavering Macro Fund v. PNC Global Investment Servicing*[24] when it observed :

> *It is essential that experts approach a case objectively and not on the basis of an unconscious desire to assist the side which engages them*.

15. This means that an expert should never amend his or her report to conform with a client's arguments, and it means that lawyers are precluded from redrafting, or demanding that an expert change his or her report. A failure to deviate from those principles can gravely impair the expert witness's credibility, and thus his or her utility.

(d) the expert is under an obligation to limit contentious issues;

16. Although this was identified many years ago, [25] this aspect of an expert's duties seems either largely unknown or widely disregarded. The duty has an added imperative having regard to the provisions of the Commercial Court rules[26] providing for expert meetings in an attempt to agree issues. It has been specifically emphasized in one English case that this duty applies as much to the initial meetings of experts as to evidence at trial.[27] It is likely that this obligation will be given teeth by the Courts in the very near future. Charlton J. expressed dismay in *James Elliott* at the divergence between the experts, describing as the most *striking feature* of the case, the *inability of the experts .. to agree on anything of importance in the case*. The failure of an expert to even attempt to agree a matter with his opposing number puts him both in breach of his duty to the Court, and has the potential to significantly impair his credibility.

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[24] [2012] IEHC 25
[25] The Law Reform Commission Consultation Paper identifies the obligation in the judgment of Tomlin J. in *Graigola v. Swansea Corporation* [1928] 1 Ch. 31
[26] Order 63A Rule 6(1)(ix) RSC.
[27] *Anglo Group plc v. Winther Brown* [2000] EWHC 127.

(e) the expert must avoid a conflict of interest;

17. While the Supreme Court has decided that it is not impermissible for a person to give expert evidence in a matter in which he or she has an interest – for example in proceedings by or against his or her employer[28] - any interest must be disclosed, and is likely to affect significantly the weight to be afforded to the expert.

INSTRUCTING AN EXPERT

18. Even though the obligation of an expert is to address all matters relevant to the opinion expressed by him or her, the specific instructions given to the expert – and the information imparted – is crucial. An expert witness is not only entitled, but *obliged* to record the facts on which his or her opinion is based. [29] Thus, and as already noted, one consistent theme of case law since the decision of the English Court of Appeal in *National Justice Campania* in 1993, is the obligation of an expert to make full disclosure of all matters relevant to the opinion he or she is asked to express. The formulation approved by the Supreme Court bears repetition :

> *Where a witness purports to give evidence in a professional capacity as an expert witness, he owes a duty to ascertain all the surrounding facts and to give that evidence in the context of those facts, whether they support the proposition which he is being asked to put forward or not.*[30]

[28] *Galvin v. Murray* [2001] 2 ILRM 234 : the view of the English High Court that an interest debarred an expert has been discredited – *Liverpool Roman Catholic Archdeacon Trustees v. Goldberg* [2002] 1 WLR 237 as explained in *Toth v. Jarman* [2006 EWCA Civ. 1028.
[29] *R. v. Turner* [1975] QB 834, 840.
[30] *Fitzpatrick v. DPP* Unreported High Court December 5 1997 (McCracken J.).

19. The '*proposition*' the expert is being asked to address is thus key both to the scope of the expert's duty, and to the assumptions underlying his or her evidence. Formulation of that issue is, of course, a matter for the legal advisors instructing the expert on their client's behalf. Experienced experts will insist on the correspondence instructing them being appended as an Exhibit to their Report. From the expert's perspective, this is prudent. It avoids any confusion as to the terms of reference of the Expert's evidence, and clearly defines the information they have to consider to comply with their legal obligation. It underscores the importance of an expert being formally and specifically instructed in an identifiable way (as opposed to being briefed generally orally, or in the course of an evolving correspondence or rolling meetings and conversations).

20. However, if there is no agreement between client/solicitor and expert to disclose an experts instructions, can disclosure of those instructions be compelled ? That issue arose in an unusual context in 2007 in *Ahern v. Mahon*[31]. The Applicant challenged *inter alia* the ruling of a Tribunal of Inquiry that he make discovery of documents relating to the retention of a financial expert in connection with his dealings with the Tribunal, contending that the proceedings of the Tribunal generated litigation privilege, and that instructions to an expert were protected by that privilege. The Court rejected the claim of the Tribunal that, in the circumstances, there had been any waiver of the privilege. However, it also agreed with the concession of counsel for the Applicant that the Tribunal was entitled upon an expert being tendered to give evidence, to question that expert witness on the *factual material which he used in order to form his opinion. He may also be asked the material instructions which were given to him'*. What the Tribunal was not entitled to do, it was held, was to conduct a general trawl through the solicitors' file.

[31] [2008] 4 IR 704.

21. Although based on a concession, this must be correct as a matter of principle. Given the materiality of the instruction to an expert to his evidence, it is difficult to see how a party tendering an expert witness can both put the witness in evidence to testify on the basis of a specific instruction, and at the same time maintain a claim to privilege over the instruction. Before the amendment of the Rules of Civil Procedure in England and Wales to expressly impose obligations on experts to disclose their instructions, it had been held that service of an expert report waived privilege over at least some of the information provided to the expert :

> *An expert must state the facts or assumptions on which the opinion was based and should not omit to consider material facts which detract from any concluded opinion. An essential element of the process is for a party to know and to be able to test in evidence the information supplied to the experts in order to ascertain if the opinion is based on a sound factual basis or on disputed matters or hypothetical facts yet to be determined by the courts …it is not for one party to keep their cards on the table so that the other party does not know the full extent of information supplied.*[32]

22. Certainly, there is a lack of clarity as to the privilege attaching to instructions of an expert called to give evidence. However, the better view must be that no privilege attaches to documents comprising the instruction. Letters of instruction to experts should both be carefully prepared, and prepared cognizant of the prospect that the opposing party may obtain access to them.

CHOOSING AN EXPERT : CONCLUDING COMMENTS

23. The judgment in the *James Elliot* case is required reading for any conscientious expert witness. The Court sat for fifty eight days, fifty two of

[32] *Clough v. Tameside Health Authority* [1998] 2 All ER 971.

which involved oral evidence, the greater part of which in turn comprised expert testimony.

24. The case presented two issues the resolution of which was heavily dependent upon expert evidence. The first was whether damage manifesting itself in a recently constructed building had been caused by the presence of pyrite in hardcore supplied by the Defendant, and the second was whether the cracking and bulging of the structure was attributable to design defects in the structure, to improper engineering of building construction, to the failure to properly construct load bearing foundations, and the failure to properly compact infill. Ultimately, the decision – for the Plaintiffs – was heavily influenced by the Court's assessment of the expert evidence. The terms in which and reasons for which, the Court rejected some of that evidence are telling, and disclose how experts who engage in excessively theoretical excursus or who seek to blind with science, rather than sense, can fail to convince.

25. The decision provides some important pointers as to how the rules of practice may develop in the future in response to widely held judicial concerns as to the manner in which expert evidence is deployed in the Courts. I have already noted that Judge Charlton observed the single most striking feature of the case (which had many striking features) was '*the inability of the experts as to engineering, architecture, geology and petrography on each side to agree on anything of importance to the case*.' He expressed the view that calling multiple experts on the one topic might be an issue that would require the trial Judge in directing appropriate proofs so as to potentially defeat the right of access to Court. That theme was pursued further by the same Judge in *Weavering Macro Fund* when he observed that *the inherent power of the court may extend, however, to the control of unnecessary duplication in expert or other testimony. The calling of multiple experts to give lengthy evidence is not always fair or helpful*.

26. And perhaps most importantly for those seeking to identify or select appropriate expert witnesses, he observed important principles that are as obvious as they are easily forgotten : ultimately, the quality of an expert opinion is determined not by the qualification of the expert nor the vigour with which he or she expresses his or her conclusions, but the internal consistency and logic of the evidence, the care with which the subject has been considered and presented, the precision and accuracy of thought as demonstrated by responses to questions at trial.

27. Thus, the Court adopted and approved the following comments of Stuart LJ in *Loveday v. Renton*[33]

> *The mere expression of opinion or belief by a witness, however eminent does not suffice. The Court has to evaluate on the soundness of his opinion. Most importantly this involves an examination of the reasons given for his opinions and the extent to which they are supported by the evidence. The judge also has to decide what weight to attach to a witnesses' opinion by examining the internal consistency and logic of his evidence; the care with which he has considered the subject and presented his evidence; his precision and accuracy of thought as demonstrated by his answers; how he responds to searching and informed cross examination and in particular the extent to which a witness faces up to and accepts the logic of a proposition put in cross examination or is prepared to concede points that are seen to be correct; the extent to which a witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence or demonstrates a flexibility of mind which may involve changing or modifying opinions previously held; whether or not a witness is biased and lacks independence.*

28. Critical to that is the preparedness of an expert to concede points that are seen to be correct. So, Charlton J. observed :

[33] [1989] 1 Med. LR 117.

The most important reasons whereby I have chosen one expert over another have been the manner in which an opinion has been reasoned through and the extent to which opposing views have been genuinely and objectively considered on the basis of their merit…of particular importance in this case has been the extent to which an expert has been able to step back and to consider and to think through an opposing point of view … experience in other cases demonstrates that there is a danger that experts may erect a barrier of apparent learning in order to disguise what would be an answer awkward to their side were it to be expressed plainly. Apart from the attractions of logic and reasoning, therefore, assessing an answer based on what is seen and heard in the courtroom remains important.

29. The judgment is salutary. The credibility of an expert witness ultimately depends on the extent to which he or she is prepared to distance the expert evidence given from the partisanship necessarily attendant upon being called for a party, to give ground where appropriate, to explain, rather than advocate, the issues arising from his or her area of expertise and do to so in terms which appeal to commonsense rather than an admiration for esoteric learning. For lawyers, that means that the best expert is not the expert who seems most enthusiastic about a client's case, or who appears to speak the most technical language. The expert who identifies the strong points and supports them while acknowledging the weaknesses of his clients position is at the end of the day, a far more effective forensic resource.

Brian Murray.