



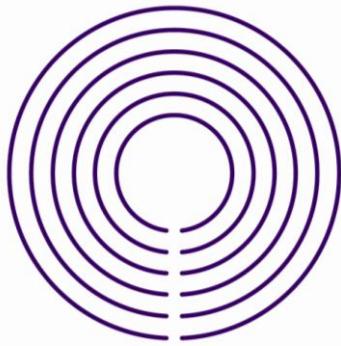
**LAW REFORM**  
COMMISSION/COIMISIÚ UM  
**ATHCHÓIRÍU AN DLÍ**

CONSULTATION PAPER

# EXPERT EVIDENCE

(LRC CP 52 – 2008)





**LAW REFORM**  
COMMISSION/COIMISIÚN UM  
**ATHCHÓIRIÚ AN DLÍ**

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# EXPERT EVIDENCE

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## LAW REFORM COMMISSION'S ROLE

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernize the law. Since it was established, the Commission has published over 140 documents containing proposals for law reform and these are all available at [www.lawreform.ie](http://www.lawreform.ie). Most of these proposals have led to reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. Its *Third Programme of Law Reform 2008-2014* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in December 2007 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role includes two other areas of activity, Statute Law Restatement and the Legislation Directory.

Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes. After the Commission took over responsibility for this important resource, it decided to change the name to Legislation Directory to indicate its function more clearly.

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Full responsibility for this publication lies, however, with the Commission.

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## **INTRODUCTION**

### **A      Background to the project**

1. This Consultation Paper forms part of the Commission's *Third Programme of Law Reform 2008-2014*,<sup>1</sup> and involves an examination of the current rules concerning the admissibility of expert evidence in court and the role and function of expert witnesses. The project also involves an examination of arrangements for ensuring the quality of expert evidence. In terms of these two key aspects of the project, the Commission also explores relevant options for reform.

### **B      The admissibility of expert evidence of opinion and the role of the expert witness in court**

2. As the detailed discussion in this Consultation Paper indicates, a key element of the law of evidence as it applies in courts is that witnesses are generally allowed to give only relevant and factual evidence; they are not permitted to express their opinion on their evidence. For example, if a person saw a colleague having an accident while working with a machine in a workplace, he or she could give evidence in court about what happened but would not be permitted to give an opinion about whether, for example, the machine complied with national or international safety standards.

3. There are a number of reasons why opinion evidence by ordinary witnesses is not permitted. One is that an opinion may be based on a "hunch" rather than actual knowledge or expertise and would therefore be unreliable. Another reason is that the opinion – for example, as to whether a machine complies with safety standards – may be directly related to what is described as the "ultimate issue" to be decided by the court. In any criminal prosecution of the employer under relevant safety and health legislation, the ultimate issue is whether the employer was in breach of any statutory duty to the employee and whether it has committed an offence. Similarly, in any civil claim the ultimate issue is whether the employer was in breach of any legal duty and is required to compensate the employee for any injuries sustained.

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<sup>1</sup> See *Report on the Third Programme of Law Reform 2008 – 2014* (LRC 86 – 2007). Project 11 in the Third Programme commits the Commission to examine the admissibility of expert evidence and the role of expert witnesses, on which the Commission began work under its *Second Programme of Law Reform 2000-2007*. The Commission is also currently (December 2008) examining two other aspects of the law of evidence under its *Third Programme of Law Reform*, documentary evidence and technology (Project 7) and the hearsay rule (Project 8).

4. The ultimate issue, whether of criminal or civil liability, is a matter for a court to decide, not for any witness. The overwhelming majority of criminal trials dealt with in the Irish courts (over 200,000 annually) are heard in the District Court by a judge sitting alone, who is both the finder of fact and determiner of liability. More serious crimes (over 2,000 annually) are in general dealt with in the Circuit Criminal Court where the court consists of a judge and jury. Here the jury, guided by the trial judge on questions of law, is the finder of fact, while the judge determines the sentence. Major criminal trials, in general murder and rape, are tried by judge and jury in the Central Criminal Court (over 100 annually). In a criminal trial the ultimate issue of innocence or guilt may turn on a complex technical issue such as DNA evidence, mobile phone tracing evidence, or the interpretation of medical evidence. In such cases, it is unlikely that a judge or members of a jury will have the detailed technical knowledge required to decide, for instance, whether a DNA profile of the accused correctly matched the DNA sample found at the scene of a crime, or whether a baby died because of violent shaking or from natural causes

5. The vast majority of civil trials are tried by a judge (or occasionally a number of judges) without a jury. Here, the ultimate issue to be decided may also turn on a technical issue, such as whether a particular machine complied with safety standards or whether a chemical substance complied with relevant statutory regulations. Again the court is unlikely to have the required knowledge to deal with all the varied issues that arise in civil trials.

6. It is clear that this is where the combination of expert evidence and the expert witness forms an important part of many criminal and civil trials. In the law of evidence, the main exception to the rule against allowing a witness to give opinion evidence is that an opinion can be given by an expert in an area of expertise outside the scope of knowledge of the court, in particular the finder of fact. The benefits of permitting the court to be assisted in its fact-finding role by expert knowledge have long been recognised. In that respect, expert evidence and expert witnesses will continue to play an important role in the courts.

## C The challenges involved in expert evidence and the role of the expert witness

7. At the same time, however, the Commission is aware that expert evidence and expert witnesses present challenges. In its *Report on the Establishment of a DNA Database*<sup>2</sup> the Commission traced the recent emergence of DNA evidence in criminal trials. The Commission noted that the benefits of DNA evidence, both in exonerating the innocent and in convicting

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<sup>2</sup> LRC 78-2005, available at [www.lawreform.ie](http://www.lawreform.ie).

the guilty, are evident but it is also clear that this is an emerging science which presents a number of challenges. On the one hand, for example, there may be some who completely mistrust scientific evidence. On the other hand, there may be those who take the view that the expert – perhaps especially a crime scene expert referring to DNA evidence – must always be right because they are always right when portrayed on TV. In other instances, the problem may be with the individual expert – the testimony may be hugely relevant and convincing but it may be delivered using scientific jargon that the court (whether judge or jury) cannot follow. In its *Report on the Establishment of a DNA Database* the Commission made some recommendations on how these matters might be addressed in the specific setting of DNA evidence.

8. The Commission is aware that the specific issues it discussed in the context of DNA evidence reflect concerns in the wider setting of expert evidence and expert witnesses generally. Increasing specialisation of knowledge in a complex society has led to an exponential growth in the number of requests to enlist the aid of experts in civil and criminal trials. This has led to an examination of this growth, with a view to ensuring that expert evidence remains available to courts while at the same time addressing concerns about its reliability.

9. In the Reports of Lord Woolf in the mid 1990s<sup>3</sup> that led to fundamental reform of civil procedure generally in the courts in England and Wales, some of the principal causes for unease with the system of giving expert evidence were outlined. In Lord Woolf's *Access to Justice, Interim Report* (1995) the following comments were made:

"In many cases the expert, instead of playing the [independent and impartial] role identified by Lord Wilberforce,<sup>4</sup> has become... 'a very effective weapon in the parties' arsenal of tactics.' A similar point was made by the Commercial judges... when they summarised the present faults as follows:

- polarisation of issues and unwillingness to concede issues from the start;
- insufficient observance of the confines of expert evidence and expansion into the realms of rival submissions; and

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<sup>3</sup> Lord Woolf, *Access to Justice, Interim Report* (1995) and Lord Woolf, *Access to Justice, Final Report* (1996).

<sup>4</sup> This is a reference to the view of Lord Wilberforce in *Whitehouse v Jordan* [1981] 1 All ER 267, in which he stated: "It is necessary that 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."

- insufficient willingness to strip out, agree or concede all but the essential issues following exchange of reports.”

10. The Australian Law Reform Commission, which carried out a review in this area in 1999, identified some of the main challenges of expert evidence as being:<sup>5</sup>

- The court hears not the most ‘expert’ opinions, but those most favourable to the respective parties, and partisan experts frequently appear for one side.
- Experts are paid for their services, and instructed by one party only; some bias is inevitable and corruption a possibility.
- Questioning by lawyers may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert.
- Where a substantial disagreement concerning a field of expertise arises it is irrational to ask a judge to resolve it; the judge has no criteria by which to evaluate the opinions.
- Success may depend on the plausibility or self-confidence of the expert rather than the expert’s professional competence.

11. This Consultation Paper seeks to set out the law as it stands in Ireland on expert evidence, and examine whether the criticisms that have been raised in other jurisdictions can be applied in the Irish context. The Commission seeks to outline the problems that have been raised as well as discussing some of the potential changes that could be made to address these problems.

#### **D Outline of the Consultation Paper**

12. In the light of these general introductory comments the Commission now proceeds to provide an overview of the succeeding chapters in this Consultation Paper.

13. Chapter 1 sets out an historic overview of how expert knowledge was used in the courts along with the development of a body of evidence laws and how this has evolved into the current rule against opinion evidence, subject to the exception that allows expert opinion testimony.

14. Chapter 2 examines the rules governing the admissibility of expert evidence. The different categories of matters on which expert evidence is admitted are outlined. This chapter also examines the precise scope and parameters of expert evidence and the rules governing this, including the requirement that the issue be outside the range of knowledge of the finder of fact and the prohibition on the giving of an expert opinion on an ultimate issue in a case. The various factors that are taken into account when determining the

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<sup>5</sup> ALRC Report 89 *Managing Justice* (1999), Chapter 6.

appropriate weight and value to attach to expert testimony in a particular case are outlined. Some of the main concerns about how expert testimony is given, the possible usurpation of the role of the jury and the possible admission of unreliable or ‘junk science’ are also identified. This chapter concludes by discussing whether there is a need to introduce some sort of reliability test, such as the *Daubert* and *Frye* tests that have been applied in the United States.

15. Chapter 3 focuses not on the evidence but on the individuals proffered to give expert evidence. The question ‘what is an expert witness’ is addressed, along with determining the scope of the duties and function of an expert witness.

16. Chapter 4 examines the potential problems that can arise with expert witnesses, such as a failure to act independently, in an unbiased manner or impartially, and the possibility of the experts becoming partisan ‘hired guns’ for their instructing parties. This chapter also outlines a number of ways in which bias and partisanship can be limited in the giving of expert testimony.

17. Chapter 5 discusses some procedural changes that could be made to deal with the expense and delays involved in the current system. A range of provisions aimed at improving communication between experts, and between experts and the court, and also aimed at improving the standard of expert reports, are identified. This chapter also examines some alternative arrangements for giving expert testimony that might be introduced, in contrast to the position in Ireland at present by which the parties are responsible for the decision to adduce expert evidence and for the choice of expert.

18. Chapter 6 examines the issue of introducing some form of accreditation, registration or training regime for experts. The range of possible sanctions that could be imposed on an expert for failing to act independently, for negligence, or for breach of duty is also discussed. In this respect, the appropriateness of having immunity from suit for expert witnesses is also debated.

19. Chapter 7 contains a summary of the Commission’s provisional recommendations for reform as well as issues on which submissions are sought.

20. This Consultation Paper is intended to form the basis for discussion and therefore all the recommendations made are provisional in nature. The Commission will make its final recommendations on the subject of expert evidence following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of its Final Report, those who wish to do so are requested

to make their submissions in writing by post to the Commission or by email to info@lawreform.ie by **30 April 2009**.

## **CHAPTER 1      ORIGINS AND DEVELOPMENT OF THE EXPERT WITNESS**

### **A            Introduction**

1.01       A wealth of academic literature and professional debate currently exists which focuses on the use of expert witnesses in court. This might give the impression that the use of expert witnesses is a new legal phenomenon, which has come about as a result of the increasing specialisation of knowledge in today's society, and that it is only in recent decades that the potential criticisms and weaknesses of the expert witness system have been identified. In fact, the use of, and problems associated with, expert evidence in court has deep historic roots, and examples can be seen in case law dating from the Middle Ages.

1.02       Hand argues that an historical analysis of the rise of expert testimony is in reality no more than a gradual recognition of such testimony amid the rules of evidence as those rules began to take form. An examination of the rise of its history highlights that expert evidence has long since been accepted as necessary and beneficial, even prior to the development and enforcement of exclusive rules of evidence.<sup>1</sup>

1.03       The purpose of this chapter is to trace the development of the use of expert evidence from its earliest origins, and by doing so to highlight that the benefits of using such evidence, and the debate surrounding its many problems, have been evolving for several centuries.

1.04       Part B looks at the early origins of the use of experts prior to the advent of trial by jury. Part C examines and explains the concept of the special jury and gives historical examples where this structure was used. Part D looks at the use of court assessors in this jurisdiction and in other jurisdictions over the centuries. Part E follows the rise of the use of the court expert and expert witnesses in the courts and Part F traces the growth of a formal body of evidence law to govern the use of such experts. Part G then discusses the problems that emerged due to increasing use of expert witnesses in litigation.

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<sup>1</sup> Hand "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard LR 40 at 50.

1.05 This chapter concludes by summarising in Part F the current Irish position on the use of expert witnesses in court, with the aim of providing an overview of the discussion that follows in the subsequent chapters.

## B Early Origins

1.06 The basis for allowing expert knowledge in the resolution of disputes is that such knowledge is necessary for a finding that certain facts existed. Prior to the advent of trial by jury, however, the resolution of disputes was largely founded on a judgment from God, the *Judicium Dei*, which involved very different principles. The older methods of proof used did not involve rational adjudications upon evidence given in support of a theory, and there was little opportunity for passing judgment on particular facts.<sup>2</sup>

1.07 The trial itself was, as Rosenthal describes it, “merely a submission to a mechanical process of proof.”<sup>3</sup> The court was simply required to decide which party should undergo the selected form of proof. Then, under the supervision of the court, this party would take an oath before God that his cause was just, and subsequently undergo some kind of test, or trial.<sup>4</sup> As can be seen from a brief explanation, these methods of trial did not therefore contain any provision for experts or for the development of laws of evidence, or for the use of witnesses in the modern sense.

1.08 The older methods of trial took four main forms. The best known and most commonly used method in criminal trials was trial by ordeal. This was an appeal to God to reveal the truth of human disputes and took several forms, usually requiring fire or water. For example, the ordeal of water required the accused party to be bound and lowered into a body of water; if he sank the water was said to have ‘received him’ with God’s blessing and he was quickly pulled out.<sup>5</sup>

1.09 Another commonly used form of ordeal involved 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 emerged unscathed, his cause was considered just and he

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<sup>2</sup> Holdsworth *A History of English Law* (Vol IX 2nd ed Methuen & Co Ltd 1945) at 130.

<sup>3</sup> Rosenthal “The Development of the Use of Expert Testimony” (1935) 2 (4) *Law and Contemporary Problems* 406.

<sup>4</sup> Sward “A History of the Civil Trial in the United States” (2003) 51 Kan. LR 347 at 352.

<sup>5</sup> Baker *An Introduction to English Legal History* (Butterworths 1990) at 5.

had successfully proved his case. If he burned, he lost.<sup>6</sup> Such ordeals were manipulable, and many undergoing an ordeal with hot iron succeeded. This may have contributed to its considerable popularity as the method of trial of choice.<sup>7</sup> In 1215, the Ordeal was denounced by the Church in the conciliar legislation of the Fourth Lateran Council under Pope Innocent III.<sup>8</sup> As the Clergy were needed to administer the oath that had backed the accusation,<sup>9</sup> the ordeal could not proceed without their support, and secular authorities quickly followed the Church's example by prohibiting ordeal by fire or water as a means of resolving disputes.<sup>10</sup>

1.10 Trial by battle is often considered to be a type of trial by ordeal, a "bilateral ordeal".<sup>11</sup> Here, the parties decided the issues by physical combat, the theory being that Providence would always intervene to ensure victory on the side of the right.<sup>12</sup> This form of trial was invoked in civil cases, and parties to the dispute would often hire champion fighters to engage in battle for them.<sup>13</sup> This may also explain why it was such a popular method amongst the upper classes, who would have been able to afford such unassailable competitors. This method of trial began to wane at the same time as the other early forms of

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<sup>6</sup> Sward "A History of the Civil Trial in the United States" (2003) 51 Kan. LR 347 at 352.

<sup>7</sup> Sward "A History of the Civil Trial in the United States" (2003) 51 Kan. LR 347 at 352.

<sup>8</sup> McAuley "Canon Law and the End of the Ordeal" (2006) 26 Oxford University Press 473.

<sup>9</sup> As per Allen "It must always be remembered...that the accusation was supported by a very solemn oath, and so long as oaths retained their magic, doubtless the theory was that there must be some substance in the accusation, or else the accuser would be blasted on the spot." Allen *Legal Duties* (Oxford 1931) cited in McAuley & McCutcheon *Criminal Liability: A Grammar* (Roundhall Sweet and Maxwell 2000) at 27 fn. 146.

<sup>10</sup> McAuley "Canon Law and the End of the Ordeal" (2006) 26 Oxford University Press 473.

<sup>11</sup> See Pollock & Maitland *The History of English Law Before the Time of Edward 1* (A reprint of 2<sup>nd</sup> ed Cambridge University Press 1968) Vol. 2 at 600; Holdsworth *A History of English Law* (7<sup>th</sup> ed Methuen & Co Ltd 1956) Vol. 1 at 310.

<sup>12</sup> Rosenthal "The Development of the Use of Expert Testimony" (1935) 2 (4) *Law and Contemporary Problems* 406.

<sup>13</sup> Sward "A History of the Civil Trial in the United States" (2003) 51 Kan. LR 347 at 353.

proof, but was not in fact formally abolished until 1818 in the renowned case of *Ashford v Thornton*.<sup>14</sup>

1.11 Another method was the system of compurgation or wager of law where the accused took an oath that he did not commit the crime and produced eleven compurgators to back this claim and testify to his good character.<sup>15</sup> Initially this required eleven neighbours of the accused to testify, but with the centralisation of Royal Justice in the two benches it became costly and unnecessary to expect 11 men to be brought long distances for routine cases. As a result the system evolved to enable the defendant to hire professional compurgators to testify on his behalf and by the end of the 16th century it was the official duty of the court porters to provide them for a fee. This in effect meant the process simply amounted to the defendant's oath coupled by a ceremony for which he paid, and the system of compurgation did not survive after 1600.<sup>16</sup>

1.12 Another factor in the decline of this method was the complexity involved in the oath, as the emphasis was placed here on the oath itself, rather than any probative value of the witness' words.<sup>17</sup> If any of the compurgators missed even one word, the oath failed and the party lost.<sup>18</sup>

1.13 Related to the wager of law system was the system of proof by witnesses. This was a process whereby a party would produce a witness who would swear an oath on the veracity of that party's version of events and attest to their good character. Essentially, success was dependant on the quantity of witnesses, and the party who could produce the most witnesses to back his claim won the lawsuit.<sup>19</sup>

1.14 These older forms of proof all began to decline around the 13<sup>th</sup> century amid a growing realisation that they were irrational and inconsistent methods of resolving disputes. In particular, contemporary Church reformers had become very disillusioned with such forms of proof, and appealing to the

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<sup>14</sup> (1818) 1 B. & Ald. 405.

<sup>15</sup> Baker *An Introduction to English Legal History* (Butterworths 1990) at 87.

<sup>16</sup> Baker *An Introduction to English Legal History* (Butterworths 1990) at 88.

<sup>17</sup> Rosenthal "The Development of the Use of Expert Testimony" (1935) 2 (4) *Law and Contemporary Problems* at 406.

<sup>18</sup> Sward "A History of the Civil Trial in the United States" (2003) 51 Kan. LR 347 at 352.

<sup>19</sup> Rosenthal "The Development of the Use of Expert Testimony" (1935) 2 (4) *Law and Contemporary Problems* at 406; Sward "A History of the Civil Trial in the United States" (2003) 51 Kan. LR 347 at 353.

Judicium Dei to settle legal disputes was criticised as being inconsistent with the principles of theology at the time.<sup>20</sup>

1.15 The vacuum left by the abandonment of these methods of proof required the secular authorities to create or adopt new procedures to carry out their functions.

1.16 Trial by inquisition became the new method of choice in the majority of Western European countries. However in England, the Juries of Presentment introduced by the Assizes of Clarendon and Northampton provided the model for what later became trial by jury.<sup>21</sup> Through jury trial, the adjudication of disputes slowly became centred on the reasoned decision of a body of reasonable human beings who received evidence before them in the form of documents and records, rather than on the outcome of a mechanical procedure of proof. Indeed, Holdsworth argues that it is at this point that we can see an indication of the tentative beginnings of a law of evidence, for example, the introduction of provisions that witnesses should be compelled to attend and testify in common law,<sup>22</sup> and for the cross examination of witnesses by counsel,<sup>23</sup> which helped to clarify the distinction between jurors and witnesses.<sup>24</sup>

1.17 However, it was not the case that the law of evidence had a gradual and consistent development right from the beginning of the system of trial by jury. In fact, the earliest jury trials had few formal procedures, and an elaborate structure of rules of evidence and procedure was not initially considered necessary. The need for such a structure was only recognised towards the end of the 18<sup>th</sup> century when the English legal system underwent what has been termed the “Adversarial Revolution.” This refers to the increasing presence of

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<sup>20</sup> For a detailed discussion of the reasoning see McAuley “Canon Law and the End of the Ordeal” (2006) 26 Oxford University Press 473.

<sup>21</sup> McAuley & McCutcheon *Criminal Liability: A Grammar* (Roundhall Sweet and Maxwell 2000) at 26.

<sup>22</sup> The Act of 1562-1563 Eliz C. 9, §12 (1563).

<sup>23</sup> Sir Thomas Smith *De Republica Anglorum* (M. Dewar ed 1982) at ii 15 Cited in Mitnick “From Neighbour-Witness to Judge of Proofs: The Transformation of the English Civil Juror” 32 (1988) Am. J. Legal Hist. 201 at 204 fn. 20.

<sup>24</sup> Holdsworth *A History of English Law* (Vol. IX 2nd ed Methuen & Co Ltd 1945) at 130.

lawyers in the trial process which until that point had been dominated by the judge.<sup>25</sup>

1.18 ‘Lawyerization’<sup>26</sup> led to criminal proceedings becoming more centred around the presumption of innocence, and also led to a clearer division between jurors and witnesses. As a result, rules governing probative evidence, and what matters could be presented to the jury, became extremely important. Once the trial process became organised around the notion that the elements of the case must be proven by the parties before a jury, the parties began to gain more control over production of evidence in court, and by the end of the 18<sup>th</sup> century a considerable body of evidence law had been developed.<sup>27</sup>

1.19 The requirement that the parties prove their case led to a realisation that the resolution of certain disputes of a technical or complex nature might well require expert or specialised knowledge. However it appears that at the outset the common law struggled to decide how best to acquire and allow such knowledge. In time, three main procedures for importing expert knowledge were developed which will now each be discussed in greater detail.

1.20 In some instances, special juries composed of persons knowledgeable in the subject matter of the particular case were empanelled, effectively a jury of experts. Elsewhere, most notably in courts of admiralty, the court itself appointed ‘court assessors’, to advise it in matters beyond its knowledge. In these cases the court had discretion to pass instructions on to the jury or to be guided by the assessor in making its own findings.<sup>28</sup> Later on, expert witnesses were hired by the parties or the court, a system that has evolved into the present one. The development of these three procedures will now be discussed.

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<sup>25</sup> Langbein “The Criminal Trial before the Lawyers” (1978) 45 U. Chic. LR 263 cited in Golan “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 9.

<sup>26</sup> This term was coined by Langbein in “The Criminal Trial before the Lawyers” (1978) 45 U. Chic. LR 263 cited in McAuley & McCutcheon *Criminal Liability: A Grammar* (Roundhall Sweet and Maxwell 2000) at 37.

<sup>27</sup> Golan “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 9.

<sup>28</sup> Rosenthal “The Development of the Use of Expert Testimony” (1935) 2 (4) *Law and Contemporary Problems* at 407.

## C Special Juries

### (1) Introduction

1.21 The first method of enhancing the knowledge of the jury was not through the use of experts as witnesses or court advisors, but in fact through 'Special Juries.' Oldham argues that the term 'special jury' can have a number of different meanings, but for the purpose of this discussion the term refers to jurors who were specially selected because their special knowledge or experience made them particularly qualified in the facts of the dispute in question, or gave them a special expertise in a particular subject matter.<sup>29</sup>

1.22 The concept of expert or special juries was not a new or novel development, and there are indications of this system dating from as far back as the 14<sup>th</sup> century.<sup>30</sup> According to Thayer;

"What we call the 'special jury' seems always to have been used. It was the natural result of the principle that those were to be summoned who could best tell the fact, the *veritatem rei*."<sup>31</sup>

1.23 By the end of the 19<sup>th</sup> century, the use of special juries was widespread. In England, the first legislation to provide for the regulation of special juries was *An Act for the Better Regulation of Juries*,<sup>32</sup> which provided for the use of such juries wherever they were requested by the parties or they were considered necessary. The 1730 Act was extended to apply in Ireland by sections 3 to 6 of *An Act for the Amendment of the Law with Respect to*

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<sup>29</sup> It could also describe either a jury of individuals of a higher class than usual (in that they satisfied certain property holding requirements), or a 'struck jury', which is one formed by a special procedure allowing parties to strike names from a large panel of prospective jurors. (See Oldham "The Origins of the Special Jury" (1983) 50 University of Chicago LR 137 at 139).

<sup>30</sup> As per Erskine Childers Esq. "Special Juries do not exist, as many people seem to suppose, by the authority of a modern statute; on the contrary, they are as ancient as the law itself." (*R v Lambert & Ors, Printers & Proprietors of the Morning Chronicle* 2<sup>nd</sup> ed., London, 1794 at 16) Cited in Oldham "The Origins of the Special Jury" (1983) 50 University of Chicago LR 137.

<sup>31</sup> Thayer A *Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 94.

<sup>32</sup> *An Act for the Better Regulation of Juries* 3 Geo. II, Cap. 25, (1730) (Cited in: Oldham "The Origins of the Special Jury" (1983) 50 University of Chicago LR 137 at 139-140 fn. 12).

*Outlawries, Special Juries and the Future Effects of Bankruptcy in Certain Cases* 1777,<sup>33</sup> and section 21 of the English *Jury Act* 1826.<sup>34</sup> The Irish *Jury Act* 1833<sup>35</sup> was the first express legislative mention of special juries in this jurisdiction.<sup>36</sup>

1.24 It should be noted however, a number of different types of special juries were used through the centuries; some of the most common ones will now be discussed.

## (2) ***Juries of Neighbours***

1.25 The earliest juries were required to be entirely composed of ‘next neighbours’ i.e. members of the locality where the dispute arose.<sup>37</sup> The reasoning behind this was that they were likely to be knowledgeable about the events in question. They were known as ‘hundredors,’ and the jury effectively amounted to juries of neighbours.

1.26 These early jurors were permitted and in fact expected to learn the facts of the case through their own means,<sup>38</sup> therefore having a jury of inhabitants from the area where the event occurred increased the likelihood of their being well-informed about the event in question.<sup>39</sup> In time, the requirement

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<sup>33</sup> *An Act for the Amendment of the Law with Respect to Outlawries, Special Juries and the Future Effects of Bankruptcy in Certain Cases* (17 & 18 Geo. III, cap. 45) (Cited in: Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19 at 35 fn. 128).

<sup>34</sup> See: Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19 at 35.

<sup>35</sup> 3 & 4 Wm. IV, Cap 91.

<sup>36</sup> This Act consolidated all previous legislation that had dealt with juries. (See; Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19 at 35 fn. 124).

<sup>37</sup> See 28 Edw. 1, ch. 9 (1300) Cited in Mitnick “From Neighbour-Witness to Judge of Proofs: The Transformation of the English Civil Juror” 32 (1988) Am. J. Legal Hist. 201 at 205 fn. 22.

<sup>38</sup> In fact, as they reached a verdict on the basis of their personal knowledge, jurors were held liable for a false verdict and if a later jury found that the first jury had erred, the members of this first jury would be severely punished and their verdict upset. See Holdsworth *A History of English Law* (2nd ed Methuen & Co Ltd 1945) at 333-34.

<sup>39</sup> As per Vaughan J in *Bushell's Case* “Being return'd of the vicinage, whence the cause of action ariseth, the law supposeth them [the jury] thence to have sufficient knowledge to try the matter in issue (and so they must) though no

for an entire jury made up of ‘next neighbours’ became unmanageable, and the rule was altered to require that only a certain number of the jury come from the particular ‘hundred’ in question.<sup>40</sup> These men were then expected to inform the other jurors of the background to the issues.<sup>41</sup>

1.27 However, at this time the distinction between jurors and witnesses, and how information was to be imported into the case, was unclear. The requirement that the jurors be knowledgeable about the facts of the case did not necessarily mean that their knowledge was firsthand, and it was common for jurors to consult witnesses and other sources of evidence before reaching their verdict.<sup>42</sup> As Holdsworth explains,

“...the issue of how a jury came by its knowledge was not originally a matter with which the law concerned itself.”<sup>43</sup>

1.28 The transformation from this type of jury of witnesses into a jury of impartial fact-finders took place gradually over several centuries, and a great deal of uncertainty remains regarding this transformation.<sup>44</sup> For a considerable period of time, the jury as witnesses coexisted with the jury as fact-finder.<sup>45</sup>

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evidence were given in either side in Court, but to this evidence the Judge is a stranger.” (*Bushell’s Case* (1670) Vaughan 1006, 135 at 147).

<sup>40</sup> Oldham explains that there is no uniform definition of the term ‘hundred’, but that historically it was used to describe a subdivision of a county, and was measured by either population or number of villages. (Oldham “The Origins of the Special Jury” (1983) 50 University of Chicago LR 137 at 165).

<sup>41</sup> As per Belknap J in *Wike v Gernon* (1374) Y.B. 48 Edw. III. 30, 17; s.c. Lib. Ass. 48,5; “In an assize in this county, if the court does not see six, or at least five, men of the hundred where the tenements are, to inform the others who are further away, I say that the assize will not be taken...those of one county cannot try a thing which is another county. Cited in Thayer A *Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 91.

<sup>42</sup> Mitnick “From Neighbour-Witness to Judge of Proofs: The Transformation of the English Civil Juror” 32 (1988) Am. J. Legal Hist. 201 at 204.

<sup>43</sup> Holdsworth *A History of English Law* (2nd ed Methuen & Co Ltd 1945) at 333-334.

<sup>44</sup> For a discussion of the evolution from a jury of witnesses to a jury of fact-finders see; Mitnick “From Neighbour-Witness to Judge of Proofs: The Transformation of the English Civil Juror” 32 (1988) Am. J. Legal Hist. 201.

<sup>45</sup> Sward “A History of the Civil Trial in the United States” (2003) 51 Kan. LR 347 at 354.

1.29 Gradually, however, parties were allowed to nominate witnesses to testify publicly in court, and as a result of this development of formal witness testimony, along with clearer rules of evidence and procedure, the number of hundredors required declined through a series of statutes<sup>46</sup> until the requirement was abolished completely for civil cases in 1705.<sup>47</sup> Eventually, the same result was worked out in practice for criminal cases.<sup>48</sup>

### (3) **All Female Juries**

1.30 Another early example of a special jury was the jury of matrons *de ventre inspicioendo*. These were all-female juries commissioned to investigate women in issues relating to disputed pregnancy and in paternity disputes. Such disputes were common in criminal cases, as a woman found guilty of a capital crime was entitled to have the death sentence delayed if she could show that she was pregnant until the child was born. In theory, on birth, the punishment of the defendant could then be carried out but in practice, due to the costs of rearing the newborn, the mother was often subsequently pardoned.<sup>49</sup> As Lambard put it,

“[a female defendant was entitled to] have (for once onely) the benefit of her belly, if it be found by women thereto appointed that she is with child.”<sup>50</sup>

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<sup>46</sup> In the 14<sup>th</sup> century six hundredors were required to be empanelled on the jury (13 Edw. 3, ch. 4 (1360), in the 15<sup>th</sup> century only four hundredors were required (J. Fortescue De Laudibus Legum Angliae ch. 25 A. Amos ed. 1825)) and in the 16<sup>th</sup> century this number had dropped to only two hundredors being required (35 Hen. 8 ch. 6, § 6 III (4) (1543); 27 Eliz., ch. 6 § 5 (1585) Cited in Mitnick “From Neighbour-Witness to Judge of Proofs: The Transformation of the English Civil Juror” 32 (1988) Am. J. Legal Hist. 201 at 205 fn. 22.

<sup>47</sup> *An Act for the Amendment of the Law and Better Advancement of Justice*, 4 & 5 Anne, ch. 16, § 6 (1705) Cited in: Oldham “The Origins of the Special Jury” (1983) 50 University of Chicago LR 137 at 165 fn. 149.

<sup>48</sup> Thayer A *Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 91.

<sup>49</sup> Old Bailey Online “Punishments at the Old Bailey – Late 17<sup>th</sup> Century to Early 19<sup>th</sup> Century” available at <http://www.oldbaileyonline.org/history/crime/punishment.html>.

<sup>50</sup> Lambard *Eirenarcha* 555 (London 1614) Cited in Oldham “The Origins of the Special Jury” (1983) 50 University of Chicago LR 137 at 171.

1.31 In order to determine if the defendant was pregnant, the court would empanel an all-female jury under a writ *de ventre inspiciendo*, a writ to ‘inspect the belly.’ The jury would be sworn in<sup>51</sup> and would then be led to a chamber where they would search and inspect the defendant. The jury would subsequently return a verdict declaring whether or not she was ‘quick with child.’<sup>52</sup>

1.32 If the jury found that she was pregnant, the court would stay her punishment until the next assize. Oldham reports that there is evidence that ‘pleading her belly’ was a common phenomenon among female criminal defendants.<sup>53</sup> However, the defendant would only be entitled to such a reprieve once only. As Blackstone reasons:

“But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a further respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.”<sup>54</sup>

1.33 The writ was also occasionally used in civil cases. Blackstone explains that a jury *de ventre inspiciendo* would be empanelled in situations where a widow “feigns herself with child, in order to exclude the next heir, and a supposititious birth is suspect to be intended.”<sup>55</sup>

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<sup>51</sup> The Clerk of Assize would issue them with the following oath: “You as [matrons] of this Jury shall swear that you shall search and try the Prisoner at the Bar, whether she be quick with Child of a quick Child, and thereof a true Verdict shall return according to the best of your judgment; so help you God.” (The Office of the Clerk of Assize (London 1682 ed.) (1st ed. London 1660) cited in: Oldham “The Origins of the Special Jury” (1983) 50 University of Chicago LR 137 at 171.

<sup>52</sup> Blackstone notes that the required verdict was quick with child, meaning that the pregnancy was sufficiently advanced. “For barely with child, unless it be alive in the womb, is not sufficient.” (Blackstone *Commentaries on the Laws of England* Vol. IX (A Facsimile of the First Edition 1769 University of Chicago Press) Book IV, Ch. 31 at 360.

<sup>53</sup> Oldham “The Origins of the Special Jury” (1983) 50 University of Chicago LR 137 at fn. 190.

<sup>54</sup> Blackstone *Commentaries on the Laws of England* Vol IX (A Facsimile of the First Edition 1769 University of Chicago Press) Book IV, Ch. 31 at 388.

<sup>55</sup> Blackstone *Commentaries on the Laws of England* Vol IX (A Facsimile of the First Edition 1769 University of Chicago Press) Book Iii, Ch. 23 at 362.

#### (4) *Juries of Foreigners*

1.34 The trial of 'aliens or foreigners' also historically gave rise to a specially constituted jury, the jury of the half tongue, or *de medietate linguae*, although this type of jury was not technically designated as 'special'.<sup>56</sup>

1.35 A writ *de medietate linguae* provided that in trials where the defendant was a foreigner, half the jury could be empanelled from juries consisting of half denizens and half foreigners, so that the trial would be more impartial.<sup>57</sup> Thayer argues that the reasoning behind the jury *de medietate linguae*, which was commonly referred to as the party jury, were considerations of policy and fair dealing, rather than on a wish to provide a well-informed or expert jury.<sup>58</sup>

1.36 The jury *de medietate linguae* in fact originated in the treatment of the Jews in medieval England. In 1190, a charter given by King Richard I allowed all Jews - who were considered resident foreigners rather than British subjects - to be tried before a half Jewish jury.<sup>59</sup> A century later, after the expulsion of the Jews from England, foreign merchants took over their role as the primary commercial class. As a result, at common law the right of these common merchants to be tried by a jury half composed of their own countrymen began to develop.

1.37 The right was built on in a number of statutes culminating in a statute of 1354 which codified the right to a half foreign jury where one party was a foreigner, and an entirely foreign jury where both parties were foreigners, in both civil and criminal trials.<sup>60</sup> Although the right was reaffirmed a century later, the party jury gradually began to decline and was banned outright in the

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<sup>56</sup> Robinson "A Historical and Comparative Perspective on the Common Law Jury" in Vidmar (Ed) *World Jury Systems* (Oxford University Press 2000) at 23.

<sup>57</sup> Blackstone *Commentaries on the Laws of England* Vol IX (A Facsimile of the First Edition 1769 University of Chicago Press) Book III, Ch. 23 at 360.

<sup>58</sup> Thayer *A Preliminary Treatise on Evidence at the Common Law* (Reprint of the 1898 edition, Rothman Reprints Inc & Augustus M Kelley Publishers, New Jersey & New York, 1969) at 94 fn. 4.

<sup>59</sup> Ramirez "The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change" (1994) 74 B.U.L. Rev. 777 at 783-784.

<sup>60</sup> Statute 28 Edw. III. c. 18 See: Blackstone *Commentaries on the Laws of England* Vol IX (A Facsimile of the First Edition 1769 University of Chicago Press) Book III, Ch. 23 at 360.

*Naturalisation Act 1870*,<sup>61</sup> as it was no longer perceived that this was the best way to ensure that the trial was fair.

**(5) Juries of Merchants & Other Professionals**

1.38 The use of special juries was also a common occurrence in trade disputes in the city of London from as early as the 1300s. Throughout the 14<sup>th</sup> and 15<sup>th</sup> Centuries, it was often the case that supervisors of the different guilds would bring cases before the mayor against those who were alleged to have committed serious breaches of the trade regulations. The mayor would subsequently summon a jury composed of men of the particular trade in question who would decide if there had been a breach of the trade regulations. The mayor would then impose sentence based on this decision.<sup>62</sup> Examples of breaches of trade regulations include fishing with meshes smaller than those required, improper tanning of hides, improper hats and caps, false tapestry and false wine.<sup>63</sup>

1.39 As well as guild supervisors bringing grievances to the mayor, it also often occurred at this time that private persons, individually or through the public prosecutor, would bring complaints that they were mistreated by a trader, for example that they were sold putrid meat or bad wine. Here also men in the same trade as the accused, and who were knowledgeable about the facts of the case, would be summonsed to give their decision, which the mayor then used in sentencing.<sup>64</sup>

1.40 There are many examples of cases over the centuries that followed which reveal the willingness of the court to allow juries to be specially constituted of members of certain trades or professions where it was considered

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<sup>61</sup> *Naturalization Act of 1870*, 33 & 34 Vict., ch. 14, 5 (Eng.) Cited in Ramirez “The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change” (1994) 74 B.U.L. Rev. 787.

<sup>62</sup> Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard LR 40 at 41.

<sup>63</sup> These and other examples of cases can be seen in Riley *Memorials of London and London Life in the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Centuries* (Longmans Green & Co 1868) (Cited in Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard LR 40 at 41 fn. 2).

<sup>64</sup> Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard LR 40 at 41.

necessary. Oldham cites Sayles early King's Bench cases<sup>65</sup> where juries of clerks and attorneys were empanelled in cases dealing with such issues as falsification of writs by attorneys or extortion by court officials. These expert juries of enquiry became more frequent as time went on as the problem of corrupt behaviour of court officers persisted.<sup>66</sup>

1.41 In 18<sup>th</sup> century London, largely under the auspices of Lord Mansfield, the aid of merchant juries was more and more frequently invoked. This had a significant contribution on the development of a body of commercial law.<sup>67</sup> Legislation was enacted to provide for the use of special juries wherever they were requested by the parties or were considered necessary.<sup>68</sup> Such juries were very commonly used in insurance cases, or cases involving bankers' customs, as it was considered that the special jurors' experience provided a helpful source of knowledge and expertise for the court and the parties to the case.<sup>69</sup>

1.42 However, such juries were not only commonly used at this time within the commercial field; they were also widely used in business disputes such as bankruptcy and debt, as well as a broad range of criminal and civil actions such as libel, slander, conspiracy, criminal conversation, bribery, trespass, assault, assumpsit, trover, replevin, debt, mandamus, actions for ejectment, actions upon bills of exchange, and bonds.<sup>70</sup>

#### **(6)      *The Decline of the Special Jury***

1.43 By the mid 19<sup>th</sup> century, special juries were being requested by parties not to provide specialist knowledge, but to ensure a higher class of juror than would otherwise appear, and special juries were available wherever a

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<sup>65</sup> Sayles (ed) *Select Cases in the Court of King's Bench Volume VI Edward III 1314-1377* (1965 Selden Society) Cited in Oldham "The Origins of the Special Jury" (1983) 50 University of Chicago LR 137 at fn. 215.

<sup>66</sup> Oldham "The Origins of the Special Jury" (1983) 50 University of Chicago LR 137 at 175.

<sup>67</sup> Oldham "Special Juries in England: Nineteenth Century Usage and Reform" *Journal of Legal History* 148.

<sup>68</sup> *English Jury Act 1730* 3 Geo. II, Cap. 25, 1730 (Cited in Oldham "Special Juries in England: Nineteenth Century Usage and Reform" *Journal of Legal History* 151 fn. 18).

<sup>69</sup> Oldham "Special Juries in England: Nineteenth Century Usage and Reform" *Journal of Legal History* 148 at 149.

<sup>70</sup> For examples of these cases where special juries were utilised see Howlin "Special Juries: A Solution to the Expert Witness?" (2004) 12 ISLR 19 at 39-40 fn. 165-179.

party was willing to pay for it.<sup>71</sup> As Sir William Erle commented while testifying before the Select Committee on Special and Common Juries of the House of Commons which was set up to examine the function of juries:

“I believe the intention of the Legislature has been departed from, and to my mind a very pernicious custom has been introduced, whereby the right to resort to a special jury has been so given as to foster the notion of there being class prejudices pervading the jury box, and that a party wanting to rely on a certain class of prejudice, would take one jury, or the other accordingly.”<sup>72</sup>

1.44 Further allegations of corruption and abuse of the special jury system emerged around this time, for example a scathing review by Jeremy Bentham on Jury Packing. In this, he referred to special juries as “an engine of corruption,” and “the Guinea Trade,” and called special jurors “Guineamen,” a reference to the fact that a successful profession could be made as a juryman as they were paid one guinea per case (in sharp contrast with the shilling or eightpence paid to common jurors).<sup>73</sup>

1.45 A more caustic description given to special jurymen was “Guinea pigs,” which highlights the underlying feeling that the authorities were capable of manipulating the selection process to ensure that only chosen men formed the panel of jurors.<sup>74</sup>

1.46 Another problem that was increasingly recognised at the end of the 19<sup>th</sup> century is the fact that the special jury system was being abused where a defendant sought to delay the trial or gain more time. The defendant would

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<sup>71</sup> Oldham “Special Juries in England: Nineteenth Century Usage and Reform” *Journal of Legal History* 148 at 151.

<sup>72</sup> Minutes of Evidence, Select Committee on Special and Common Juries, 7 July 1868, at 47 (Cited in: Oldham “Special Juries in England: Nineteenth Century Usage and Reform” *Journal of Legal History* 148 at 151).

<sup>73</sup> Bentham *The Elements of the Art of Packing, as Applied to Special Juries, Particularly in Cases of Libel Law* (Effingham Wilson 1821) at Ch. 4 § 4 Available at: <http://www.constitution.org/jb/packing.htm>

<sup>74</sup> As per John Horne in *R v Horne* 20 State Trials 651, 687 (1777) “The special jurors...are qualified by the crown; they are esquired by the crown; and these crown esquires always attend upon the special juries...The Solicitor of the Treasury, who is constantly in this employ of striking special juries, knows all the men, their sentiments, their descriptions, and the distinction of men.” (Cited in: Oldham “Special Juries in England: Nineteenth Century Usage and Reform” *Journal of Legal History* 148 at 153).

obtain a rule for a special jury, and this effectively resulted in the trial being postponed.<sup>75</sup>

1.47 Two major statutory reforms were enacted to address these criticisms. The *County Juries Act 1825*,<sup>76</sup> sought to enhance the qualifications and quality of special jurors by requiring them to be merchants, bankers, esquires, or persons of higher degree, however, the absence of an express definition of these terms led to inconsistent and discretionary application of the Act's provisions in different localities.<sup>77</sup> The act also set up a system of anonymous balloting for the selection of jurymen in order to address criticisms about jury packing.<sup>78</sup>

1.48 The *Juries Act 1870*<sup>79</sup> further attempted to redeem the special jury system by establishing further procedural rules for special jurors,<sup>80</sup> and by altering the qualification requirements of special jurors.<sup>81</sup> However, despite these attempted reforms, the special jury's popularity continued to decline, and in the *Juries Act 1949* it was abolished in England in all but the very narrowest category of cases.<sup>82</sup>

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<sup>75</sup> Oldham "Special Juries in England: Nineteenth Century Usage and Reform" *Journal of Legal History* 148 at 158-9.

<sup>76</sup> 6 Geo IV, Cap. 50, section 31-32.

<sup>77</sup> To compensate for the lack of definition, the *Juries Act (Ireland) 1867* was introduced, section 14 of which set out a list of all persons capable of sitting on an expert jury in Ireland. The list included "the sons of Peers, Baronets, Knights and Magistrates, persons who had served the office of Sheriff or Grand Juror, bankers, wholesale merchants who did not carry out any retail trade; traders who were possessed of personal property of the value of £5000, and the sons of such persons." (Howlin "Special Juries: A Solution to the Expert Witness?" (2004) 12 ISLR 19 at 38).

<sup>78</sup> 6 Geo IV, c. 50, section 31. Cited in; Oldham "Special Juries in England: Nineteenth Century Usage and Reform" *Journal of Legal History* 148 at 155.

<sup>79</sup> 33 & 34 Vict. Cap. 77 Cited in; Oldham "Special Juries in England: Nineteenth Century Usage and Reform" *Journal of Legal History* 148 at 159.

<sup>80</sup> 33 & 34 Vict. Cap. 77 sections 11-15, 17, 19.

<sup>81</sup> 33 & 34 Vict. Cap. 77 section 6.

<sup>82</sup> *Juries Act 1949*, 12 & 13 Geo. 6, Ch. 27 sections 18-19. The remaining exception was the City of London Special Jury, which was eventually abolished in 1971 in the *Courts Act 1971* Ch. 23, Para 42.

1.49 The abandonment of the special jury occurred earlier in this jurisdiction, as section 66 of the *Juries Act 1927* provided for the abolition of the two-tiered system of jurors.<sup>83</sup>

## D Court Assessors

1.50 An alternative to enlisting the aid of a special jury that has been used over the centuries by common law courts, most commonly in admiralty cases, was the use of court assessors, or advisors. The purpose of this was to give the court specialist experience, skill or knowledge which it might not normally possess.<sup>84</sup> A concise definition is provided by Dickey who describes a court assessor as:

“[A] person who, by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any questions which might be put to him by the judge on the subject in which he is an assessor.”<sup>85</sup>

1.51 The use of assessors originated in the admiralty courts, and the earliest reported example dates from the 16<sup>th</sup> century.<sup>86</sup> Although there are examples of other courts enlisting the aid of assessors, they were most frequently invoked in nautical proceedings. Statutory provisions remain in force which allow for the appointment of court assessors in court proceedings generally<sup>87</sup> but their actual use, outside nautical proceedings, appears to be limited to patents cases and railway investigations.

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<sup>83</sup> Section 66 of the *Juries Act 1927* states: “(1) On the passing of this Act every provision in any statute, order, rule of court, or other enactment whereby any person is entitled either generally or in particular circumstances to a special jury shall cease to have effect. (2) Every reference in any statute, order, rule of court, or other enactment not repealed or terminated by this Act to a special jury or to a common jury shall be construed and have effect as a reference to a jury under this Act.”

<sup>84</sup> Dickey “The Province and Function of Assessors in English Courts” (1970) 33 MLR 494.

<sup>85</sup> Dickey “The Province and Function of Assessors in English Courts” (1970) 33 MLR 494 at 501.

<sup>86</sup> *Re Rumney and Wood* (1541), Selden Society, Vol. 6, 102 (Cited in Dickey “The Province and Function of Assessors in English Courts” (1970) 33 MLR 494).

<sup>87</sup> Thus, section 59 of the *Supreme Court of Judicature (Ireland) Act 1877* provides for the use of assessors in the High Court and Order 36, rule 41 of the *Rules of the Superior Courts 1986* provides for their appointment “in such manner and

1.52 There were many similarities between a court assessor and an expert witness, as the function of both is to furnish the court with specialist knowledge and information in areas in which they are particularly skilled. Indeed, in some cases assessors were referred to as witnesses, and the information they provide as evidence, a practice that was criticised by Viscount Simons L.C. in *Richardson v Redpath, Brown & Co Ltd*.<sup>88</sup>

“To treat...any assessor, as though he were an unsworn witness in a special confidence of the judge, whose testimony cannot be challenged by cross-examination and perhaps cannot even be fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of assessors are. He is an expert available for the judge to consult if the judge requires assistance in understanding the effect and meaning of technical evidence.”

1.53 This demonstrates that the problem with referring to assessors as witnesses is that key differences existed in reality in the way the two carried out their role and duties. Expert witnesses were appointed and remunerated by the parties whereas assessors were appointed by the court and remuneration depended on the governing statute or the discretion of the court. Furthermore, assessors were not witnesses and so were not sworn and were not subject to cross examination.

1.54 Another difference lies in the fact that assessors are required to furnish the court with advice, in private, to enable it to make its decision, not to bolster the arguments of a party. Therefore, they are not concerned with the

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upon such terms as the court shall direct.” Similarly, under Section 95 of the *Patents Act 1992*, in patents litigation the court may appoint a specially qualified assessor if it thinks fit, and try the case wholly or partially with his or her assistance. Under section 64 of the *Railway Safety Act 1995*, an assessor may be called to assist the court of inquiry set up to investigate railway incidents. In the context of admiralty, under section 38 of the *Merchants Shipping (Investigation of Marine Casualties) Act 2000*, assessors can be enlisted to assist the court in inquiries to investigate marine casualties, and under section 73 of the *Harbours Act 1996* assessors can be recruited if needed where an inquiry has been set up in relation to the revocation or suspension of a pilot’s license. Section 2 of the *Tribunals of Inquiry (Evidence) (Amendment) Act 1979* provides for the use of assessors in tribunals of inquiry. Section 15 of the *Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998* provided that the Committee could appoint an assessor if needed for the performance of its functions.

<sup>88</sup> [1944] A.C. 62.

weight or balance of evidence, and should not be asked to decide on the issues.<sup>89</sup> The distinction between the two is supported by the rule, recognised in a number of English cases throughout the 18<sup>th</sup> century, that expert evidence cannot be adduced on a matter within the scope of knowledge and experience of assessors assisting the court.<sup>90</sup>

1.55 Although it appears that there is considerable value attached to the role of assessors, unease was expressed in a number of cases in the 19<sup>th</sup> century with their function.<sup>91</sup> Regardless of the advice given, it is still the function of the judge to decide on the issues, but increasing concern began to be raised that judges might not fully appreciate this fact and might attach undue importance to the assessors' views. In *The Beryl*<sup>92</sup> case Brett L.J. stated, in the context of nautical proceedings:

"The assessors who assist the judge take no part in the judgment whatsoever: they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill."

However, later on he recognised the reality that:

"Still, it would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called to assist him."<sup>93</sup>

1.56 The perceived danger that a process whereby a judge receives undisclosed specialised knowledge or advice from an assessor whose is under no obligation to disclose the advice given to the judge could lead to an effective transfer of the decision making function from judge to assessor, might well account for the general decline in the use of court assessors. Today, they are most frequently appointed in nautical proceedings and their use elsewhere is limited.

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<sup>89</sup> Dickey "The Province and Function of Assessors in English Courts" (1970) 33 MLR 494 at 501, 504.

<sup>90</sup> *The Gazelle* (1842) 1 Wm. Rob 471, 474; 166 E.R. 648, 649; *Saul v St. Andrew's Steam Fishing Co Ltd, The St. Chad* [1965] Lloyd's Rep 1 (CA).

<sup>91</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 2.14.

<sup>92</sup> (1884) 9 P.D. 137.

<sup>93</sup> (1884) 9 P.D. 137 at 141.

## **E Court Experts and Expert Witnesses**

1.57 The use of special juries declined in the early 20th century and the use of expert witnesses, who were summoned to give advice to the court, greatly increased. However, expert witnesses first made tentative appearances much earlier than this.

1.58 There are many examples of cases dating from as far back as the 14<sup>th</sup> century where skilled persons were summoned to assist the court and, as is evident, when later on concrete rules of evidence were being developed and enforced, the use of expert witnesses continued despite the rule prohibiting opinion evidence.

1.59 Initially, the court itself would summon skilled persons to assist it in deciding on a question of fact where it did not possess the requisite knowledge. As early as 1345, in an appeal of mayhem,<sup>94</sup> the court enlisted the aid of experts when surgeons from London were summoned.<sup>95</sup> Here, the question to be decided by the court was if the appellant should be entitled to bring a case before them, a question which hinged on whether or not his wound was fresh, and thus whether it amounted to a mayhem.<sup>96</sup>

1.60 Similarly in 1494 ‘masters of grammar,’ were summoned to explain the meaning of a Latin word to help construe a bond<sup>97</sup> and in 1554 the court in *Buckley v Rice-Thomas*<sup>98</sup> confirmed that in the context of the case at hand it should be permissible for the court to call grammarians where its own Latin was lacking.<sup>99</sup> Saunders J used the opportunity to give a general statement on when the use of experts might be accepted:

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<sup>94</sup> A mayhem was a common law offence which consisted of the intentional removal of a body part needed by the person to engage in combat.

<sup>95</sup> (1345) Anonymous, Lib. Ass. 28 pl. 5 (28 Ed. III) Cited in Holdsworth *A History of English Law* Vo. 10 (2nd ed Methuen & Co Ltd 1945) at 212.

<sup>96</sup> Holdsworth *A History of English Law* Vo. 10 (2nd ed Methuen & Co Ltd 1945) at 212.

<sup>97</sup> (1494) Anonymous 21 H. VII. 33 pl. 30 Cited in Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard LR 40 at 43 fn. 2.

<sup>98</sup> (1554) Plowden 124; 75 ER 182.

<sup>99</sup> In this case the question arose about the true meaning of the Latin word ‘licet,’ as the defendant claimed that the use of this word made the plaintiff’s allegations uncertain. It was argued that the word ‘licet’ is “not an allegation in fact....but is only an argumentative allegation” Staunford J held; “In order to understand it

"If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation."<sup>100</sup>

1.61 To further this argument, Saunders J cites earlier examples of cases where the court enlisted the aid of experts in coming to its decision. Amongst these:

"....a case where excommengement was pleaded against one, and the party said he ought not to be disabled thereby, because there was an appeal pending thereof, there the Judges enquired of them that were well versed in the canon law touching the force thereof"<sup>101</sup>

1.62 This demonstrates that the practice at this time was for the court, rather than the parties to call the experts. Holdsworth explains that experts at this time were more in the kin of "expert assistants to the court" than witnesses called by the parties, which "naturally prevented any question from being raised as to their information in the aspect of testimony to the jury."<sup>102</sup>

1.63 Therefore while the court enlisted the aid of experts, they were not expert *witnesses* in the modern sense, because as Rosenthal argues, "We can look for the expert witnesses only when proof of facts by witnesses, rather than by the personal knowledge of the tribunal, becomes accepted."<sup>103</sup>

1.64 In 1562 the *Statute of Elizabeth* was passed which compelled witnesses to appear in court.<sup>104</sup> This greatly contributed to the development of

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truly, being a Latin word, we ought to follow the steps of our predecessors Judges of the law, who, when they were in doubt about the meaning of any Latin words, enquired how those that were skilled in the study thereof took them, and pursued their construction" (Per Staunford J *Buckley v Rice Thomas* (1554) Plowden 124; 75 ER at 189).

<sup>100</sup> Per Saunders J. *Buckley v Rice Thomas* [1554] Plowden 124; 75 ER at 192.

<sup>101</sup> *Buckley v Rice Thomas* (1554) Plowden 124; 75 ER at 193.

<sup>102</sup> Holdsworth *A History of English Law* Vol. 10 (2nd ed Methuen & Co Ltd 1945) at 212.

<sup>103</sup> Rosenthal "The Development of the Use of Expert Testimony" (1935) 2 (4) *Law and Contemporary Problems* at 408.

<sup>104</sup> Act of 1562-1563, 5 Eliz. Ch. 9 Paragraph 12 of this Act imposed a penalty of ten pounds on any person who refused to attend when served with compulsory process to testify, and created a private cause of action against the reluctant

the modern system of deciding the case on the basis of the testimony by witnesses before the jury and by the mid 17<sup>th</sup> century, a clearer distinction could be made between jurors and witnesses. By the 18<sup>th</sup> century the adversarial system and the concept of proof by witnesses before the jury had firmly taken shape.

## F Theory and Nature of the Opinion Rule

1.65 As mentioned above, by the end of the 18<sup>th</sup> century, once the notion that parties were responsible for their own proof in court had taken hold, they began to gain more control over production of evidence and examination of witnesses in court, and a considerable body of evidence law had been developed.<sup>105</sup> A number of exclusionary rules developed to govern the content and presentation of evidence before the jury, most notably the rule against hearsay, which sought to limit witness testimony to that based on personal observation, and the opinion rule, which sought to control the way in which witnesses gave their testimony.<sup>106</sup>

1.66 The opinion rule remains one of the chief exclusionary rules of evidence today and provides that witness testimony in the form of opinion or inference is inadmissible in both civil and criminal proceedings, and witnesses are confined to giving evidence of facts. The doctrine was in fact summarised as early as 1651 by Vaughan C.J. in *Bushell's Case*:<sup>107</sup>

"The verdict of a Jury and Evidence of a Witness are very different things, in the truth and falsehood of them; a Witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a Juryman swears as to what he can infer and conclude from the Testimony of such Witnesses by the act and force of the Understanding, to be the Fact inquired after, which differs nothing in the Reason, though much in the punishment, from

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witness in favour of "the party grieved" for the "loss and hindrance that the party which procured the said process shall sustain, by reason of the non-appearance of the said witness." (Cited in Wasserman "The Subpoena Power: Pennoyer's Last Vestige" (1989) 73 Minn. L. Rev. 37).

<sup>105</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 9.

<sup>106</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 10.

<sup>107</sup> (1671) Vaughan, 142, 22 Car. 2. Cited in Hand "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard LR 40 at 44-45.

what a Judge, out of various cases consider'd by him, inferrs to be the Law in the Question before him.”

1.67 Wigmore argues that in the 18<sup>th</sup> century when the rule began to develop, it was concerned with testimonial qualifications and so sought to ensure that only ‘men of science’ would testify on ‘matters of science.’<sup>108</sup> However, nowadays the primary rationale for the rule is that it prevents witnesses from usurping the role of the tribunal of fact whose job it is to make inferences and reach conclusions on the basis of facts placed before them. As per Kingsmill Moore J in the more recent case of *AG (Ruddy) v Kenny*:<sup>109</sup>

“It is a long standing rule of our law of evidence that, with certain exceptions, a witness may not express an opinion as to a fact in issue...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.”<sup>110</sup>

1.68 Wigmore contends that a related purpose of the rule is to ensure that unnecessary testimony is not placed before the jury, as he explained:

“[w]herever inferences and conclusions can be drawn by the jury as well as the witness, the witness is superfluous.”<sup>111</sup>

1.69 The opinion of an ordinary witness is thus seen as having no useful bearing on the case. This rationale was also referred to by Kingsmill Moore J in *AG (Ruddy) v Kenny*,<sup>112</sup> where he explained that the rule ensures that possible hazards such as “prejudice, faulty reasoning and inadequate knowledge,” which might be introduced if a witness were allowed to give opinion evidence, are avoided.<sup>113</sup>

1.70 The development in the exclusionary rule of opinion evidence in the 18<sup>th</sup> century was accompanied by the simultaneous development of a wide exception to the rule in favour of expert witnesses. It can be seen that the

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<sup>108</sup> Wigmore *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol. VII at §1918.

<sup>109</sup> (1960) 94 I. L.T.R. 185.

<sup>110</sup> *AG (Ruddy) v Kenny* (1960) 94 I. L.T.R. 185 at 190.

<sup>111</sup> Wigmore *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol. VII at §1918.

<sup>112</sup> (1960) 94 I. L.T.R. 185.

<sup>113</sup> (1960) 94 I. L.T.R. 185 at 190.

'expert witness' developed as an exception to the developing adversarial structure, as according to Golan, it was "the only type of witness the new system could not rationalise under its evolving doctrines."<sup>114</sup>

1.71 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.<sup>115</sup> In the absence of any other legal test, the opinion rule therefore provides the principal legal distinction between ordinary and expert witnesses.<sup>116</sup>

1.72 This exception to the opinion rule in favour of experts is well evidenced by examples from the late 17<sup>th</sup> century onwards where experts were permitted to give testimony of their conclusions to the jury. For example in *Alsopp v Bowtrell*<sup>117</sup> the jury accepted the testimony of physicians who argued in a disputed legitimacy case that a child born forty weeks and nine days after the death of the mother's husband could well be his child, as the birth could have been delayed by ill usage and lack of strength.

1.73 In the *Witches Case*<sup>118</sup> a doctor summoned to testify clearly believed the accused persons were witches and supported this belief with a scientific explanation of the fits they underwent. However, it is not clear from the judgment who called the doctor to testify.<sup>119</sup>

1.74 In the 1678 murder trial *R v Pembroke*<sup>120</sup> physicians were called by both sides to testify as to the real cause of the deceased's death and as to whether or not a man can die of his wounds without fever. Hand points out that the only striking feature of this case is that at no stage in the course of proceedings was the giving of such testimony seen as unusual.<sup>121</sup> This implies

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<sup>114</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 10.

<sup>115</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 10.

<sup>116</sup> Rosenthal "The Development of the Use of Expert Testimony" (1935) 2 (4) *Law and Contemporary Problems* at 412.

<sup>117</sup> (1620) Cro. Jac. 541.

<sup>118</sup> (1665) 6 Howell, State Trials, 687.

<sup>119</sup> Rosenthal "The Development of the Use of Expert Testimony" (1935) 2 (4) *Law and Contemporary Problems* at 409.

<sup>120</sup> (1678) 1b. 1337, 1228, 1340, 1341.

<sup>121</sup> Hand "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard LR 40 at 46.

that the giving of opinion evidence by experts was by this stage an accepted exception to the rule against opinions.

1.75 Similarly, in a case from the following year, *R v Greene*,<sup>122</sup> a physician was summoned by the prosecution to support the theory that the victim's death could not have been caused by wounds on his body as there was no blood and that he must have therefore died of strangulation.

1.76 There are several cases dating from the 18<sup>th</sup> century which show that by then the practice of giving expert testimony was well settled and accepted.<sup>123</sup> However, the rules of evidence also began to be more strictly enforced, including the general rule excluding the opinion of witnesses who were not experts.

1.77 This was emphasised in *R v Heath*<sup>124</sup> a perjury case where the defendant swore that Lady Altham had never had a child. In the course of proceedings, a witness, who had testified he had seen Lady Altham with "a big belly" was asked "what do you apprehend became of that big belly?" The court stressed that the opinion of a witness can only be given where it is the best evidence available in the case, highlighting the exclusionary nature of opinion evidence.<sup>125</sup>

1.78 Similar developments took place in civil cases. *Folkes v Chadd*,<sup>126</sup> is regarded as the seminal precedent that established the admissibility of expert testimony and confirmed that expert witnesses could testify directly to the jury

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<sup>122</sup> (1679) 7 Howell, State Trials, 185, 186.

<sup>123</sup> See for example *R v Kidd*, (1701) 14 Howell, State Trials, 137; *R v Blandy*, (1744) 18 Howell, State Trials, 1138; Cited in; Hand "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard LR 40 at 48.

<sup>124</sup> (1744) 18 Howell, State Trials, 70 Cited in Hand "Historical and Practical Considerations Regarding Expert Testimony" (1901) 15 Harvard LR 40 at 47 fn. 1.

<sup>125</sup> Per Irish K.B., Marley C.J., Ward and Blennerhassett JJ.; "The apprehension of a witness is asked where no other evidence can be had in capital cases; as where a witness is produced to prove a wound was given, he is asked whether he apprehends that wound was the cause of death. That must be asked, for he cannot tell otherwise. It is the best evidence that can be had in that case. But as to a fact, if you make the apprehension of a witness necessary, it takes away all proof of fact." (*R v Heath* (1744) 18 Howell, State Trials, 70 at 76).

<sup>126</sup> (1782) 3 Douglas 157.

as a witness for either party.<sup>127</sup> Here, a trespass action was taken against the defendant for threatening to cut down an embankment erected by the plaintiffs to prevent overflowing of the sea on to the plaintiff's land. The defendants argued that they were justified and entitled to cut down the embankment as it had caused the flooding of the harbour leading to extensive damage.

1.79 On appeal, Lord Mansfield ordered a new trial on the basis that the testimony of a renowned engineer in favour of the plaintiffs, which amounted to an opinion about the cause of the damage, should have been held admissible. It had been argued that the testimony should be excluded as it "was matter of opinion, which could be no foundation for the verdict of the jury, which was to be built entirely on facts, and not on opinions."<sup>128</sup> This however was rejected by Lord Mansfield who used this opportunity to outline the parameters of the admissibility of expert testimony:

"It is objected that Mr. Smeaton is going to speak, not as to facts, but as to opinion. That opinion, however, is deduced from facts which are not disputed – the situation of banks, the course of tides and of winds and the shifting of the sands....The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House.<sup>129</sup> I cannot believe that where the question is, whether a defect arises from a natural or artificial cause, the opinions of men of science are not to be received....the cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Therefore we are of the opinion that his judgment, formed on the facts, was very proper evidence."<sup>130</sup>

1.80 The development of the opinion rule gave rise to another related rule of evidence namely the requirement for a hypothetical question where the expert has not observed the facts at issue himself. This limits the questions that

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<sup>127</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 11.

<sup>128</sup> *Folkes v Chadd* (1782) 3 Douglas 157 at 159.

<sup>129</sup> Trinity House is a still-existing corporation that is concerned with the safety of shipping and the well-being of sea-farers. It is thought to have originated in a 1514 by Charter of King Henry VIII to a fraternity of mariners "so that they might regulate the pilotage of ships in the King's streams." (Ruddock "The Trinity House at Deptford in the Sixteenth Century" (1950) 65(257) *The English Historical Review* 458).

<sup>130</sup> *Folkes v Chadd* (1782) 3 Douglas 157 at 159.

can be asked of the expert where he does not have personal observation, and provides a means for the jury to test the opinion by explaining the grounds for the opinion.<sup>131</sup>

1.81 The hypothetical question requirement is first to be seen in cases from the late 17<sup>th</sup> and early 18<sup>th</sup> century when the distinction between ‘opinion’ and ‘fact’ became more clear. Hand cites the celebrated murder case of *Spencer Cowper*<sup>132</sup> where the question arose whether the deceased had been drowned and where surgeons and sailors were enlisted to answer hypothetical questions on the circumstances under which a deceased body would sink.

1.82 In the murder trial *R v Ferrers*<sup>133</sup> the accused raised the defence of insanity. To support this defence, a number of lay witnesses were called to testify about the purported insane acts committed by the defendant. Subsequently, a surgeon was called and asked if he would conclude based on the facts and the testimony of the preceding witnesses, that the defendant was insane. Pursuant to the Crown Counsel’s objection to this line of questioning, Lord Mansfield held that the defendant was not entitled to put such a general question to the surgeon but that he could specify the specific facts, already submitted in evidence, on which the surgeon would base his opinion, even though the surgeon had not had firsthand experience of the purported acts of the defendant.<sup>134</sup>

1.83 Similarly, in *Beckwith v Sydebotham*,<sup>135</sup> Lord Ellenborough confirmed that expert witnesses were entitled to be summoned, even where they had not had firsthand experience with the facts of the issue. However, the point was stressed that they were required to give their opinion on the basis of hypothetical questions:

“As the truth of the facts stated to them was not certainly known, their opinion might not go for much; but still it was admissible evidence. The prejudice alluded to might be removed by asking them, in cross-examination, what they should think upon the statement of facts contended for the other side.”<sup>136</sup>

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<sup>131</sup> Rosenthal “The Development of the Use of Expert Testimony Law and Contemporary Problems” (1935) 2 (4) *Expert Testimony* at 414.

<sup>132</sup> (1699) 13 Howell, State Trials, 1126-1135.

<sup>133</sup> (1760) 19 Howell, State Trials, 924-944.

<sup>134</sup> Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard LR 40 at 48.

<sup>135</sup> 1 Camp. 116.

<sup>136</sup> *Beckwith v Sydebotham* 1 Camp. 116 at 116.

1.84 Much discussion on the issue was given in *Mc'Naghten's Case*<sup>137</sup> in 1843 where the question arose if a medical expert could rule on the sanity of the accused at the time of the crime from the testimony of the witnesses at the trial, without having firsthand experience of the accused prior to the trial. The majority of the Justices held that he could not be asked his opinion on such issues, as explained by Tindal J:

“...because each of those questions involves a determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible.”<sup>138</sup>

1.85 Tindal J’s judgment highlights that the requirement for hypothetical questions has largely been motivated by a need to prevent the usurpation by the expert of the jury’s power and function to decide on the facts of the case. However Wigmore argues that, beneficial as the hypothetical question rule is,

“Misused by the clumsy and abused by the clever, [it] has in practice led to intolerable obstruction of truth.”<sup>139</sup>

## **G A Growing Recognition of the Problems with Expert Testimony**

1.86 The foregoing discussion demonstrates that the adversarial system also had a significant effect on the manner in which experts gave their opinions in court. Whereas previously experts were drafted in by and to be of assistance to the court, from the 18<sup>th</sup> century onwards, as demonstrated by *Folkes v Chadd*,<sup>140</sup> experts began to be directly employed by the parties themselves to help advance their respective cases. Golan explains that “as the court assumed a neutral position, free reign was increasingly given in the courtroom to partisan views.”<sup>141</sup>

1.87 However, decisions from this time show a considerable lack of unease about the potential problems that could arise with the switch from court appointed, independent and impartial expert advisors to partisan ‘experts for

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<sup>137</sup> (1843) 10 Cl. & Fin. 200.

<sup>138</sup> *Mc'Naghten's Case* (1843) 10 Cl. & Fin. 200 at 212.

<sup>139</sup> Wigmore *A Treatise on the Anglo-American System of Evidence in Trial at Common Law* (3rd edition, Little Brown and Company, Boston, 1940) Vol. VII at §686.

<sup>140</sup> (1782) 3 Douglas 157.

<sup>141</sup> Golan “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 10.

hire.' For example in *Folkes v Chadd*,<sup>142</sup> Lord Mansfield explained his decision to allow the opinion of the expert engineer on the basis that "the opinion of men of science" can be of considerable value where the issue in question is "a matter of science."<sup>143</sup> As such, he failed to refer to the fact that the particular man of science in question had been specifically selected by one of the parties to advance their case.

1.88 Golan argues that this shows little awareness of the potential difficulties that might arise with partisan experts.<sup>144</sup> He points out that the failure to identify potential problems proved unfortunate, as "by the mid 19<sup>th</sup> century partisan expert testimony become an acrimonious and persistent thorn in the side of the common law."<sup>145</sup>

1.89 As the 19<sup>th</sup> century progressed, the growth and spread of industry meant the types and quantity of expert witnesses appearing in trials had rapidly increased. At the same time, an undercurrent of dissatisfaction with the expert witness system had become stronger and its opponents louder.

1.90 In *Severn, King and Company v Imperial Insurance Company*<sup>146</sup> the types of problems that could arise with expert testimony, such as conflicting experts, became apparent. Here, the plaintiff's sugar factory had been destroyed by fire and they took a civil case against the defendant insurance company to recover their losses when the company refused to pay out compensation. The defendants argued that they were entitled to refuse to pay out as their contract with the plaintiffs had been rendered void by the fact that the plaintiffs had, without informing the insurance company, introduced a new method of sugar purification three months prior to the fire, and that this method was considerably more dangerous than the previous method used.

1.91 At trial, the case essentially consisted of conflicting evidence from a torrent of distinguished men of science on either side testifying as to the dangers involved in the different methods of sugar refining, arguments backed

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<sup>142</sup> (1782) 3 Douglas 157.

<sup>143</sup> *Folkes v Chadd* (1782) 3 Douglas 157 at 159.

<sup>144</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 13.

<sup>145</sup> Golan "The History of Scientific Expert Testimony in the English Courtroom" (1999) 12 *Science in Context* 7 at 14.

<sup>146</sup> *The Times* April 14, 1820.

up with contradictory definitions, observations and experiments and conflicting evidence.<sup>147</sup> According to Dallas CJ:

“[the experts] left the court in a state of utter uncertainty; and the two days during which the results of their experiments had been brought into comparison, were days not of triumph, but of humiliation to science.”<sup>148</sup>

1.92 *The Times* reported Dallas CJ’s harsh criticism of the partisanship and bias evident from the conflicting experimental evidence adduced by experts on both sides:

“It must be a matter of general regret to find the respectable witnesses to whom [Dallas CJ] was alluding drawn up, not on one side, and for the maintenance of the same truths, but, as it were, in martial and hostile array against each other.”<sup>149</sup>

1.93 Similar criticisms were made about the practice of ‘shopping’ for partisan or biased experts by Jessell LJ in *Thorn v Worthing Skating Rink Co.*<sup>150</sup>

“A man may go, and does sometimes, to a half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone: the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case,

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<sup>147</sup> After hearing two days of expert testimony the jury found in favour of the plaintiffs and the insurance company appealed on the basis that the verdict had been reached against the weight of the evidence. The court suspended the appeal until suits against other insurance companies who had refused to pay out to the plaintiffs had been settled. The next suit, against the *Phoenix insurance company*, involved the same litany of experts and same amount of contradictory experiments, and was also found in favour of the plaintiffs. No other trials were reported. (Golan “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 20).

<sup>148</sup> *Severn, King and Company v Imperial Insurance Company* *The Times* April 14, 1820.

<sup>149</sup> *Severn, King and Company v Imperial Insurance Company* *The Times* April 14, 1820.

<sup>150</sup> (1877) 6 Ch D 415.

where a person wanted a certain thing done, that they went to sixty-eight people before they found one.”<sup>151</sup>

1.94 As these cases demonstrate, by the mid 19<sup>th</sup> century, judges were increasingly critical of ‘expert shopping’ and of those expert witnesses who acted as partisan advocates for the party they represented manifested by the experience of experts being in constant conflict. Experts employed in such cases were highly paid, therefore, as Golan puts it:

“...their conduct was seen as the corruption of their science, of selling its credibility to the higher bidder.”<sup>152</sup>

1.95 Despite these criticisms, and despite numerous calls from both members of the scientific and legal communities for reform of the system of expert testimony to the effect that the expert witness would be employed independently from the parties or as an advisor to the court itself, as the 19<sup>th</sup> century progressed the system remained one whereby clients could shop around to find an expert who would give a suitable opinion. As Golan explains;

“The scandals were frequent, but they were generally justified by the legal profession as a price worth paying in what was believed to be a competitive free market of legal evidence that constituted both the best mechanism of proof-testing and the best protection from abuse of executive power.”<sup>153</sup>

1.96 At the end of the 19<sup>th</sup> century therefore, the expert witness, in the modern sense of the term, had become a key figure in court proceedings. As we shall see in the following chapters, over time stricter admissibility and procedural requirements have been applied to the system of expert testimony which has helped to reduce the potential for abuse.

1.97 However, the historic analysis in this chapter reveals that the key criticisms of expert testimony, still frequently raised today, have existed ever since expert witnesses have been used in the courts and therefore this debate is not a new but a considerably antiquated one.

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<sup>151</sup> *Thorn v Worthing Skating Rink Co* (1877) 6 Ch D 415.

<sup>152</sup> Golan “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 20.

<sup>153</sup> Golan “The History of Scientific Expert Testimony in the English Courtroom” (1999) 12 *Science in Context* 7 at 24.

## H Conclusion

1.98 Today, the opinion rule, which holds that witness testimony in the form of opinion is inadmissible in both civil and criminal proceedings, and that witnesses are confined to giving evidence of facts, is firmly entrenched in the rules of evidence. As per Kingsmill Moore J in *AG (Ruddy) v Kenny*:<sup>154</sup>

“It is a long standing rule of our law of evidence that, with certain exceptions, a witness may not express an opinion as to a fact in issue...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.”<sup>155</sup>

1.99 The admissibility of expert evidence is the principal exception to the rule. An opinion may be given by a witness who has expertise in a particular area that is relevant to the issue at hand. The purpose of this exception is that such evidence provides the judge or jury with the necessary specialist criteria for testing the accuracy of their conclusions, and enables them to form their own independent judgment by applying these criteria to the facts proven in evidence.<sup>156</sup>

1.100 In order to adduce expert evidence, the party will need to prove that the evidence is needed in the circumstances and that the person in question is suitable to give expert evidence on the issue. The burden of proof of expertise rests on the party wishing to adduce the witness in evidence.

1.101 It is ultimately the decision of the court to allow evidence of experts. The two main requirements that a party must satisfy in order to be permitted to adduce expert evidence in court are;

- It must be shown that the expert evidence is necessary and relevant in the circumstances
- It must be established that the witness is a qualified expert

1.102 These two requirements will be discussed in greater detail in the following chapters.

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<sup>154</sup> (1960) 94 I. L.T.R. 185.

<sup>155</sup> *AG (Ruddy) v Kenny* (1960) 94 I. L.T.R. 185 at 190.

<sup>156</sup> As per Cooper LJ in *Davie v Edinburgh Magistrates* [1953] SLT 54.

## **CHAPTER 2        ADMISSIBILITY OF EXPERT EVIDENCE**

### **A            Introduction**

2.01 This chapter sets out the current rules and procedures relating to the use of expert evidence in Ireland. Part B outlines the main rules of evidence which apply to the giving of expert testimony and the necessary elements that need to be proved. Part C lists the various categories of issues which the court allows to form the subject matter of expert testimony.

2.02 Part D examines the permitted scope of expert testimony and discusses how the court determines how a particular matter is outside the range of knowledge of the finder of fact. Part E discusses the reasons behind the development of strict rules of evidence applying to expert witnesses by highlighting some of the problems that can arise in this regard, including the possibility of the usurpation by the expert witness of the role of the judge or jury.

2.03 Finally, Part F queries whether there is a need to impose an additional barrier to admissibility to ensure expert evidence is reliable by introducing a formal reliability test that all parties seeking to adduce expert evidence would have to satisfy.

### **B            Rule against Opinion Evidence**

2.04 The general rule is that witness testimony in the form of opinion is inadmissible in both civil and criminal proceedings, and witnesses are confined to giving evidence of facts. The primary rationale for this rule is that it prevents witnesses from usurping the role of the tribunal of fact whose job it is to make inferences and reach conclusions on the basis of facts placed before them.<sup>1</sup> As Kingsmill Moore J stated in *AG (Ruddy) v Kenny*:<sup>2</sup>

"It is a long standing rule of our law of evidence that, with certain exceptions, a witness may not express an opinion as to a fact in issue...It is for the tribunal of fact – judge or jury as the case may be

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<sup>1</sup> McGrath *Evidence* (Thomson Roundhall 2005), p.311.

<sup>2</sup> (1960) 94 I.L.T.R. 185.

– to draw inferences of fact, form opinions and come to conclusions.”<sup>3</sup>

### **(1)      *Exception to Exclusionary Rule: Expert Opinion Evidence***

2.05     The main exception to the exclusionary rule is that an opinion may be given by a witness who has expertise in a particular area which is relevant to the issue at hand. The purpose of this is to provide the judge or jury with the necessary specialist criteria for testing the accuracy of their conclusions, and enable them to form their own independent judgment by applying these criteria to the facts proved in evidence.<sup>4</sup>

2.06     This was considered by Kingsmill Moore J in *AG (Ruddy) v Kenny*<sup>5</sup> where he explained that:

“...the nature of the issue may be such that even if the tribunal of fact had been able to make the observations in person he or they would not have been possessed of the experience or the specialised knowledge necessary to observe the significant facts, or to evaluate the matters observed and to draw the necessary inferences of fact.”<sup>6</sup>

2.07     Based on the inherent subjectivity and potential for difficulties with opinion evidence the exception to the exclusionary rule is strictly interpreted. As will be discussed below, the admissibility of expert evidence is governed by a number of rules and conditions in terms of the types of issues on which expert opinion evidence will be permitted and the scope of evidence that can be given.

### **(2)      *Necessary Elements to Prove Necessity for Expert Testimony***

2.08     In order to be authorised, the party will need to prove that expert evidence is needed in the circumstances and that the person in question is suitably qualified to give expert evidence on the issue. The burden of proof of expertise rests on the party wishing to adduce the witness in evidence.

2.09     The two main requirements that a party must satisfy in order to be permitted to adduce expert evidence in court are;

- i)       It must be shown that the expert evidence is necessary in the circumstances in that it is relevant and that it has probative value.
- ii)      It must be established that the witness is a qualified expert.

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<sup>3</sup> (1960) 94 I.L.T.R. 185 at 190.

<sup>4</sup> As per Cooper LJ in *Davie v Edinburgh Magistrates* [1953] SLT 54.

<sup>5</sup> (1960) 94 I.L.T.R. 185.

<sup>6</sup> *AG (Ruddy) v Kenny* (1960) 94 I.L.T.R. 185 at 190.

2.10 The first of these requirements will now be examined in greater detail by considering the various categories of expert evidence that have been recognised and, once the evidence is considered as falling within a permitted category, the scope of any such evidence that may be given.

2.11 The second of these categories involves an examination of how the courts have interpreted the concept of an expert for the purposes of the giving of expert testimony. This will be looked at in greater detail in chapter three.

### C The Categories of Expert Evidence

2.12 As a general rule, expert evidence will be allowed in relation to all matters that are outside the scope of the knowledge and expertise of the finder of fact. As Pigot C.B. pointed out in *McFadden v Murdock*,<sup>7</sup> expert evidence can be given;

“...wherever peculiar skill and judgment, applied to a particular subject, are required to explain results, and trace them to their causes.”<sup>8</sup>

2.13 Notwithstanding this generality, Hodgkinson and James have identified a number of different categories of evidence that can be given by expert witnesses.<sup>9</sup> They find that five such categories of expert evidence can be distinguished.

- i) Expert evidence of opinion, based on facts that have been adduced before the court.
- ii) Expert evidence to explain technical or complex subject areas or the meaning of technical terminology.
- iii) Expert evidence of fact, on an issue that requires expertise to fully comprehend, observe and describe.
- iv) Expert evidence of fact, on an issue that does not require expertise in order to fully observe, comprehend and describe, but which is a necessary preliminary to the giving of evidence in the other four categories.
- v) Admissible hearsay of a specialist nature.

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<sup>7</sup> (1867) 1 I.C.L.R. 211.

<sup>8</sup> *McFadden v Murdock* (1867) 1 I.C.L.R. 211 at 218.

<sup>9</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 2-001 – 2-006.

2.14 These categories however undoubtedly overlap and evidence sought to be given in a particular case may easily fit into a number of different categories.

**(1) Evidence in the form of Opinion Based on Facts Given in Court**

2.15 Expert opinion evidence is admissible in respect of any matter requiring expertise that is necessary to explain a result or fact that is admitted in court. It has long been recognised by the common law that “the opinion of scientific men upon proven facts may be given by men of science within their own science.”<sup>10</sup>

2.16 Ultimately whether the 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. However, 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. The principles governing the scope of expert evidence and assessing the boundaries of knowledge of a jury or court will be discussed below.

**(a) Types of Expert Opinion Evidence**

2.17 Expertise has however since expanded far beyond the traditional boundaries of professional expertise as the growth in demand for specialised knowledge has led to related growth in the demand for specialist expertise in increasingly complex issues.

2.18 Another recent phenomenon is the development of a dedicated ‘litigation support industry.’ This describes the trend where certain persons have developed skills which are solely geared towards providing expert evidence, for example accident reconstruction and care experts.<sup>11</sup>

2.19 The significantly lucrative nature of the expert evidence ‘industry’ has fuelled this exponential growth, but also highlights the risk that the process could be abused for profit if left unregulated. However, the list of categories of subjects is not exhaustive and continues to expand.

2.20 Persons regularly called as experts are those in the medical field such as physiotherapists, occupational therapists and psychologists who are often called in personal injuries cases or to give an opinion on the mental state of an individual.

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<sup>10</sup> *United States Shipping Board v St. Albans* [1931] AC 632.

<sup>11</sup> Lord Woolf (1996) *Access to Justice, Final Report*, HMSO at 137.

2.21 Other growing areas of expertise include forensic accounting and computer analysis to tackle the rise in fraud cases, engineering, actuary, insurance, handwriting comparison and recognition, accident investigation, facial mapping and identification, DNA, blood, urine, blood-alcohol and drug-testing, educational issues, art-related matters such as antiques, and ballistics.<sup>12</sup>

2.22 Where experts have been appointed to give opinion evidence about particularly technical or scientific concepts, they may be required to give a great deal of factual background about the complex concepts on which they base their opinion. Therefore, this category of evidence often overlaps with the categories discussed below, and in reality the evidence given by most experts will entail a mixture of expert opinion and specialised fact.

**(2) *Expert Evidence to Explain Complex Subject Matters or Technical Terminology***

2.23 One of the more common reasons a party seeks to have expert evidence adduced, effectively the 'bread and butter of expert evidence,'<sup>13</sup> is to explain complex, technical, or scientific topics to a judge or jury that is completely unacquainted with these concepts.

**(a) *Types of Factual Expert Evidence***

2.24 Whilst expert evidence of fact can be adduced on any issue that requires it, in practice there are a number of technical and scientific areas that typically form the subject matter of factual expert evidence.

**(i) *DNA Principles and Terminology***

2.25 In recent years, the use of DNA evidence in trials, particularly in criminal trials by the prosecution, has burgeoned. However, although the public at large is now tentatively acquainted with the principles underlying the use of such evidence, most of this knowledge has been imparted through the media, television and film, and thus the public perception of such evidence may be inaccurate. As a result, expert evidence continues to be necessary in any case involving DNA evidence to explain to the jury the complex principles of DNA technology and evidence.<sup>14</sup>

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<sup>12</sup> Hannibal & Mountford *The Law of Civil and Criminal Evidence. Principles and Practices* (Pearson Education 2002) pg. 55.

<sup>13</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 2-001 – 2-006.

<sup>14</sup> See the cases discussed in the Commission's *Report on the Establishment of a DNA Database* (LRC 78-2005), including *The People (DPP) v Mark Lawlor* Central Criminal Court, 2 December 1995; *The People (DPP) v Ian Horgan Irish*

### **(ii) Patent Cases**

2.26 Expert witnesses are also frequently called in patent cases, as the concepts involved are particularly intricate. Malek notes that experts are called in patent cases to explain the technical terms employed, to instruct the court on the relevant principles involved, to explain the nature, working, characteristic features and probable mechanical results of an invention, as well to identify old and novel concepts in the specification, outline the extent of scientific advancement, and also, to point out differences and similarities with rival inventions and explain the significance of these similarities and differences.<sup>15</sup>

2.27 An interesting development in England occurred in a patent infringement case involving DNA, *Kirin-Amgen Inc and Ors v Hoechst Marion Roussel Ltd & Ors*<sup>16</sup> where the House of Lords was, with the consent of the parties, given a series of seminars *in camera* prior to the case by a Professor of Biochemistry at Oxford University to explain the relevant aspects of recombinant DNA technology. As pointed out by Lord Hope:

“This had the result of shortening the length of time that it was necessary to devote to the hearing by several days...it is a course which might usefully be adopted in the future in cases of this kind, where the technology is complex and undisputed and the parties are willing to consent to it.”<sup>17</sup>

### **(iii) Foreign Law**

2.28 Expert evidence will be required in order to explain and prove foreign law. In *O'Callaghan v O'Sullivan*<sup>18</sup> Kennedy C.J. held that where an issue of foreign law arises it must be “proved as a fact...it must be so proved by the testimony and competence of expert witnesses shown to possess the skill and knowledge....required for stating, expounding, and interpreting that law.”<sup>19</sup>

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Examiner 25 June 2002; *The People (DPP) v Murphy* [2005] 4 IR 504; *R v Doheny & Adams* (1997) 1 Cr.App.R. 369.

<sup>15</sup> Malek & Ors (Eds) *Phipson on Evidence* (16<sup>th</sup> Ed Thomson Sweet and Maxwell 2005) at 1025.

<sup>16</sup> [2004] UKHL 46.

<sup>17</sup> [2004] UKHL 46 at 135.

<sup>18</sup> [1925] 1 I.R. 90.

<sup>19</sup> [1925] 1 I.R. 90 at 112; See also *Waterford Harbour Commissioners v British Railways Board* [1979] ILRM 296.

2.29 However, expert evidence is not permitted to prove a matter of domestic law, presumably as this will not be considered an issue that should be outside the knowledge of the finder of fact.<sup>20</sup>

**(iv) Customs and Practices of a Trade or Profession**

2.30 Expert evidence will also often be given by individuals well versed and well qualified to give a detailed account of the normal practices and procedures of a particular skill, trade or profession.

2.31 For example, it has been held in several Irish decisions that evidence can be admitted to demonstrate the general practice of conveyancing solicitors in performing searches on properties,<sup>21</sup> to explain what the correct rent would be for a property of a certain size in a certain area,<sup>22</sup> to outline the general practice of medical practitioners in medical negligence cases,<sup>23</sup> and to explain trade customs in particular professions, such as the giving of holiday pay<sup>24</sup> or the losses that would be incurred under certain sales conditions.<sup>25</sup>

2.32 The admissibility of expert evidence concerning customs and practices was considered in *McMullen v Farrell*<sup>26</sup> 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. He relied on the decision of Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp*<sup>27</sup> who held:

"Clearly, if there is some practice in a particular profession, some accepted standard of conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received."<sup>28</sup>

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<sup>20</sup> See *Society for the Protection of Unborn Children (Ireland) Ltd. v Grogan (No. 3)* [1992] 2 IR 471; *F. v Ireland* [1995] 1 IR 321.

<sup>21</sup> *Roche v Pielow* [1986] I.L.R.M. 189.

<sup>22</sup> *English Exporters (London) Ltd. v Eldonwall Ltd.* [1973] Ch. 415.

<sup>23</sup> *O'Donovan v Cork Co. Council* [1967] I.R. 409.

<sup>24</sup> *O' Connail v The Gaelic Echo (1954) Ltd.* (1958) 92 I.L.T.R. 194.

<sup>25</sup> *McFadden v Murdock* (1867) Exchequer IR ICL 211.

<sup>26</sup> [1993] 1 I.R. 123.

<sup>27</sup> [1978] 3 All ER 571.

<sup>28</sup> *Midland Bank Trust Co. Ltd v Hett Stubbs & Kemp* [1978] 3 All ER 571 at 582.

**(v) Technical or Scientific Terminology**

2.33 Non-opinion expert evidence may be required to interpret the correct meaning to be applied to a technical term in a document such as a will or contract, or to prove that a seemingly ordinary word had a particular meaning in the context in which it was used, where such meaning is in dispute between the parties. For example in *Thorn v Dickens*<sup>29</sup> expert evidence was admitted to show that the testator had intended to gift his property to his wife by using the term 'all to mother' as it was the custom in the testator's locality to refer to one's wife as mother.<sup>30</sup>

2.34 In another patent infringement case, *Hoechst Celanese Corporation v BP Chemicals Ltd*,<sup>31</sup> Aldous LJ held that in deciding the meaning of technical words, a judge is entitled to hear expert evidence from "the notional skilled man in the art", as there is no presumption in existence which finds that where words are used that can have a technical meaning, they were intended to be given their technical meaning:

"...it would be wrong to start the task of construction with any preconceived idea. Having obtained the knowledge of the notional skilled man, the [patent] Specification must be read as a whole to ascertain its meaning and from that the court has to decide the ambit of the monopoly claimed using the guidance in the Protocol [to the European Patent Convention]."<sup>32</sup>

2.35 Furthermore, 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.<sup>33</sup>

2.36 However, the courts are flexible regarding the meaning of the 'skilled man', and in the interpretation of technical or complex concepts or language, copious qualifications or academic experience will not always be necessary, depending on the concept that needs to be interpreted.

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<sup>29</sup> [1906] WN 54.

<sup>30</sup> See also *Re Cook* [1948] Ch. 212.

<sup>31</sup> [1998] EWCA Civ 1081.

<sup>32</sup> *Hoechst Celanese Corporation v BP Chemicals Limited* [1998] EWCA Civ 1081.

<sup>33</sup> See for example *Baldwin & Francis Ltd. v Patents Appeal Tribunal* [1959] 1 Q.B. 105; *Cooper (Max) and Sons Pty Ltd v Sydney City Council* (1980) 54 A.L.J. 234 cited in Lewison *The Interpretation of Contracts* (Sweet and Maxwell 2004) at 130-132.

2.37 For example in the copyright infringement case *Confetti Records v Warner Music*<sup>34</sup> one of the claimant's arguments was alleged derogatory treatment of a rap song that he had composed, due to the overlay of the song with a rap containing references to violence and drugs.<sup>35</sup> In order to determine this issue, the court had to interpret the lyrics of the rap, many of which were in slang commonly used by drug dealers. As pointed out by Lewison J;

"This led to the faintly surreal experience of three gentlemen in horsehair wigs examining the meaning of such phrases as "mish mish man" and "shizzle (or sizzle) my nizzle"."

2.38 Ultimately the claimant's argument of derogatory treatment failed as Lewison J held that although the words of the rap were in a form of English, they were for practical purposes a foreign language, and thus required an expert in such language to interpret, which the claimant had failed to prove.

2.39 Lewison J appeared to be of the opinion that the requisite expert on such matters would be a drug dealer acquainted with such terminology, although he admitted that "the occasions on which an expert drug dealer might be called to give evidence in the Chancery Division are likely to be rare."

#### **(vi) Meaning of Foreign Words**

2.40 The court may also receive expert evidence as to the meaning of foreign words, where the language is out of the range of knowledge of the court, but the legal effect of these words remains a matter for the courts to determine.<sup>36</sup>

2.41 The service provided by translators can also be considered under this category of expert evidence.<sup>37</sup> The right to an interpreter is laid out in

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<sup>34</sup> [2003] EWHC 1274.

<sup>35</sup> Under section 80 of the English *Copyright Patents and Designs Act 1988* the author of a literary, dramatic, musical or artistic work has the right, in certain circumstances, not to have his work subjected to derogatory treatment. Under section 80 (2) (b) of the Act a treatment is derogatory if "it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author".

<sup>36</sup> *Di Sora v Phillips* (1863) 10 H.L. Cas. 624; *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251 Cited in Lewison *The Interpretation of Contracts* (Sweet and Maxwell 2004) at 128-129

<sup>37</sup> Hodgkinson & James argue that court interpreters can properly be described as expert witnesses in that they provide expert advice to the court, in evidential form, that is outside the specialist knowledge or ability of the court, and which can be

Articles 5 and 6 of the European Convention on Human Rights<sup>38</sup> as incorporated into Irish law by the *European Convention on Human Rights Act 2003*. Court translators are commonplace nowadays in many cases coming before the Irish courts, and the Courts Service have access to interpreters in 210 languages and dialects through the use of private agencies.<sup>39</sup>

2.42 However, the use of such interpreters in Ireland has been the subject of much criticism, as it has been pointed out that no process is provided where interpreters can be trained and tested and no qualifications are necessary or required in order to work as a court interpreter.<sup>40</sup>

2.43 In the Court of Criminal Appeal decision in *The People (DPP) v Yu Jie*<sup>41</sup> one of the applicant's grounds for appeal was based on the fact that the interpreter provided by the Gardaí to question to applicant while in custody, was in fact a Chinese policeman who was working for Interpol. This fact was not made known to the applicant at the time, but he discovered this by looking at the interpreter's laptop during the course of questioning.

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evidentially challenged. (*Hodgkinson & James Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 5-016)

<sup>38</sup> Article 5(2) provides: "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." Article 6 (3) provides: "Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him...e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

<sup>39</sup> The Courts Service *Strategic Plan 2005-2009* states that the Courts Service will continue to provide interpreters in court to ensure that all court users can do their business in the language of their choice. Courts Service 'Sustaining the Momentum – Courts Service Strategic Plan 2005-2009' at 17. Available at [www.courts.ie](http://www.courts.ie).

<sup>40</sup> Phelan (2002) 'Working Group on the Jurisdiction of the Courts: Submission from the Irish Translators and Interpreters Association (ITIA)' Available at [http://www.translatorsassociation.ie/component/option,com\\_docman/task,cat\\_view/gid,28/Itemid,16](http://www.translatorsassociation.ie/component/option,com_docman/task,cat_view/gid,28/Itemid,16); Battles "Mistranslating Court Interpreters are 'a Threat to Justice'" *The Sunday Times* 6 May 2007; National Consultative Committee on Racism and Interculturalism 'Interpreting, Translation and Public Bodies in Ireland: The Need for Policy and Training' (2007, NCCRI) Available at: [http://www.translatorsassociation.ie/component/option,com\\_docman/task,cat\\_view/gid,10/Itemid,16](http://www.translatorsassociation.ie/component/option,com_docman/task,cat_view/gid,10/Itemid,16).

<sup>41</sup> [2005] IECCA 95.

2.44 The applicant argued that the realisation that it was a Chinese police officer may have in some way inhibited the Applicant, particularly as there is no right to silence under questioning in his own country.

2.45 The Court of Criminal Appeal rejected that any impropriety had taken place in respect of the interpreter, finding no suggestion that the interpreter was biased or acted from any improper motive or was in any way intimidatory towards the applicant.

2.46 However, this case does raise the possibility that interpreter services and their lack of regulation within the court system could become an increasingly common ground for appeal or challenge in cases in the near future.

2.47 *The Commission provisionally recommends that further research be conducted into the functioning of translators in our court system in order to ascertain if reforms need to be taken to improve access to justice.*

**(3) Expert evidence of fact on an issue requiring expertise to fully comprehend, observe and describe**

2.48 This will overlap to a certain extent with the previous category, particularly where scientific evidence such as DNA technology is at issue. Expert evidence will be needed both to explain the principles of such science or technology and to describe and explain in a factual manner the results or outcomes of tests or experiments, and also often to carry out these tests and experiments, submitted as evidence. However, the court is not under any obligation to accept experiments and tests that have been conducted by experts as evidence.<sup>42</sup>

2.49 In the English case *R v Meads*,<sup>43</sup> the evidence against the defendant was an admission which police officers claimed to have recorded in contemporaneous handwritten notes during various interviews. The defendant argued that the admissions were fabrications and sought to introduce an experiment as expert evidence in the form of a timed re-enactment of the alleged interviews.

2.50 The prosecution had argued that the new evidence was inadmissible on the basis that it constituted opinion evidence founded on an insufficiently organised body of knowledge. However, this was rejected by the English Court of Appeal, which held that the evidence was expert evidence of fact, as no specialist skill or knowledge was needed to relay it, and was no more opinion

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<sup>42</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 2-003.

<sup>43</sup> [1996] Crim LR 519, CA.

evidence than that of a police officer who times a journey in order to test the veracity of an alibi.

2.51 However, as can be seen in *R v Harris & Ors*<sup>44</sup> even where expert witnesses are interpreting the results of factual evidence such as scientific tests, they still may disagree as to the meaning of the results, which highlights that this type of evidence will often still be in the form of opinion rather than fact.<sup>45</sup>

2.52 Furthermore, even if the experts are in agreement about the results of the tests, they may still be in dispute about the significance of these results for the case at hand. In this case, the English Court of Appeal accepted that:

“...even on the interpretation of objective evidence there can be two views expressed by highly experienced and distinguished medical experts.”<sup>46</sup>

**(4) Expert evidence of fact, on an issue that does not require expertise to fully observe, but is a necessary preliminary to giving evidence in the other four categories.**

2.53 Hodgkinson and James note that this category does not strictly come within the definition of expert evidence but argue that it is worthy of discussion due to the fact that it often forms an inseparable part of the evidence given by an expert.<sup>47</sup>

2.54 The type of evidence envisaged by this category was described by Hobhouse J in *The Torenia*<sup>48</sup> as being factual evidence that is used to support or contradict the opinion evidence. Such evidence is common, as in giving their expert opinion experts necessarily rely on their expertise and their experience and refer to that experience in their evidence.

2.55 Examples of this is where an expert will refer to other cases and how they apply to the case at hand, or where an expert gives evidence about past

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<sup>44</sup> [2005] EWCA Crim 1980.

<sup>45</sup> In this case, the defendant was accused of murdering her baby by excessive shaking. Both parties' experts were in conflict about the results which were demonstrated by a slide taken from the victim's brain. One expert was of the view that the slide demonstrated blood oozing from the dura into the subdural space which was indicative of intradural haemorrhages; the other expert believed the slide was indicative of subdural haemorrhages.

<sup>46</sup> [2005] EWCA Crim 1980 at para. 73.

<sup>47</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 1-012.

<sup>48</sup> [1983] 2 Lloyd's Rep. 210.

experiments or experiments conducted for the purposes of the case at hand.<sup>49</sup> This category will inevitably overlap with the following category of admissible hearsay.

### **(5) Admissible Hearsay of a Specialist Nature**

2.56 The hearsay rule operates to exclude as evidence any out-of-court statements that are offered for the purpose of proving the truth of their contents.

2.57 In the context of expert evidence, the hearsay rule applies to provide that in order to be admitted, the primary sources and facts upon which the expert's evidence is based must be proved by admissible evidence given by either the expert himself or by other witnesses.<sup>50</sup>

#### **(a) Exceptions to the Hearsay Rule**

2.58 Nowadays, there are many recognised exceptions to the hearsay rule, both statutory and at common law, which may operate to admit the evidence given by a particular expert if the evidence in question is of a specialist nature and comes within one of the recognised exceptions.

##### **(i) Ireland**

2.59 In fact, in civil proceedings the number of exceptions that have been identified is so wide-ranging that the rule has been practically abolished, and its abolition was recommended by the Commission in its *Report on The Rule Against Hearsay in Civil Cases*.<sup>51</sup> However, it will still often apply in criminal proceedings and much uncertainty remains as to the extent of its application in the criminal context.

2.60 Materials used by experts in giving their opinion may be permitted under one of the existing common law or statutory exceptions to the rule against hearsay for example if the material is a published work, record or document of a public nature, is a statement contained in a business record, or is considered part of the *res gestae*.<sup>52</sup>

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<sup>49</sup> [1983] 2 Lloyd's Rep. 210 at 233.

<sup>50</sup> *R.T. v V.P.* [1990] 1 I.R. 545; *R. v Abadom* [1983] 1 W.L.R. 131.

<sup>51</sup> LRC 25-1988. The Commission is currently reviewing the hearsay rule in both civil and criminal cases under its *Third Programme of Law Reform 2008-2014*, project 8.

<sup>52</sup> For a detailed discussion of the categories of exceptions to the hearsay rule see McGrath *Evidence* (Thomson Roundhall 2005) at 235-304.

**(ii) England**

2.61 In England, the operation of the hearsay rule is now largely governed by statute, with recent civil and criminal legislative reforms that have greatly helped to clarify the admissibility of this evidence.<sup>53</sup>

2.62 In civil proceedings, the rule against hearsay was abolished by Section 1(1) of the *Civil Evidence Act 1995*.<sup>54</sup> Hearsay in criminal proceedings is covered by Part 11 of the *Criminal Justice Act 2003*. Section 114 of the 2003 Act put eight common law exceptions to the hearsay rule on a statutory basis. In the context of expert witnesses, section 118 allows evidence to be admitted if it falls under:

“Any rule of law under which in criminal proceedings an expert witness may draw on the body of expertise relevant to his field.”

2.63 Section 127 of the 2003 Act further provides that preparatory statements prepared for the purposes of criminal proceedings by an expert or a member of the expert’s team can be adduced in evidence by the expert to form part of his or her expert opinion.

2.64 No comparable legislation exists in this jurisdiction but, as will be discussed below, the Irish courts have held on a number of occasions that the materials used by an expert are admissible in evidence as a permitted exception to the hearsay rule.

**(b) The Requirement for Proof: The ‘Factual Basis’ Rule**

2.65 As already mentioned, if the primary facts forming the basis of the expert’s opinion are not proved in admissible evidence little weight will be attached to the opinion.<sup>55</sup>

2.66 This ‘basis’ rule has long since been recognised. In *Wright v Doe d Tatham*<sup>56</sup> the point was made that:

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<sup>53</sup> For a detailed discussion of operation of the hearsay rule in England in the context of expert witnesses see Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 8-001 - 8-056.

<sup>54</sup> Section 1 (1) provides that “evidence shall not be excluded on the grounds that it is hearsay.”

<sup>55</sup> As per Dixon J in *Ramsay v Watson* (1961) 108 C.L.R. 642 “if the man whom the physician examines refuses to confirm in the witness box what he said in the consulting room, then the physician’s opinion may have little or no value, for part of the basis of it has gone.” (at 649) See also; *R v Abbey* [1982] 2 S.C.R. 24 at 44.

<sup>56</sup> (1838) 4 Bing. N.C. 489.

"The cautious rules by which the rejection of evidence is determined, affect as well the most weighty opinions, as the most worthless gossip, unless vouched by the indispensable sanction of an oath; a certain and few well known cases only excepted."<sup>57</sup>

2.67 Similarly, in the Australian case *Ramsay v Watson*,<sup>58</sup> Dixon J stressed that:

"Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician."<sup>59</sup>

2.68 The proof requirement takes into account the reality that it is not the expert that decides on the facts in issue, and it is ultimately the finder of fact who decides whether to accept or reject the expert's opinion. In order to properly determine the value of the expert's opinion, the court must necessarily be knowledgeable about the facts on which this opinion is based.

**(c) *Avoiding the Proof Requirement – The Hypothetical Question***

2.69 A way of avoiding this requirement to some extent could be the use of the hypothetical question, where the expert stresses that his opinion is based on a proviso that certain facts or events were true or will be proved, if not his opinion should be discarded.<sup>60</sup>

2.70 If an expert is giving opinion evidence in the form of a hypothesis, he or she is required to firmly explain that the conclusion reached by the expert has no factual basis but assumes the existence of a number of factors which have not been proven in evidence.

**(d) *Exceptions to the Proof Requirement***

2.71 Greater flexibility however is given in relation to inferences or opinions drawn from primary facts that have been proven in court. The practical reality of specialisation that an expert acquires from study or experience is that such expertise or knowledge base will usually be founded, partly at least, on material of which the expert does not have firsthand experience.

2.72 For example, as early as the 19<sup>th</sup> century in this jurisdiction, in *McFadden v Murdock*<sup>61</sup> Pigot CB rejected the argument that an expert trader

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<sup>57</sup> (1838) 4 Bing. N.C. 489 at 589.

<sup>58</sup> (1961) 108 C.L.R. 642.

<sup>59</sup> (1961) 108 C.L.R. 642 at 649.

<sup>60</sup> Pattenden "Expert Opinion Evidence Based on Hearsay" [1985] Crim. L.R. 85 at 86.

<sup>61</sup> (1867) Exchequer IR ICL 211.

should not be entitled to give an account of the losses incurred in the course of his own trading experiences because such facts cannot be proved. Pigot CB held in the alternative that such evidence, once similar to the facts which form the subject matter of the controversy, should be admissible “in illustration” of the opinion of the expert.<sup>62</sup>

2.73 Thus, an exception to the proof requirement grew out of necessity as well as out of recognition of the greater ability of the expert than the court to evaluate the reliability of background hearsay, as it was recognised that, as when dealing with complex subject matters, juries proved less able to draw the necessary inferences from the facts deposed.<sup>63</sup>

**(i) Expert's Ability to Rely on Materials from their Field of Expertise**

2.74 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. This has been termed ‘non-specific hearsay’.<sup>64</sup>

**(I) England**

2.75 In *R v Abadom*,<sup>65</sup> Kerr L.J. referred to this practical reality and expressed the view that:

“it is no more than a statement of the obvious that, in reaching their conclusion, [experts] must be entitled to draw on material produced by others in the field in which their expertise lie...once the primary facts on which their opinion is based have been proved by admissible evidence, they are entitled to draw on the work of others as part of the process of arriving at their conclusions.”<sup>66</sup>

**(II) Canada**

2.76 In *Wilband v The Queen*,<sup>67</sup> Fauteux J. explained the reasoning behind this by pointing out that such evidence does not affect the rule against hearsay

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<sup>62</sup> (1867) Exchequer IR ICL 211 at 219 Pigot CB approved the comments of Mansfield LJ in *Folkes v Chadd* (1782) 3 Douglas 157 in support of this view.

<sup>63</sup> Pattenden “Expert Opinion Evidence Based on Hearsay” [1985] Crim. L.R. 85 at 93.

<sup>64</sup> Pattenden “Expert Opinion Evidence Based on Hearsay” [1985] Crim. L.R. 85 at 93-95.

<sup>65</sup> [1983] 1 W.L.R. 126.

<sup>66</sup> [1983] 1 W.L.R. 126 at 131.

<sup>67</sup> (1966) CanLII 3 (S.C.C.); [1967] S.C.R. 14.

as the material in question is not being submitted to prove its veracity but rather to explain the thought processes and knowledge bases which helped the expert to form his opinion:

“...the value of [an expert’s] opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information.”<sup>68</sup>

(III) *Ireland*

2.77 The issue was also considered in this jurisdiction in *The People (DPP) v Boyce*.<sup>69</sup> One of the grounds of appeal was the contention that expert evidence was admitted to include an unproven factor. The appellant argued that since the expert witness had relied on statistical information in scientific literature and could not give evidence of his own knowledge he should not have been allowed to give expert evidence on the basis of such statistics or databases. The Court summarised the principles governing this area:

“Any primary fact relied upon by the expert must be proved by admissible evidence but there are other secondary matters such as established scientific norms, practices, standards and reference points within the field of expertise....which he or she may rely upon or the like.”

The Court continued;

“In a long established exception to the hearsay rule, an expert can ground or fortify his or her opinion by referring to works of authority, learned articles, recognised reference norms and other similar material as comprising part of the general body of knowledge falling within the field of expertise of the expert in question.”

(ii) ***Expert’s Ability to Rely on General Experiences from Field of Expertise***

2.78 It has also been held that, in coming to an expert opinion, an expert is entitled to assess the facts against previous experiences that he or she may have had dealing with similar issues, as long as the comparable evidence does not amount to hearsay evidence of facts.

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<sup>68</sup> *Wilband v The Queen* 1966 CanLII 3 (S.C.C.), [1967] S.C.R. 14 at 21.

<sup>69</sup> [2005] IECCA 143.

2.79 Megarry J. in *English Exporters Pty. Ltd. v Eldonwall Ltd*<sup>70</sup> attempted to explain the distinction between the requirement that the expert have personal knowledge of the facts upon which his opinion is based, and the fact that he is entitled to rely on these facts in forming his opinion and in this way is not subject to the rule against hearsay in the same way as a witness of fact;

"Basically, the expert's factual evidence on matters of fact is in the same position as the factual evidence of any other witness. Further, factual evidence that he cannot give himself is sometimes adduced in some other way, as by the testimony of some other witness who was himself concerned in the transaction in question, or by proving some document which carried the transaction through, or recorded it; and to the transaction thus established, like the transactions which the expert himself has proved, the expert may apply his experience and opinions, as tending to support or qualify his views. That being so, it seems to me quite another matter when it is asserted that a valuer may give factual evidence of transactions of which he has no direct knowledge, whether per se or whether in the guise of giving reasons for his opinion as to value. It is one thing to say "From my general experience of recent transactions comparable with this one, I think the proper rent should be £x": it is another to say "Because I have been told by someone else that the premises next door have an area of x square feet and were recently let on such-and-such terms for £y a year, I say the rent of these premises should be £z a year....It therefore seems to me that details of comparable transactions upon which a valuer intends to rely in his evidence must, if they are to be put before the court, be confined to those details which have been, or will be, proved by admissible evidence, given either by the valuer himself or in some other way. I know of no special rule giving expert valuation witnesses the right to give hearsay evidence of facts...I can see no compelling reasons of policy why they should be able to do so."<sup>71</sup>

(iii) ***Expert's Ability to Rely on Second Hand Information in Order to Form an Expert Opinion***

2.80 Where the expert does not have firsthand knowledge of the facts upon which his opinion is based, for example a psychiatrist or psychologist who bases his evaluation of a patient on statements or events narrated to him by the

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<sup>70</sup> [1973] 1 Ch. 415.

<sup>71</sup> [1973] 1 Ch. 415 at 421.

patient, it may be nevertheless permissible for him to state a hypothesis on these assumed facts.<sup>72</sup>

2.81 In cases involving delay in sexual abuse cases, psychiatrists are often recruited to testify about the reasons for the delay. In such cases, it has been held that the psychiatrists are entitled to believe the complainant at face value and use the information in their opinion.

2.82 Such statements are admitted as evidence for the reason that these psychiatrists and psychologists have qualified as experts in diagnosing the behavioural symptoms of individuals, and have formed an opinion on the basis of these statements, which the trial judge deems to be relevant to the case.

2.83 However, it is important to note that these statements are not admissible as proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognised professional procedures.<sup>73</sup>

2.84 Thus an expert opinion based on second-hand evidence is admissible, if relevant. Furthermore, it is apparent that a distinction can be drawn between the requirement for first hand evidence, which if not present, will reduce the weight to be given to the opinion of the expert, and the rule against hearsay. The hearsay rule does not operate to exclude an expert opinion based on second-hand evidence because this evidence is not admitted to prove the fact of what the expert has been told.<sup>74</sup>

2.85 In the Canadian case *R v Abbey*<sup>75</sup> the accused's psychiatrist and not the accused himself, testified, in the course of his opinion, to events related to him during several interviews. There was no admissible evidence brought before the court in respect of any of these events. On appeal Dickson J held that a retrial should be ordered as the testimony of the expert;

“...while admissible in the context of the opinion, was not in any way evidence of the factual basis of these events and experiences. The trial judge in his decision fell into the error of accepting as evidence of these facts, testimony which if taken to be evidence of their existence would violate the hear-say rule.”<sup>76</sup>

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<sup>72</sup> *R.T. v V.P.* [1990] 1 I.R. 545

<sup>73</sup> Per Richie J in *Phillion v The Queen*, [1978] 1 S.C.R. 18 at 24.

<sup>74</sup> Per Jessup J.A. in the Canadian case *R v Rosik* [1971] 2 O.R. 47 at 84-85.

<sup>75</sup> [1982] 2 S.C.R. 24.

<sup>76</sup> *R v Abbey* [1982] 2 S.C.R. 24 at 45

**(e) Hearsay and Expert Evidence: Irish Examples**

2.86 A series of nullity cases in this jurisdiction considered the above principles in detail. In *F v L (Orse F)*<sup>77</sup> Barron J. held that hearsay evidence by the petitioner and two other witnesses would be disregarded and, insofar as the consultant psychiatrist related matters told to him by others in the absence of the respondent, then the Court could not accept them as true but only as statements made to him in the course of his profession in relation to a matter authorised by the Respondent.

2.87 Similarly, in *RT v VP (Orse VT)*,<sup>78</sup> the respondent objected to expert opinion evidence given by an expert for the petitioner, a psychiatrist, concerning the mental state of the respondent, as hearsay, as the witness had never met or examined the respondent. The expert had based this opinion on statements from the petitioner and on a report written by the court appointed expert, also a psychiatrist, who had examined the respondent.

2.88 Lardner J upheld this objection stating that an expert witness is entitled to give an opinion on facts which are admitted or proven by himself or other witnesses, or matters of common knowledge, or upon a hypothesis based thereon, but evidence based on an individual he had never met or examined was inadmissible as hearsay.

2.89 McGrath submits that it seems incorrect to classify such evidence as hearsay, considering that in this case both the petitioner and the court-appointed expert were called to give evidence in court. He argues that it would have been more appropriate to object to the evidence on the grounds of its lack of probative value, and so this is a matter which should go to the weight rather than admissibility of the evidence.<sup>79</sup>

2.90 However a more lenient approach was taken by O'Higgins J in two later nullity cases, *JWH (Orse W) v GW*<sup>80</sup> and *DK v TH (Orse TK)*.<sup>81</sup> In both cases, which were decided on the same day, evidence was admitted from psychiatrists concerning the mental state of the respondents even though the respondents had not been examined by the experts. O'Higgins J warned that such evidence would be of limited value due to the lack of input from the respondent but felt that this should be taken into account in assessing the weight and not the admissibility of the evidence.

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<sup>77</sup> [1990] 1IR 348.

<sup>78</sup> [1990] 1 IR 545.

<sup>79</sup> McGrath *Evidence* (Thomson Roundhall 2005) at 319.

<sup>80</sup> Unreported, High Court February 25, 1998.

<sup>81</sup> Unreported, High Court February 25, 1998.

2.91 An even more relaxed view to the admissibility of expert evidence was taken in *State (D and D) v Groarke & Ors*.<sup>82</sup> Here the petitioners contested the validity of a ‘fit person’ order,<sup>83</sup> which provided for the removal of a child from its parents, on grounds that fair procedures had not been followed in the making of the order. In particular, the petitioners objected to the evidence adduced by the respondents; a video of a doctor interviewing the child with the aid of anatomical dolls, which had formed to a large extent the opinion of this doctor that the child had been abused.

2.92 The Supreme Court allowed this evidence to be admitted, finding that the court should have before it the basic evidence (in this case the video recording and an explanation from the expert witness doctor regarding the meaning of the use by the child of the dolls) that was used to form the basis of the doctor’s opinion that the order should be made, in order to determine if this conclusion was correct.<sup>84</sup>

2.93 In *Southern Health Board v C*<sup>85</sup> similar facts were involved. Here, a father objected to videotape evidence of an interview between his child and a social worker, which formed the basis of an allegation of sexual abuse, being admitted in court in proceedings to impose a fit person order on grounds that such evidence amounted to hearsay. The Supreme Court held that the evidence was rightly admitted.

2.94 O’Flaherty J took the view that the videotape evidence was not hearsay evidence as it did not constitute independent evidence of the child but a material part of the expert testimony of the social worker.

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<sup>82</sup> [1990] 1 I.R. 305

<sup>83</sup> Under section 58 of the *Children Act 1908* a child under the age of 15 years could, in certain circumstances, be placed in the care of a ‘fit person.’

<sup>84</sup> In *State (D and D) v Groarke & Ors* [1990] 1 I.R. 305 at 310, Finlay CJ stated: “In order to determine with safety, having regard to the nature of this interview, such a vital matter as to whether the conclusion reached by the doctor carrying out is a sound conclusion which would warrant such a drastic step as the possibly long-term removal of the care of a child out of the custody of its parents, it would be necessary for the tribunal before which such evidence of conclusion was given to have, in addition, the basic evidence from which that conclusion was reached, namely the video recording (where it existed) of the interview between the doctor and the child and a demonstration, in addition, of the precise use and the expert witness’s belief in the meaning of the use by the child, of the anatomical dolls.”

<sup>85</sup> [1996] 1 I.R. 219.

"[W]e point out that the *key evidence* as far as this part of the case is concerned will be that offered by the social worker, Mr. Jim O'Leary. In a sense, the tapes are simply material that will back up his testimony. Essentially however, the important evidence will be his expert testimony."<sup>86</sup>

2.95 The Court also found that it was a matter for the District Court to accept or reject this expert testimony, and that it remained open to the respondent to employ their own expert witness to cross examine the social worker in order to assist him in meeting the allegations.

2.96 McGrath argues that these decisions push back traditional boundaries regarding the type of evidence that is admissible in support of expert testimony and highlight the potential for the rules regarding expert evidence to be used as a backdoor means of admitting hearsay evidence.<sup>87</sup>

2.97 However it is important to note that in both cases much emphasis appeared to be placed on the welfare and best interests of the child. The cases did not involve a determination of the veracity of the allegations or of a prosecution of the alleged perpetrators. It is questionable if such an approach would have been taken if criminal proceedings were being taken, or the truth of the allegations was to be determined.

2.98 A more recent case dealing with potential hearsay in the evidence of the expert witness is *MCG(P) v F(A)*.<sup>88</sup> Here, the parties sought court direction about the scope and extent of the powers of the expert witness in the case, a medical inspector who was appointed by the court under Order 70 Rule 32, Rules of the Superior Court for the purposes of the petition of a degree of nullity.

2.99 More specifically, the parties wished to determine if the medical inspector, an experienced consultant psychiatrist, was entitled to interview third party informants, in respect of his diagnosis of the state of mind of the parties around the time of the ceremony of marriage. The medical inspector pointed out that his expert assessment would be less complete and satisfactory from his point of view as a medical expert unless he interviews third-party informants as

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<sup>86</sup> Per O'Flaherty J *Southern Health Board v C* [1996] 1 I.R. 219 at 239.

<sup>87</sup> McGrath *Evidence* (Thomson Roundhall 2005) at 321 – The admissibility of videotape evidence in civil cases involving children is now provided in the *Children Act 1997*, and to a certain extent in criminal proceedings by the *Criminal Evidence Act 1992*.

<sup>88</sup> [2000] IEHC 11, High Court, 28 January 2000.

would often be usual in making a clinical diagnosis where personality disorder is suggested.

2.100 Budd J accepted that it would be desirable to have as much information as possible available to the medical inspector, however, he pointed out that the wording of the provisions of the statute and of the rules governing the appointment of a medical inspector envisages an inspection of the parties themselves and not an examination of third-party informants and felt that it:

“...would stretch the elasticity beyond breaking point to extend matters to include interviewing third-party informants and this would be in breach not only of the letter but also of the spirit of the wording of the statute and of the rules.”<sup>89</sup>

2.101 Budd J also stressed the point that the ultimate responsibility of deciding whether or not to grant a decree of nullity was not that of the medical inspector, but of the court. He held that in order to ensure that the court remains in control of the inquiry, and for the other reasons cited, third party informants should not be interviewed.

2.102 He also seemed largely motivated by the danger that the evidence given by third party informants may be later exposed to be false. As he reasoned:

“The report based on the psychiatrist’s expertise and interviews only with the parties avoids the problem of the Court having to work out how much of the inspector’s report is based on what the inspector heard from a witness whose evidence the Court has not heard or whose evidence the Court has rejected as false...There are very real problems in reality about a Court having to extrapolate sound parts of an Inspector’s report which have not been tainted by hearsay or evidence which has been rejected. A further consideration is that the Court is seen to be in control of the proceedings and that justice is seen to be done and the perils from hearsay and loss of confidence on the part of the parties in the conduct of the proceedings from an expanded role of the medical inspector...If the inspector has based part of his assessment on contaminated evidence then this is going to cause problems in the future when his report is considered by the Court and there may be real difficulties in unscrambling the part of the omelette which has been contaminated by hearsay or false and rejected evidence.”<sup>90</sup>

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<sup>89</sup> [2000] IEHC 11, High Court, 28 January 2000, at 19.

<sup>90</sup> [2000] IEHC 11, High Court, 28 January 2000, at 21.

2.103 This case shows a return to the strict view that if objection to evidence from an expert witness is raised on grounds of hearsay, such evidence is likely to be ruled inadmissible, and highlights that the court remains, as per Budd J:

“....chary of widening the scope of the inquiry and of intermeddling by persons who may be partisan and who are not actually called to give evidence by one of the parties before the court.”<sup>91</sup>

2.104 McGuinness J considered the role of evidence of delay in cases of child sexual abuse in *VW v DPP*.<sup>92</sup>

“All such evidence is open to challenge in cross-examination. It must however be borne in mind that it is not the task of the expert witness to assess the credibility of the complainant or the guilt or innocence of the applicant. The truth or otherwise of the complaints is to be tested at the trial.”

#### D The Scope of Expert Evidence

2.105 There are a number of rules governing the exact parameters of the evidence that may be given by an expert. The general rule relating to opinion evidence is an exclusionary one – a witness is not entitled to give an opinion or draw inferences from facts observed; they can only testify as to the facts observed by them personally.

2.106 Expert evidence operates as a limited exception to this strict exclusionary rule. The court’s reluctance to admit opinion evidence stems from its inherent subjective nature and its ability to lead to inconsistencies and injustices. As Lord Pearce stated:

“Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy.”<sup>93</sup>

2.107 As a result, the operation of the exception in favour of expert opinion evidence and the scope of such evidence that will be considered admissible are circumscribed by a number of ancillary rules which are strictly applied.

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<sup>91</sup> *McG(P) v F(A)* [2000] IEHC 11, High Court, 28 January 2000, at 25.

<sup>92</sup> Supreme Court, 31 October 2003.

<sup>93</sup> *Toohey v Metropolitan Police Commissioner* [1965] 1 All ER 506 at 509-510, 512.

**(1)      *Within the Field of Expertise of the Expert***

2.108 It is a well accepted common law requirement that the expert must confine himself to expressing an opinion on issues that are within the ambit of his area of expertise,<sup>94</sup> and an expert witness cannot express an opinion on legal or technical issues raised in the case, or the merits of the plaintiff's and defendant's arguments.

2.109 As distinguished above, in some cases an expert will only be required to outline the scientific or technical facts as understood by him. In other cases the expert will be asked to give an opinion on a set of circumstances based on his expertise. The problem arises where the distinction between fact and opinion breaks down and the expert ends up expressing a more detailed opinion than is permissible.

**(a)      *Defining the Parameters of Expertise***

2.110 Experts are entitled to give non-opinion expert evidence, such as describing the concepts involved in a patents case or explaining the principles of DNA technology, however, the courts are strict to ensure that in doing so the experts do not go further and comment for example, as to whether the defendant's invention infringed the plaintiff's patent.

2.111 This is because such matters are for the judge or jury to decide as the expert witness is not, by reason of his expertise, any better placed to give an opinion on such matters than the judge or jury as such matters do not amount to specialised knowledge.

2.112 There is a danger that if an expert was entitled to give an opinion based on the expert facts outlined, excessive weight will be given to this by members of the jury and also that it may effectively amount to the expert trying the issues of the case.

**(b)      *England***

2.113 One case where the English courts had to decide on the parameters of the expertise of the expert was *R v Barnes*.<sup>95</sup> Here, the Court of Appeal refused the appellant the right to introduce fresh evidence from an arboriculturalist, or wood grain expert, to the effect that the wood grain pattern on a fingerprint allegedly taken from a wooden door at the scene of a crime and matching that of the defendant, did not match the wood grain of the door itself.

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<sup>94</sup> One of the duties of expert witnesses identified by Cresswell J *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)* [1993] 2 Lloyd's Rep 68 is that an expert should clearly state when a particular issue falls outside his area of expertise.

<sup>95</sup> [2005] EWCA Crim 1158.

2.114 The Court held that while the witness was undoubtedly an expert on wood grain, he had no expertise in the interpretation of lifts, or in the identification of wood-grain on lifts, which were the questions in issue, therefore his evidence was not considered of sufficient relevance to form the basis of an appeal.

**(c) Ireland**

2.115 In an Irish case, *The People (DPP) v Yusuf Ali Abdi*,<sup>96</sup> the defendant appealed his conviction for the murder of his baby son on the grounds that the Court had erred in law by permitting an expert witness psychologist to give opinion evidence about the applicant's motive in killing his son. He argued that such an opinion did not come within the ambit of a psychologist's expertise.

2.116 He based this argument on the decision in *The People (DPP) v Egan*<sup>97</sup> and argued that the purpose of a psychiatrist is solely to offer an expert opinion as to whether the accused was insane or not at the time of the killing, and questions of intent and motive are matters for the jury, as they are matters of ordinary human experience.

2.117 The evidence in dispute was that of a consultative psychiatrist, who had prepared a report on the applicant which was used in evidence during the trial. In this report the psychiatrist had stated a belief that the defendant's alleged actions were motivated by "his inability to accept that he would be unable to rear his child in his own religious faith coupled by the threat of losing custody of the child."<sup>98</sup>

2.118 The Court of Criminal Appeal held, however, that the material was rightly admitted. The Court noted that, in two previous cases relied on, insanity had been neither established or alleged, as both were cases where it was sought to establish that the accused could avail of the defence of provocation in that he was suddenly and totally deprived of his self control, which was plainly a matter for the jury to consider and beyond the proper reach of expert testimony. The case at hand, the Court held, differed greatly. In the present case insanity was specifically alleged and pleaded, and the defence had called expert evidence to establish it. The prosecution was plainly entitled therefore to counter this with expert testimony of its own.

2.119 There are several other examples from this and other jurisdictions where expert testimony has been objected to on the grounds that the expert was giving evidence on an issue that did not come within the ambit of his area

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<sup>96</sup> [2004] IE CCA 47.

<sup>97</sup> [1990] ILRM 780

<sup>98</sup> At paragraph 16.8 of the expert's report.

of expertise. This shows a readiness on behalf of the courts to ensure that the confines of expert evidence are firmly observed.

2.120 The majority of the objectionable evidence in these cases is however excluded as a result of the ‘common knowledge’ or ‘ultimate issue’ rules, and these two rules operating together have the effect of strictly excluding all evidence that is likely to result in the role of the finder of fact from being usurped.

## **(2)      *The Common Knowledge Rule***

2.121 Even if the matter in question falls within one of the categories of expert evidence identified above and thus comes within the range of matters for which expert testimony is permitted, if the jury is capable of making inferences from the factual testimony presented, that is, where the issue in question is within the scope of knowledge and competency of the tribunal of fact, any extra expert evidence will be superfluous and so is inadmissible. As Lawton LJ stated in *R v Turner*<sup>99</sup>

“An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.”<sup>100</sup>

2.122 Evidence relating to matters of common knowledge, matters which can be dealt with by the trier of fact by applying common sense and life experience is therefore inadmissible.

2.123 The primary rationale for the exclusionary rule is to prevent the function of the judge or jury from being usurped by allowing an expert to decide on matters which are within the province of the finder of fact. Another underlying concern of the rule is to prevent excessive time wasting in trials by limiting the type of expert evidence that comes before the court.

### **(a)      *Operation of the Rule in Common Law Jurisdictions***

2.124 The rule excluding matters of common knowledge from the scope of expert testimony has been reaffirmed on several occasions in this jurisdiction and in England for centuries. However, recent cases indicate an easing of the rule, and there are many examples of inconsistent case law on this issue.

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<sup>99</sup> [1975] Q.B. 834.

<sup>100</sup> *R v Turner* (1974), 60 Crim. App. R. 80, at p. 83.

2.125 Much judicial commentary exists which strongly confirms that expert witnesses will not be permitted to give evidence on matters which are considered within the scope of knowledge of the finder of fact.

2.126 In the Australian case *Transport Publishing Co Pty Ltd v Literature Board of Review*<sup>101</sup> Dixon C.J. stated that “ordinary human nature, that of people at large, is not the subject of proof by evidence, whether supposedly expert or not.”<sup>102</sup>

**(i) England**

2.127 In *R v Turner*,<sup>103</sup> the accused had bludgeoned his girlfriend to death after she confessed her infidelity to him. The court refused evidence the of a psychiatrist that such an event was likely to have caused an explosion of rage in him, as “jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illnesses are likely to react to the stresses and strains of life.”<sup>104</sup>

2.128 The reasoning behind this view is a recognition of the fact that when an expert makes a determination on an issue on which a judge or jury would be well capable of forming their own opinions and drawing their own conclusions on, the judge or jury is prone to attach greater significance than is perhaps warranted to the opinion of the expert. In *R v Turner*<sup>105</sup> Lawton LJ made reference to this:

“If, on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is dressed up in scientific jargon it may make the judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion any more helpful than that of the jurors themselves; but there is a danger that they may think it does.”

2.129 Sopinka J’s comments in the Canadian case *R v Mohan*<sup>106</sup> are also in this vein:

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<sup>101</sup> (1955) 99 C.L.R. 111.

<sup>102</sup> *Transport Publishing Co. Pty. Ltd. v The Literature Board of Review* (1955) 99 C.L.R. 111 at 119.

<sup>103</sup> [1975] QB 834.

<sup>104</sup> Per Lawton LJ at 841-842.

<sup>105</sup> [1975] Q.B. 834.

<sup>106</sup> [1994] 2 S.C.R. 9 at 21.

“...dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves.”

**(ii) Ireland**

2.130 The ‘common knowledge’ rule has also been enforced by the Irish courts on several occasions. *Turner* was approved in Ireland in *The People (DPP) v Kehoe*,<sup>107</sup> a case with similar facts, where the Court of Criminal Appeal held a psychiatrist’s evidence about the accused’s state of mind should not have been admitted as it merely sought to articulate more fully the defence of provocation of the accused, which the accused was in a position to give to the jury himself.

2.131 Similarly, in *McMullen v Farrell*<sup>108</sup> although Barron J. admitted expert evidence about the everyday professional practice of solicitors, he refused to admit evidence relating to the manner in which litigation is conducted as he felt the court itself has factual knowledge of this practice.<sup>109</sup>

**(b) Difficulties Determining Matters of Common Knowledge – A Move Away from the Common Knowledge Rule?**

2.132 The distinction between facts that require expertise and facts that are within the range of knowledge of the finder of fact is not always clear and difficulties can arise in certain areas. This is apparent from the case law where it can be seen that the rule against matters of common knowledge has occasionally received disparate and inconsistent application.

2.133 Deciding on admissibility and policing the boundaries of what is within the knowledge of the finder of fact is made more difficult by the fact that these boundaries can change with developments in science and technology.

2.134 One area where considerable difficulties have arisen is whether or not expert testimony should be admitted on the credibility of the accused.<sup>110</sup>

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<sup>107</sup> [1992] I.L.R.M. 481.

<sup>108</sup> [1993] 1 I.R. 123 at 148.

<sup>109</sup> There are several other examples of cases where the court has considered it inappropriate or unnecessary to hear evidence relating to the role and duties of solicitors. See for example *R v Wahab & Ors* [2002] EWCA Crim 1570 at Para 43 (Cited in Malek & Ors (Eds) *Phipson on Evidence* (16<sup>th</sup> Ed Thomson Sweet and Maxwell 2005) at 1033 fn. 97.

<sup>110</sup> See for example *R v Turner* [1975] Q.B. 834 and *R v Mackenny* (1981) 76 Cr. App. Rep. 271 However, this decision was overturned in *R v Pinfold and Mackenny* (2003) where the Court of Appeal held that the Court’s approach has

This is particularly so in criminal trials, probably due to the presence of the jury and the view that they might afford greater weight to expert evidence than is appropriate or than would a judge.

2.135 However, there are some limited examples of cases where expert evidence on the credibility of the accused has been admitted; where it is considered that the issue of credibility is outside the experience and knowledge of the jury; as this is a more reliable indicator than attempting to define whether or not the evidence relates to a recognised mental illness or not.<sup>111</sup>

**(i) Ireland**

2.136 The emergence of new and specialised areas of expertise has led to difficulties in determining whether an issue is something which a lay judge and jury are capable of assessing, or whether expert evidence on the issue is necessary.

2.137 In *The People (DPP) v Pringle*<sup>112</sup> the accused argued that expert forensic evidence, which amounted to a comparison of fibres found on cars used in a bank raid and those found on the accused's pullover, should not have been admitted as the judges were competent to make such a comparison themselves.

2.138 The court however rejected this, placing considerable emphasis on the expertise of the witness in forensic science, and expressed the view that requiring judges to personally conduct "laboratory experiments...for visual comparisons" as being "novel and wholly inappropriate."<sup>113</sup>

2.139 Psychiatric and psychological expert evidence has generated considerable difficulties. In *Kehoe*, O'Flaherty J was of the opinion that medical expert evidence such as that of psychiatrists should properly be confined to matters such as insanity and other forms of mental illness. In borderline cases

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developed over the years and is now more generous towards the admission of expert evidence than was once the case. (See Roberts "Towards the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials (2004) 8 E. & P. 215).

<sup>111</sup> See for example *R v Raghip* The Times, December 9 1991; *R v Ward* 96 Cr App R 1; *R v Steele* [2003] EWCA Crim 1640 all of which dealt with the credibility of confessions made in custody.

<sup>112</sup> (1981) 2 Frewen 57.

<sup>113</sup> Per O'Higgins CJ (1981) 2 Frewen 57 at 88 (cited in Healy *Irish Laws of Evidence* (Thomson Roundhall 2004)).

the court may decide to allow expert evidence where it is unsure if it can make a sound or fully informed decision without it.<sup>114</sup>

2.140 However, with the new defence of diminished responsibility,<sup>115</sup> mental health issues will no longer be considered so clear cut in determining liability. The evidence of medical experts on the mental state of the accused will therefore no doubt attract a renewed significance and will in the future, if submitted, be more readily admitted in this regard.

2.141 The Commission notes that the language used in the *Criminal Law (Insanity) Act 2006* refers to “mental disorder”<sup>116</sup> which differs from the English “abnormality of the mind.”<sup>117</sup> Although it remains to be seen how the Irish courts will interpret this provision, it could be considered that the Irish provisions have a much narrower ambit than the corresponding English provision. It can thus be argued that “mental disorder” should be equated with a recognised mental condition, about which expert testimony will undoubtedly be held to be admissible.

2.142 In its *Consultation Paper on Child Sexual Abuse*, the Commission considered whether or not expert evidence should be considered admissible in helping to determine the credibility of alleged victims of child sexual abuse.<sup>118</sup>

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<sup>114</sup> *King v Lowery & R* [1974] A.C. 85.

<sup>115</sup> This defence was introduced in Ireland under section 6(1) of the *Criminal Law (Insanity) Act 2006* which provides: “Where a person is tried for murder and the jury or, as the case may be, the Special Criminal Court finds that the person— (a) did the act alleged, (b) was at the time suffering from a mental disorder, and (c) the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act, the jury or court, as the case may be, shall find the person not guilty of that offence but guilty of manslaughter on the ground of diminished responsibility.”

<sup>116</sup> Section 1 of the 2006 Act states: “mental disorder includes mental illness, mental disability, dementia or any disease of the mind but does not include intoxication.”

<sup>117</sup> Section 2(1) of the UK *Homicide Act 1957* provides: “Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.”

<sup>118</sup> See Law Reform Commission *Consultation Paper on Child Sexual Abuse* LRC CP 2-1989, Chapter 6; Law Reform Commission *Report on Child Sexual Abuse* LRC 32 1990.

The Commission recognised that matters of human nature and behaviour within the limits of normality are not susceptible to expert evidence.<sup>119</sup>

2.143 The Commission went on to refer to a number of English cases where expert evidence on matters such as credibility of the accused,<sup>120</sup> and the credibility of the accused's allegation of assault,<sup>121</sup> but recognised that the "child sexual abuse syndrome" as [at the time of the report] lacks clear scientific empirical validation."<sup>122</sup>

2.144 The Commission outlined both the advantages, such as giving the jury a more informed perspective, and explaining the reasons for a child's unusual behaviour, and disadvantages, such as the possibility of usurpation of the role of the finder of fact and delay, of admitting evidence on the likely reactions of child victims of sexual abuse.<sup>123</sup>

2.145 In conclusion, the Commission provisionally recommended that expert evidence be admissible as to competence and as to children's typical behavioural and emotional reactions to sexual abuse, a recommendation that was confirmed in the later Report.<sup>124</sup>

2.146 The Commission's recommendations on this issue reflect the general trend of the courts to adapt to new and emerging forms of expertise, and a willingness to take a flexible approach in relation to what can be considered an issue that is not within the common knowledge of the finder of fact and on which expert evidence is therefore considered beneficial and admissible.

### **(ii) England**

2.147 The courts have readily allowed expert evidence to prove recognised mental illness, however recent cases in England show that the categories of what will be considered 'mental illness' have expanded over the years and

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<sup>119</sup> Law Reform Commission *Consultation Paper on Child Sexual Abuse* LRC CP 2-1989 at 6.02.

<sup>120</sup> *Lowery v The Queen* [1973] 3 All ER 662 (PC).

<sup>121</sup> *Toohey v Metropolitan Police Commissioner* [1965] 1 All ER 506 (HL).

<sup>122</sup> Law Reform Commission *Consultation Paper on Child Sexual Abuse* LRC CP 2-1989 at 6.05.

<sup>123</sup> Law Reform Commission *Consultation Paper on Child Sexual Abuse* LRC CP 2-1989 at 6.07-6.15.

<sup>124</sup> Law Reform Commission *Consultation Paper on Child Sexual Abuse* LRC CP 2-1989 at 6.16; Law Reform Commission *Report on Child Sexual Abuse* LRC 32 1990 at 6.04.

evidence is now being allowed in a far wider range of cases than anticipated by *Turner*.

2.148 For example in *R v Toner*<sup>125</sup> expert evidence showing that a mild hypoglycaemic attack could have negated intent was allowed. Similarly in *R v Ward*<sup>126</sup> psychological evidence was allowed to help prove that the accused was suffering, while not from a mental illness, from a personality disorder so serious as to be described as a mental disorder.

2.149 Expert evidence has also been admitted in England in cases involving inter alia insanity,<sup>127</sup> battered wives syndrome,<sup>128</sup> and automatism.<sup>129</sup> It has also been accepted that expert psychiatric evidence is legally necessary where examining the issue of diminished responsibility.<sup>130</sup>

2.150 In *R v O'Brien*<sup>131</sup> a similarly broader approach to the admissibility of expert psychiatric evidence was taken. Roche LJ stated:

“At one time the law was thought to be that expert evidence of the kind that we have heard could only be admitted if that evidence showed a recognised mental illness, this being the interpretation placed upon *R. v. Turner*. It has now been accepted that expert evidence is admissible if it demonstrates some form of abnormality relevant to the reliability of a defendant’s confession or evidence.”<sup>132</sup>

**(iii) Australia**

2.151 It is also interesting to note that in the Australian case *Murphy v The Queen*<sup>133</sup>, the High Court of Australia reversed the decision of the trial judge that the evidence of a consultant psychiatrist, which sought to show that the

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<sup>125</sup> 93 Cr App R 382.

<sup>126</sup> 96 Cr App R 1.

<sup>127</sup> *People (AG) v Fennell (No 1)* [1940] I.R. 445.

<sup>128</sup> *R v Thornton (No. 2)* [1996] 2 All ER 605; *R v Sally Lorraine Emery (And another)* (1993).

<sup>129</sup> *Hill v Baxter* [1958] 1 Q.B. 277.

<sup>130</sup> See *Dix* (1981) 74 Cr. App. R. 306 at 311 Cited in Mackay & Coleman “Excluding Expert Evidence: A Tale of Ordinary Folk and Common Experience” [1991] Crim. L.R. 800 at 801.

<sup>131</sup> [2000] EWCA Crim 3.

<sup>132</sup> [2000] EWCA Crim 3.

<sup>133</sup> [1989] 164 CLR 94.

defendant was of limited intellectual capacity, was inadmissible due to the fact that it related to matters of human nature and behaviour within the limits of normality and thus did not qualify as expert evidence.

2.152 In the course of the judgment, the High Court of Australia expressed doubt concerning the English *Turner* decision:

“Lawton L.J. added some remarks which may not be so unquestionable: “Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life.” There are difficulties with such a statement. To begin with, it assumes that “ordinary” or “normal” has some clearly understood meaning and, as a corollary, that the distinction between normal and abnormal is well recognized. Further, it assumes that the commonsense of jurors is an adequate guide to the conduct of people who are “normal” even though they may suffer from some relevant disability. And it assumes that the expertise of psychiatrists (or, in the present case, psychologists) extends only to those who are “abnormal.” None of these assumptions will stand close scrutiny.”<sup>134</sup>

2.153 The High Court of Australia then reformulated the test to one that considers whether the evidence would provide assistance to the decision maker.

**(c) Abolition of the Common Knowledge Rule**

2.154 As evident from the inconsistent case law, and more obviously from the Australian decision *Murphy v The Queen*,<sup>135</sup> there appears to have been a shift away from a strict application of the common knowledge rule. Indeed, some jurisdictions have decided to abolish the rule outright.

**(i) Australia**

2.155 The Australian Law Reform Commission’s Interim Paper on Evidence criticised the common law rule for a number of reasons. The Commission argued that what is ‘common knowledge’ must be clearly definable in order for the exclusionary rule to function properly, and that finding a clear definition is however, not possible.<sup>136</sup>

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<sup>134</sup> *Murphy v The Queen* [1989] 164 CLR 94 at 110.

<sup>135</sup> [1989] 164 CLR 94

<sup>136</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at 354-355.

2.156 The Commission also argued that the rule excluding matters of common knowledge lacked theoretical justification because there are many situations in which the trier of fact might have some acquaintance with a subject as would the public at large, but might still find assistance from an expert of some value.<sup>137</sup> They gave the example of evidence that may be given by mental health professions on the ‘ordinary man,’ which as a consequence of the common knowledge rule, will be excluded.

“As a result the common knowledge concept has denied the courts....the work done by psychologists in conducting research into perception, memory, narration and in demonstrating the fallibilities of eye witness identification and the giving of confessions. A refusal by the courts to utilise the fruits of such research means that they base their decisions on knowledge that is incomplete and out of date.”<sup>138</sup>

2.157 The ALRC recommended that, rather than ask whether the area in relation to which expert opinion evidence is tendered is one of common knowledge, the question for the court should be whether the trier of fact could usefully receive assistance from the expert opinion evidence.”<sup>139</sup>

2.158 Following these recommendations, Section 80(b) of the *Evidence Act 1995* (Cth) abolished the common knowledge rule excluding expertise being admitted on areas of common knowledge.<sup>140</sup>

2.159 More recently, the Australian, New South Wales and Victorian Law Reform Commissions published a Report on Uniform Evidence Law,<sup>141</sup> which sought to conduct an inquiry into the operation of the laws of evidence in the various jurisdictions. This report addressed whether there was a need to amend Section 80 (b) of the *Evidence Act 1995* which removed the exclusionary rule against matters of common knowledge.

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<sup>137</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at 354-355.

<sup>138</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at 354-355.

<sup>139</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at 354-355. These recommendations were reiterated in Australian Law Reform Commission “Report 38 – Evidence” (ALRC 1987) para 151(c).

<sup>140</sup> *Evidence Act 1995* (Cth) s. 80 provides: “Evidence of an opinion is not inadmissible only because it is about.... (b) a matter of common knowledge.”

<sup>141</sup> ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005).

2.160 In the ALRC's Issues Paper for this report, it was acknowledged that as a result of the abolition of the common knowledge rule, dealing with evidence about such matters as motor vehicle accident reconstruction, which may have been excluded by the application of the common law rules, involves unnecessary time and expense.<sup>142</sup>

2.161 It was further acknowledged in the issues paper that the abolition of the exclusionary rule greatly facilitated the routine admission of expert opinion evidence in relation to identification, which could have the effect of lengthening cases where identification is a main issue.<sup>143</sup>

2.162 In the Final Report of the combined Commissions, it was noted that several submissions had recommended the reintroduction of the common knowledge rule. It was argued by the Law Institute of Victoria that it created a "high risk that juries might rely on, or afford particular probative value to, expert evidence on matters of common knowledge"<sup>144</sup>

2.163 Other submissions received by the Commissions argued that the common knowledge rule prevents difficulties arising where a jury gives undue weight to the opinion an expert who strays outside his or her area of expertise.<sup>145</sup>

2.164 However, the combined Commissions concluded that there was no need to reintroduce the common knowledge rule. They argued that the mere existence of the common knowledge rule is not itself preventive of the problem of experts straying outside their field of expertise. They further argued that there are sufficient safeguards contained within the *Evidence Act 1995* to counteract the difficulties created by the abolition of the rule.

2.165 For example Section 55(1) requires any evidence tendered to have the ability to "rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding." Therefore an opinion based excessively on matters of common knowledge may be excluded as a result of this section.

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<sup>142</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at 6.52; See also *Clark v Ryan* (1960) 103 CLR 486.

<sup>143</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at 6.53; See also *R v Smith* (2000) 116 A Crim R 1.

<sup>144</sup> ALRC Report 102; NSWLRC Report 112; VLRC Final Report; "Uniform Evidence Law" (December 2005) at 9.130.

<sup>145</sup> ALRC Report 102; NSWLRC Report 112; VLRC Final Report; "Uniform Evidence Law" (December 2005) at 9.133.

2.166 Similarly, section 7, which outlines the general admissibility criteria for expert evidence, requires such evidence to be “wholly or substantially” based on expert knowledge, which would appear to exclude evidence predominantly based on matters of common knowledge.

2.167 Furthermore, section 135 gives the court a general discretion to exclude evidence likely to; be unfairly prejudicial to a party; be misleading or confusing; or cause undue waste of time.

2.168 These provisions, in the Commissions view, along with the benefits of the abolition of the common knowledge rule, are sufficient reasons not to reintroduce the rule.<sup>146</sup>

### **(ii) New Zealand**

2.169 In its discussion paper on Expert Evidence and Opinion Evidence<sup>147</sup> the New Zealand Law Reform Commission considered the common knowledge rule and the desirability of its retention.

2.170 The Commission explained that the primary justification for preventing an expert from giving evidence on a matter within the knowledge of the finder of fact is that “to allow expert evidence in such a case would be to defeat the purpose for which juries are used.”<sup>148</sup>

2.171 However, the Commission also expressed the view that the rule can “operate to limit unduly the reception of evidence which would add to the understanding and knowledge of the judge or jury” because of the fact that it “excludes evidence by its subject matter without regard to its reliability and value in the trial.”<sup>149</sup>

2.172 As a result of these findings, the Commission recommended the abolition of the common knowledge rule and outlined two main alternatives for reform based on recommendations of other Law Reform Commissions.

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<sup>146</sup> ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005) at 9.137.

<sup>147</sup> New Zealand Law Commission “Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper (Preliminary Paper 18, December 1991, NZLC).

<sup>148</sup> Per McMullin J in *R v B (an accused)* [1987] 1 NZLR 362, 367 cited in New Zealand Law Commission “Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper (Preliminary Paper 18, December 1991, NZLC) at Para. 39.

<sup>149</sup> New Zealand Law Commission “Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper (Preliminary Paper 18, December 1991, NZLC) at Para. 40.

However, the Commission also acknowledged that both options would have the same substantive effect and would exclude the same evidence on the same grounds.

2.173 First, the Australian approach, which allows expert opinion wholly or substantially based on specialised knowledge, but subject to a general exclusionary power for quality control. Second, the Federal Rules of Evidence approach, which allows such expert opinion evidence as would “assist the trier of fact to understand the evidence or to determine a fact in issue,” subject to a general exclusionary power.<sup>150</sup>

2.174 In its final Report on Evidence – Reform of the Law, the New Zealand Law Commission considered these options for reform and concluded that the ‘common knowledge’ and ‘ultimate issue’ rules should be abolished, and that they should be replaced by a ‘substantial helpfulness’ test. This would allow opinion evidence if the opinion is likely to “substantially help” the court or jury to understand other evidence or ascertain any material fact.<sup>151</sup>

2.175 The *Evidence Act 2006*<sup>152</sup> has taken on board these recommendations. Section 25 (1) now provides that:

“An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.”

2.176 Section 25 (2) (b) further provides that an opinion by an expert is not inadmissible simply because it is about a matter of common knowledge.

**(d) Conclusion – Is Reform of the Common Knowledge Rule Necessary?**

2.177 As already discussed, the common law rule against permitting expert evidence on matters of common knowledge remains firmly applied in this jurisdiction. However, recent case law also reveals an increasing willingness on the part of the courts to expand the interpretation of what consists of matters outside the scope of knowledge of the finder of fact and the boundaries of expertise continues to expand.

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<sup>150</sup> Federal Rules of Evidence Rule 702 (Available at <http://www.law.cornell.edu/rules/fre/index.html>.

<sup>151</sup> New Zealand Law Commission “Evidence –Evidence Reform of the Law” (Report 55 Volume 1 August 1999, NZLC) at Para.74-75.

<sup>152</sup> No 69 of 2006. The 2006 Act came into force in 2007.

**(i)        *Abolition of Common Knowledge Rule***

2.178     It is open to the Commission to recommend following the approach taken in jurisdictions such as Australia and New Zealand, namely the adoption of a rule whereby expert evidence will not be excluded solely on the grounds that it is based on a matter of common knowledge.

2.179     The Commission could recommend a new test for admissibility, modelled on the New Zealand provisions, which takes a functional approach and requires consideration about whether the trier of fact could usefully receive assistance from the expert opinion evidence.

2.180     This general test could be balanced by provisions such as those contained in Australian legislation which give the court a general discretion to exclude evidence likely to; be unfairly prejudicial to a party; be misleading or confusing; or cause undue waste of time.

2.181     The possible advantages of such a reform have been detailed above. It can be argued that there are many issues which can be considered within the common knowledge of the court but on which expert evidence would still be of extreme benefit to the finder of fact.

2.182     It can be also argued that the case law demonstrates that the rule continues to be inconsistently applied, and the courts have continuously circumvented it, to the extent that it has become extinct in all but name. Its express abolition would therefore not have significant practical ramifications.

2.183     Such a reform would therefore significantly widen the scope of admissible expert evidence. However, it could be considered that this is a trend that is occurring in the case law regardless as the courts appear to be giving an increasingly broad interpretation to what is outside of the scope of knowledge of the finder of fact.

**(ii)        *Retention of Common Knowledge Rule***

2.184     A strong argument can also be made for the retention of the common knowledge rule. It is acknowledged that the rule helps to clarify for both the court and any potential experts for the parties to the case what the precise scope of expert evidence that will be permitted encompasses.

2.185     It further helps to consolidate in the expert's mind that his or her role is to give expert evidence and not to act as an additional finder of fact giving his or her view on the issues in the case as this amounts to a usurpation of the role of the finder of fact.

2.186     The rule also requires the expert to prove to a high standard that the evidence they are giving involves 'expertise,' and also requires the expert to ensure that his or her evidence does not stray outside the area of expertise. Therefore the rule promotes a high standard of expert testimony.

2.187 It has already been explained that the abolition of the rule can lead to problems such as undue lengthening of cases as it has the potential to greatly widen the matters for which a party will seek to adduce expert evidence.

2.188 There is also the added danger with the abolition of the rule that where an expert opinion is given on an issue, on which the court would be perfectly entitled to come to their own opinion, undue weight or deference may be given to the opinion of the expert as they may be erroneously considered to be better placed to give an opinion.

2.189 Furthermore, as can be seen in the case law, the rule in practice has not caused any major difficulties as the courts have been willing to circumvent it by stretching the boundaries of what will be considered, on the one hand a matter of common knowledge, and on the other hand, outside the scope of knowledge of the finder of fact.

2.190 The Commission now turns to set out its provisional recommendations on this area. In the view of the Commission, the role serves a valuable purpose in clearly defining the type of expert evidence that will be given, and bearing in mind the fact that expert opinion evidence is in itself a strict exception to the rule against opinion evidence, it should remain strictly applied.

2.191 The Commission further believes that any potential difficulties that may occur with the operation of the rule, such as its ability to exclude evidence that may have strong probative value, will be resolved by the court's ability to give a flexible interpretation to what consists of matters of common knowledge and the willingness of the court to recognise new areas of expertise.

2.192 *The Commission provisionally recommends that the common knowledge rule should not be abolished and that matters of common knowledge should remain outside of the scope of matters on which expert testimony can be given.*

### **(3)      *The Ultimate Issue Rule***

2.193 Traditionally, expert opinion evidence about the ultimate issues in the case was not permitted, as this would effectively erode the jury process and be a 'trial by expert'.<sup>153</sup>

2.194 The underlying rationale behind the exclusionary rule is therefore the desire to prevent the role of the judge or jury from being usurped. Another concern is to prevent the finder of fact from being unduly influenced by an

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<sup>153</sup> C. Fennell *The Law of Evidence in Ireland* (2<sup>nd</sup> ed LexisNexis Butterworths 2003) at 168.

expert opinion, which may not be reliable, on an issue which is crucial to the ultimate decision in the case.

2.195 However, recent cases reveal that this rule is now gradually being perceived as being unduly restrictive. Furthermore, the courts have always had difficulties in defining what constitutes the ultimate issue. This has led to different interpretations being given to the rule. As a result, it has been increasingly abandoned or, with careful wording, circumvented, in this jurisdiction, in line with developments in the US, Australasia and Canada, to the extent that it could now be considered almost obsolete.

**(a) Ireland**

2.196 The traditional rule against expert evidence on issues which pertain to the ultimate issues in the case can be seen in *The People (DPP) v Kehoe*.<sup>154</sup> Here, O'Flaherty J felt that the expert psychiatrist had "overstepped the mark" when he expressed an opinion that the accused did not have an intention to kill and that the accused was telling the truth.

2.197 This was a murder case and the issue for the court was to decide whether the accused could avail of the defence of provocation. In expressing an opinion that the accused did not have an intention to kill, the expert was clearly trespassing on the duty of the jury to decide on provocation.

2.198 However, a more flexible approach can be seen in later cases where the courts have recognised that a strict application of the exclusionary rule is not always appropriate. For example, Barron J. in *McMullen v Farrell*<sup>155</sup> stated a belief that there are certain cases where professional witnesses are entitled to express their opinion on the question which the court has to decide.

2.199 This development is not unremarkable as a considerable body of inconsistent case law was generated by the rule.<sup>156</sup> This inconsistency of application can be explained by recognising that the reason for adducing expert evidence was that the finder of fact did not have the expertise on which to base a decision.

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<sup>154</sup> [1992] I.L.R.M. 481.

<sup>155</sup> [1992] I.L.R.M. 776.

<sup>156</sup> For example in *Attorney General (Ruddy) v Kenny* (1960) 94 I.L.T.R. 185, opinion evidence that an accused was unfit to drive due to drunkenness was admitted from a member of the Garda Siochana, whereas in the later English decision *R v Davies* [1962] 3 All ER 97 evidence on the same issue was excluded. Although these decisions are from two different jurisdictions, the ultimate issue rule is a common law rule that had equal application in both jurisdictions.

2.200 One area where the ultimate issue rule has often been raised is in the context of nullity proceedings. In many such cases a medical inspector will be appointed to consider whether both parties had the mental capacity to enter into the marriage, a question which essentially amounts to the ultimate issue in the case. This fact was acknowledged by Budd J in *S(J) v S(C)*<sup>157</sup>

“In some unopposed nullity cases, the Consultant Psychiatrist gives an opinion verging on the ultimate issue which the Court is going to have to decide, namely, whether one or other of the parties suffered from such illness at the time of the ceremony of marriage as to be incapable of entering into and sustaining a viable marital relationship.”<sup>158</sup>

2.201 However, it can be argued that the role of the medical inspector in such cases is not decisive of the issues. Although the medical inspector will give an opinion about whether or not, in his or her expert view, the individual was mentally capable of entering into a viable marriage at the time of the marriage, it remains the role of the court to decide whether or not to grant the annulment. Although the court will take the expert’s evidence into account this is not binding and it is open to the court to reject or place little weight to the evidence and grant a decision that is not reflective of the expert’s evidence.

2.202 Furthermore, despite the decline in the ultimate issue rule in Irish case law, the courts are very careful to avoid experts making widespread findings of fact, and it has been stressed in several cases that the judge cannot abdicate his role to the expert, no matter how distinguished.<sup>159</sup>

**(b) England**

2.203 The common law rule has been similarly eroded in England. It has been statutorily abolished in the context of civil law proceedings, but despite calls for reform, continues to have application in the context of criminal proceedings.

**(i) Civil Proceedings**

2.204 In its 17<sup>th</sup> Report *Evidence of Opinion and Expert Evidence* the English Law Reform Committee expressed the opinion that in certain cases, the opinion of an expert on an issue in the proceedings can be a useful aid to the judge who has to decide the case and thus the Committee saw “no reason why

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<sup>157</sup> [1996] IEHC 23; [1997] 2 IR 506.

<sup>158</sup> [1996] IEHC 23; [1997] 2 IR 506 at para [8].

<sup>159</sup> See for example, *F (Orse C) v C* [1991] 2 I.R. 330

an expert witness should not be asked the direct question as to his opinion on an issue in the action which lies within the field of his expertise.”<sup>160</sup>

2.205 Pursuant to the recommendations of the Law Reform Committee, the *Civil Evidence Act 1972* gave express statutory permission for the giving of evidence on an ultimate issue. Section 3 of the Act provides:

“(1) Subject to any rules of court made in pursuance of Part I of the Civil Evidence Act 1968 or this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence

(3) In this section “relevant matter” includes an issue in the proceedings in question.”

2.206 Notwithstanding this generality however, Section 5(3) of the Act qualifies this general permission by giving the court the general discretion to exclude any evidence it so wishes.

2.207 In English civil cases therefore, evidence on an ultimate issue can be admitted, but equally it can be prohibited where, in the opinion of the court, it is not relevant or has little or no probative value, or where the court finds for whatever reason it should not be admitted.

### **(ii)      *Criminal Proceedings***

2.208 In criminal proceedings, the traditional strict application of the ultimate issue rule has been replaced by a more flexible approach; however, the rule continues to apply.

2.209 In *DPP v A and BC Chewing Gum Ltd*.<sup>161</sup> evidence of child psychologists was excluded in a case involving a charge of contravening the *Obscene Publications Act 1959* by publishing bubble gum battle cards which, it was alleged, were of an obscene nature. On appeal, the question was raised if it had been appropriate to exclude the evidence for reasons that it was evidence on the very issue the court had to determine – i.e. if the cards were of an obscene nature.

2.210 The court drew a distinction between questions about the effect literature, purported to be of an obscene nature, would have on young children, and the question of whether the literature in question was such “to deprave and corrupt” such children. The second question, they held, was a matter for the

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<sup>160</sup> Law Reform Committee “Seventeenth Report – Evidence of Opinion and Expert Evidence” (1970, London, HMSO) at para 63.

<sup>161</sup> [1968] 1 Q.B. 159.

court, not due to the fact that it amounted to an ultimate issue in the case, but due to the fact that such a question was not outside the range of scope and knowledge of the ordinary person.

2.211 In the course of the judgment, however, Parker C.J. alluded to the general degeneration of the ultimate issue rule:

"With the advance of science more and more inroads have been made into the old common law principles. Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and although technically the final question 'Do you think he was suffering from diminished responsibility' is strictly inadmissible, it is allowed time and time again without any objection."<sup>162</sup>

2.212 More recently, in *R v Stockwell*<sup>163</sup> Taylor J expressly stated that the ultimate issue rule has been effectively abolished in criminal cases in England:<sup>164</sup>

"The rationale behind the supposed prohibition is that the expert should not usurp the functions of the jury. But since counsel can bring the witness so close to opining on the ultimate issue that the inference as to his view is obvious, the rule can only be, as the authors of the last work referred to say, a matter of form rather than substance. In our view an expert is called to give his opinion and he should be allowed to do so. It is, however, important that the judge should make clear to the jury that they are not bound by the expert's opinion, and that the issue is for them to decide."<sup>165</sup>

2.213 It is arguable, however, that despite the near eradication of the ultimate issue rule in England, many of the older cases where evidence on the ultimate issue was excluded would still have the same result, if not on the same grounds, if decided today.

2.214 This is because the other admissibility rules, for example the requirement that the issue is one that is outside the knowledge and expertise of the court, will still apply to exclude evidence that is not considered necessary as a result of the court's determination not to let the role of judge and jury be

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<sup>162</sup> *DPP v A and BC Chewing Gum Ltd* [1968] 1 Q.B. 159.

<sup>163</sup> (1993) 97 Cr.App.R. 260.

<sup>164</sup> The rule has been similarly abolished in civil cases by Section 3 of the Civil Evidence Act 1972.

<sup>165</sup> *R v Stockwell* (1993) 97 Cr.App.R. 260 at 265-66.

usurped by expert witnesses. This is well demonstrated by the decision of the court in *DPP v A and BC Chewing Gum Ltd*.<sup>166</sup>

2.215 Another example of this approach can be seen in *R v Ugoh*.<sup>167</sup> This was a group rape case where expert evidence from a psycho-pharmacologist was admitted to the extent that the expert could state the likely effects of alcohol on the complainant's capacity to consent to sexual intercourse and to explain how the complainant was likely to act with the quantity of alcohol in her blood stream, both of which were issues in the case.

2.216 However the expert was not allowed to give evidence on the issue of whether or not the complainant's capacity to consent would have been evident to those who were with her at the time. The court did not object to the evidence due to the fact that it went to an ultimate issue in the case. It did object due to the fact that the accused's ability or inability to appreciate the complainant's inability to consent was not an issue for which expert evidence was necessary, as this was not outside the scope of knowledge of the jury.

“The appellants were normal young men, not themselves under the influence of drink or drugs, whose ability or inability to appreciate the complainant's inability to consent were a matter for the jury to assess. Their age, inexperience, tiredness or desires at 3.00 a.m. on a Saturday night or early Sunday morning were all matters for the jury to assess.”<sup>168</sup>

2.217 As can be seen from this case law, despite uncertainty relating to the extent of the application of the ultimate issue rule in English criminal proceedings, the English courts have retained a wariness to admit any expert evidence that may unduly encroach on the role and function of the judge or jury, regardless of the rule used to prohibit this evidence.

### **(c) Australia**

2.218 In its 1985 *Interim Report on Evidence* the Australian Law Reform Commission recognised that the ultimate issue rule has been repeatedly criticised by numerous Law Commissions.<sup>169</sup>

2.219 They also point out that there have been inconsistencies in the correct formulation and application of the rule and that “the courts have

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<sup>166</sup> [1968] 1 Q.B. 159.

<sup>167</sup> [2001] EWCA Crim 1381.

<sup>168</sup> Per Mance LJ *R v Ugoh* [2001] EWCA Crim 1381 at 20.

<sup>169</sup> Australian Law Reform Commission *Interim Report 26 – Evidence* (ALRC June 1984) at para 359.

departed from the most commonly understood version of the rule when they have felt it appropriate, resulting in an ad hoc development of the law.”<sup>170</sup>

2.220 The Commission further argued that the underlying rationale for the rule, namely the assumption that the role of the finder of fact would be usurped without it, is erroneous because such an assumption is founded on a misunderstanding of the role and function of witnesses, whose task it is to present the evidence, and that of judges and juries, whose task it is to evaluate this evidence.<sup>171</sup>

“The popular justification for the rule, that it prevented the expert or lay witness from usurping the function of the jury, is misconceived. There is no usurpation. The jury, in any event will be told that they must assess the evidence, lay and expert. It is upon the most important issues that expert assistance can be crucial and the courts need to be able to receive it. It is necessary to give both sides, be the proceedings criminal or civil, full opportunities to call witnesses to give relevant evidence.”<sup>172</sup>

2.221 The Commission therefore opted to concur with the approach of the United States Federal Rules of Evidence and with the recommendations of Law Reform Commissions in Canada,<sup>173</sup> Scotland<sup>174</sup> and South Australia,<sup>175</sup> that the ultimate issue rule be abolished

2.222 With the introduction of the *Evidence Act 1995 (Cth)* the common law rule against expert evidence going to the ultimate issue was removed by

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<sup>170</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at para 359.

<sup>171</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at para 359.

<sup>172</sup> Australian Law Reform Commission “Interim Report 26 – Evidence” (ALRC June 1984) at para 743.

<sup>173</sup> Ontario Law Reform Commission, *Report on The Law of Evidence*, 1976, 153-8; Law Reform Commission of Canada, *Report on Evidence*, 97, 98 (ss 67-71); Federal/Provincial Task Force, *Report on Uniform Rules of Evidence*, para 8-10.

<sup>174</sup> Scottish Law Commission *Memo No 46 Law of Evidence R.01-R.06*. See also Law Reform Committee, 17; Criminal Law Revision Committee, England and Wales, Eleventh Report, *Evidence (General)* HMSO, London. 1977, para 266-272.

<sup>175</sup> Criminal Law and Penal Methods Reform Committee of South Australia, Third Report, *Court Procedure and Evidence*, Govt Printer, Adelaide, 1975, para 6.

Section 80. In its Issues Paper on Evidence, the Australian Law Reform Commission examined the operation of section 80.<sup>176</sup>

2.223 The Commission acknowledged that the removal of the rule had led to problems in certain categories of cases, such as professional negligence cases, where concern was raised that juries in such cases may be overly influenced by expert evidence on the central issue involved, i.e. whether or not the defendant has been negligent.<sup>177</sup> They also noted that there have been several calls for the revival of the rule, based on concerns about the effect of such evidence on a jury.<sup>178</sup>

2.224 These arguments were revisited in the Final Report on Uniform Evidence law, where the combined commissions considered whether or not there is a need for the revival of the rule.<sup>179</sup> The Commission highlighted the many submissions that had been made in support of the rule but ultimately came to the conclusion that the uniform Evidence Acts seem to be operating satisfactorily without the rule and so recommended that the ultimate issue rule remain abolished and that it should not be reintroduced.<sup>180</sup>

**(d) New Zealand**

2.225 In the New Zealand case *R v Howe*<sup>181</sup> the Court of Appeal referred to the general trend of a move away from a strict application of the ultimate issue rule;

“The rule that a witness cannot give evidence on the ultimate issue has now been very much eroded. Experts do commonly give

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<sup>176</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004).

<sup>177</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at para 6.45.

<sup>178</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at para 6.47; ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005) at 9.1116.

<sup>179</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at para 6.47; ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005)

<sup>180</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at para 6.47; ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005) at 9.1116.

<sup>181</sup> [1982] 1 NZLR 618.

evidence on matters on which the ultimate decision in the case turns.”<sup>182</sup>

2.226 The rule and the desirability of its retention was also the subject of consideration in the discussion paper on Expert Evidence and Opinion Evidence of the New Zealand Law Reform Commission.<sup>183</sup> The Commission acknowledged that in practice the rule has proved to be too restrictive and tends to be widely ignored.<sup>184</sup>

2.227 The Commission acknowledged that the rationale behind the rule is the danger that the fact finder will be over-impressed by unreliable opinion and give it weight which it does not deserve.

2.228 However, the Commission expressed the view that this danger is present regardless of whether the evidence is directed at an ultimate issue or not, and therefore a more appropriate approach is to assess any evidence directly “the primary issue being whether the evidence is helpful and reliable, not whether it goes to the ultimate issue.”<sup>185</sup> This recommendation was approved in the New Zealand Law Reform Commission’s Final Report on Evidence.<sup>186</sup>

2.229 The Commission’s recommendations were implemented in the New Zealand *Evidence Act 2006*. Section 25(2)(a) provides that an opinion of an expert is not inadmissible because it is about an ultimate issue to be determined in the proceedings.

2.230 Expert evidence on an ultimate issue in a case is therefore statutorily admissible in both criminal and civil proceedings in New Zealand.

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<sup>182</sup> [1982] 1 NZLR 618 at 628.

<sup>183</sup> New Zealand Law Commission “Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper (Preliminary Paper 18, December 1991, NZLC).

<sup>184</sup> New Zealand Law Commission “Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper (Preliminary Paper 18, December 1991, NZLC) at para 43.

<sup>185</sup> New Zealand Law Commission “Evidence Law: Expert Evidence and Opinion Evidence – A Discussion Paper (Preliminary Paper 18, December 1991, NZLC) at para 42, 44

<sup>186</sup> New Zealand Law Commission “Evidence –Evidence Reform of the Law” (Report 55 Volume 1 August 1999, NZLC) at Para.77.

**(e) Conclusion - Is Reform of the Ultimate Issue Rule Necessary?**

2.231 As already discussed, the ultimate issue rule against permitting expert evidence on matters which go to the ultimate issue in a case remains firmly applied in this jurisdiction.

2.232 However, recent case law also reveals difficulties with the rule such as inconsistent interpretation and application. This has led many jurisdictions to expressly abolish the ultimate issue rule.

**(i) Abolition of the Ultimate Issue Rule**

2.233 It has been argued that the underlying basis for the rule, namely the usurpation of the role of the jury, does not in fact require the rule. It remains the function of the jury to accept or reject the opinion of the expert and thus to decide on the ultimate issue; merely hearing the expert's opinion evidence on the ultimate issue does not amount to the expert having the final say.

2.234 It is open to the Commission to recommend the abolition of the ultimate issue rule and its replacement with a general admissibility test based on whether or not the evidence is of assistance to the court, whilst at the same time emphasising the informative and discretionary rather than binding nature of the expert's opinion, and the ultimate duty of the finder of fact to decide the case.

2.235 Such a reform would remove the inconsistencies and barriers imposed by the rule and ensure that the judge or jury have all necessary expertise available to them on every issue involved in the case.

**(ii) Retention of the Ultimate Issue Rule**

2.236 There is also a valid argument to be made in favour of the retention of the ultimate issue rule. The argument can be made that if "ultimate issue" is properly interpreted, by its very definition expert evidence would never be permitted or considered necessary.

2.237 Expert evidence is often necessary to explain to the judge or jury the scientific or technical background of issues that are central in a case. However, the role of the expert in such cases is not decisive of the issues.

2.238 The overriding function of expert testimony is to provide the finder of fact with the necessary expert knowledge to come to their final conclusions. The overriding function of the finder of fact is to use the expert information given to them and then come to its own informed conclusions about the ultimate issue involved in the case.

2.239 Although the court will take the expert's evidence into account, this is not binding and it is open to the court to reject or place little weight on the evidence and to give a decision that does not reflect the expert's evidence.

2.240 This interpretation of the ultimate issue rule endorses both the underlying roles of the expert witness and of the judge and / or jury. The ultimate issue rule should this be considered as prohibiting an expert from giving an opinion if to do so would involve unstated assumptions as to either disputed facts or propositions of law.<sup>187</sup>

2.241 The retention of the rule in principle is important, provided that the court is left with the discretion to allow such evidence in a particular case where necessary. The Commission is of the view that the rule serves the valuable purpose of strengthening the role of the finder of fact by ensuring that the expert witness does not usurp the role of the court to determine the issues in a case. It is also a useful benchmark for the expert witness to ensure that he or she does not step over the line in relation to the evidence that is permissible and stray outside the area of expertise for which expert testimony is being adduced.

2.242 *The Commission provisionally recommends that the Ultimate Issue rule should not be abolished and should have continued application as it does not impose any excessive difficulties in practice.*

2.243 *The Commission provisionally recommends that the Court should continue to be entitled to allow expert evidence to inform and educate the judge and or jury about the background to the ultimate issue where necessary, whilst emphasising that the ultimate decision on such issues is for the court and not the expert.*

#### **(4) Expert and Non-Expert Evidence of Fact**

2.244 As recognised above, expert witnesses can often give expert evidence of fact as well as expressing their opinion, such as where certain results or techniques require expertise to explain. Furthermore, the distinction between expert and non-expert evidence of fact can, in reality, have significant ramifications. For example, the costs of an expert witness may be recovered whereas those of a witness of fact may not. Similarly, while both witnesses of fact and expert witnesses are equally legally compellable, it is rarely the case in practice that the court will be called on to compel the attendance of an expert witness, as generally a party will have a number of possible experts on a particular issue to choose from, and it is clear that a reluctant or unwilling expert is likely to do more harm than good to the party's case.<sup>188</sup>

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<sup>187</sup> This was the interpretation adopted by the Federal Court of Australia in *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 350 (Lockhart, Wilcox and Gummow JJ) quoting Eggleston *Evidence, Proof and Probability* (2nd ed, 1983), at 147–148.

<sup>188</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) 6-003.

2.245 In the 1843 decision of *Webb v Page*<sup>189</sup> Maule J set out a clear definition of the distinctions between witnesses who are called to give evidence of fact on facts which they have seen, and those expert witnesses who are called to give evidence of fact on facts of which he is knowledgeable as a result of experience or study in the field of expertise:

“There is a distinction between the case of a man who sees a fact and is called to prove it in a Court of Justice, and that of a man who is selected by a party to give his opinion on a matter with which he is peculiarly conversant from the nature of his employment in life. The former is bound, as a matter of public duty, to speak to a fact which happens to have fall within his knowledge – without such testimony the court of justice must be stopped. The latter is under no such obligation. There is no necessity for his evidence, and the party who selects him must pay him.”<sup>190</sup>

2.246 More recently, however, the distinction between the two is not always clear cut, and several cases have had trouble distinguishing between expert and non-expert evidence of fact.<sup>191</sup> For example in *The People (DPP) v Buckley*<sup>192</sup> the question arose whether the defendant’s admission that the substance recovered from his pocket was cannabis was sufficient evidence that it was cannabis in the absence of a certificate of analysis from the Garda Forensic Science Laboratory confirming that it was such.

2.247 Charleton J relied on the decisions in *R v Chatwood*<sup>193</sup> and *Bird v Adams*<sup>194</sup> in ruling that “the qualities of cannabis are not now so unusual as to put it in a different category so that expert evidence of its presence is always required.”<sup>195</sup> Charleton J appeared to be of the opinion that the defendant could give factual evidence that the substance he had in his possession was

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<sup>189</sup> (1843) 1 Car & Kir 23.

<sup>190</sup> (1843) 1 Car & Kir 23 at 695.

<sup>191</sup> See for example *DN Greenwich London Borough* [2004] EWCA Civ 1659 a professional negligence case where the court held that evidence from the defendant, an educational psychologist, was evidence of fact, not evidence of an expert witness, notwithstanding the fact that their evidence would be that of a professional in the issue at hand.

<sup>192</sup> [2007] IEHC 150.

<sup>193</sup> [1980] 1 W.L.R. 874, [1980] 1 All E.R. 467, 70 Cr. App. Rep. 39.

<sup>194</sup> [1972] Crim. L.R. 174.

<sup>195</sup> [2007] IEHC 150 at para. 16.

cannabis. “An accused, who admits a substance is cannabis can be, but not necessarily must be, relied on to know what he is talking about.”<sup>196</sup>

2.248 In *Bird v Adams*<sup>197</sup> the English High Court pointed out that:

“...there are many instances where an admission made by a defendant on a matter of law in respect of which he was not an expert was really no admission at all, e.g., a defendant could not know in a bigamy case whether a foreign marriage was valid...but here the...defendant certainly had sufficient knowledge of the circumstances of his conduct to make his admission at least *prima facie* evidence of its truth.”

2.249 This decision was relied on in *R v Chatwood*<sup>198</sup> where a heroin addict’s confession that he had injected heroin was sufficient evidence to prove that the substance in question was heroin. The Court of Appeal appeared to characterise the admission as expert opinion evidence, but Hodgkinson & James argue that there is no real difference between the classic definition of lay witness evidence as evidence perceived by the senses, and the evidence given in this case. They consider that the court may have been misled due to the fact that a heroin rush is not perceived by one of the five senses when injected, but nevertheless that the admission should have been considered as evidence of fact.<sup>199</sup>

2.250 These cases highlight that the lines between expert and non-expert opinion evidence of fact are often blurred, particularly where narcotics cases are involved. However it would appear from the foregoing that the courts are willing to admit the evidence as evidence of fact, as it will remain open to the trier of fact to decide on the value or lack thereof to attach to such evidence.

2.251 The Commission believes that this is an important requirement as if it is unclear, greater evidential weight may be given if it appears that the expert is stating a fact, rather than his or her own opinion.

2.252 *The Commission provisionally recommends that experts should be required, as far as possible, to distinguish clearly between matters of fact and matters of opinion when giving their expert evidence both orally and in the expert report.*

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<sup>196</sup> Per Charleton J, *The People (DPP) v Buckley* [2007] IEHC 150 at para. 16.

<sup>197</sup> [1972] Crim. L.R. 174.

<sup>198</sup> [1980] 1 W.L.R. 874, [1980] 1 All E.R. 467, 70 Cr. App. Rep. 39.

<sup>199</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 82.

## **(5) Non-Expert Opinion Evidence**

2.253 Dickson J in *R v Abbey*<sup>200</sup> clearly elucidated one of the reasons for the extent of the categories of expert evidence:

“The law of evidence...reposes on a few general principles riddled by innumerable exceptions.”

### **(i) Common Law Exceptions to the Rule against Opinion Evidence**

2.254 In keeping with this, a number of common law derogations from the exclusionary rule outside of expert testimony can be seen.

#### **(I) Where Fact and Inference are Indivisible**

2.255 For example non-expert opinion evidence may be admitted where it is necessary to do so because of the indivisibility of fact and inference in a witness' testimony. As explained by Mac Dermott LCJ in *Sherrard v Jacob*,<sup>201</sup> there may be:

“...instances in which the primary facts and the inference to be drawn there from are so adherent or closely associated that it may be hard, if not impossible, to separate them.”

#### **(II) Matters of Common Experience**

2.256 The exclusionary rule may also be relaxed where the matter is within “common experience within the ken of ordinary men,”<sup>202</sup> for example an observation on someone's state of mind at a particular time.

#### **(III) Matters Incapable of Precise Appreciation**

2.257 An exception may also be made where the matter is one that is not capable of exact observation and the most that can be expected is an approximation or estimation, for example evidence of identification, “the speed of a motor car, the size of a crowd, the temperature of a day, and any question of measurement.”<sup>203</sup>

#### **(IV) Catch-All Exception where Convenient to Do So**

2.258 Finally, there is a broad, catch-all range of circumstances where witnesses are permitted to give opinions where this is convenient and the

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<sup>200</sup> [1982] 2 S.C.R. 24.

<sup>201</sup> [1965] N.I. 151.

<sup>202</sup> *Sherrard v Jacob* [1965] N.I. 151at 156.

<sup>203</sup> Per Kingsmill Moore J in *AG (Ruddy) v Kenny* (1960) 94 I.L.T.R. 185 at 190.

opinion does not go to the facts of the case. As Lavery J stated in *AG (Ruddy) v Kenny*:<sup>204</sup>

“...there are innumerable incidents of everyday life upon which an ordinary person can express a useful opinion and one which ought to be admitted.”

2.259 In this case, the ‘incident’ in question was drunkenness, which, in the view of the learned judge, was a matter on which an ordinary person was capable of expressing an opinion, without the need of the expert opinion of a member of An Garda Siochana or a medical expert.

(ii) ***Statutory Exceptions to the Rule against Opinion Evidence***

2.260 A number of statutory exceptions have also developed over time. Section 3(2) of the *Offences against the State Act (Amendment) Act 1972*<sup>205</sup> provides that where certain members of the Garda Siochana testify in evidence that ‘he believes that the accused was at a material time a member of an unlawful organisation,’ then this statement constitutes evidence that the accused was then such a member.

2.261 Other statutory provisions which permit express opinions to be adduced in evidence include the *Proceeds of Crime Act 1996*,<sup>206</sup> the *Domestic Violence Act 1996*<sup>207</sup> and the *Competition Act 2002*.<sup>208</sup>

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<sup>204</sup> (1960) 94 I. L.T.R. 185.

<sup>205</sup> No. 26 of 1972.

<sup>206</sup> Section 8 provides that where a garda states in proceedings that he believes that property which the respondent is in control of constitutes the proceeds of crime, or was acquired by the proceeds of crime, then that statement can be evidence of the matter referred to an the value of the property.

<sup>207</sup> Section 3 (4) (b) provides that where an applicant for a barring order states a belief that he has a legal or beneficial interest in the property the subject of the barring order, which equals or rivals that of the respondent, the such belief is admissible in evidence.

<sup>208</sup> Section 9 provides that for proceedings under the Act, the opinion of a person who appears to the court to have the necessary qualifications or experience with respect to the matter calling for specialist knowledge, shall be admitted in evidence. It also sets out a number of matters on which expert evidence will be permitted.

## **E           The Weight and Value to be Attached to Expert Evidence**

2.262     As will be discussed below, the general approach of the courts is that reliability of expert evidence is a matter to be assessed at the weight, rather than admissibility, stage of litigation. Whereas the court might be willing to admit expert evidence freely, such a favourable view may not always be taken when assessing the weight to be attached to such evidence.

### **(1)       The Court Assesses the Value of the Expert Evidence**

2.263     It is important to note that the court is not obliged to accept or act on expert evidence and can refuse to admit it or reject it if they so wish. The decision making function of the court must not be usurped by the expert, and it remains at all times the duty of the court to determine the truth of the matter at hand. The evidence of an expert will therefore only be of persuasive, not binding effect, to be taken into account along with all of the other evidence in the case.

2.264     This was acknowledged by the court in *Davie v Edinburgh Magistrates*<sup>209</sup> where the court rejected the defender's contention that the court was bound to accept the evidence of their main expert witness as no similar expert had been adduced by the pursuer to counter his conclusions. Although Lord President Cooper acknowledged the fact that the expert's opinion was uncontested, however, he went on to state:

"Expert witnesses, however skilled and eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury.....The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury."<sup>210</sup>

### **(2)       The Evidence of Lay Witnesses can be given Greater Weight than Expert Evidence**

2.265     In this jurisdiction it has long been recognised that the court is entitled to prefer the evidence of lay witnesses over experts if this appears to fit in better with the facts of the case. In *Poynton v Poynton*<sup>211</sup> the court held that where two witnesses were advanced in support of a case, one being a witness of fact who had personally perceived the event, and one being an expert witness who expressed an opinion on the issue in question (in this case the

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<sup>209</sup>     (1953) SLT 54.

<sup>210</sup>     (1953) SLT 54 at 57.

<sup>211</sup>     (1903) 37 ILTR 54.

sanity of a testator) the evidence of the witness of fact is to be preferred. Madden J reasoned:

"We have the highest authority for the proposition that mere speculative opinion and expressions of opinion cannot reasonably be compared with the evidence of witnesses who had an opportunity of applying the ordinary facts of mental capacity....in my opinion the evidence given on behalf of the plaintiff (supporting the will) runs on a different plane from the purely speculative evidence, unaccompanied by any attempt to test the mental capacity of the testator which was relied on by the defendant, and that the jury acted unreasonably in not differentiating between the two classes of evidence."

2.266 This judgment would appear to hold that where a witness of fact and an expert witness are presenting conflicting evidence, the testimony of the witness of fact is to be afforded greater weight. However, it is also evident from this judgment that the expert witness was criticised for his failure to make a thorough investigation of the testator.

2.267 In circumstances where the expert has presented a well researched and thorough argument, particularly where the opinion relates to issues of medical expertise, it can be argued that the opinion of any expert may in some cases be of far more benefit than the unlearned opinion of a witness of fact. However, there are a number of cases in this jurisdiction where lay evidence was accorded higher weight than expert evidence, which demonstrates that the courts continue to place a high value on the testimony of lay witnesses.

2.268 For example, the Supreme Court in *Hanrahan v Merck, Sharpe & Dohme Ltd*,<sup>212</sup> agreed with the plaintiff's contention that "there is greater force and credibility to be given to the first-hand evidence of witnesses whose truthfulness was not called into question, as opposed to the largely abstract ex post facto evidence of scientists who had no direct or personal experience of the matters complained of."<sup>213</sup>

2.269 There are also a number of examples of the Court preferring the evidence of lay witnesses over scientific testimony in criminal cases where experts are advanced in support of a defence of insanity to a murder charge. For example in both *The People (AG) v Fennell (No. 1)*<sup>214</sup> and *The People (AG) v Kelly*<sup>215</sup> the jury preferred lay testimony which supported the proposition that

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<sup>212</sup> [1988] IESC 1; [1988] ILRM 629 (5th July, 1988).

<sup>213</sup> [1988] IESC 1; [1988] ILRM 629 (5th July, 1988) at 35.

<sup>214</sup> [1940] I.R. 445.

<sup>215</sup> (1962) Frewen 267.

the accused was sane at the time of the fatal attack. On appeal, the Court in both cases stressed that the jury were perfectly entitled to do so.

2.270 A series of nullity cases also demonstrate that the courts are quick to prefer their own opinion over that of an expert where they believe this is most appropriate and so attach little value to the expert's opinion.<sup>216</sup> This highlights that the courts are wary prevent a situation of 'trial by expert' and will not attach high or excessive weight to an expert's opinion if the opinion of the court, having heard all of the evidence, does not correspond.

### **(3) Factors to be Taken into Account When Determining Weight**

2.271 A number of cases have discussed the range of factors to be taken into account when determining the appropriate weight to attach to any expert evidence. In this jurisdiction in *AG (Ruddy) v Kenny*,<sup>217</sup> Davitt P outlined some of the factors need to be taken into account to determine the weight to be given to such evidence:

"It will depend upon the nature of the evidence, the impartiality of the witness and his freedom from bias, the facts on which he bases his opinion, and all the other relevant circumstances."

2.272 Similarly, in the English decision *Davie v Edinburgh Magistrates*<sup>218</sup> Lord President Cooper held that the value and weight to be attached to expert evidence depends upon:

"...the authority, experience and qualifications of the expert and above all upon the extent upon which his evidence carries conviction and not upon the possibility of producing a second person to echo the sentiments of the first expert witness."

2.273 However, the main worry is that, despite these guidelines, greater deference will be given to the opinion of an expert whose testimony is eloquent and impressive, but not necessarily very relevant or reliable. The danger that excess weight will be accorded to a particular theory can be heightened when the task of determining weight is given to a lay jury or tribunal with little legal training, regardless of warnings given by a judge in summing up to prevent this.

2.274 In a 1999 survey of Australian judicial perspectives on expert testimony, approximately 70% of judges surveyed conceded that they had had

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<sup>216</sup> As per Keane J in *F (Orse C) v F* [1991] ILRM at p.79: "It is the responsibility of the courts alone and not of psychiatrists, however eminent, to determine whether a decree of nullity should be granted."

<sup>217</sup> (1960) 94 I. L.T.R. 185.

<sup>218</sup> [1953] SLT 54.

occasions where they had felt that they had not understood expert evidence in the cases before them. 20% of respondent judges said that they “often” experienced difficulty in evaluating opinions expressed by one expert as against those expressed by another.<sup>219</sup>

2.275 This survey reveals a potential difficulty created by the situation where the judge or jury is required to assess the value of evidence that is being admitted for the sole reason that it is considered outside of the scope of knowledge of the judge or jury.

#### **(4) Conflicting Expert Testimony**

2.276 The question of weight also encompasses the issue of conflicting expert evidence. In most litigation, both parties will advance experienced experts to present their own, often contradictory, arguments. The difficulty for the finder of fact to decide on which expert to agree with is apparent when one considers that the reason for adducing the evidence in the first place is the fact that it is outside the range of knowledge of the court.

2.277 Lord Woolf summarised the inherent contradiction within expert evidence well in his Final Report on reform of the English civil justice system, *Access to Justice*:

“The traditional way of deciding contentious expert issues is for a judge to decide between two contrary views. This is not necessarily the best way of achieving a just result. The judge may not be sure that either side is right, especially if the issues are very technical or fall within an area in which he himself has no expertise. Nevertheless, he hopes to arrive at the right answer. Whether consciously or not his decision may be influenced by factors such as the apparently greater authority of one side's expert, or the experts' relative fluency and persuasiveness in putting across their arguments.”<sup>220</sup>

2.278 This effectively means that in the ‘battle of the experts,’ the opinion given by the witness with the greater oratorical skills may be the one that sways the opinion of the judge or jury, particularly where complex issues are in question, regardless of whether the opinion is the more reliable in the circumstances.

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<sup>219</sup> Freckleton, Reddy & Selby “Australian Judicial Perspectives on Expert Evidence; an Empirical Study” (Australian Institute of Judicial Administration, 1999) at Question 3.7.

<sup>220</sup> Lord Woolf *Access to Justice, Final Report*, HMSO (1996) Ch. 13.8.

2.279 It was stressed in *Best v Wellcome Foundation Ltd.*<sup>221</sup> that the function of the court where there is a conflict of evidence is not to decide which witness they prefer. Rather, as Finlay CJ stated:

“The function which the court can and must perform is to apply common sense and a careful understanding of the logic and likelihood of events to conflicting opinions and conflicting theories concerning a matter of this kind.”<sup>222</sup>

2.280 This is a reasonable statement; however, it is submitted that, in reality, expert evidence is being advanced more and more frequently on complex subjects and theories. In such instances, applying common sense and logic may not make the task any easier. The inherent difficulty was noted over a century ago by the great American jurist and judge Learned Hand when he explained that:

“But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.....If you would get at the truth in such cases, it must be through someone competent to decide.”<sup>223</sup>

2.281 More recently in Ireland, O’Sullivan J, writing extra judicially, gave a vivid description of the difficulties he faced in trying a medical negligence case. The task of the judge, he explained, was “to apply the rules of probability to two eminently distinguished and coherent bodies of evidence which were in mutual conflict,” a task which left him feeling like “an intellectual pygmy looking up at two giants: from that vantage point one simply cannot tell which of them is taller.”<sup>224</sup>

## F Usurpation of the Role of Judge or Jury

2.282 Kenny states that there are three ways in which experts may usurp the role of others in the legal process. They may usurp the function of the jury by giving a conclusion on the ultimate issue in the case rather than providing

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<sup>221</sup> [1993] 3 I.R. 421.

<sup>222</sup> [1993] 3 I.R. 421 at 462.

<sup>223</sup> Hand “Historical and Practical Considerations Regarding Expert Testimony” (1901) 15 Harvard LR 40 at 54-55.

<sup>224</sup> O’Sullivan ‘A Hot Tub for Expert Witnesses’ [2004] 4 Judicial Studies Institute Journal 1. In this article, he recommends adopting the Australian Competition Tribunal model which consists of a panel, or ‘hot tub’ of opposing experts who debate the issue amongst themselves without initial intervention from lawyers.

information to the jury to enable them to reach a more informed conclusion. They may usurp the role of the judge, by imposing on the jury their own interpretation of statutory terms such as ‘responsibility.’ Finally, they may usurp the role of the legislature by giving opinions on general policy in relation to the convictions. For example, “that people who are sick in a certain way should not be sent to prison.”<sup>225</sup>

2.283 Therefore, along with the risk that unwarranted weight will be given to expert evidence, there is also a related and overlapping risk that the opinion of the expert will be taken on board to decide the case at hand, resulting in an effective ‘trial by expert.’ This is particularly so now, since the rule prohibiting the proffering of expert witness opinion on the ultimate issues of a case has been all but abandoned.

2.284 It stands to reason that there is a real risk that a lay jury, and in some cases even experienced judges, might place more emphasis on the opinion given by esteemed experts than on the conclusions that they might draw themselves. It has been repeatedly stressed in the case law that a finder of fact cannot abdicate his or her function to an expert no matter how distinguished.

2.285 For example in *R v Turner*<sup>226</sup> Lawton J was quite firm in his comments that the courts would be vigilant to prevent ‘trial by psychiatrist’:

“We do not find that prospect attractive and the law does not at present provide for it... we are firmly of the opinion that psychiatry has not yet become a satisfactory substitute for the common sense of juries or magistrates on matters within their experience of life.”<sup>227</sup>

2.286 In this jurisdiction, O’Flaherty J in *The People (DPP) v Kehoe*,<sup>228</sup> pointed out that the questions as to whether the accused was telling the truth and whether he had an intention to kill were:

“...clearly matters four-square within the jury’s function and a witness, no more than the trial judge or anyone else, is not entitled to trespass on what is the jury’s function.”<sup>229</sup>

2.287 In *The People (DPP) v Yusuf Ali Abdi*<sup>230</sup> Hardiman J warned:

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<sup>225</sup> Kenny “The Expert in Court” (1983) 99 LQR 197 at 208.

<sup>226</sup> [1975] 1 QB 834 CA.

<sup>227</sup> [1975] 1 QB 834 CA at 842-3.

<sup>228</sup> [1992] I.L.R.M. 481.

<sup>229</sup> Per O’Flaherty J, in *The People ( DPP) v Kehoe* [1992] I.L.R.M. 481.

<sup>230</sup> [2004] IECCA 47.

"The role of the expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform the tribunal so that it may come to its own decision. Where there is a conflict of expert evidence it is to be resolved by the jury or by the judge, if sitting without a jury, having regard to the onus of proof and the standard of proof applicable in the particular circumstances. Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact."

2.288 Similarly, in *The People (DPP) v Fox*<sup>231</sup> the Court approved of the comments of Lord President Cooper in the Scottish case *Davie v Edinburgh Magistrates*.<sup>232</sup> This extract has since been cited with approval in a number of cases in this jurisdiction:<sup>233</sup>

"However skilled or eminent, he can give no more than evidence. They cannot usurp the functions of the jury or the judge, sitting as jury, any more than a technical assessor cannot substitute his evidence for the judgment of a court."

2.289 Related sentiments have been expressed in a series of nullity cases where the courts have recognised that on the one hand, the evidence of psychologists, psychiatrists and social workers is now recognised of being of great importance in dealing with nullity cases, on the other hand however, deciding the marital status of the parties remains the ultimate responsibility of the judge. The function of any expert witness adduced is to help with this task and not to usurp it. For example, Keane J stated in *F(Ors C) v C*.<sup>234</sup>

"How was the Court to decide what these phrases mean in the context of any particular case? Not certainly by reference to the evidence of psychiatrists; they can, of course, assist the court as to the nature and extent of any mental illness suffered by a spouse, but it is the responsibility of the courts alone and not of psychiatrists, however eminent, to determine whether a decree of nullity should be granted."

2.290 Similarly, Murphy J stressed in *KWT v DAT*<sup>235</sup> that:

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<sup>231</sup> Special Criminal Court, 23 January 2002.

<sup>232</sup> (1953) SLT 54.

<sup>233</sup> See for example *L(P) v DPP* [2002] IEHC 25 (16th April, 2002); *The People (DPP) v Murphy* [2005] IECCA 52 (5 May 2005).

<sup>234</sup> [1991] ILRM 79.

<sup>235</sup> [1992] 2 IR 11.

“...at the end of the day it seems to me that I cannot abdicate my function to the experts, however distinguished, and even though they are, in the present case, in agreement on the point that the parties to marriage did not have an adequate emotional capacity to sustain the relationship of marriage.”<sup>236</sup>

2.291 This point was cited with approval in *MCG(P) v F(A)*<sup>237</sup> and *F(G) v B(J)*,<sup>238</sup> highlighting the continuing reluctance of the judiciary to pass the responsibility of deciding on essential elements of the case to an expert witness. Budd J stated:

“When it comes to deciding the issues confronting the Court then the buck firmly lands on the desk of the Court and cannot be shifted to the inspector, however experienced and respected the medical inspector may be.”<sup>239</sup>

2.292 In practice however, where the judge is being asked to adjudicate on issues about which he or she is completely inexperienced, and on which he or she is undecided, it stands to reason that considerable deference will be given to witnesses who present themselves as expert in the field, and present convincing and impressive argument, peppered with technical terminology, even if this is not the most accurate representation of the facts in the case.

2.293 Guidance was given about the role and function of an expert witness in the English case of *Liddell v Middleton*<sup>240</sup> where Stuart-Smith LJ said:

“The function of the expert is to furnish the Judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by the ordinary layman to enable the Judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect “I considered the statements and/or evidence of the witnesses in this case and I conclude from their evidence that the Defendant was going at a certain speed, or that he could have seen the Plaintiff at a certain point.” As this is essentially a job for the jury to decide.

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<sup>236</sup> [1992] 2 IR 11 at 21.

<sup>237</sup> [2000] IEHC 11 (28th January, 2000).

<sup>238</sup> [2000] IEHC 112 (28th March, 2000).

<sup>239</sup> [2000] IEHC 11 (28th January, 2000) at 20.

<sup>240</sup> (1996) PIQR 36.

2.294 He went on to consider the particular facts of the case and concluded in this way:

"We do not have trial by expert in this country; we have trial by Judge. In my judgment, the expert witnesses contributed nothing to the trial in this case except expense. For the reasons I have indicated, their evidence was largely if not wholly irrelevant and inadmissible. Counsel on each side of the trial succumbed to the temptation of cross-examining them on their opinion, thereby lengthening and complicating a simple case.

## **G      Junk Science and the Need for a Reliability Test**

2.295 Testing the reliability of evidence can be particularly difficult where scientific or technical evidence is in question. It has long been recognised that the disciplines of law and science are founded in very different principles and thus their interrelation can be strained. Heffernan points out that the two disciplines "are characterised by notable differences in ideology, expectation, methodology, language and discourse."<sup>241</sup>

2.296 Applying scientific information to principles of law can prove to be difficult task. This is because, according to Heffernan:

"Lawyers and scientists are creatures of their respective cultures; they neither approach litigious issues in the same way nor speak the same professional language. The search for scientific truth is a markedly different enterprise from the law's inquiry into the proof of allegation and counter-allegation."<sup>242</sup>

2.297 Problems can arise therefore where a party seeks to present expert evidence about a recent scientific advance or other novel or emerging area of expertise which may not have received widespread approval or recognition.

2.298 It can be difficult for a lay judge or jury, entirely unacquainted with scientific or technical fields of expertise, to assess whether the evidence coming before them has a reliable and well-established foundation, or whether it amounts to what has been termed 'junk science.'<sup>243</sup> The term 'junk science,' refers to the abuse of science and scientific terminology in the courtroom setting by importing irrelevant or inaccurate evidence to advance a party's arguments

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<sup>241</sup> Heffernan *Scientific Evidence, Fingerprints and DNA* (Firstlaw).

<sup>242</sup> Heffernan "Gauging the Reliability of Expert Witnesses" (2006) 6 JSIJ 140 at 150.

<sup>243</sup> The term 'junk science' was first coined in the renowned work by Huber *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books 1991).

2.299 The evidence envisaged under this section is that which relates to new and emerging areas of expertise; scientific advances and new theories and techniques that have not been previously tested in the courts. The various jurisdictions have taken different approaches regarding how best to establish the reliability of such expert testimony.

**(1) Ireland**

2.300 In Ireland, all that is required in order for a party to have expert evidence adduced is that the party can prove that the expert evidence is relevant in that it is necessary to resolve the issue at hand, and that the party can prove that the person in question is a sufficiently qualified expert in the particular field.

2.301 In contrast with other jurisdictions, there is no admissibility test which requires the party to demonstrate that the expert evidence they purport to adduce can be considered as being founded on a sufficiently reliable basis.

**(a) Problems Generated by Lack of Formal Reliability Test**

2.302 It is clear that in certain instances it may not always be clear to the court whether expertise would be helpful in a particular case, or whether or not an issue is outside the scope of expertise of the finder of fact.

2.303 Although the majority of this evidence will undoubtedly be trustworthy and dependable, there have been examples of infamous cases (albeit a small number) where inaccurate, for the most part scientific, evidence has led to serious miscarriages of justice.

**(b) Judicial Discretion to Refuse Unreliable Evidence**

2.304 It can be argued that the existing admissibility requirements do, to a certain extent, address the issue of reliability, as deciding on the appropriateness of a witness' expertise and the necessity for the evidence to be based on the facts will inevitably involve a determination of how reliable the evidence is.

2.305 Notwithstanding the absence of a set test, the court at all times retains the discretion as to whether to admit expert evidence or not, and the case law demonstrates that the Irish courts are keenly aware of the potential for unreliable evidence and will not hesitate to reject evidence that does not meet the appropriate threshold.

2.306 Although the cases in this jurisdiction that have considered the trustworthiness of expert evidence, and the related need for a reliability requirement are rare, on a number of occasions expert evidence has been rejected on the basis that it is not sufficiently supported by legitimate expertise.

**(c) Case Law Rejecting Expert Evidence**

2.307 A case where expert evidence was rejected as unreliable is *The People (DPP) v Fox*.<sup>244</sup> Here, the prosecution sought to rely on the evidence of an expert on handwriting to prove that it was the accused's signature on a document in issue. The Court rejected this evidence, finding that the evidence in question was not backed by any scientific criteria which would have enabled the finder of fact to test the accuracy of the expert's conclusions.

2.308 It was pointed out that it was common practice when giving expert evidence of handwriting to give the similarities and dissimilarities of the writing which the expert relies on in evidence and this was not done here. Similarly, the expert was criticised for his sole reliance on lower case writing without giving an explanation for doing so.

2.309 Similarly in *NC v DPP*<sup>245</sup> the Supreme Court refused to prosecute the accused in circumstances where hypnosis had been used on the complainant to recover suppressed memory of sexual offences. It was not that hypnosis was seen as an illegitimate form of expertise that lead to this result but rather the fact that the therapist was not present at the trial for questioning about the procedures involved, and considerable uncertainty surrounded the date and circumstances of the alleged recovery of memory.

2.310 The Court was thus concerned about the absence of an "effective test or control of the mechanism of alleged recovered memory." This would infer that the Irish courts will require a high level of proof of the reliability of any novel form of expertise, even if no formal reliability test has been enunciated.

**(d) Reliability of DNA Evidence**

2.311 The majority of judicial consideration on the appropriate reliability test for expert testimony has been based on an examination of DNA evidence and its trustworthiness.

2.312 In its *Consultation Paper on the Establishment of a DNA Database* the Commission outlined a number of cases that had considered the reliability of DNA evidence.<sup>246</sup> It was noted that the reliability of DNA technology has been

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<sup>244</sup> Special Criminal Court, January 23, 2002.

<sup>245</sup> Supreme Court, 5 July 2001.

<sup>246</sup> See Law Reform Commission *Consultation Paper on The Establishment of a DNA Database* LRC CP 29-2004 at 9.01-9.50.

accepted in general terms in Ireland in *The People (DPP) v Lawlor*<sup>247</sup> and in *The People (DPP) v Horgan*.<sup>248</sup>

2.313 The Commission also outlined, however, a number of cases where the individual DNA evidence given in the case was criticised or rejected. For example, in *People (DPP) v Howe*<sup>249</sup> an acquittal was directed as the DNA evidence was considered unreliable for two reasons. First, the forensic scientist had no qualification in statistics therefore could not determine the probability of the DNA belonging to another person. Second, the prosecution had not disproved that the accused did not have a brother, who could have had similar DNA.

2.314 A strong warning was given in the context of DNA testimony in *People (DPP) v Allen*<sup>250</sup> where the Court of Criminal Appeal admitted the evidence, but stated:

“Expert evidence comparing DNA profiles is a comparatively recent scientific technique, and indeed it would appear that it is still being perfected. As in many scientific advances, the jury have to rely entirely on expert evidence. One of the primary dangers involved in such circumstances is that, the matter being so technical, a jury could jump to the conclusion that the evidence is infallible. That, of course, is not so in the case of DNA evidence, at least in the present state of knowledge.”<sup>251</sup>

#### **(e) Conclusion**

2.315 The case law already discussed demonstrates that even though there is no formal test or yardstick which the court can use to help determine whether or not the expert evidence which a party wishes to adduce is reliable, in reality the Irish courts are anxious to ensure that expert evidence is substantially sound before permitting it to form part of the evidence before the court.

2.316 In contrast with other jurisdictions there has been little judicial debate or commentary in this jurisdiction on the reform of this area or on the merits of

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<sup>247</sup> Central Criminal Court 2 December 2005 – See Law Reform Commission Consultation Paper on *The Establishment of a DNA Database* LRC CP 29-2004 at 9.04.

<sup>248</sup> *Irish Examiner* 25 June 2002.

<sup>249</sup> *Irish Times* 15 October 2003, Central Criminal Court (Butler J).

<sup>250</sup> [2003] 4 I.R. 295

<sup>251</sup> [2003] 4 I.R. 295 at 4.

the introduction of additional admissibility criteria based on the reliability of the evidence.

2.317 However, there is growing academic literature on the issues of reliability and junk science, and other jurisdictions have implemented various reforms in this context. Legal developments in the United States in this area have been the main catalyst for reform internationally, and notable case law in the US (for example the *Frye* and *Daubert* decisions) has been used as the basis for discussion on the need to introduce a reliability test wherever this has been considered.

## **(2)      *United States***

2.318 The American courts have imposed more rigorous admissibility requirements than most other common law jurisdictions in an effort to prevent unreliable testimony and to ensure against the proliferation of junk science.

### **(a)      *The Frye Test***

2.319 The US debate on this issue began with the landmark decision in *Frye v United States*.<sup>252</sup> Here, the defendant sought to adduce expert evidence about the results of a systolic blood pressure deception test, the precursor to the lie detector test, to prove his innocence. The court refused to allow the evidence to be admitted. In the course of the judgment they set down a new test for the reliability of expert evidence,

“Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained *general acceptance* in the particular field in which it belongs.”<sup>253</sup> (emphasis added)

2.320 This test engendered considerable debate and sometimes criticism in the US but became the dominant test in the US for the next 70 years.<sup>254</sup> It required parties who wished to adduce expert evidence to prove that the evidence in question had gained ‘general acceptance’ in the field of expertise

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<sup>252</sup> (1923) 54 App. D. C. 46, 293 F. 1013.

<sup>253</sup> *Frye v United States* (1923) 54 App. D. C. 46, 293 F. 1013 at 1014.

<sup>254</sup> Imwinkelried, “Junk Science’ in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?” (2004) 26 *Dublin University Law Journal* 83.

from which it purported to belong, by demonstrating that the principle had gained consensus amongst a considerable body of experts in the field.

**(b) The Daubert Test**

2.321 The decision in *Daubert v Merrell Dow Pharmaceuticals, Inc*<sup>255</sup> was the next major case to fuel the growing debate on ‘junk science.’ This was a civil action where the plaintiffs claimed that a pregnant mother’s use of the defendant’s anti-nausea drug, Bendectin, could result in her child developing limb defects and sought to advance significant expert evidence to support this proposition.

2.322 The US Supreme Court refused to admit the plaintiffs evidence and in doing so, held that the *Frye* test had been impliedly overruled by Rule 702 of the Federal Rules of Evidence which deals with the use of ‘scientific, technical or other specialised knowledge’ by the courts, as nothing in that test required ‘general acceptance’ as a prerequisite to admissibility.<sup>256</sup> On the basis of Rule 702, the Court then set down a new test;

“To summarize: ‘general acceptance’ is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence - especially Rule 702 - do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.”

2.323 Blackmun J recognised that this new test may cause some difficulties in its application, therefore a non-exhaustive list of factors that would help establish if a science or proposition was sufficiently empirically tested were listed in the course of the judgment.<sup>257</sup> These are summarised by Imwinkelried as including;

- i) Whether the proposition is testable empirically. For example, if an astrologer’s claim cannot be tested in that fashion, it cannot qualify as admissible “scientific knowledge” under Rule 702.
- ii) Whether the proposition has been tested. The proposition may be testable and plausible; however it is a grave mistake to equate the

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<sup>255</sup> 509 U.S. 579; 113 S. Ct. 2786 [1993].

<sup>256</sup> Federal Rule 702 provides; “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.”

<sup>257</sup> 509 U.S. 579; 113 S. Ct. 2786 [1993] at 593-594.

- plausible and the proven. The proposition does not deserve scientific status until it has literally been put to the test.
- iii) Whether the theory has a “known or potential rate of error”. When the technique has an ascertainable error rate, the jury can more intelligently decide how much weight to ascribe to the expert's testimony.
  - iv) Whether the proposition has been subjected to peer review and publication. On the one hand, Justice Blackmun insisted that peer review is “not a *sine qua non* of admissibility”. A given proposition may be so new, or of such limited interest that it is unrealistic to expect it to have been published. On the other hand, peer review is “a relevant... consideration”. Peer review can be circumstantial evidence that the proposition rests on proper scientific procedure. Publication “increases the likelihood that substantive flaws in methodology will be detected. ...”
  - v) Whether there are standards for using the methodology. The more standardised the procedures, the easier it is for other scientists to retest the proposition in question, and therefore the sounder the underlying methodology.
  - vi) Whether the methodology is generally accepted. Under *Frye*, general acceptance is an exclusive test for admissibility. *Frye* elevated general acceptance to the status of a test. Although the *Daubert* Court rejected *Frye*, the Court correctly recognised that, like peer review, general acceptance can be persuasive circumstantial evidence that the methodology is sound. When a methodology is old enough to have garnered general acceptance, other scientists have had a chance to retest the proposition. If the technique still enjoys widespread support, presumably no one has identified significant deficiencies in the research.<sup>258</sup>

2.324 This decision can be seen as moving the focus from requiring the evidence to be generally accepted, to requiring the evidence to be empirically validated. Bernstein argues *Daubert* requires the court to address two distinct issues:

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<sup>258</sup> Imwinkelried “Junk Science’ in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?” (2004) 26 *Dublin University Law Journal* 83.

"First, are the studies or data upon which the expert is relying trustworthy? Second, if so, are these studies or data actually probative of the issues before the court?"<sup>259</sup>

2.325 Blackmun J in *Daubert* also explained that whereas *Frye* focused "on exclusively 'novel' scientific techniques," *Daubert* was not so limited and any expertise sought to be adduced in evidence, not just new evidence, would have to conform to its requirements.<sup>260</sup> This greatly expanded the categories of evidence which could be scrutinised in terms of their reliability, as *Frye* jurisdictions had often treated 'soft-science' as being exempt from compliance with the general acceptance test.<sup>261</sup>

**(c) Post-Daubert Position**

2.326 In the aftermath of the *Frye* and *Daubert* decisions, different approaches were taken by the various states. Although a number of states still subscribe to the *Frye* test, the majority of states now follow the *Daubert* standard.<sup>262</sup> Indeed, the case law following *Daubert* saw the courts become increasingly strict about the reliability of expert testimony.

**(i) Expert Opinion can be Unreliable even if Methodologies are Sound**

2.327 For example in *General Electric Co. v Joiner*<sup>263</sup> the respondent claimed that his exposure to certain materials used in the course of his employment "promoted" his development of small cell lung cancer and advanced expert evidence in the form of rodent studies and other vague epidemiological data in support of his claim. The petitioners criticised the

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<sup>259</sup> Bernstein "Junk Science in the United States and the Commonwealth" (1996) 21 Yale Jn'l Intn'l L. 123 at 136.

<sup>260</sup> As per Blackmun J in *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 U.S. 579; 113 S. Ct. 2786 (1993) fn. 11 "Although the *Frye* decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence. Of course, well established propositions are less likely to be challenged than those that are novel, and they are more handily defended."

<sup>261</sup> Imwinkelried "'Junk Science' in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?" (2004) 26 *Dublin University Law Journal* 83.

<sup>262</sup> Bernstein "Junk Science in the United States and the Commonwealth" (1996) 21 Yale Jn'l Intn'l L. 123.

<sup>263</sup> 522 US 136 (1997).

testimony of the experts in that it was “not supported by epidemiological studies . . . [and was] based exclusively on isolated studies of laboratory animals.”

2.328 The Supreme Court approved the decision of the District Court to find in favour of the respondents, finding that the studies cited by the expert were not sufficient support for his conclusions. For the Court, Rehnquist J urged future courts to exclude expert evidence that relied on misguided reasoning to infer causation from the available evidence, even if the underlying general methodology used was valid:

“...conclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.”<sup>264</sup>

(ii) ***Expert Opinion can be Unreliable Even Where the Expertise is Non-Scientific***

2.329 Likewise in *Kumho Tyre Co v Carmichael*<sup>265</sup> the excluded testimony in question was that of a tyre expert who sought to give evidence of “tyre technology” to the effect that he could give the reasons for tyre failure having examined the tyre in question.

2.330 The Supreme Court expanded on Blackmun’s comments in *Daubert* to the effect that the range of expert testimony that could be required to prove its methodologies were sound is no longer confined to scientific fields but can be applied to all fields of expertise, even those where expertise is being claimed as a result of technical or practical experience:

“We do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match.”<sup>266</sup>

2.331 Breyer J acknowledged that the criteria set down in *Daubert* which are to be used to assess the validity of any expert testimony are not definitive but are meant to act as helpful guidelines. This is a recognition of the fact that not all types of expert testimony are conducive to scientific methods of empirical testing.

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<sup>264</sup> Rehnquist J in *General Electric Co. v Joiner* 522 US 136 (1997).

<sup>265</sup> 526 U.S. 137 (1999).

<sup>266</sup> Breyer J in *Kumho Tyre Co v Carmichael* 526 U.S. 137 (1999).

2.332 However, Breyer J did find that some of the *Daubert* criteria could be used to evaluate the validity of non-scientific evidence, even experience based testimony, and that the individual court in each case should have a certain degree of leeway in relation to what factors are used to determine the reliability of expert evidence. He gave the following examples:

“In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert’s experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”<sup>267</sup>

**(d) Conclusion**

2.333 The willingness of states to apply increasingly stringent admissibility requirements came about in the wake of an increased awareness that much of the expert evidence that was being proffered in litigation at the time was proving to be erroneous or inaccurate.<sup>268</sup>

2.334 The tests in *Frye* and *Daubert* greatly reduced the possibility for inaccurate evidence or junk science being admitted as expert testimony, and both tests have been subject of copious commentary in the US, both academically and in the case law.<sup>269</sup>

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<sup>267</sup> Per Beyer J *Kumho Tyre Co v Carmichael* 526 U.S. 137 (1999).

<sup>268</sup> See Imwinkelried, “‘Junk Science’ in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?” (2004) 26 *Dublin University Law Journal* 83 for examples for studies conducted in the 1980’s and 1990’s revealing vast discrepancies in evidence adduced in court.

<sup>269</sup> For extensive discussion on US developments in the context of reliability in expert testimony see, inter alia: Imwinkelried, “‘Junk Science’ in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?” (2004) 26 *Dublin University Law Journal* 83; Bernstein “Junk Science in the United States and the Commonwealth” (1996) 21 *Yale Jn'l Int'l L.* 123; Faigman & Ors “Check Your Crystal Ball at the Courthouse Door Please: Exploring the Past, Understanding the Present and Worrying about the Future of Scientific Evidence” (1994) 15 *Cardozo LR* 1799; Koutchoukos “Solomon meets Galileo (And Isn’t Quite Sure What to Do With Him)” (1994) 15 *Cardozo LR* 2237; Imwinkelried “The Next Step After Daubert: Developing a Similarly Epistemological to Ensuring the Reliability of Non-Scientific Expert Testimony” (1994) 15 *Cardozo LR* 2271; Bernstein “Expert Witnesses, Adversarial Bias, and

**(3) Australia**

2.335 In its *Issues Paper on Evidence*, which formed part of its Review of the *Evidence Act 1995*, the Australian Law Reform Commission gave detailed consideration to what they term ‘the field of expertise rule,’ or the requirement that “claimed knowledge or expertise should be recognised as credible by others capable of evaluating its theoretical and experiential foundations.”<sup>270</sup>

2.336 The Commission explained that the Uniform Evidence Act does not contain a specific ‘area of expertise’ requirement, and that all the act requires is that the person purporting to give expert evidence have “specialised knowledge.”<sup>271</sup>

2.337 They further explain that the ‘field of expertise’ rule has been the subject of contention at common law and that although different approaches have been taken within the various Australian jurisdictions and courts, that the applicable test has not yet been fully resolved.<sup>272</sup>

**(i) High Court of Australia**

2.338 The High Court of Australia originally adopted a ‘general acceptance’ style test. In *HG v The Queen*.<sup>273</sup> The court held that in order to qualify as expert evidence, the expert’s knowledge and experience of a particular area must be:

“....sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.”<sup>274</sup>

2.339 The question of reliability was reconsidered more recently in *Velvesski v The Queen*.<sup>275</sup> Here, the appellant was convicted of the murder of his wife and three children and appealed on the grounds that *inter alia* expert evidence should not have been admitted from the prosecution which sought to prove that the appellant’s wife had been murdered rather than committed suicide. The

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the (Partial) Failure of the Daubert Revolution” (2007) George Mason Law & Economics Research Paper No. 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>.

<sup>270</sup> Australian Law Reform Commission *Review of the Evidence Act 1995*, IP 28 (2004) at 6.13.

<sup>271</sup> Section 79 *Evidence Act 1995*.

<sup>272</sup> Australian Law Reform Commission *Review of the Evidence Act 1995*, IP 28 (2004) at 6.20.

<sup>273</sup> (1999) 197 CLR 414, [58].

<sup>274</sup> (1999) 197 CLR 414, [58].

<sup>275</sup> (2002) H.C.A. 4 (14 February 2002).

appellant argued that such evidence should not be admissible as it was not established that, based on the test in *HG v The Queen*.<sup>276</sup>

“...there is a reliable body of knowledge and experience, based on the observation of wounds, which would enable a person to express an expert opinion whether particular wounds were self-inflicted.”<sup>277</sup>

2.340 This was rejected on appeal where it was held that whether wounds may have been suicidally self-inflicted is capable of being the subject of expert evidence if a suitable foundation as to the witnesses' training, study or experience has been laid. They went on to discuss what would constitute sufficient 'training, study or experience':

“[T]he words used in the section, necessarily include, as they must in all areas of expertise, observations and knowledge of everyday affairs and events, and departures from them. It will frequently be impossible to divorce entirely these observations and that knowledge from the body of purely specialised knowledge upon which an expert's opinion depends. It is the added ingredient of specialised knowledge to the expert's body of general knowledge that equips the expert to give his or her opinion.”<sup>278</sup>

2.341 These comments could be interpreted as a move away from assessing reliability in terms of how well it has been organised or recognised towards a *Daubert*-style assessment of the evidence in terms of the expert's training, study or experience.

2.342 These judgments have led commentators to find that the approach of the Australian High Court is that while recognition may be one basis for a conclusion of reliability, under the uniform Evidence Acts the ultimate test is reliability' of the expert's knowledge or experience in an area.<sup>279</sup>

### **(ii) South Australia**

2.343 In the South Australian decision of *R v Bonython*<sup>280</sup> King CJ set down a test for the admissibility of expert evidence in that jurisdiction. This test has

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<sup>276</sup> (1999) 197 CLR 414, [58].

<sup>277</sup> (2002) H.C.A. 4 (14 February 2002) at 154.

<sup>278</sup> (2002) H.C.A. 4 (14 February 2002) at 158.

<sup>279</sup> Odgers *Uniform Evidence Law* (6th ed, 2004) at 1.3.4260 Cited in: Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at para 6.47; ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005) at 9.37.

<sup>280</sup> [1984] 38 SASR.

been cited with approval on several occasions in various common law jurisdictions.

"Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts; a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area and b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which of the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court."<sup>281</sup>

2.344 Therefore King CJ's admissibility test can be summarised as requiring:

1. The evidence comes within the categories of subjects on which expert evidence is admissible. This can be broken down to two further requirements;
  - a. the subject matter of the evidence is one that *requires special knowledge or assistance* in order to make a sound judgment on (i.e. it is outside the scope of knowledge of the ordinary person)
  - b. the subject matter has been accepted as forming *part of a sufficiently organised or recognise reliable knowledge* or experience to be considered a reliable body of knowledge or experience
2. The expert has *sufficient qualifications or experience* to be considered an expert in the field.

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<sup>281</sup> *R v Bonython* (1984) 38 SASR at 45.

**(iii) Victoria**

2.345 In contrast with South Australia, the Victoria Court of Criminal Appeal rejected the general acceptance rule in *R v Johnson*.<sup>282</sup> Here Brooking J stated the applicable admissibility requirements in that jurisdiction:

“Provided the judge is satisfied that there is a field of expert knowledge ... it is no objection to the reception of the evidence of an expert within that field that the views which he puts forward do not command general acceptance by other experts in the field.”<sup>283</sup>

**(iv) Reform of the Australian Admissibility Requirements – The Addition of a Reliability Test**

2.346 The need to have some sort of reliability test on the types of knowledge submitted to be the subject matter of expert evidence was recently discussed by the Australian, the New South Wales, and the Victorian Law Reform Commissions as part of their combined review of Uniform Evidence Law in 2005.<sup>284</sup>

2.347 The Commissions acknowledged the ongoing debate as to whether an additional admissibility requirement relating to reliability of the evidence should be introduced and summarised the different approaches that have been adopted by the various Australian courts and jurisdictions.<sup>285</sup>

2.348 The Commissions referred to the *Frye* and *Daubert* tests and acknowledged that it has not yet been resolved to what extent these should be apply in the context of the *Uniform Evidence Act*. In the Issues paper the Commission summarised the arguments in this regard:

“One view is that the ‘specialised knowledge’ requirement of section 79 should be interpreted as imposing a standard of evidentiary reliability, so that expert opinion evidence must be derived from a reliable body of knowledge and experience. At the least, aspects of the field of expertise test, including ‘general acceptance’ and *Daubert*-style reliability criteria may be able to be used to help determine the probative value of evidence in the exercise of the general discretion to exclude evidence. On the other hand, there may

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<sup>282</sup> (1994) 75 A Crim R 522.

<sup>283</sup> (1994) 75 A Crim R 522 at 535.

<sup>284</sup> ALRC Report 102; NSWLRC Report 112; VLRC Final Report; “Uniform Evidence Law” (December 2005).

<sup>285</sup> ALRC, NSWLRC, VLRC “Uniform Evidence Law – Report 102” (December 2005) at Ch. 9.31-9.38.

be concern about the restoration of a field of expertise rule, contrary to legislative intent, through such interpretations of section 79.”<sup>286</sup>

2.349 In the final report, the Commission expressed the view that it was unnecessary to recommend an amendment to import any of the tests, such as the *Frye* test, that have been considered necessary at common law, or to clarify any aspects of the ‘specialised knowledge’ requirement of s 79. Therefore, the Commissions appeared satisfied to let determination of reliability to be decided by the court on a case by case basis without any additional admissibility barriers such as requiring the evidence to have been generally accepted (*Frye*) or requiring the underlying methodology to be scientifically verifiable (*Daubert*).

**(4) England & Wales**

2.350 As in this jurisdiction, there is no formal or statutory reliability test for admissibility of expert evidence. Expert evidence will be admitted once it is relevant and the person seeking to give the evidence is sufficiently qualified to be considered an expert.

2.351 Relevancy hinges on the ability of the evidence to be of assistance in helping the court to reach a ‘fully informed decision’,<sup>287</sup> a question that will in turn hinge on whether the issue is one which an ordinary person would require instructions on the essentials of the necessary field of expertise to make this fully informed decision.<sup>288</sup>

**(a) Judicial Discretion and Flexible Case by Case Approach**

2.352 Rather than create set categories of permitted evidence, or a formal reliability test for admissibility, the English courts have taken a case by case approach in assessing new scientific developments that come before the courts.<sup>289</sup>

2.353 This was acknowledged by Gage LJ in *R v Harris & Ors*<sup>290</sup> where he stated:

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<sup>286</sup> Australian Law Reform Commission, *Review of the Evidence Act 1995*, IP 28 (2004) at para 6.24.

<sup>287</sup> *United Bank of Kuwait v Prudential Property Services* (1995) Court of Appeal 27th November 1995 at 4.

<sup>288</sup> Per Butler-Sloss LJ *Re M and R (Minors)* [1996] 4 All ER at 239.

<sup>289</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-001.

<sup>290</sup> [2005] EWCA Crim 1980 (21 July 2005).

"There is no single test which can provide a threshold for admissibility in all cases. As Clarke demonstrates developments in scientific thinking and techniques should not be kept from the Court. Further, in our judgment, developments in scientific thinking should not be kept from the Court, simply because they remain at the stage of a hypothesis. Obviously, it is of the first importance that the true status of the expert's evidence is frankly indicated to the court."<sup>291</sup>

2.354 In recent years, the English courts have had to decide on the reliability of certain types of new and novel types of scientific and technical evidence in a number of cases. However, the court has resisted the formulation of an additional admissibility test in the form of a reliability test.

**(b) Focus on the Qualifications of the Expert**

2.355 In *R v Robb*,<sup>292</sup> the prosecution sought to adduce an expert in phonetics to give expert voice identification evidence after repeatedly listening to recordings of the defendant's voice.

2.356 Bingham L.J. laid down a two-pronged test for admissibility of expert evidence; first, whether study and experience will give a witness's opinion an authority which the opinion of one not so qualified will lack, and if so, second, whether the witness in question is *peritus*, that is skilled,<sup>293</sup> and has adequate knowledge. Bingham LJ continued:

"If these conditions are met the evidence of the witness is in law admissible, although the weight to be attached to his opinion must of course be assessed by the tribunal of fact."

2.357 The test propounded here by Bingham LJ arguably failed to take into account the reliability of the evidence at all, focusing instead on expert giving the evidence and their qualifications.

2.358 In *R v Stockwell*,<sup>294</sup> a facial mapping expert was called by the prosecution to help prove that the defendants' disguised face appeared on

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<sup>291</sup> [2005] EWCA Crim 1980 (21 July 2005) at [270] In *R v Clarke* (1995) 2 Cr.App.R. at 425, 429 the Court of Appeal stated: "It is essential that our criminal justice system should take into account modern methods of crime detection... There are no closed categories where such evidence may be placed before a jury. It would be entirely wrong to deny the law of evidence the advantages to be gained from new techniques and new advances in science." (Cited in Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-001).

<sup>292</sup> (1991) 93 Cr.App.R. 161.

<sup>293</sup> See also Lord Russell's comments in *R v Silverlock* [1894] 2 Q.B. 766 at 771.

<sup>294</sup> (1993) 97 Cr App 260.

video films taken during a bank robbery and attempted robbery. On appeal, the Court had to decide if this evidence was rightly admitted.

2.359 The English Court of Appeal observed that the trial judge had described facial mapping evidence as ‘breaking new ground’ went on to approve his view that “one should not set one’s face against fresh developments, provided that they have a proper foundation,” therefore allowing the evidence to be admitted.

2.360 In relation to the test for admissibility, the court appeared to affirm the approach taken in *Robb*:

“In such circumstances we can see no reason why expert evidence, if it can provide the jury with information and assistance they would otherwise lack, should not be given. In each case it must be for the judge to decide whether the issue is one on which the jury could be assisted by expert evidence, and whether the expert tendered has the expertise to provide such evidence.”<sup>295</sup>

**(c) Move towards a Reliability Test?**

2.361 The decision in *R v Gilfoyle*<sup>296</sup> came closer to referring to reliability as being requisite for admissibility. Here, the court refused to admit evidence of a psychologist, submitted by the defence, to prove that the deceased was in such a frame of mind prior to death that she was likely to commit suicide. The court held that this ‘psychological autopsy’ was a new developing brand of science that had not yet been properly accepted within its field of expertise.

2.362 Rose L.J. observed that expert evidence “based on a developing new brand of science or medicine” would not be admissible “until it is accepted by the scientific community as being able to provide accurate and reliable opinion.”<sup>297</sup> The court cited *Strudwick & Merry*<sup>298</sup> and *Frye*<sup>299</sup> in support of this view.<sup>300</sup>

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<sup>295</sup> (1993) 97 Cr App 260 at 264.

<sup>296</sup> (2001) 2 Cr. App. R. 5.

<sup>297</sup> (2001) 2 Cr. App. R. 5 at 25.

<sup>298</sup> (1994) 99 Cr. App. 326.

<sup>299</sup> 54 App. D. C. 46, 293 F. 1013.

<sup>300</sup> (2001) 2 Cr. App. R. 5 at 25.

**(d)      *Return to Traditional Qualifications-Based Approach***

2.363     However, *Gilfoyle* was criticised in *R v Dallagher*<sup>301</sup> where *Robb* was again reasserted. In this case, the defendant successfully appealed his murder conviction on the basis that fresh evidence had emerged in the form of misgivings about the extent to which ear print evidence alone could safely be used to identify a suspect.

2.364     The court here pointed out that the American approach in *Frye*<sup>302</sup> had now been overtaken by the test propounded in *Daubert*<sup>303</sup> and cited Cross & Tapper as encapsulating the current test in England:

“The better, and now more widely accepted, view is that so long as the field is sufficiently well-established to pass the ordinary tests of relevance and reliability, then no enhanced test of admissibility should be applied, but the weight of the evidence should be established by the same adversarial forensic techniques applicable elsewhere.”<sup>304</sup>

2.365     Although the court here mentioned the *Daubert* test, as well as US Federal Court Rule 702 on which that decision was based, the Court of Appeal failed to elaborate whether *Daubert* criteria should be applied in England to ensure that the evidence had a sufficiently certain grounding, but seemed to infer that the decision about the reliability and relevancy of the evidence should continue to be decided by the judge on a case by case basis.

**(e)      *Problems with Lack of Reliability Test***

2.366     Although the court in *Dallagher*<sup>305</sup> refused to find that the evidence should have been ruled inadmissible on the basis of the *Robb* test, at the retrial this evidence was not re-introduced by the prosecution and ultimately the accused's conviction was quashed. This highlights the potential for inaccurate evidence to lead to false convictions.

2.367     Another example of this is *R v Cannings*<sup>306</sup> where the appellant appealed her murder conviction on the basis of new advances in scientific

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<sup>301</sup> [2002] EWCA Crim 1903.

<sup>302</sup> 54 App. D. C. 46, 293 F. 1013.

<sup>303</sup> 509 U.S. 579; 113 S. Ct. 2786 [1993].

<sup>304</sup> Tapper Cross and Tapper on Evidence (9<sup>th</sup> ed Butterworths 1999) at 523; cited in *R v Dallagher* [2002] EWCA Crim 1903.

<sup>305</sup> [2002] EWCA Crim 1903.

<sup>306</sup> [2004] EWCA Crim 1.

understanding of sudden infant death syndrome which showed that multiple cases of the syndrome in one family was not so rare as had been stated at trial by an expert witness. Again, the appellant had spent time in prison before these developments came to life, underlining the potential for untested evidence to have onerous implications for accused persons.

**(f) Confusion in Recent Case Law**

2.368 More recently, in *R v Luttrell*<sup>307</sup> the appellants sought to argue that a requirement for admissibility includes proving that the evidence can be seen to be reliable because the methods used can be sufficiently explained in cross examination to test veracity or falsehood. This was rejected by the court, Rose L.J. stating:

“We cannot accept that this is a requirement of admissibility. In established fields of science, the court may take the view that expert evidence would fall beyond the recognised limits of the field or that methods are too unconventional to be regarded as subject to the scientific discipline. But a skill or expertise can be recognised and respected, and thus satisfy the conditions for admissible expert evidence, although the discipline is not susceptible to this sort of scientific discipline.”<sup>308</sup>

2.369 In the course of this judgment Rose LJ acknowledged that two conditions for admissibility have been recognised; first, that study or experience will give a witness's opinion an authority which the opinion of one not so qualified will lack; and secondly the witness must be so qualified to express the opinion. Confusingly, Rose L.J. found the basis for this two-pronged requirement not only in *Robb* but also in the South Australian decision *R v Bonython*.<sup>309</sup>

2.370 However, in reality the decision in *R v Bonython*<sup>310</sup> imposes more stringent requirements than *Robb* as it contains the added requirement, not present in *Robb*, that “the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.”<sup>311</sup>

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<sup>307</sup> [2004] EWCA Crim 1344.

<sup>308</sup> [2004] EWCA Crim 1344 at 34.

<sup>309</sup> [1984] 38 SASR.

<sup>310</sup> [1984] 38 SASR.

<sup>311</sup> Per King CJ *R v Bonython* [1984] 38 SASR at 46.

2.371 It is apparent from this that Rose L.J. considered reliability relevant to deciding if the conditions for admissibility are met, but he was of the view that in itself reliability goes to its weight. Furthermore, he did not seem to be of the view that the reliability requirement went so far as the necessitate proof that the methods used can be tested in cross examination, but merely requiring proof that the evidence had been sufficiently organised or recognised as being so.

2.372 Similar confusion can be seen in the civil context. For example in *Barings plc v Cooper & Lybrand (No.1)*<sup>312</sup> Evan-Lombe LJ considered in some detail what the appropriate test for admissibility of expert evidence should be for civil proceedings and found that the test enunciated in *R v Bonython*<sup>313</sup> constituted a good description of what was necessary to qualify.<sup>314</sup>

2.373 Evans Lombe summarised the principles set out in the governing authorities as requiring the evidence to be based on “recognised expertise governed by recognised standards and rules of conduct” which could clearly be interpreted as requiring the evidence to

2.374 Therefore, despite repeated judicial emphasis that no additional admissibility requirements exist other than those set out in *Robb* by Bingham LJ, it can be argued that more recent English cases, both civil and criminal, have applied a ‘general acceptance’ test without acknowledging that this test was founded in *Frye*, which decision was expressly rejected in *R v Dallagher*.<sup>315</sup>

### **(g) Conclusion**

2.375 As can be seen, the flexible approach of the English court has made it easier to embrace emerging areas of expertise, and, as can be seen, the courts have shown a willingness to accept many originally unconventional types

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<sup>312</sup> [2001] EWHC Ch 17 (9 February 2001).

<sup>313</sup> [1984] 38 SASR.

<sup>314</sup> [2001] EWHC Ch 17 (9 February 2001) at [38].

<sup>315</sup> [2002] EWCA Crim 1903 Hodgkinson and James cite other civil and criminal cases where a ‘general acceptance’ test appears to have been applied; See the comments of; Mance J in “*The Ardent*” [1997] 2 Lloyds’s Law Reports at 547; Evans-Lombe J in *Barings Cooper v Lybrand (No. 1)* [2001] EWHC Ch 17 (9th February, 2001); See also *R v Hodges* [2003] EWCA Crim 290 and *R v O’Doherty* [2003] 1 Cr.App.R. 77 (Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-0016 fn. 34).

of identification evidence such as voice identification evidence,<sup>316</sup> facial mapping evidence,<sup>317</sup> ear print evidence,<sup>318</sup> and genetic printing by DNA analysis.<sup>319</sup>

2.376 Furthermore, the English courts have repeatedly emphasised that the appropriate test for admissibility is one that asks first, whether study or experience will give the opinion of a witness an authority lacking in the opinion of one not so qualified, and second, whether the person is sufficiently qualified.

2.377 However, the negative consequences that can result from allowing misleading theories or ‘junk science’ to advance a party’s case are also evident from the above mentioned cases.

2.378 As a result, the courts should be wary that any desire to embrace new scientific developments does not lead to the introduction of unreliable and inaccurate evidence capable of leading to unsafe convictions.

2.379 Hodgkinson and James are critical of the lack of judicial debate about how best to deal with expert evidence and the lessons that can be learned from other jurisdictions.<sup>320</sup> They recommend that the English courts would do well to consider applying the test in *R v Bonython*<sup>321</sup> or at the very least, introducing some a sort of *Daubert* style judicial guidance to help the court assess whether the evidence is reliable to go before the court.

#### **(5) A Reliability Test for Ireland?**

2.380 The question to be asked is whether imposing a *Daubert*-like test for admissibility in Ireland would be workable or beneficial? Imwinkelried argues that in the light of the proliferation in use of expert witnesses in all types of litigation in Ireland, and the substantial threat to justice posed by flaws in expert testimony, the Irish courts would do well to take heed of US developments in

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<sup>316</sup> *R v Robb* (1991) 93 Cr.App.R. 161.

<sup>317</sup> *R v Stockwell* (1993) 97 Cr App 260.

<sup>318</sup> *R v Kempster* [2003] EWCA Crim 3555.

<sup>319</sup> *R v Adams and Doheny* (1997) 1 Crim App R 369; *People (DPP) v Allen* [2003] 4 I.R. 295.

<sup>320</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-006.

<sup>321</sup> [1984] 38 SASR.

this area, and insist that any evidence adduced be empirically tested and supported.<sup>322</sup>

2.381 This part of the chapter will now summarise the arguments that have been made for and against the introduction of a reliability test.

**(a) Disadvantages – Reasons to Retain the Status Quo**

- It has been argued that there would be a certain degree of circularity in asking a court to decide on the reliability of evidence that is essentially being introduced due to the fact that it outside of the range of knowledge of the court.<sup>323</sup>
- It has also been suggested that the reason for the lack of judicial scrutiny on the need for a reliability requirement can be explained by the fact that our system is adversarial in nature and therefore as a result, the process itself tends to weed out unreliable testimony through cross-examination from the other party thus negating the need for such a requirement at admissibility stage.<sup>324</sup>
- It has often been contended then that reliability is more appropriately an issue to be taken into account when assessing the weight of the evidence rather than admissibility.<sup>325</sup> In the context of jury trials assessing the admissibility of evidence after it has been heard could prove difficult for lay jurors.
- Heffernan points out that there are a number of differences in the Irish and American legal systems that might have a bearing on this issue.<sup>326</sup> She notes in particular that juries play a much bigger role in American litigation than in this jurisdiction. The risk of juries being unduly swayed by effusive and ostentatious expert witnesses has long since been recognised as being far higher than the risk of influencing a judge well versed in such routines. Similarly, there are a number of procedural differences between the Irish and American systems. For example the

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<sup>322</sup> Imwinkelried, “‘Junk Science’ in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?” (2004) 26 *Dublin University Law Journal* 83.

<sup>323</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 1-020.

<sup>324</sup> Heffernan “Gauging the Reliability of Expert Witnesses” (2006) 6 JSIJ 140 at 147.

<sup>325</sup> As per Rose J in *R v Luttrell* [2004] EWCA Crim 1344; *Davie v Edinburgh Magistrates* (1953) SLT 54.

<sup>326</sup> Heffernan “Gauging the Reliability of Expert Witnesses” (2006) 6 JSIJ 140 at 168.

summary judgment mechanism in the US aims to resolve proceedings at a pre-trial stage, or at least, reduce the contentious issues at trial, and it is here that admissibility issues are often resolved. Ireland has no equivalent procedure, which means that the Irish system might be far less procedurally conducive to applying and enforcing a *Daubert* based test, if introduced.

- It can also be argued that a 'general acceptance' test, or a 'reputable body of opinion' test of reliability, would in reality be too strict and too conservative, and would cause much useful and reliable evidence to be excluded. It could result in courts lagging behind advances in science and other learning.<sup>327</sup>
- Finally, it can be argued that the introduction of a reliability test is unnecessary and superfluous. Despite high profile examples of miscarriages of justice caused by unreliable or inaccurate expert testimony, such cases are rare and the large majority of expert testimony that comes before the court will relate to well established and undoubtedly reliable principles of expertise. Furthermore, as pointed out by Hodgkinson and James:

"....most of the well publicised miscarriages of justice arise not from the use of novel but flawed science but from the incorrect application of well established scientific principles and techniques<sup>328</sup> or from a misunderstanding of sound science<sup>329</sup> or a failure of the prosecution to disclose material that could undermine its scientific case<sup>330</sup> and/or, occasionally, deliberate misrepresentations of the effect of forensic work.<sup>331,332</sup>

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<sup>327</sup> ALRC Report 102; NSWLRC Report 112; VLRC Final Report; "Uniform Evidence Law" (December 2005) at 9.38.

<sup>328</sup> See, for example the prosecutor's fallacy cases involving DNA such as *R v Doheny & Adams* [1997] 1 Cr.App.R. 369, CA and *Pringle v The Queen* [2003] UKPC 9; The Birmingham 6 case *R v McIlkenney* (1991) 93 Cr.App.R. 287.

<sup>329</sup> See, for example, the one in 73,000,000 statistic in *R v Clarke (Sally)* [2003] EWCA Crim 1020.

<sup>330</sup> *R v Clarke (Sally)* [2003] EWCA Crim 1020 (microbiology report); *R v Ward (Judith)* [1993] 1 WLR 619; *R v Maguire* (1992) 94 Cr.App.R. 133, CA and see also, Sir John May's Report into the cases of the Maguire 7.

<sup>331</sup> *R v Ward (Judith)* *ibid.*; *R v Maguire* *ibid.*; and see also, Sir John May's Report into the cases of the Maguire 7.

**(b) Advantages – Reasons to Introduce a Reliability Test**

- It is equally arguable that Ireland would benefit from introducing a reliability threshold for the admissibility of expert evidence, similar to that introduced in other jurisdictions such as the US.
- For instance, as discussed below, a reliability requirement would go a long way towards eliminating the presence of junk science from being submitted as evidence.<sup>333</sup>
- Hodgkinson & James argue that the failure to encompass a reliability requirement could have unfortunate consequences for example where ‘pseudo-science’ or new scientific developments are being proffered as evidence as there is no onus on the expert to show that there is a link between the issues in the case and the reliability of the expert knowledge.<sup>334</sup>
- It has already been noted that the degree and range of subject matter of specialisation has escalated over the years with new and more specialised forms of ‘expertise’ appearing with more and more regularity. It can be difficult to expect a court unacquainted with the complex evidence with which they are presented, to evaluate the merits of this evidence or its reliability.
- Requiring juries to evaluate the appropriate weight to accord to new and untested scientific advances has the potential to lead to miscarriages of justice, and that the better approach would be to prohibit expert evidence in avant-garde areas of science or technology from being admitted until the area has been sufficiently accepted or recognised as a reliable body of knowledge.<sup>335</sup>

2.382 Based on the foregoing, the Commission has provisionally come to the conclusion that the arguments in favour of a reliability test are greater and

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<sup>332</sup> Hodgkinson and James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-006.

<sup>333</sup> The term ‘junk science’ was first coined in Huber *Galileo’s Revenge: Junk Science in the Courtroom* (Basic Books 1991). The term ‘junk science,’ refers to the abuse of science and scientific terminology in the courtroom setting by importing irrelevant or inaccurate evidence to advance a party’s arguments.

<sup>334</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 1-021.

<sup>335</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 1-021 – 1-022.

that it should be introduced as an additional requirement for admissibility of all expert testimony.

2.383 *The Commission provisionally recommends that a reliability test should be introduced as an additional requirement for admissibility of all expert testimony.*

**(c) Appropriate Form of Reliability Test**

2.384 The introduction of a reliability test has been considered to have considerable merits. However, the question remains as to what form such a test should take and how should it be introduced into Irish law.

**(i) Statutory Provision**

2.385 One option that could be taken is the formulation of an express formal and binding test for admissibility the elements of which would have to be satisfied by all parties seeking to adduce expert evidence.

2.386 However, it is clear that there may be difficulties with creating such a test in a stand-alone provision for reliability of expert evidence, and it would be more appropriate to incorporate a reliability test provision into a larger instrument on expert evidence in general containing all applicable rules relating to expert evidence, such as part of an Evidence Code or Act.

2.387 Furthermore, the approach taken in other jurisdictions, even those where an Act of Code of Evidence is provided for, generally appears to be that the statutory provisions contain general provisions giving the judge in an individual case the discretion to determine whether or not to admit the evidence, and the appropriate test to be applied by the judge in coming to this decision tends to be formulated in the case law.

**(ii) Judicial Guidelines**

2.388 A more appropriate approach, it is submitted, is to create a judicial guidance note on admissibility which outlines the appropriate test that should be applied by the trial judge when confronted with novel or other areas of expertise the reliability of which is not clear.

2.389 This could be applied as a non-exhaustive and non-binding guide that can be adverted to by the trial judge in assessing whether or not to admit expert evidence.

2.390 *The Commission provisionally recommends the introduction of a judicial guidance note outlining the factors that can be taken into account by the trial judge when assessing whether the expert evidence in question meets the requisite reliability threshold.*

**(d) Requisite Contents and Elements of a Test**

2.391 Once the appropriate form has been decided on, the appropriate wording and elements of the test to be introduced must be considered. From the above discussion, two discernible approaches appear to have been taken in different jurisdictions.

**(i) General Acceptance Test**

2.392 The approach originally taken in the US in *Frye*, which also constitutes the test applied in *Bonython*,<sup>336</sup> is to require the evidence to have reached a set level of acceptance within the field of expertise to which it relates which can then be used to vouch for its validity.

2.393 This requires the party wishing to adduce expert evidence to demonstrate that the principle has gained consensus, acceptance and recognition among a considerable body of experts in the field.

**(I) Advantages**

- This test is advantageous as it is clear that the body best placed to assess the merits and reliability of the evidence is the expert community from which the principle stems. If the evidence has achieved acceptance within the expert field itself, its reliability is greatly bolstered. This helps to ensure that the trial judge will not struggle with the task of understanding and assessing the reliability of evidence entirely outside of the scope of his or her knowledge.
- This argument is strengthened by the fact that a similar approach is taken in professional negligence cases where the question of negligence is based on whether or not the action taken is one which no reasonable professional in the area would have taken.
- It can be argued that the general acceptance test does not impose too onerous a criterion where the expertise is sufficiently sound in terms of reliability. Such evidence is likely to have achieved general acceptance without difficulty. Evidence that has not been recognised by a large body of experts within the field is more likely to be considered unreliable even where other factors are used to determine this.
- The general acceptance requirement would also ensure that there would be a considerable body of experts who recognise the theory and would thus form a considerable body of experts available to give

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<sup>336</sup> However, it should be noted that the *Bonython* test also requires the evidence to be "sufficiently organised or recognised to be accepted as reliable" which requires examining the substantive nature of the evidence as well as assessing the degree of support it has received from experts in the field.

evidence on the issue. It could thus promote consistency in decision making.<sup>337</sup>

### (II) Disadvantages

- It can be argued however that permitting the evidence to be adduced solely on the basis of its acceptance by the expert community from which it stems removes the decision about its reliability away from the court and into the hands of the expert community, which may be seen as a usurpation of the role of the judge and jury.
- Furthermore, the general acceptance test, which requires acceptance amongst a *considerable body* of experts, imposes a much higher burden on the expert than does the test for professional negligence, which assesses negligence on the basis of action that *no reasonable professional* would have taken.
- It can be argued that satisfying the general acceptance standard will not automatically ensure the reliability of evidence. Peer review is a clear example that a theory has achieved recognition and acceptance within a particular field of expertise, yet assessment in terms of peer review has been repeatedly criticised.<sup>338</sup> McMullan gives the example of the Sokal article incident where an article was published in an American peer reviewed article and its author later admitted the theory discussed in the article to be a hoax.<sup>339</sup> Its acceptance in the journal highlights the potential inadequacy of peer reviewing as a filtering mechanism for unreliable areas of expertise.
- The test can also be criticised in that it precludes certain evidence from the outset, namely evidence that is so novel and new that it has not yet been assessed by the expert community to which it relates, without assessing the foundational basis of the evidence at all.

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<sup>337</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-006.

<sup>338</sup> Koukoutchos “Solomon Meets Galileo (And Isn’t Quite Sure What to Do With Him)” (1994) 15 Cardozo Law Review 2237; McMullen “Expert Witnesses: Who Plays the Saxophones?” (1999) Journal of Judicial Administration.

<sup>339</sup> The article was entitled; “Transgressing the boundaries: Towards a transformative hermeneutics of quantum gravity” in the American Culture Studies Journal Social Text. McMullan explains that the authors aim appears to have been to poke fun at certain learned authors (McMullen “Expert Witnesses: Who Plays the Saxophones?” (1999) Journal of Judicial Administration.

- It may occur that a case arises where the key point of expertise is so novel and technical that it has not been considered before. This fact should not be used to exclude such evidence when in reality it could have an important bearing on the facts in issue.
- There may also be difficulties in determining the appropriate level of 'general acceptance' and what constitutes a considerable body of expert recognition for the purpose of the test.
- It has also been argued that this test tends to prohibit the admission of new research undertaken specifically for the purposes of litigation which can lead to novel but reliable evidence being excluded.<sup>340</sup>
- An automatic prohibition on evidence not meeting the appropriate standards in terms of reputation, as opposed to substance, is not desirable.

2.394 *The Commission provisionally recommends that the general acceptance test, by focusing on the number of experts in the area that recognise the theory, rather than assessing the subjective merits of the theory itself, imposes too onerous a burden in terms of its provenance as opposed to its content to be considered an appropriate test to determine the reliability of the evidence.*

#### **(ii) Empirical Validation**

2.395 An alternative test which could be imposed is one similar to that propounded in *Daubert*, namely a test that focuses on the evidence itself in terms of its underlying methodologies and results to examine its reliability. Such a test should take the form of a non-exhaustive range of factors that would be taken into account by the court when assessing the evidence, general acceptance being just one of these factors.

2.396 The decision in *Daubert* provided useful guidance as it gave examples of those factors that can be used to determine reliability. Based on this decision, and on other guidelines<sup>341</sup> that have been suggested in relation to this, the principal factors that should form the basis of any reliability test based on empirical validation include;

<sup>340</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 3-006.

<sup>341</sup> See for example Kenny "The Expert in Court" (1983) 99 LQR 197 at 205-206; Moles "The Role and Function of the Expert Witness" Available at: <http://netk.net.au/Reports/ExpertWitness.asp>; Imwinkelried "Junk Science' in the Courtroom: Will the Changes in the American Law of Expert Testimony Influence the Irish Courts?" (2004) 26 *Dublin University Law Journal* 83.

1. Are the principles behind the theory *consistent* in that its proponents are in agreement about its constituent elements which would enable it to be *empirically testable and falsifiable*?
2. Have the principles and procedures behind the theory been *empirically tested* in that it can be demonstrated by evidence of actual experiences rather than hypothetical situation?
3. Are the conclusions reached by the expert backed up by sufficient supporting evidence and *logical* based on the principles underlining the theory?
4. Has the theory a known or potential *rate of error*?
5. Has the theory been subjected to *peer review* and publication?
6. Is the theory *methodical* in the sense that there is agreement about the correct standards of procedures for using the methodology which enable it to be duplicated?
7. Has the theory been *generally accepted*?

2.397 The trial judge should proceed on the basis that the evidence is inherently unreliable and then assess the merits of the evidence in terms of the above factors.

2.398 The trial judge should also have discretion in terms of what factors should be applied to particular evidence as it is clear that not all evidence, particularly non scientific evidence, will be conducive to testing by the full list of criteria above and thus the above factors should be flexible in their application.

(I) *Advantages*

- The introduction of such a reform would be easily facilitated in practice as the discretionary rather than binding nature will give the trial judge considerable leeway and flexibility in terms of deciding on the best way of assessing the merits of the evidence. This will ensure that the key role of the trial judge in determining the admissibility of evidence is firmly consolidated.
- The test also provides a useful source of guidance for the trial judge in relation to the key factors that indicate reliability when assessing avant-garde theories, the benefit of which is immeasurable considering that such novel theories will undoubtedly be outside the scope knowledge of the trial judge.
- Furthermore, it is often not the evidence itself that proves to be suspect or unreliable, but the methods and processes used to reach the result

which prove to be negligently followed or to be fundamentally flawed.<sup>342</sup> Requiring the evidence to be empirically validated would prevent the risks of contamination or errors in evidence being presented to the court as it would encompass both the substantive nature of the evidence as well as the procedures and structures involved in its use.

### (II) Disadvantages

- It is clear that given the vast and unlimited range of subject matters on which expert testimony can be given, not all areas of expertise will be conducive to empirical validation, principally those that do not have a scientific or technical basis.<sup>343</sup> If all evidence was required to satisfy a definitive list of factors, this would lead to the undesirable result that certain evidence would be excluded due to a lack of, for example, sufficient peer review.
- However, this problem is easily overcome by adopting the approach taken in *Kumho Tyre Co v Carmichael*<sup>344</sup> and recognising that whilst not all validation criteria can be used to validate non-scientific testimony some still remain relevant, so the test should be flexible in its application to ensure that the court has a certain leeway regarding what factors are used to assess the reliability of particular evidence taking into account whether it relates to scientific or non scientific area of expertise.

2.399 Based on the foregoing, the Commission believes there are few arguments that can be made against the introduction of a reliability test based on empirical validation. The Commission therefore provisionally recommends the introduction of a judicial guidance note outlining a non-exhaustive and non-binding list of factors, based on empirical validation, which can be used to help the court assess the reliability of tendered expert evidence.

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<sup>342</sup> An example of this is *R v Pitchfork* (January 23 1988) the first publicised use of DNA evidence in England. Although the reliability of DNA evidence had been repeatedly proven, the accused here initially escaped charges as he had substituted another person's blood sample for testing in place of his own. (See Law Reform Commission *Consultation Paper on The Establishment of a DNA Database* LRC CP 29-2004 at 2.04).

<sup>343</sup> Imwinkelried "The Next Step after Daubert: Developing A Similarly Epistemological Approach to Ensuring The Reliability of Non-Scientific Expert Testimony" (1994) 15 Cardozo LR 2271.

<sup>344</sup> 526 U.S. 137 (1999).

2.400 *The Commission provisionally recommends the introduction of a judicial guidance note outlining a non-exhaustive and non-binding list of factors, based on empirical validation, which can be used to help the court assess the reliability of tendered expert evidence.*

**(e) Effects of a Finding of Unreliability**

2.401 The last issue to be considered is the consequences of a judicial finding that the evidence has not met the required standard of reliability. Evidence that does not satisfy any of the factors on the checklist should clearly be automatically excluded from the outset.

2.402 However, in some instances the trial judge may be uncertain about the validity of the evidence. It could for example have a well researched logical seemingly sound basis, but due to its relative infancy, it may be lacking in general acceptance and peer review. In such cases the court may consider it appropriate to admit the evidence, based on its probative value, whilst giving a warning to the jury about its potential unreliability or limitations.

2.403 This issue was considered in *R v Luttrell and Ors*<sup>345</sup> where the court held that the reliability of lip reading evidence is a matter relevant to weight rather than admissibility and thus that the evidence was rightly admitted.

2.404 However, Rose LJ went on to discuss the range of circumstances under which a judicial warning is appropriate. Although his comments were limited to the context of lip-reading evidence, they provide useful guidance for the approach to be taken in similar situations involving other types of evidence:

"We have no doubt that lip reading evidence requires a warning from the judge as to its limitations and the concomitant risk of error, not least because it will usually be introduced through an expert who may not be completely accurate: as we have indicated above, the material before this court indicates that lip reading evidence will, on occasion, fall significantly short of perfection. That imperfection does not render the material inadmissible, for the reasons we have already explained, but it does necessitate a careful and detailed direction. As with any "special warning", its precise terms will be fact-dependent, but in most, if not all cases, the judge should spell out to the jury the risk of mistakes as to the words that the lip reader believes were spoken; the reasons why the witness may be mistaken; and the way in which a convincing, authoritative and truthful witness may yet be a mistaken witness. Furthermore, the judge should deal with the particular strengths and weaknesses of the material in the instant case, carefully setting out the evidence, together with the criticisms that can

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<sup>345</sup> [2004] EWCA Crim 1344 (28 May 2004).

properly be made of it because of other evidence. The jury should be reminded that the quality of the evidence will be affected by such matters as the lighting at the scene, the angle of the view in relation to those speaking, the distances involved, whether anything interfered with the observation, familiarity on the part of the lip-reader with the language spoken, the extent of the use of single syllable words, any awareness on the part of the expert witness of the context of the speech and whether the probative value of the evidence depends on isolated words or phrases or the general impact of long passages of conversation. However, as we have indicated, the precise terms of the direction will depend on the facts of the case, and the instruction to the jury in this, as in many other areas, should never be given mechanistically.”

2.405 The Commission considers that this approach provides a useful insight in the manner in which this issue of discretion should be approached.

2.406 *The Commission provisionally recommends that the court should have the discretion to determine whether or not evidence that fails to satisfy the reliability test should be excluded. The Commission also provisionally recommends that where the extent of the reliability is uncertain, or where the trial judge feels it appropriate or necessary, he or she can argue that the evidence be admitted subject to a warning to the jury about its uncertain reliability.*

#### **(6) Conclusion**

2.407 As well as requiring the evidence to be relevant, reliable and within the scope of matters on which expert evidence is permitted, a party is also required to demonstrate that the person seeking to give the evidence is sufficiently qualified to be considered an expert witness. The way in which the courts assess the status of an expert is considered in the next chapter.

## **CHAPTER 3        THE QUALIFIED & IMPARTIAL EXPERT: DUTIES AND FUNCTIONS OF EXPERT WITNESSES**

### **A              Introduction**

3.01        In Chapter 2 the Commission discussed the circumstances under which the court will allow a party to adduce expert evidence. In this chapter the Commission considers the factors that determine who is entitled to give expert evidence. Part B discusses the factors the court will take into account to determine whether an individual adduced by a party to act as an expert witness has sufficient qualifications and experience to enable him to be considered an expert for the purposes of giving expert testimony.

3.02        Part C examines the principal duties and functions of an expert witness and also discusses some of the problems that have been identified in the context of the experts themselves.

### **B              What is an ‘Expert Witness’?**

3.03        As outlined in Chapter 2, the two principal requirements that a party must satisfy in order to adduce expert evidence are first, that expert evidence is necessary in the circumstances and second, that the person purporting to give such evidence is sufficiently skilled in the subject matter in question. This chapter examines the second of these two requirements.

3.04        However, once it has been held that the subject matter is one on which expert testimony can be given, it does not necessarily follow that the individual put forward by the party to give such evidence will be an expert in the particular subject matter. Equally, although the person may be considered an expert in the particular field of study, they may in reality have little or no expertise on the specific issue which is sought to be demonstrated.

#### **(1)            *Definition***

3.05        Because expert evidence can be given on an unlimited range of subject matters, the law has struggled to set out a concrete definition of an expert for the purposes of court proceedings. Different definitions have been suggested in various jurisdictions, all of which are concerned with a discernible

field of expertise, and sufficient knowledge or experience in this field, which enable the person to give evidence in court.

**(a) Ireland**

3.06 In Ireland, to date no set definition of an expert, statutory or otherwise, has been adopted, and it can be seen that the courts have adopted a very broad and flexible approach to what constitutes an ‘expert’ for the purposes of giving expert evidence. The courts have continuously attempted to explain the parameters of what constitutes an expert witness, but have resisted setting out a formal definition.

**(i) Judicial Commentary on Definition of an Expert**

3.07 Despite resisting a formal definition, over the centuries there have been many judicial pronouncements about the exact role and function of the expert witness in the common law adversarial context in this jurisdiction.

3.08 In a 19<sup>th</sup> century decision, *McFadden v Murdock*,<sup>1</sup> Pigot CB confirmed the general rule permitting expert opinion evidence to be given where this will assist to explain matters helpful to the jury. In the course of the judgment he referred to expert witnesses in this context as being:

“...persons of peculiar skills and knowledge on the particular subject, the testimony of such, as to their opinion and judgment upon the facts is admissible evidence to enable the jury to come to a correct conclusion.”

3.09 The broad definition given to what constitutes an ‘expert’ was also alluded to by Pigot CB where he explained that an expert cannot be confined to someone proficient in a set range of subject matters:

“The subjects to which this kind of evidence is applicable are not confined to classes and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results, or trace them to their causes.”<sup>2</sup>

3.10 Almost a century later, in *AG (Ruddy) v Kenny*,<sup>3</sup> Davitt J expressly mentioned some of the subject matters which the court will consider to be within the realm of an expert:

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<sup>1</sup> (1867) Exchequer IR ICL 211.

<sup>2</sup> (1867) Exchequer IR ICL 211 at 217.

<sup>3</sup> (1960) 94 I. L.T.R. 185.

“...matters which require special study and experience in order that a just opinion may be formed, as, for instance, matters of art, science, medicine, engineering and so forth.”<sup>4</sup>

3.11 However, nowadays the range of subject matters on which expert evidence can be given has expanded beyond the boundaries of traditional areas of expertise and an expert can now be found on a subject matter specifically generated for litigation, for example accident support services.

3.12 More recently, in *The People (DPP) v Fox*,<sup>5</sup> in the course of a finding that a Garda Commissioner was entitled to be considered an expert in drug trafficking, the court defined what it would consider to be an expert:

“...a person who is well qualified to express a credible opinion or belief on the subject so much so that the Court is entitled to regard such opinion and belief as admissible evidence for the purpose of supplying the Court with information which is outside of the range and knowledge of the Court”

3.13 In *Galvin v Murray*,<sup>6</sup> Murphy J gave careful consideration to this question. He considered that, in order to give an expert opinion, the witness must be, in the opinion of the judge, qualified in the subject calling for his specialist knowledge. Thus:

“An expert may be defined as a person whose qualifications or expertise give an added authority to opinions or statements given or made by him within his area of expertise.”<sup>7</sup>

### **(ii) Legislative Guidance on Definition of an Expert**

3.14 As mentioned above, there is no legislative definition of ‘expert’ for the purpose of giving expert testimony. However, some guidance can be found in the *Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements)* 1998 (S.I. No. 391 of 1998). The 1998 Rules state that they apply to expert reports including:

“...report or reports or statement from accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists, scientists, or any other expert whatsoever intended to be called to give evidence in relation to an issue in an action.”

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<sup>4</sup> (1960) 94 I.L.T.R. 185 at 186.

<sup>5</sup> Unreported, Special Criminal Court, January 23, 2002.

<sup>6</sup> [2000] IESC 78.

<sup>7</sup> [2000] IESC 78 at 85.

3.15 This highlights that not only may the categories of professionals listed be considered as experts (if they have the appropriate qualifications or experience) the court may also accept “any other expert whatsoever” as an expert witness. This emphasises that the categories are not closed.

**(b) Australia**

3.16 In a recent Australian survey of judicial attitudes to expert witnesses, Freckleton described expert witnesses as “suppliers of informed opinions on matter beyond the ken of lay finders of fact...Their role is to shed light on areas that would otherwise not be adequately appreciated or understood.”<sup>8</sup>

3.17 The legislatures in the various Australian jurisdictions have all adopted their own definition of an ‘expert’ and an ‘expert witness’. These definitions differ but most are just minor variations of the one main definition; an expert witness is someone who is competent and qualified, based on their specialist knowledge, to give an opinion to the court.

**(i) The Federal Court**

3.18 The Federal Court Rules of the Federal Court of Australia define an expert witness as; “a person who is called, or is to be called, by a party to give opinion evidence, based on the person’s specialised knowledge, based on the person’s training, study or experience.”<sup>9</sup>

**(ii) The Family Court**

3.19 The Family Court definition of an expert and an expert witness set out in the *Family Law Rules 2004* (which were enacted as a result of the recommendations of a 1999 report by the Australian Law Reform Commission on Case Management in Family Law Cases) is interesting as it includes ‘independence’ as a characteristic of an expert. An expert is defined as; “an independent person who has relevant specialised knowledge, based on the person’s training, study or experience.” An expert witness is defined as “an expert who has been instructed to give or prepare independent evidence for the purpose of a case.”<sup>10</sup>

**(iii) New South Wales**

3.20 The *Uniform Civil Procedure Rules* adopted in New South Wales in 2005 also set out a definition of an expert for the purpose of giving expert

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<sup>8</sup> Freckleton, Reddy & Selby “Australian Judicial Perspectives on Expert Evidence; an Empirical Study” (Australian Institute of Judicial Administration, 1999) at 15.

<sup>9</sup> *Federal Court Rules - Statutory Rules 1979 No. 140 as amended* made under the Federal Court of Australia Act 1976 Order 34A r 2.

<sup>10</sup> *Family Law Rules 2004 (Cth)* r 15.43.

testimony.<sup>11</sup> An expert is defined as “person who has such knowledge or experience of, or in connection with, that issue, or issues of the character of that issue, that his or her opinion on that issue would be admissible in evidence.”

3.21 An expert witness is defined separately as “an expert engaged or appointed for the purpose of: (a) providing an expert’s report for use as evidence in proceedings or proposed proceedings, or (b) giving opinion evidence in proceedings or proposed proceedings.”<sup>12</sup>

**(iv) Queensland**

3.22 In Queensland, the *Uniform Civil Procedure Rules (Qld)* adopted in 1999 define an expert as; “a person who would, if called as a witness at the trial of a proceeding, be qualified to give opinion evidence as an expert witness in relation to an issue arising in the proceeding.”<sup>13</sup>

**(v) Australian Capital Territory**

3.23 In the Australian Capital Territory the newly introduced *Court Procedure Rules 2006* sets out the rules governing the use of expert witnesses in court. Rule 1201 sets out what is meant by an expert and an expert witness for the purposes of the proceedings under these rules.

3.24 An expert is defined extensively as “a person who (a) has specialised knowledge about matters relevant to an issue arising in the proceeding based on the person’s training, study or experience; and (b) would, if called as a witness at the trial of the proceeding, be qualified to give opinion evidence as an expert witness in relation to the issue.”<sup>14</sup>

3.25 An expert witness is defined under Rule 1201 as “an expert appointed or engaged to do either or both of the following: (a) to provide a report about the expert’s opinion for use as evidence in the proceeding; (b) to give opinion evidence in the proceeding.”<sup>15</sup>

**(c) England**

**(i) Judicial Commentary on Definition of an Expert**

3.26 As in Ireland, the English courts have resisted a formal definition of what constitutes an expert for the purposes of giving expert evidence and

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<sup>11</sup> See *Uniform Civil Procedure Rules 2005 (NSW)*.

<sup>12</sup> *Uniform Civil Procedure Rules 2005 (NSW)* r. 35.18.

<sup>13</sup> *Uniform Civil Procedure Rules 1999 (Qld)* r 425.

<sup>14</sup> *Court Procedure Rules 2006 (ACT)* r. 1201.

<sup>15</sup> *Court Procedure Rules 2006 (ACT)* r. 1201.

deciding on the competency of an individual to be considered an expert remains at the discretion of the trial judge.

3.27 The main considerations that will be taken into account are the possession of knowledge of the expertise in question, and an ability to use that knowledge as a result of training or education in that specialism. During argument in *R v Silverlock*<sup>16</sup> Vaughan-Williams J stated that;

“No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people.”<sup>17</sup>

**(ii) Legislative Guidance on Definition of an Expert**

3.28 Also similarly to Ireland, in England there is no legislative definition of what constitutes an expert. Existing legislation that does make reference to experts does so in the most general terms, reflecting the broad indefinable nature of the concept of an expert for the purpose of court proceedings.

3.29 In civil proceedings, although most of the rules governing expert evidence have been put on a statutory footing since the introduction of the Civil Procedure Rules, these rules also refrain from giving a formal definition of an expert witness. CPR r. 35.2 states that an expert is “an expert who has been instructed to give or prepare evidence for the purpose of court proceedings.”<sup>18</sup>

3.30 Likewise in criminal proceedings, Rule 33.1 states that any reference to an expert for the purpose of the rules “is a reference to a person who is required to give or prepare expert evidence for the purpose of criminal proceedings, including evidence required to determine fitness to plead or for the purpose of sentencing.”<sup>19</sup>

**(2) Necessary Experience and Qualifications**

**(a) Broad Definition Given**

3.31 The broad definition given in this jurisdiction to what amounts to an expert indicate that it is not compulsory for a person to hold formal qualifications to be an expert, and expert knowledge acquired through experience, independent study or a hobby will be considered by the courts as equally valid as academic qualifications once this is sufficient.<sup>20</sup>

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<sup>16</sup> [1894] 2 QB 766.

<sup>17</sup> [1894] 2 QB 766.

<sup>18</sup> Civil Procedure Rule 35.2.

<sup>19</sup> Criminal Procedure Rule 33.1.

<sup>20</sup> AG (*Ruddy*) v Kenny (1960) 94 I.L.T.R. 185 at 190.

3.32 For example in *The People (DPP) v Gilligan*<sup>21</sup> the court considered that a Garda commissioner was suitably qualified to be considered an expert in the practice of drug trafficking as he was;

“...a person with considerable experience in the field...and, in light of that experience, was in the view of the court a person with a wealth of knowledge on all aspects of [that field.]

3.33 In *The People (DPP) v Fox*<sup>22</sup> it was explained that the value of expert evidence will depend on “the authority, experience and qualifications of the expert” which would appear to place emphasis on the necessity for some sort of express manifestation of expertise, however, it is not expressly stated that formal qualifications are required.

**(b) No Formal Qualification Needed**

3.34 It has long been recognised that the court is ultimately concerned with the extent of the expertise, rather than the way in which this expertise was acquired. In *R v Silverlock*<sup>23</sup> a solicitor was allowed give his opinion on a handwriting comparison because, although he had no formal qualification, he had studied handwriting as a hobby for 10 years, and this, in the view of the trial judge, sufficiently qualified him to be an expert in the area. On appeal, Lord Russell stated:

“It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be *peritus*; he must be skilled in doing so; but we cannot say that he must have become *peritus* in the way of his business or in any definite way. The question is, is he *peritus*? Is he skilled? Has he adequate knowledge?”<sup>24</sup>

3.35 Therefore whether the 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.

3.36 Similarly, whether a person is an expert or not will also largely depend on whether or not the particular area on which they are an authority is

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<sup>21</sup> Unreported 15 March 2001.

<sup>22</sup> Unreported, Special Criminal Court, January 23, 2002.

<sup>23</sup> [1894] 2 QB 766.

<sup>24</sup> [1894] 2 QB 766.

one which is considered by the courts to be outside of the scope of the finder of fact.<sup>25</sup> As Smith J stated in *Carter v Boehm*:<sup>26</sup>

“...the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it.”

**(c) Ad-Hoc Experts**

3.37 However, expertise acquired through practical experience qualifies an individual to express an opinion only on the specific issue which is sought to be proved, and proving this is more difficult than where formal qualifications are available to overtly demonstrate the area of expertise. In *Clark v Ryan*,<sup>27</sup> the leading Australian case on this issue, the plaintiff sought to introduce an expert witness to testify about the reasons for the defendant's articulated vehicle 'jack-knifing' across the road.

3.38 The expert did not have any formal qualifications on this subject matter but he argued he was qualified to give expert evidence as he had 50 years experience of engineering problems in Australia, and over a great number of years had been engaged in investigating road accidents for insurance companies and others and in assessing losses.<sup>28</sup>

3.39 The majority of the court held the evidence to be inadmissible. Dixon J reasoned that the knowledge gained by the witness through his experience did not qualify him to express an expert opinion on the behaviour of articulated vehicles under certain circumstances. He stated:

“If it had been desired to prove how in fact semi-trailers of the kind driven by the defendant Clark do in practice behave, perhaps a witness or witnesses experienced in their actual use might have given admissible evidence, not of opinion, but of the fact. But Mr. Foster Joy did not possess that experience. If it had been desired to give technical evidence of the physics involved and of any relevant opinions deduced therefrom, possibly that might have been done by

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<sup>25</sup> See chapter two for a discussion on the range of subject areas which the courts consider to be a field of specialised knowledge and outside the range of knowledge of the finder of fact.

<sup>26</sup> (1766) 3 Burr 1905.

<sup>27</sup> (1960) 103 C.L.R. 486.

<sup>28</sup> (1960) 103 C.L.R. 486 at 491.

a qualified witness although one may doubt how intelligible to the jury the evidence would have been and what useful purpose it would have served. But it certainly does not appear that Mr. Foster Joy was qualified to give such testimony and in fact he did not essay to do so. What in truth occurred was to use the witness to argue the plaintiff's case and present it more vividly and cogently before the jury.”<sup>29</sup>

3.40 The decision in *Clark* highlights the fact that in order for a person to be considered an expert witness, the opinion expressed must form a direct part of the subject matter of the special knowledge gained by the person's qualifications or experience.

3.41 Furthermore, a person who has only practical experience must abstain from attempting to give a scientific or technical explanation and is confined to giving an opinion on the extent of their experience. Therefore in the Australian decision *R v Bjordal*<sup>30</sup> the court held the evidence of a police officer on the likely speed of the defendant's vehicle to be inadmissible as the officer had based his calculations about the likely speed on a scientific formula that he had adjusted. The court held that the officer lacked the expertise to adjust the formula and was therefore giving an opinion outside of the range of his area of expertise.

3.42 However, where a witness of fact, such as a police officer called to the scene of accident, was shown to have several years of experience in the police traffic division, had attended numerous fatal road accidents, and had attended courses in accident investigation, he may be entitled to give expert evidence about the issues in the case as well as being a witness of fact.<sup>31</sup>

3.43 Although rarely challenged in this jurisdiction, the case law from other jurisdictions would indicate that experts who have gained their specialist knowledge through practical experience, called 'ad-hoc experts'<sup>32</sup> or 'connoisseur experts'<sup>33</sup> would be allowed to give expert evidence here once the

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<sup>29</sup> (1960) 103 C.I.R. 486 at 491.

<sup>30</sup> [2006] Crim. L.R. 183.

<sup>31</sup> *R v Oakley* [1979] R.T.R. 417.

<sup>32</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 1-030.

<sup>33</sup> Bernstein "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution" (February 2007). George Mason Law & Economics Research Paper No. 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 29.

issue is within their range of experience and is directly related to the issues in the case.

3.44 In Ireland, the *Safety, Health and Welfare at Work Act 2005* provides that a ‘competent’ person must be appointed to fulfil the roles set out under the statutory provisions with the aim of promoting health and safety in the workplace. Section 2(2) of the 2005 Act states:

“(a) For the purposes of the relevant statutory provisions, a person is deemed to be a competent person where, having regard to the task he or she is required to perform and taking account of the size or hazards (or both of them) of the undertaking or establishment in which he or she undertakes work, the person possesses sufficient training, experience and knowledge appropriate to the nature of the work to be undertaken.

(b) Account shall be taken, as appropriate, for the purposes of paragraph (a) of the framework of qualifications referred to in the Qualifications (Education and Training) Act 1999.”

3.45 This section places a considerable emphasis on both skills and knowledge, and the reference in section 2(2)(a) to “sufficient training, experience *and* knowledge” [emphasis added] would appear to place a higher onus on an individual under this Act than is placed on a person purporting to act as an expert witness.

3.46 It could be argued that imposing a requirement on each expert to demonstrate formal academic qualifications along with substantial practical experience would be unworkable in practice, taking into account the unlimited range of subject matters on which an expert may be asked to testify, and the strong possibility that academic qualifications on such issues may not exist. In reality, it is submitted, most if not all experts who are hired by parties to give expert testimony will possess some formal qualifications in their field of expertise.

3.47 Imposing a requirement for formal qualifications, therefore, may not prove a significant barrier to entry. However, it must be admitted that many experts giving expert testimony, particularly on technical or mathematical issues, are academics. Thus, imposing a requirement for academic qualifications *and* practical experience may significantly limit those available to testify. Indeed, if the academic qualifications are extensive, imposing an additional requirement for practical experience, in some areas at least may be unnecessary.

**(d) Expertise in the actual issue involved in the case**

3.48 Nevertheless, it can be seen nowadays that professional qualifications and accreditations frequently have a significant impact on the weight and admissibility of expert testimony. Indeed, in the wake of the development of an expert witness ‘industry,’ with professionals in every field imaginable willing to tender their services to the court, it is unlikely that knowledge merely acquired through a hobby will be considered as sufficient to render a person competent to be an expert.

3.49 Proving or acquiring expert status is in reality made much easier by the presence of academic or other qualifications, or professional or other experience, which gives the individual knowledge or experience beyond that which the ordinary lay person would possess.<sup>34</sup> Furthermore, as pointed out by Heald LJ:

“However, even though a person may possess significant academic qualifications, or have lengthy experience in a particular profession that would indicate expert status on the face of it, this does not necessarily mean that the person is automatically an expert on the particular issue which he seeks to prove.”<sup>35</sup>

3.50 An example of the difference between professional or academic expertise and actual expertise in the issue in question is amply demonstrable by the English case *Hawkes v London Borough of Southwark*.<sup>36</sup> Here, Aldous LJ rejected the evidence of the plaintiff’s expert witness because, although he undoubtedly had extensive academic qualifications that went beyond that of the lay person, the actual issue in question was one which would not have been proven by this expertise and in this case the issue was in fact within the knowledge and experience of the ordinary person. He explained:

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<sup>34</sup> See for example *DC v DPP* [2005] IEHC 431 where Quirke J placed considerable emphasis on the expert witness’s academic qualifications and professional experience: “Mr. Gilligan has testified on oath as to his qualifications. They included B.A. and M.A. degrees and a B.C.S. Diploma in clinical psychology. He has averred in evidence that he worked for many years as a clinical psychologist and retains a practice as a working clinical psychologist.” Quirke J concluded: “[T]here is, accordingly, no reason why this court should doubt his professional competence, his qualifications or his professional capacity to adduce independent expert testimony for the benefit of this court.”

<sup>35</sup> Heald “A Judge’s Analysis” (1996) NLJ 1723 at 1724.

<sup>36</sup> [1998] EWCA Civ 310 (20 February 1998).

"Mr Dawson was cross-examined as to his qualifications to give evidence as an expert. He held a BSc degree in Mechanical Engineering and was a chartered member of the Institute of Mechanical Engineers. He had, over a period of about 3½ years, investigated what he described as numerous manual handling accidents and prepared expert's reports and given evidence on those accidents. He had not attempted to carry a door up the stairs and gave no evidence that he had taken part in any manual handling operations of the type under consideration in this case. That being so it must have been apparent, or should have been, to everyone at the trial that it was questionable as to whether Mr Dawson had the relevant expertise to give expert evidence relevant to any issue in the case. Further, it was questionable as to whether any expert evidence was necessary or admissible."<sup>37</sup>

Further on he concluded:

"I do not believe that Mr Dawson had established that he was qualified to give expert evidence of the type he did. He had a degree in Mechanical Engineering and over 3½ years investigated and given evidence on manual handling accidents. Whether those cases had any similarity to the one involved in this case is not clear. A person who investigates accidents does not necessarily acquire expertise in the reasons why accidents occur. Policemen investigate large numbers of road accidents. That would not necessarily give them sufficient knowledge to act as experts in road accident cases. No doubt experience built up over many years can provide sufficient expertise to qualify a person to give evidence as an expert, but that is not this case as Mr Dawson has only been investigating accidents for about 3½ years. The fact that a person has expertise in aspects of manual handling cannot qualify him as an expert in all forms of manual handling. Manoeuvring a door upstairs is very different from lifting a sack. In my view Mr Dawson established some expertise as a mechanical engineer. His evidence did not establish that he was qualified to give expert evidence on the difficulties and risks of manoeuvring a door upstairs. He gave no evidence as to what was the usual practice. I believe therefore that his opinion evidence was inadmissible. Mr Dawson's evidence appears to have prolonged the trial. It provoked Counsel for the Defendants to cross-examine him on

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<sup>37</sup> *Hawkes v London Borough of Southwark* [1998] EWCA Civ 310 (20 February 1998).

his opinion, thereby lengthening and complicating what was a simple case.”<sup>38</sup>

3.51 Therefore, an expert will have to be able to demonstrate to the court that he is not only an expert in the particular field, but that he also has expert knowledge and or considerable experience on the particular issue which is the subject matter of the case. This makes expert status a highly subjective concept and one which will undoubtedly depend on the specific facts and issues of each case. A keen understanding that having a lengthy curriculum vitae will not grant automatic expert status was succinctly summarised by Heald LJ:

“Personal and professional qualification and experience are useful benchmarks provided that long service does not mask an ignorance of and unwillingness to face and absorb new ideas and analytical methods. Length of experience needs to be qualified by the professional and geographical areas in which it has been gained.”

**(e) Contemporary Expertise**

3.52 A final point to note is that it is self evident that continued participation or research in the expert’s profession or field is essential to maintain an awareness of changes and developments in the subject matter. An expert who becomes a full time expert may therefore be liable to become out of touch with the industry.

3.53 One way of preventing this from occurring is to introduce a requirement that only persons who are involved either academically or professionally with the subject matter at the time they are being put forward as an expert witness should be allowed to be considered as such.

3.54 Such a requirement would help to ensure that the opinion given is coming from someone who is up to date with the industry and therefore can give a well researched contemporary opinion.

3.55 On the other hand, such a requirement could be considered excessively onerous and could have the affect of disproportionately excluding a large number of experts, who would otherwise be more than qualified, from giving expert evidence.

3.56 For example, it is often the case that retired professionals will offer their services as expert witnesses in their area of expertise as a way of having an extra income on retirement. The length of experience such individuals have gained could mean they have very valuable expert opinion evidence to offer the

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<sup>38</sup> *Hawkes v London Borough of Southwark* [1998] EWCA Civ 310 (20 February 1998).

court but they would be prevented from doing so by the introduction of such a requirement.

3.57 The Commission can now turn to set out the provisional recommendations it has reached on this area, and in respect of which it seeks submissions and views.

**(f) *Provisional recommendations and views***

3.58 *The Commission provisionally recommends the adoption of a definition of the term “expert” for the purposes of giving expert testimony and invites submissions on the form of wording that would be appropriate for such a definition.*

3.59 *The Commission invites submissions as to whether experience-only based knowledge should suffice for a witness to be entitled to give expert evidence or whether formal, professional qualifications, study or training is necessary.*

3.60 *The Commission provisionally recommends that a person seeking to act as an expert witness need not be actively involved in the field of expertise at the time of the giving of expert evidence.*

3.61 *The Commission provisionally recommends that, when assessing the competency of an individual to be considered an expert, considerable account be taken of the length of time they have spent studying or practising in the particular area, as well as, in the case of retired people and others no longer practising, the length of time they have spent away from the field.*

**(3) *Court Procedure for Proving Expertise***

**(a) *Judicial Decision***

3.62 Deciding if a person is competent to be considered an expert is a matter for the presiding judge, who will have to be satisfied that the expert witness possesses special knowledge and experience going beyond that of the trier of fact.<sup>39</sup>

3.63 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 questions during the examination-in-chief stage of the proceedings after the witness has taken an oath.<sup>40</sup>

3.64 If there is a challenge to the witness's expertise, this can be proved by the expert by testifying about his qualifications and/or experience. In the

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<sup>39</sup> *R v Marquard*, 1993 CanLII 37 (S.C.C.).

<sup>40</sup> Healy *Irish Laws of Evidence* (2004 Thomson Roundhall) at 361.

absence of a rebuttal of expertise, the judge will accept the witness's testimony of his qualifications or experience as *prima facie* evidence of his expertise and primary evidence of this will not be required.<sup>41</sup>

3.65 It is submitted that it may prove confusing for a jury to hear the expert evidence of a witness and for the evidence then to be ruled inadmissible at a later stage in the trial. The merits of introducing a preliminary hearing (*voir dire*) for assessing the expert witness's qualifications and experience should be considered. This is discussed in greater detail in Chapter 5, below.

**(b) Cross Examination**

3.66 In general terms, it can be said that the actual expertise of an expert witness is not likely to be challenged for the simple reason that the expert is well known to legal counsel and to the court. In a minority of cases, expertise may be robustly challenged as a matter of the admissibility of the evidence, but this is not common. It is more common that the actual substance of the evidence given is challenged in terms of the weight to be attached to it, as opposed to its admissibility.<sup>42</sup> In this respect, the main way in which a witness's expertise is determined in our adversarial system is through examination and (sometimes robust) cross examination in court. A witness may be subject to extensive questioning by the opposing party (and, on occasion, by the judge) about the extent of their expertise and their professional ability to express a valid expert opinion on the issue sought to be given in evidence.

3.67 For example in the infamous 1931 English case *R v Rouse*,<sup>43</sup> the first question put to the defence's expert engineer by the prosecuting counsel was "What is the coefficient for the expansion of brass?" The exchange between the two continued:

"Q. I asked you: What is the coefficient of the expansion of brass? Do you know what it means? A. Put that way, probably I do not. Q. You are an engineer? A. I dare say I am. Q. Let me understand what you are. You are not a doctor? A. No. Q. Not a crime investigator? A. No. Q. Nor an amateur detective? A. No. Q. But an engineer? A. Yes. Q.

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<sup>41</sup> *Martin v Quinn* [1980] I.R. 244; *Minister for Agriculture v Concannon*, High Court, 14 April 1980; *DPP v O'Donoghue* [1991] 1 I.R. 448. Cited in McGrath *Evidence* (Thomson Roundhall 2005) at 318.

<sup>42</sup> See the comments of Hardiman J in *JF v DPP* [2005] IESC 24 (26 April 2005), quoted at paragraph 3.123, below.

<sup>43</sup> *The Times*, 24 February 1931.

What is the coefficient of the expansion of brass? You do not know?  
A. No, not put that way.”<sup>44</sup>

3.68 In this case, the witness’s professional experience more than enabled him to testify on the technical issue for which he had been hired, but this method of cross-examination had the effect of seriously undermining his credibility. Although the question was later criticised as unfair, in that it was unrealistic to ask an expert to know the exact technical answer to this question off the top of his head, the expert witness should have been prepared to respond to such a question by revealing that he understood the question and explaining why it is impossible to give a straightforward answer and then going on to reveal how the answer should be determined.

3.69 It can be seen from the above exchange that one of the consequences of having such a broad definition of the term ‘expert’ is that many professionals who offer their services in court do not fully appreciate the extent of the role of the expert witness. As explained by a leading consultant in this area in Ireland:

“They don’t understand that the first thing a good cross-examining barrister is going to do is to attack their credibility. They take things personally. They often don’t realise that once they put themselves out there as an expert they stand to have their expertise and credibility challenged – that’s how the system is supposed to work.”<sup>45</sup>

**(c) Requirement of Oratorical Ability**

3.70 An expert witness is therefore someone not only who has the necessary knowledge and expertise in the subject matter in question to give a valid opinion, but also who has the necessary explanatory skills to demonstrate and explain this expertise before a judge and jury, and the ability to withstand robust cross examination. As elucidated by Jacob L.J. in *Rockwater v Technip France SA & Ors.*<sup>46</sup>

“Their function is to educate the court in the technology – they come as teachers, as makers of the mantle for the court to don. For that purpose it does not matter whether they do or do not approximate to the skilled man. What matters is how good they are at explaining things.”

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<sup>44</sup> O’Flaherty “The Expert Witness and the Courts” (1997) 3 MLJ 3 at 6 See also Normanton (ed) *The Trial of A.A. Rouse* (1931, William Hodge and Company).

<sup>45</sup> See O’Boyle “Leave it to the Experts” (1998) 92 (9) Law Society of Ireland Gazette 20 at 22.

<sup>46</sup> [2004] EWCA Civ 381; [2004] R.P.C. 46.

3.71 The Guidance Protocol designed to supplement the Civil Procedure Rules (CPR) in England shows an understanding of the extent of the requisite elements to be an expert witness.<sup>47</sup> This Protocol significantly develops the CPR r. 35 definition of an expert, and provides useful guidance about the full extent of the role and function of an expert. It sets out that prior to appointment of an expert in civil litigation the following must be established:

- That they have the appropriate expertise and experience
- That they are familiar with the general duties of an expert
- That they produce a report, deal with questions and have discussions with other experts within a reasonable time and at a cost proportionate to the matters in issue;
- A description of the work required
- Whether they are available to attend the trial, if attendance is required; and
- There is no potential conflict of interest.<sup>48</sup>

3.72 Our adversarial system assumes that if there is any shortfall in the witness' expertise, it will be exposed at examination in chief or cross examination stages and the witness may be prohibited from giving expert evidence or at least their opinion will be considerably undermined and limited weight will attach to such opinion.

3.73 However, although examination in chief and cross examination will be effective in weeding out potential charlatans in the majority of cases, it may prove difficult on occasion to determine or quantify the extent of the witness' purported expertise, particularly where specialist knowledge is required in relation to an area which is not governed by some form of professional accreditation, study or training.

3.74 The potential difficulties with assessing expertise are clear when one considers that the judge is ultimately given the task of evaluating the skill and ability of the witness to give evidence on a subject, where the reason such evidence is being admitted is because the subject is outside the range of knowledge of the judge.

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<sup>47</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005).

<sup>48</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005) at 7.1.

#### **(4) Relationship between an Expert Witness & Instructing Party**

3.75 The Irish courts have held that a person is not entitled to give expert evidence where he or she is one of the parties to the case.<sup>49</sup> However, it has been held on a number of occasions that a person can be called as an expert witness if they have a pre-existing relationship with one of the parties, for example if they are in their employment.

3.76 The Supreme Court in *Galvin v Murray*<sup>50</sup> reversed the decision of Johnston J in the High Court where he had held that where a County Council sought to rely on engineers engaged by it for the purposes of litigation, they should not be considered to be expert witnesses. At issue was O.39, rules 45 and 46 of the *Rules of the Superior Courts 1986* as inserted by the *Rules of the Superior Courts (No 6) (Disclosure of Reports and Statements) 1998* which provide that all documents prepared by (inter alia) an expert for the purpose of giving expert evidence may be made the subject of a discovery order. In this case, the County Council argued that the evidence given by an engineering firm who were employed by the Council was not covered by the discovery rules as the report of the engineers was submitted in their capacity as employees of the Council and not as experts. Murphy J in the Supreme Court accepted that the report of an expert who is also an employee or agent of a party may contain observations beyond that which an independent expert might have made which may act to the detriment of that party, but reasoned that it remained open to that party to engage another expert witness instead of calling its employees or agents.

3.77 Murphy J went on to hold that while the fact that the witness was employed or engaged by one of the parties may affect his independence, this should be taken into account when assessing the weight to be attached to his expert evidence, and should not affect his status as an expert. In support of this view, he approved the English decision *Shell & Pensions v Fell Frischmann*<sup>51</sup> where it had been pointed out that the English rules pertaining to expert evidence, like the Irish rules, “refer to “expert evidence” and not to “evidence given by independent experts.”

3.78 In *Shell* it was held that the rules relating to expert evidence “apply generally to independent experts, to so called ‘in-house’ experts and to parties themselves,”<sup>52</sup> which Murphy J considered was the correct approach to adopt.<sup>53</sup>

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<sup>49</sup> Herbert J in *Sheeran v Meehan* High Court, 6 February 2003.

<sup>50</sup> [2000] IESC 78.

<sup>51</sup> [1986] 2 All ER 911.

<sup>52</sup> [2000] IESC 78 at 85.

3.79 In England, the same approach was taken in *Field v Leeds City Council*<sup>54</sup> where it was held that the mere fact of employment did not disqualify the employee from acting as an expert witness for his employer, as long as the employee was able to prove that he had the relevant expertise in an area in issue and that he was aware of his overriding duty to the court, not to his employer.<sup>55</sup> However, it was also stressed by May LJ that the fact that the expert was in the employment of one of the parties may affect the weight to be afforded to his opinion.<sup>56</sup>

3.80 The opposite view appears to have been taken in the later English case *Liverpool Roman Catholic Archdiocesan Trust v Goldberg*.<sup>57</sup> Here, Evans-Lombe J held inadmissible the evidence of an expert tendered on behalf of the defendant, due to the fact that the defendant had had a close personal and professional relationship with the expert for several years. He held that the expert should not be entitled to give evidence on public policy grounds in that that justice should not only be done but should be seen to be done:<sup>58</sup>

“...where it is demonstrated that there exists a relationship between the proposed expert and the party calling him which a reasonable observer might think was capable of affecting the views of the expert so as to make them unduly favourable to that party, his evidence should not be admitted, however unbiased the conclusions of the expert might probably be. The question is one of fact, namely, the extent and nature of the relationship between the proposed witness and the party.”<sup>59</sup>

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<sup>53</sup> See also *R v Gokal* [1999] EWCA Crim 669 (11 March 1999) where one of the grounds of appeal against a conviction for conspiracy to defraud was that two of the expert witnesses proffered should not have been entitled to give evidence on the grounds that they were not independent as their company was at the time of the case involved in a negligence action against one of the parties to the case. The judge held that the experts were properly entitled to give evidence as the trial judge had clearly pointed out the factors that might affect the reliability of the expert's evidence and the extent of independence could go only to weight not admissibility.

<sup>54</sup> [1999] EWCA Civ 3013 (8 December 1999).

<sup>55</sup> Per Waller LJ at [27] [1999] EWCA Civ 3013 (8 December 1999).

<sup>56</sup> Per May LJ at [31] [1999] EWCA Civ 3013 (8 December 1999).

<sup>57</sup> [2001] EWHC Ch 396 (6 July 2001).

<sup>58</sup> [2001] EWHC Ch 396 (6 July 2001) at [12].

<sup>59</sup> [2001] EWHC Ch 396 (6 July 2001) at [13].

3.81 However, this approach was held to be incorrect by the Court of Appeal in *R (Factortame & Ors) v Secretary of State for Transport*.<sup>60</sup> Lord Phillips MR reasoned that such an approach would have the result of automatically excluding any employee from giving evidence on behalf of an employer.<sup>61</sup>

3.82 He held that while it is desirable that an expert witness have no actual or apparent interest in the outcome of the proceedings, such an interest is not an automatic reason for exclusion from giving expert evidence,<sup>62</sup> thus re-establishing the earlier, and it is submitted, more desirable, approach to admitting experts who have a pre-existing relationship with one of the parties.

3.83 *Factortame* was also approved in *Armchair Passenger Transport Ltd v Helical Bar PLC*<sup>63</sup> and Nelson J outlined the reasons for this approach:

"It is always desirable, as the Court of Appeal said in *Factortame* that an expert should have no actual or apparent interest in the outcome of the proceedings. Expert witnesses should be chosen accordingly so that the difficulties which have arisen in this case can be avoided. I recognise however that there are fields in which only a limited number of experts are available and that those who are pre-eminent may have direct work experience in the field or with competitors which might at first sight be thought to threaten their independence. Such cases should be rare but when they arise should be dealt with in accordance with the principles in *Factortame* and *Field*."<sup>64</sup>

3.84 This highlights that acquiring 'expert witness' status does not require the witness to be independent from the parties. The difficulties posed by an absolute exclusion on experts who have a pre-existing relationship with one of the parties become clear when applied in the criminal context, as many of the forensic experts that may be called to give evidence will have been employed by the state.<sup>65</sup>

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<sup>60</sup> [2002] EWCA Civ 932 (3 July 2002).

<sup>61</sup> [2002] EWCA Civ 932 (3 July 2002) at [70].

<sup>62</sup> Per Phillips MR at [70] [2002] EWCA Civ 932 (3 July 2002).

<sup>63</sup> [2003] EWHC 367.

<sup>64</sup> [2003] EWHC 367 at [65].

<sup>65</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at para. 10-015.

3.85 However, as will be discussed below, there is nevertheless a duty on the expert to give evidence in an independent and impartial manner. As Head LJ stated:

“The expert witness should never be a party’s advocate but a person who, having understood the parties’ relevant allegations, can see whether they correctly define the issues to which his expertise is to be directed and – pinpointing any discrepancies – can put his expertise impartially at the disposition of the judge to assist him to perform *his* task of rightly deciding an issue before him.”<sup>66</sup>

### **(5) Conclusion**

3.86 The above discussion highlights that it can be occasionally difficult to determine if a person is an ‘expert’ based on their experience or qualifications, or whether the issue they purport to be an expert on is considered a reliable body of specialist knowledge outside of the range of knowledge of the finder of fact. The judge is given the task of assessing whether or not a person is an expert, but cross examination is also instrumental in revealing potential failings in an expert’s knowledge and expertise.

## **C Principal Recognised Duties of Expert Witnesses**

### **(1) No Definitive List of Duties in Ireland**

3.87 In Ireland, in *The People (DPP) v Fox*<sup>67</sup> the Special Criminal Court approved Lord President Cooper’s definition of the overriding function of an expert witness, as set down in *Davie v Edinburgh Corporation Magistrate*.<sup>68</sup>

“Their duty 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 the facts proven in evidence.”<sup>69</sup>

3.88 In this jurisdiction however there has been little judicial or legislative direction to date for expert witnesses about the extent of their role, function and duties. In preparing this Consultation Paper, it has been indicated to the Commission that many expert witnesses have learned about their role and duties through ad hoc advice from previous experts, lawyers, and from the

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<sup>66</sup> Head “A Judge’s Analysis” (1996) NLJ 1723.

<sup>67</sup> Special Criminal Court, 23 January 2002.

<sup>68</sup> (1953) SLT 54.

<sup>69</sup> (1953) SC 34 at 40.

general trial process. This may not lead to a full understanding of what the role of the expert witness entails.

3.89 It has been suggested to the Commission that some experts experienced difficulty in obtaining full and accurate instructions. It may, for example, be understandably difficult for an instructing lawyer to give appropriate instructions where a complex area of expertise is at issue. It has been suggested to the Commission that some experts may see their role as being an advocate to the instructing party, rather than as owing a duty to the court.

3.90 Similar sentiments have been expressed by several judges who have experience in receiving expert evidence. According to Barr J:

“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 specialised appreciation of the particular problem at issue.”<sup>70</sup>

## **(2) *The Ikerian Reefer case***

3.91 In England, prior to the introduction of the *Civil Procedure Rules 1998*, made under the *Civil Procedure Act 1997* (which followed Lord Woolf's *Access to Justice Reports*), the authoritative judgment on the conduct and duties of experts was *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)*,<sup>71</sup> in which Cresswell J assembled the duties and responsibilities applicable to expert witnesses that had been recognised over the years:<sup>72</sup>

“The duties and responsibilities of expert witnesses in civil cases 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 (Per Lord Wilberforce *Whitehouse v Jordan* [1981] 1 W.L.R. 246 at p. 256).
2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co. Plc*

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<sup>70</sup> Barr “Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development” (1999) 4 (4) BR 185.

<sup>71</sup> [1993] 2 Lloyd's Rep 68.

<sup>72</sup> [1993] 2 Lloyd's Rep 68, at 81-82.

[1987] 1 Lloyd's Rep. 379 at p. 386 per Mr. Justice Garland and *Re J*, [1990] F.C.R. 193 per Mr. Justice Cazalet). An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (*Re J* sup.).

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 (*Re J* sup.). 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 (*Derby & Co Ltd and Others v Weldon and Others*, The Times, Nov. 9, 1990 per Lord Justice Staughton).

6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of 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 (see 15.5 of the Guide to Commercial Court Practice)."

3.92 Although this summary has not been expressly cited with approval in Ireland, the judgment remains the seminal decision on the duties of expert witnesses in many common law jurisdictions. It has been cited and endorsed in numerous cases and academic works on the topic of expert witnesses in several common law jurisdictions, and has formed the basis for practice directions for expert witnesses in England and Australia.

3.93 As already mentioned, in this jurisdiction there has been little legislative or judicial guidance about the applicable duties owed by expert witnesses in this jurisdiction. In contrast, other jurisdictions have taken a number of different approaches when it comes to outlining the extent of the duties of an expert witness.

### **(3) Summary of Main Recognised Duties**

3.94 Prior to summarising the approaches taken by the various bodies and the different jurisdictions, it may be worthwhile to summarise some of the principle duties and obligations that have repeatedly been identified as forming an inseparable part of the expert witness's role, in an effort to determine what the minimum contents should be of any code of conduct or practice direction for expert witnesses in this jurisdiction.

3.95 There is a strong argument to be made that these duties, or at least a large number of them, should be set down in some sort of normative framework in this jurisdiction. Even if this does not have the weight of a statute or Statutory Instrument, it may be useful to create some sort of Practice Direction or even Guidance Leaflet that would provide guidance for expert witnesses about the extent of their role and obligations.

3.96 The principal duties which should form part of any such Code of Guidance will now be set out, along with a discussion about how they might fit into the current Irish legal framework.

#### **(a) Role and Function of Expert Witness**

3.97 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."<sup>73</sup>

3.98 This description of the role and function of the expert provides a useful starting point on which to discuss the necessary duties which an expert must obey in order to correctly and effectively carry out this function.

#### **(b) Overriding Duty to the Court**

3.99 The expert owes a paramount duty to assist the court by providing independent and unbiased opinion on matters within his own expertise which will enable them to reach their decision, and an accompanying duty to bear this overriding obligation in mind when giving evidence.<sup>74</sup>

3.100 Indeed, it has been recognised as far back as the mid 19<sup>th</sup> century in this jurisdiction that while an expert is retained and remunerated by a party to an action, in the words of Crampton J in *R v O'Connell*<sup>75</sup> "he has a prior and

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<sup>73</sup> Per Lord President Cooper in *Davie v Edinburgh Magistrates* [1953] SLT 54.

<sup>74</sup> Per Garland J *Polivitte Ltd. v. Commercial Union Assurance Co. Plc.* [1987] 1 Lloyd's Rep. 379 at p. 386; Cazalet J in *Re J*, [1990] F.C.R. 193.

<sup>75</sup> (1844) 7 Irish L. Rep 261.

perpetual retainer on behalf of truth and justice.”<sup>76</sup> Therefore, the demands of Justice must be placed above any particular personal or party interest that the expert may have.<sup>77</sup>

3.101 Setting out an express overriding duty to the court seems to have occurred across the board in all jurisdictions in any code of guidance that has been created for experts. The aim of such an express requirement is to firmly implant it into the expert’s mind that their function is the provision of unbiased information to the court, and not to provide a one-sided opinion preferred by the instructing party. In this way the ‘overriding duty’ can be interpreted as meaning that the duty owed to the party can never supersede the duty owed to the court.

3.102 However, Edmond discusses the potential impact of the imposition of an explicit duty and argues that such a reform is unlikely to make much difference to the practice and culture of expert witnessing.<sup>78</sup> He argues that experts are already under a duty to tell the truth in court as a result of swearing the oath, so “it does not follow that clarifying the duty will produce more *objective* evidence....[and] expecting the imposition of an *additional* obligation to have manifest effects on expert practice might seem a little optimistic.”<sup>79</sup>

3.103 Furthermore, the legal attribution of duties may come into conflict with contractual duties that may be owed to the instructing party in relation to priority of obligations, particularly where the potential expert is in a pre-existing, pre-litigation, contractual arrangement with one of the parties.

3.104 However, it is submitted that the potential significance of the introduction of an overriding duty far outweighs the arguments for non-inclusion. Edmond does admit that such a duty may have such effects as encouraging experts to divulge more information or structure their reports differently.<sup>80</sup>

3.105 Therefore it is submitted that the introduction of an express, legally binding paramount duty to the court is very worthy of consideration, even if it goes no further than to clarify in the expert’s mind the focus of their role to give independent, objective information to the court.

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<sup>76</sup> (1844) 7 Irish L. Rep 261 at [321]; This decision was cited in approval in *Rondel v Worsley* [1967] 1 QB 443.

<sup>77</sup> O’Flaherty “The Expert Witness and the Courts” (1997) 3 MLJI 3.

<sup>78</sup> Edmond “Edmond “After Objectivity: Expert Evidence and Procedural Reform” (2003) Syd L Rev 8.

<sup>79</sup> Edmond “Edmond “After Objectivity: Expert Evidence and Procedural Reform” (2003) Syd L Rev 8.

<sup>80</sup> Edmond “Edmond “After Objectivity: Expert Evidence and Procedural Reform” (2003) Syd L Rev 8.

**(c) *Duty to Give Well-Balanced, Well-Reasoned & Honestly Held Opinion***

3.106 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 based this opinion on,<sup>81</sup> 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.

3.107 This duty also involves a requirement to ensure that any opinion given is genuinely held and, where practicable, is reasonable. The expert is also 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, and to inform the court about a change of opinion or when unable to give a definitive opinion on a matter.<sup>82</sup>

3.108 A number of cases in this jurisdiction, which are discussed below, have examined the calibre of expert evidence and what standard of expertise will be required. It is argued therein that it is pointless in recruiting a professional witness if their evidence does not demonstrate expertise once critically examined.

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<sup>81</sup> As per Heydon J in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (14 September 2001), a prime duty of expert witnesses in giving opinion evidence is "to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions." In this case, the NSW Court of Appeal rejected the expert's opinion as he had failed to properly explain how he had reached his conclusions, and failed to outline the facts and assumptions underlying his conclusions.

<sup>82</sup> Head LJ states that in giving evidence, an appropriate checklist for an expert should be: "1. What truly are the allegations which concern me; do they define what I see as the true issue(s)? 2. Have I studied all the witness statements and disclosed documents to ascertain the facts 3. Have I made all appropriate factual observations of bodies, places, machines, buildings, accounts etc? 4. Have I specified for myself the assumptions that I shall rely on so clearly that, if challenged, I can detail them and identify all my sources? 5. Have I prepared by report in simple, intelligible English, using as few technical words as I can, explaining those that necessarily remain? 6. What, if any, do I see as the points of challenge to my observations, assumptions, and conclusions; and what, if any, are the answers to them? 7. Since the expert is not an advocate but must inform the mind of the court fully not partially, have I improperly omitted anything relevant?" See Head LJ "A Judge's Analysis" (1996) NLJ 1723.

3.109 Therefore there is a duty on expert witnesses to ensure their opinion is thoroughly researched, taking into account all relevant theories and developments in the area, so that all expert knowledge possible is brought before the court.

3.110 In *MS v DPP*<sup>83</sup> McCracken J. made reference to the duty of an expert witness to take all efforts to create full and informed expert report, containing all relevant facts, even those which do not support the opinion of the expert, when he stated emphatically;

"It is my strongly held view that 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 give that evidence in the context of those facts, whether they support the proposition he is being asked to put forward or not."

3.111 The necessity to place all relevant information before the court, and the consequences of a failure to do so, were also emphasised in this jurisdiction in *The People (DPP) v Allen*.<sup>84</sup> Here, the appellant argued that the expert witness, a forensic scientist, had not presented a full and complete summary of the statistical chances of the DNA evidence in question being that of the appellant.

3.112 The Court of Criminal Appeal emphasised that as DNA evidence is a relatively recent technique, and is an issue in which the jury are likely to be entirely reliant on expert evidence, it was likely that the jury could come to the conclusion that the evidence is infallible, thus placing a high onus on the expert to explain that this is not the case.<sup>85</sup>

3.113 The court proceeded to allow the appeal on the grounds that the expert had failed to elicit complete statistics concerning DNA comparisons between brothers, a failure which had the potential to mislead or confuse the jury. It was reiterated that "the real problem in this case is not the evidence which [the expert] gave, but rather the evidence which she did not,"<sup>86</sup> which serves to clearly stress again the importance of the expert disclosing all relevant and surrounding facts involved in the particular case.

3.114 The necessity to give a well informed opinion backed up by scientific reasoning was also stressed in *The People (DPP) v Fox*.<sup>87</sup> Here, the

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<sup>83</sup> High Court, 5 December 1997.

<sup>84</sup> [2003] 4 I.R. 295.

<sup>85</sup> [2003] 4 I.R. 295 at 299.

<sup>86</sup> [2003] 4 I.R. 295 at 299.

<sup>87</sup> Special Criminal Court, 23 January 2002.

prosecution sought to rely on the evidence of an expert on handwriting to prove that it was the accused's signature on a document in issue. The Court rejected this evidence by finding that the evidence in question was not backed by any scientific criteria which would have enabled the finder of fact to test the accuracy of the expert's conclusions.

3.115 It was pointed out that it was common practice when giving expert evidence of handwriting to give the similarities and dissimilarities of the writing which the expert relies on in evidence and this was not done here. Similarly, the expert was criticised for his sole reliance on lower case writing without giving an explanation for doing so. The Court approved an extract from the Scottish case *Davie v Edinburgh Corporation Magistrate*.<sup>88</sup>

“In particular the bare *ipso dixit* of a scientist, however eminent, upon the issue in controversy will normally carry little weight for it cannot be tested by cross-examination or independently appraised and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.”

3.116 Similar emphasis has been placed on the need for the opinion to be sufficiently backed up with supporting evidence in England. As stated by Jacob LJ in *Routestone v Minories Finance*.<sup>89</sup>

“What really matters in most cases are the reasons given for the opinion. As a practical matter a well constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up, the opinion does, if not, not.”

3.117 The English case *R v Clark (Sally)*<sup>90</sup> is also a good example of the potential onerous consequences of a failure to disclosure of all relevant information. Here, Mrs. Clark was convicted of the murder of her two sons largely as a result of the testimony of an expert witness, Dr. Williams, who had conducted the post-mortem on the two babies. After the first post mortem Dr. Williams concluded that the baby had died from sudden infant death syndrome, yet after the second post-mortem, reconsidered the case and concluded that both babies had probably died as a result of shaking.

3.118 However, following the first (unsuccessful) appeal against the conviction in 2000,<sup>91</sup> records of microbiological tests that had been taken by Dr. Williams during the post-mortem of the second baby were discovered which

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<sup>88</sup> (1953) SLT 54.

<sup>89</sup> [1997] BCC 180.

<sup>90</sup> [2003] EWCA Crim 1020

<sup>91</sup> *R v Clark* [2000] EWCA Crim 54 (2nd October, 2000).

showed the presence of a particular bacterium making the death consistent with staphylococcal infection, and thus not from unnatural causes.<sup>92</sup> The case was referred back to the Court of Appeal on the grounds of newly discovered evidence and as a result of this, along with inaccurate evidence from another expert witness, Mrs. Clark was ultimately acquitted, not however, until she had been wrongly convicted for the murder of her two babies and served more than three years of her sentence.

**(d) Requirements of Truth, Independence and Impartiality**

3.119 It is the basic duty of every expert to act in such a way so as not to bring into disrepute the standard of experts. More specifically, the expert must resist becoming a partisan advocate for the instructing party and always act justly and independently. In England, the Civil Justice Council's Protocol for experts states that a useful test of independence is that the expert would give the same opinion even if acting for the other side.<sup>93</sup> Similarly, a willingness to consider and accept the alternative view put forward by another is vital in an expert; "unqualified loyalty to one's own opinion is not acceptable."<sup>94</sup>

3.120 The duty to remain independent and impartial is given further weight due to the incorporation of the European Convention on Human Rights (ECHR) in this jurisdiction by the *European Convention on Human Rights Act 2003*.<sup>95</sup> Article 6 of the ECHR provides:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

3.121 Clearly, if the tribunal by which an individual is to be tried is to remain 'independent and impartial' as required by Article 6, those individuals brought in to assist the court by providing expert evidence must act independently and impartially at all times. However, the comments of Potter J in the English case *Toth v Jarman*<sup>96</sup> are relevant in this regard: "The requirement in [Article 6 ECHR] for an "independent and impartial tribunal" relates to the integrity of the

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<sup>92</sup> See Dwyer "Case Note – The Duties of Expert Witnesses of Fact and Opinion; *R v Clark (Sally)*" (2003) 7 *International Journal of Evidence and Proof* 264.

<sup>93</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005) at 4.3.

<sup>94</sup> Head "A Judge's Analysis" (1996) NLJ 1723.

<sup>95</sup> Number 20 of 2003.

<sup>96</sup> [2006] EWCA Civ 1028 at [106].

tribunal. It does not mean that an expert witness called by the parties must satisfy the same test of independence as a judge is required to satisfy.”

3.122 In *Payne v Shovlin*,<sup>97</sup> Kearns J referred to the introduction in 1999 of the Civil Procedure Rules in England and Wales and that Lord Woolf’s motivation for their introduction (as expressed in his *Access to Justice* reports) was so that expert witnesses would not be “partisan advocates” but “mutual fact finders or opinion givers.”

3.123 In *JF v DPP*<sup>98</sup> Hardiman J referred to the function of experts and the requirement for independence, and explained that the independence of an expert is not affected by the adversarial system where both sides introduce their own experts to advance their own arguments. He sought to explain that the expert should, and does, retain his independence, when the other side advances their own expert, and the presence of an expert on the other side does not detract from the independence of an expert.

“In the ordinary personal injuries case, where the plaintiff is deploying expert opinion, it will usually be the opinion of a reputable medical, engineering or actuarial practitioner whose integrity and independence is rarely if ever in doubt. The employment of an expert on the other side is not posited on any doubts as to the competence or integrity of the plaintiff’s expert. It is done to ensure that everything is taken into account, to counter any unconscious sympathy with one’s own patient or client, to ensure that the latest techniques and interpretations are brought to bear, to detect any unwarranted assumptions or conclusions and to test and challenge the other side’s expert opinion insofar as that can properly be done. Moreover, the mere presence, actual or anticipated, of an expert on the other side provides a wholesome discipline. I would entirely reject the view, implicit in certain of the prosecutor’s submissions, that it is only where there is some reason to doubt the independence or objectivity of one side’s expert witness that the other has a right to deploy expertise of its own.”<sup>99</sup>

3.124 Lord Wilberforce’s oft-cited warning about the duty to act with independence is that “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.”<sup>100</sup> However it must be recognised

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<sup>97</sup> [2006] IESC 5 (9 February 2006).

<sup>98</sup> [2005] IESC 24 (26 April 2005).

<sup>99</sup> [2005] IESC 24 (26 April 2005).

<sup>100</sup> Per Lord Wilberforce *Whitehouse v Jordan* [1981] 1 W.L.R. 246 at p. 256.

that this provision should not be taken in its literal sense; it implies that an expert should act in an impartial, independent and unbiased manner at all times and they should never amend their report in order to comply with their instructing party's argument.

3.125 It does not mean that the report should be completely untouched by the court requirements as in reality an expert's report will have to be created with litigation in mind and thus will have to conform to an expected standard and format. Therefore the content, and not the form, must be uninfluenced by the exigencies of litigation, and the expert will be expected in their report to keep the issues in the case in mind and not give more general principles.

3.126 The requirement to be truly independent can raise problems in cases where the expert is in a pre-existing relationship with one of the parties, such as an employee. This was referred to by Murphy J in *Galvin v Murray*<sup>101</sup> where he acknowledged that the fact that a witness is an employee of one of the parties may affect his independence, and this is a matter which may affect the weight to be afforded to his testimony.

3.127 However, Murphy J also pointed out in the course of the judgment that it remains open to each party to hire an independent expert, and not an employee, and in any event, any expert coming before the court will have to convince the finder of fact that their evidence carries considerable weight, an issue that will depend on the facts and circumstances of each case. Therefore imposing a legally binding requirement of independence would not appear to be too onerous.

**(e) Duty to Limit Contentious Issues**

3.128 This duty was referred to in England by Tomlin J in *Graigola Merthyr Co Ltd v Swansea Corporation*<sup>102</sup> where he 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 a duty which exists notwithstanding that it may not always be easy to discharge.”

3.129 The reasoning behind the imposition of a duty of an expert to narrow contentious issues was explained by Chadwick J in *Stanton v Callaghan*:<sup>103</sup>

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<sup>101</sup> [2000] IESC 78.

<sup>102</sup> [1928] 1 Ch 31.

"It is of importance to the administration of justice, and to those members of the public who seek access to justice, that trials should take no longer than is necessary to do justice in the particular case; and that, to that end, time in court should not be taken up with a consideration of matters which are not truly in issue. It is in that context that experts are encouraged to identify, in advance of the trial, those parts of their evidence on which they are, and those on which they are not, in agreement."

3.130 The introduction in England of the Civil Procedure Rules 1998 have consolidated this duty to a certain extent as Rule 35.12 provides that the court may direct a 'without prejudice' discussion between the experts for the purposes of requiring the experts to reach an agreement on those expert issues on which they are in agreement, and those issues on which they are not in agreement.

3.131 It is clearly desirable in the interests of reducing costs and delays in litigation that the testimony of an expert be limited to that which is necessary. Where expert witnesses from both sides are not in conflict over a particular issue on which expertise is needed, it makes sense that both parties should agree that one expert present the evidence, or that both experts come together to prepare a joint report on areas of common agreement, so that the court is not required to hear the same evidence twice. The possible structure of such a procedure is discussed below in Chapter 5.

**(f)      *Conflict of Interest***

3.132 A related duty to the requirement to act independently and objectively at all times is the duty to avoid a conflict of interest. This incorporates an obligation on the expert to notify the parties and the court where there is any potential conflict of interest, or where the expert feels that he or she is not totally independent or does not appear independent, based on the principle that justice should be both done and seen to be done.

3.133 Part 5 of the Expert Witness Directory of Ireland's Code of Conduct outlines the requirement of independence, professional objectivity and impartiality, and the duty to disclose any circumstances which might influence the work of the expert. In this part, examples of such circumstances are expressly mentioned as including;

- (a) any directorship or controlling interest in any business in competition with the client;
- (b) any financial or other interest in goods or services (including software) under dispute;

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<sup>103</sup> [1998] EWCA Civ 1176 (8 July 1998).

- (c) any personal relationship with any individual involved in the matter
- (d) the existence but not the name of any other client of the expert with competing interests.<sup>104</sup>

3.134 As mentioned above, as a result of *Galvin v Murray*,<sup>105</sup> a person is not prevented from acting as an expert witness simply due to the fact that they have a pre-existing relationship with one of the parties to the action. However, nowhere in that judgment is it expressly stated that where an expert is called who is an employee of one of the parties, or who has some other pre-existing relationship with one of the parties, they are under a duty to disclose this pre-existing relationship.

3.135 As it is recognised in *Galvin* that such a relationship may have an effect on the appropriate weight to be accorded to such an expert's testimony,<sup>106</sup> it is clearly desirable that such a disclosure be compulsory. Therefore it may be worthwhile introducing a mandatory requirement that all relevant pre-existing relationships between potential experts and the parties to an action, or other relevant individuals or associations bearing relevance on the case, be disclosed.

3.136 The effect of a conflict of interest on the admissibility of expert evidence was considered in England in *Toth v Jarman*.<sup>107</sup> Here, the appellant argued that the medical expert's involvement in the 'Medical Defence Union' raised a conflict of interest between his duty of objectivity as an expert and his interest in helping to defend a member of that organisation that would have caused the judge to accord lesser weight to or reject his evidence.<sup>108</sup>

3.137 The court held that the presence of a conflict of interest does not automatically disqualify an expert; the key question, which is to be found in *The Ikerian Reefer*,<sup>109</sup> is whether or not the evidence is independent. The paramount

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<sup>104</sup> The Expert Witness Directory of Ireland "Code of Conduct; Expert Witnesses Engaged by Solicitors" Available at; <http://www.expertwitnessireland.info/>.

<sup>105</sup> [2000] IESC 78.

<sup>106</sup> As Murphy J stated: "The fact that an engineer is employed by one or other of the parties may affect his independence with a consequent reduction in the weight to be attached to his evidence but it could not deprive him of his status as an expert." [2000] IESC 78 at 85.

<sup>107</sup> [2006] EWCA Civ 1028 (19 July 2006).

<sup>108</sup> [2006] EWCA Civ 1028 (19 July 2006) at [77].

<sup>109</sup> *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)* [1993] 2 Lloyd's Rep 68.

duty owed by the expert to the court was also reiterated. Potter J however, went on to state:

"However, while the expression of an independent opinion is a necessary quality of expert evidence, it does not always follow that it is sufficient condition in itself. Where an expert has a material or significant conflict of interest, the court is likely to decline to act on his evidence, or indeed to give permission for his evidence to be adduced. This means it is important that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in proceedings as possible."<sup>110</sup>

3.138 The court rejected the contention that as no information about a conflict of interest had been requested at trial, there was no obligation to disclose it, finding that any material conflict of interest must be disclosed.<sup>111</sup> Regarding the appropriate time for disclosure of the existence of a possible conflict of interest, the court found that the appropriate time is when the report of the expert is first served on the other parties.<sup>112</sup>

3.139 Potter J acknowledged that in the absence of court guidance, it is understandable that at the time of exchange of reports, a party may realise a potential conflict of interest but be of the view that it is an immaterial one, and therefore fail to disclose. However, he went on to hold that in all future cases where this occurs the party should not take the course of non-disclosure, as it is for the court, and not the parties to decide whether a conflict of interest is material or not.<sup>113</sup> This judgment gives clear guidance to experts regarding the extent of their duties to disclose any potential conflict of interest. The Irish court would do well to adopt a similar approach.

### **(g) Duty to Keep the Opinion within the Permitted Scope**

3.140 There are four main elements to this duty:

(a) The expert witness is required to confine his or her opinion to matters outside the scope of the expertise of the finder of fact.

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<sup>110</sup> [2006] EWCA Civ 1028 (19 July 2006) at [102].

<sup>111</sup> [2006] EWCA Civ 1028 (19 July 2006) at [108].

<sup>112</sup> [2006] EWCA Civ 1028 (19 July 2006) at [111].

<sup>113</sup> [2006] EWCA Civ 1028 (19 July 2006) at [111] He also pointed out that the court may take a different view to the party as to the existence of a material conflict of interest which might lead the court to reject the expert's evidence and cited *Liverpool Roman Catholic Archdeacon Trustees Inc v Goldberg No 2* [2002] 1 WLR 237 in support of this.

(b) The expert is required to keep his or her opinion within the parameters of the area of his or her expertise.

(c) The expert must give an opinion only on the issues involved in the case in question.

(d) The expert must not take the place of the finder of fact by reaching conclusions or decisions based on his or her knowledge, but merely to impart this knowledge to enable the finder of fact to reach their own conclusions.

3.141 This denotes that in giving evidence on their area of expertise experts should not profess to give opinions about their entire profession but should stay within the defined scope of their competence, a requirement which corresponds with the reason for their appointment.<sup>114</sup> This requirement also reveals the corollary duty of an expert to state clearly when an issue falls outside their scope of expertise. It may be appropriate to require that where necessary, and with the consent of the judge, the expert must take the advice of another competent expert in order to answer the question beyond his competence.

3.142 One of most important duties for an expert is to stay within the permitted scope by not straying into issues that are within the scope of knowledge of the finder of fact, or that are outside the parameters of his area of expertise.

3.143 Indeed, rules relating to admissibility of expert evidence, such as the Ultimate Issue rule, are largely drafted with a view to preventing an expert from giving any additional evidence than that necessary. The dangers that can arise where an expert witness purports to opine on an area in which they are not proficient has been well demonstrated by a number of high profile cases involving miscarriages of justice.

3.144 For example, in the above-mentioned *R v Clark (Sally)*<sup>115</sup> one of the expert witnesses was paediatrician Professor Roy Meadow, who was adduced by the prosecution to testify about the two sudden and unexpected deaths of infants from natural causes. Professor Meadow submitted in evidence a report of a government research team on Sudden Infant Death (SID), which contained statistics about the chances of SID occurring based on the presence of certain relevant factors, and concluded that the chance of two SID deaths occurring in the Clark family was highly remote.

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<sup>114</sup> See, for example, Rule 1 – 2) CNCEJ “Regles de Deontologie de L’Expert Judiciaire” Available at; <http://www.fncej.org/>.

<sup>115</sup> [2003] EWCA Crim 1020.

3.145 On appeal this evidence was criticised as misleading and that it "grossly overstates the chances of two sudden deaths within the same family."<sup>116</sup> It was also pointed out that Professor Meadow may have made errors in his statistical equations.<sup>117</sup> Although Professor Meadow was a well respected paediatrician, and would no doubt be considered an expert in that field, the evidence he gave here strayed into the field of statistics, in which he was unqualified, and which led to his miscalculation which ultimately resulted in the miscarriage of justice. Clarke MR commented:

"Professor Meadow is not a statistician and had no relevant expertise which entitled him to use the statistics in the way he did. I entirely accept the point that he made a mistake which other non-statisticians have made but that does not seem to me to exonerate him. He gave the evidence as part of his expert evidence and, moreover, did so in a colourful way which might well have been attractive to a jury without expressly disclaiming any expertise in the field on an issue the only possible relevance of which can have been (as stated above) to support the prosecution's case that the children had both died from unnatural causes. He knew that he had no such experience and should have expressly disclaimed any."<sup>118</sup>

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<sup>116</sup> *R v Clark (Sally)* [2003] EWCA Crim 1020 at [178].

<sup>117</sup> Professor Meadow came to the figure of one in 73 million by squaring the statistical chance of one child dying from SID under certain factors as set out in the report (1:8543), by itself (1:8543x8543), thus assuming that the two events were to be considered as independent of each other, without taking account of conditions specific to the Clark family. However, as explained by Collins J in the later case of *General Medical Council v Meadow* [2006] EWHC 146 (Admin) (17 February 2006) "As will be obvious, [Dr. Meadow's evidence] was based on the extract from the CESDI study which I have already cited. It was a statement based on a misunderstanding of the significance of the squaring. The squaring was not intended to be a guide to the risk of recurrence. The figures given were estimates based on a mathematical modelling and were not observed rates. Since independence could not be assumed, the squaring was a statistically invalid assumption and was intended to do no more than show that it produced in truth an underestimate of the real risk. I am bound to say, having read Professor Fleming's evidence (he was a witness before the FPP), I am far from clear why the squaring exercise was included at all." (at [37]).

<sup>118</sup> *General Medical Council v Meadow* [2006] EWCA Civ 1390 (26 October 2006) at [83].

**(h)      *Duty to Instructing Party***

3.146     Besides the overriding duty that is owed to the court, the expert also owes a duty to act with reasonable care towards the instructing party. The expert is required to clearly consult with the instructing party prior to appointment to ensure all conditions of appointment are agreed, and that the area of expertise and the opinion sought are clarified by both parties.

3.147     A question for consideration is the possible inclusion under this section of a legally binding duty to ensure that, for the protection of his client, the expert maintains proper insurance for an adequate indemnity, as suggested in the Code published by Euroexpert.<sup>119</sup> The extent of the liability owed by an expert towards their instructing party will be discussed below.

3.148     Furthermore, once an expert has undertaken to act as an expert witness, they have a duty to carry out the necessary tasks to see out the role, this includes being available, as far as is reasonably possible, to testify in court about the contents of an expert report.

3.149     The extent of the duty owed by the expert to the instructing party to give evidence in court was examined in England in *Re N*.<sup>120</sup> Here the defendant, a forensic medical examiner, was hired as an expert witness on behalf of the prosecution to testify about injuries suffered by the plaintiff in an alleged rape case. The defendant examined the plaintiff and recorded her findings in a witness statement; however, at the time of the trial she was unavailable for questioning as she had gone on holiday and the defendant was held to be in contempt of court and a fine was imposed.

3.150     However, the plaintiff then brought a further civil action against the defendant claiming that the failure of the defendant to appear in court led to the case collapsing, which the plaintiff further alleged had the effect of exacerbating the post traumatic stress disorder she had developed as a result of the attack. The plaintiff argued that on tort principles

“...the Defendant owed the Plaintiff a duty of care to take all reasonable steps to provide evidence of that examination in furtherance of the contemplated prosecution and, in particular, to attend the trial of Mr [G] as a prosecution witness when required.”<sup>121</sup>

3.151     In this case, the defendant appealed against the previous refusal of the court to strike out the plaintiff’s claim as disclosing no reasonable cause of

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<sup>119</sup>     Euroexpert “Code of Practice” Available at: <http://www.euroexpert.de/en/Code-of-practice/341>.

<sup>120</sup>     [1999] EWCA Civ 1452 (20 May 1999).

<sup>121</sup>     *Re N* [1999] EWCA Civ 1452 (20 May 1999) at [9].

action. The Court allowed the defendant's appeal finding that as a result of the witness' immunity from suit the plaintiff had no cause of action, and held that the argument that the defendant owed a duty of care to the plaintiff to take all reasonable steps to attend court and to give evidence was 'wholly misconceived.'

3.152 The court also made the point here that the immunity from suit of an expert is motivated by the fact that the expert's duty to the court in giving evidence may be entirely in conflict with a party's interests,<sup>122</sup> thus reiterating that while a duty of reasonable care is owed to the party, the duty to the court remains paramount.

3.153 However, Clarke LJ did point out that where duty to attend court was established, for example by contract between an expert and a party to proceedings, this decision should not represent a bar to recovery of damages in such a case.

3.154 It is also interesting to note that since this decision the Rule 35 of the Civil Procedure Rules has been interpreted as imposing an obligation on an expert in civil cases to attend court if called upon to do so and therefore to ensure that those instructing them are aware dates to be avoided and to take all reasonable steps to be available.<sup>123</sup>

#### **(i) *Duty to Take Reasonable Care in Creating Expert Report***

3.155 When giving an expert opinion, the expert will be required to set out the opinion in a written report prior to the trial. There is a duty on the expert to exercise reasonable care and skill in the creation of this report. This duty requires the expert to comply with the formalities involved in the creation of the report, including a written declaration of veracity in relation to the contents of the report.

3.156 As can be seen below, the New South Wales Law Reform Commission recommended that provisions relating to the exact contents

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<sup>122</sup> Stuart-Smith LJ stated in *Re N* [1999] EWCA Civ 1452 (20 May 1999) at [17]: "Mr Nicol also submitted that there was no potential conflict between the duties owed by the Defendant to the police or CPS and that to the Plaintiff, to attend court to give evidence. That may be so, if one restricts the ambit of the duty to that sole obligation. I have already indicated that in my view it is not permissible to do so. It is quite apparent that the defendant's duty to the police, CPS and indeed the Court in giving evidence may be entirely in conflict with a complainant's interests. Hence the need for the immunity".

<sup>123</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005) at 19.1.

necessary to be included in the expert's reports should not be set out in a code of conduct for experts, as it would be better to set out a separate guidance note outlining procedural issues that must be taken on board by experts.<sup>124</sup>

3.157 This recommendation has its merits, in that having the duties listed separately to the procedural requirements would help to explain clearly to the expert witnesses the exact extent of their role.

**(j) Duty to Sign Expert's Declaration**

3.158 Having a statement inserted into any code of guidance requiring experts to sign a declaration stating they have read and are aware of their duties, and requiring them to swear an intention to conform with their duties, will it is submitted, go a long way towards ensuring that expert witnesses are aware of the scope and parameters of their role and function.

3.159 Great emphasis is placed in other jurisdictions on the importance of the Code of Conduct, to the effect that only experts who proceed in accordance with the norms of conduct found in the code should be relied upon and may be admitted into evidence.

3.160 For example, in New South Wales, in the decision of *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain*<sup>125</sup> Einstein J refused to allow an expert to testify where he had not been given a copy of the Expert Witness Code of Conduct by the instructing party, which meant as a result that he had failed to be bound by the Code in the giving of his statement, as required by Part 36 Rule 13C of the NSW Supreme Court Rules.<sup>126</sup> Einstein J added:

"To my mind, considerable significance attaches to enforcing strict compliance in the expert witness provisions now found in part 36 rule 13C. Questions of the significance of the opinions of experts have been mooted over a much extended period of time and the...Expert Witness Code Of Conduct was promulgated with the clear intent that only reports by experts who have proceeded in accordance with the stated norms of conduct, should be relied upon and may be admitted

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<sup>124</sup> NSW Law Reform Commission "Report 109 – Expert Witnesses" (June 2005) at 9.17.

<sup>125</sup> [2002] NSWSC 980.

<sup>126</sup> These rules have now been replaced by the Uniform Civil Procedure Rules 2005. This, however, carries the Code of Conduct over into law, and UCPR rule 31.23 provides that an expert's report cannot be given in evidence, nor can an expert give oral evidence until the court is satisfied that the expert has read the code of conduct set out in Schedule 7 of the UCPR and has agreed to be bound by it.

into evidence. The significance of the Code Of Conduct emerges clearly from the whole of the Code as well as from the 'general duty to the court' section of schedule K as well as from the stipulations as to the form of expert's reports.<sup>127</sup>

3.161 The expert's declaration was also considered in some detail by the English Court of Appeal in *Toth v Jarman*.<sup>128</sup> The Court recommended that the Civil Procedure Rules Committee ought to consider extending the requirements in the declaration to ensure that any conflict of interest is avoided by requiring a declaration that all matters capable of affecting the expert's opinion have been disclosed as part of the expert's declaration:

"In our judgment, the Civil Procedure Rules Committee should consider extending the requirement for an expert's declaration at the end of his report. Its present form is directed to ensuring that the contents of the report represent the independent and unvarnished opinion of the expert making the report. But, as we have explained above, there is another side to independence. The expert should not leave undisclosed any conflict of interest which might bring into question the suitability of his evidence as the basis for the court's decision. The conflict of interest could be of any kind, including a financial interest, a personal connection, or an obligation, for example, as a member or officer of some other body. But ultimately, the question of what conflicts of interest fall within this description is a question for the court, taking into account all the circumstances of the case."<sup>129</sup>

3.162 It is at least arguable that if any similar Code is promulgated in this jurisdiction, in the interests of furthering its objectives and increasing the standard and quality of experts and expert testimony, a similarly strict approach should be taken to enforcement.

3.163 Furthermore, it could be argued that, apart from any fear of sanctions, requiring an expert to make an express declaration of intent to abide by their duties may have a significant psychological impact on the content of their evidence, and may make them act in a more independent manner.

3.164 One could argue that this function is already served by the requirement of all witnesses to swear an oath when testifying. The expert

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<sup>127</sup> *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980 at [9].

<sup>128</sup> [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul).

<sup>129</sup> *Toth v Jarman* [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul) at [199].

report, however, will have been created far in advance of the giving of testimony in court. Thus, a requirement to sign a declaration at the end of an expert report should ensure that the expert's duty is at the forefront of their mind from the outset.

3.165 The Commission now turns to examine the way in which the duties of experts have been treated in other jurisdictions.

## D Duties of Expert Witnesses Recognised in Other Jurisdictions

3.166 Although the decision in the *Ikerian Reefer* remains the principal source of reference for identification of the duties owed by expert witnesses, other jurisdictions have expanded on this by formulating their own list of duties that are owed by expert witnesses and which are binding on experts to varying degrees.

### (1) England

3.167 Extensive consideration has and continues to be given throughout the years in the English courts on the precise and evolving role and duties of an expert witness.

#### (i) Civil Cases

3.168 In civil cases, the *Ikerian Reefer* decision has been replaced by the radical reforms which came about arising from Lord Woolf's *Access to Justice* reports in 1995 and 1996,<sup>130</sup> which sought to address growing criticisms of certain aspects of the civil justice system in England. In his Interim Report Lord Woolf identified the system of expert evidence as being one of the two largest generators of unnecessary cost and delays in civil litigation, the other one being the system of discovery.<sup>131</sup>

#### (II) The Civil Procedure Rules

3.169 The recommendations in the Final Report led to a complete overhaul of the Civil Justice System through the introduction of the Civil Procedure Rules (CPR), which radically changed the procedures for admission of expert evidence in civil cases.

3.170 The Rules replace and reform the Rules of the Supreme Court and the County Court Rules, however, CPR 1.1(1) states that the Rules are a "new procedural code" and the courts have taken the view that references to their predecessors and the line of authority built up by these should not be

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<sup>130</sup> See: Lord Woolf, *Access to Justice* (Interim Report, HMSO, London, 1995) and Lord Woolf, *Access to Justice* (Final Report, HMSO, London, 1996).

<sup>131</sup> Lord Woolf, *Access to Justice* (Interim Report, HMSO, London, 1995) at Ch. 23.1.

encouraged,<sup>132</sup> except in limited circumstances where the previous rules have not been amended by the CPR, and thus retain a persuasive force.<sup>133</sup>

(II) *Part 35 Civil Procedure Rules*

3.171 Part 35 of the CPR is entitled 'Experts and Assessors' and aims to set out the protocol for the use of experts in civil litigation. The CPR must also be read in the light of its supplementing practice directions, and the Practice Direction to Part 35 (PD35) significantly expands the provisions of Part 35 to explain more clearly the extent of the duties that are imposed by the CPR rules on experts in civil claims.

3.172 In keeping with the overriding objective behind the introduction of the rules, namely enabling the court to deal with cases justly by reducing costs and delays,<sup>134</sup> CPR r.35.1 states that expert evidence adduced in court is to be limited to that which is reasonably necessary to resolve the proceedings, and under CPR r. 35.4 the court has the power to restrict expert evidence where it so wishes.<sup>135</sup>

3.173 In his Final Report, Lord Woolf stated that the overall objective of the CPR in the context of experts should be to foster an approach which emphasises the expert's paramount duty to the court, not to the party who retains him,<sup>136</sup> an objective that was duly adopted in CPR r.35.3. According to

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<sup>132</sup> In *Vinos v Marks & Spencers plc* [2001] 3 All ER 784 May LJ stated: "The Civil Procedure Rules are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former Rules." See also the comments of Lord Woolf in *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926: "The whole purpose of making the CPR a self-contained code was to send the message which now generally applies. Earlier authorities are no longer generally of any relevance once the CPR applies."

<sup>133</sup> See for example *Garratt v Saxby* [2004] EWCA 341 at 18: "Although it has been said on a number of occasions that decisions on pre-CPR procedural rules are not binding for the purpose of interpreting the CPR, there are circumstances in which they may be of considerable persuasive force."

<sup>134</sup> See CPR r.1.1.

<sup>135</sup> CPR r.35.1; CPR r. 35.4.

<sup>136</sup> Lord Woolf *Access to Justice* (Final Report, HMSO 1996) Ch. 13.12.

PD35, this imposes a duty on an expert to help the court on matters within his or her own expertise.<sup>137</sup>

3.174 PD 35 also explains that the duty imposed by CPR r. 35.3 requires the expert's evidence to be independent, and requires the expert to provide an unbiased, impartial opinion to assist the court, and not to assume the role of the advocate.<sup>138</sup> The overriding duty to the court was further explained in *Mutch v Allen*:<sup>139</sup>

"This new regime is designed to ensure that experts no longer serve the exclusive interest of those who retain them, but rather contribute to a just disposal of disputes by making their expertise available to all. The overriding objective requires that the court be provided with all relevant matter in the most cost effective and expeditious way. This policy is exemplified by provisions such as rule 35.11 which allows one party to use an expert's report disclosed by the other party even if that other party has decided not to rely on it himself."

3.175 In order to fulfil their duty under this section, the expert is also required to consider all relevant facts, "including those which might detract from his opinion,"<sup>140</sup> as well as being required to make it clear when an issue falls outside his or her area or expertise or when he or she is unable to reach a definitive opinion due, for example, to insufficient evidence.<sup>141</sup> The expert is also expected to communicate without delay any material change of opinion to both parties and, where necessary, to the court.<sup>142</sup>

3.176 Part 35 continues by outlining some of the other duties or tasks that are required to be carried out by expert witnesses in civil litigation. CPR r. 35.5 sets out that experts are required to give their expert evidence in a written report unless the court directs otherwise.<sup>143</sup> CPR r. 35.10, supplemented by part

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<sup>137</sup> Civil Procedure Rules "Practice Direction to supplement CPR Part 35 Experts and Assessors" at 1.1.

<sup>138</sup> Civil Procedure Rules "Practice Direction to supplement CPR Part 35 Experts and Assessors" at 1.2-3.

<sup>139</sup> [2001] 2 C.P.L.R. at 24.

<sup>140</sup> Civil Procedure Rules "Practice Direction to supplement CPR Part 35 Experts and Assessors" at 1.4.

<sup>141</sup> Civil Procedure Rules "Practice Direction to supplement CPR Part 35 Experts and Assessors" at 1.5.

<sup>142</sup> Civil Procedure Rules "Practice Direction to supplement CPR Part 35 Experts and Assessors" at 1.6.

<sup>143</sup> CPR r. 35.5.

2 of PD35, outlines the necessary requirements for the contents of this written report, amongst these a requirement that an expert sign a statement that he understands and has complied with his duty to the court,<sup>144</sup> along with signing a ‘statement of truth’, the form of which is set out in PD35.<sup>145</sup> CPR r. 35.6 states that experts may have questions put to them about their report by the other party or a single joint expert (in accordance CPR r. 35.7),<sup>146</sup> and outlines the extent of the duty of the expert in this regard and the consequences of failure to answer a question.<sup>147</sup>

(III) *Civil Justice Council's Guidance Protocol*

3.177 The Civil Justice Council of the Department of Constitutional Affairs also published a Guidance Protocol for experts in civil cases which aimed to reflect, but not replace, CPR r.35 and its PD35, and to provide further guidance for experts in relation to compliance and interpretation of the CPR rules.<sup>148</sup>

3.178 This Protocol contains a section dedicated to the Duties of Experts.<sup>149</sup> The section reiterates the overriding duty owed by experts to the court, but also states that experts “owe a duty to exercise reasonable skill and care to those

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<sup>144</sup> CPR r. 35.10.

<sup>145</sup> Civil Procedure Rules “Practice Direction to supplement CPR Part 35 Experts and Assessors” at 2.4 states “The form of the state of truth is as follows: I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.”

<sup>146</sup> CPR r. 35.7 provides that the court can direct that evidence in a particular case is to be given by a single joint expert where two or more parties to the case wish to give evidence on a particular issue. The court is given the power under CPR r. 35.7.3 to decide how such experts are to be appointed. CPR r. 35.8 sets out the instructions that can be given by the court prior to the appointment of a single joint expert.

<sup>147</sup> CPR r. 36.1 (a) & (b) – The reason behind this procedure is explained in Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 16 as being designed to facilitate the clarification of opinions and issues after expert’s reports have been served.

<sup>148</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 2.1

<sup>149</sup> See Part 4 “Duties of Experts” in Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005).

instructing them, and to comply with any relevant professional code of ethics.”<sup>150</sup> The protocol goes on to state that experts are also obliged to ensure that they assist the court to enable them to promote the overriding objective of the CPR, namely, to deal with cases justly.<sup>151</sup>

3.179 The protocol also reiterates the duty of experts, as recognised in PD35, to provide independent opinions, unaffected by the pressures of litigation, and to refrain from becoming the instructing party’s advocate.<sup>152</sup> Furthermore, Part 4.4 of the protocol is significant as it develops the scope of the evidence that can be given by an expert by underlining the duties to take into account all material facts,<sup>153</sup> and to confine the opinion “to matters which are material to the dispute between the parties and...matters which lie within their expertise,” to make it clear where an issue falls outside their area of expertise,<sup>154</sup> and inform the court of any change in their opinions on a material matter.<sup>155</sup>

3.180 Interestingly, the Protocol has a section specifically dedicated to the conduct and duties of Single Joint Experts appointed by the court under CPR r. 35.7.<sup>156</sup> It is explained that single joint experts are obliged to keep all instructing parties informed of any material steps taken. It is once again reiterated that they have an overriding duty to the court, but as they are all parties’ appointed experts they owe an equal duty to all parties to maintain independent,

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<sup>150</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.1.

<sup>151</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.2.

<sup>152</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.3.

<sup>153</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.5.

<sup>154</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.4.

<sup>155</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 4.6.

<sup>156</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 17.

impartiality and transparency,<sup>157</sup> and to serve their reports simultaneously on all parties.<sup>158</sup>

(IV) *Judicial Reformulation of Ikerian Reefer Principles*

3.181 Most recently, Toulmin J in *Anglo Group Plc v Winther Brown & Co Ltd and BML (Office Computers) Ltd*<sup>159</sup> stated that the guidelines set out by Cresswell J in *The Ikerian Reefer* in 1990 need to be considered and reformulated in light of the introduction of CPR r 35. He restated and extended the rules in following terms;

- "1. An expert witness should at all stages in the procedure, on the basis of the evidence as he understands it, provide independent assistance to the court and the parties by way of objective unbiased opinion in relation to matters within his expertise. This applies as much to the initial meetings of experts as to evidence at trial. An expert witness should never assume the role of an advocate.
2. The expert's evidence should normally be confined to technical matters on which the court will be assisted by receiving an explanation, or to evidence of common professional practice. The expert witness should not give evidence or opinions as to what the expert himself would have done in similar circumstances or otherwise seek to usurp the role of the judge.
3. He should co-operate with the expert of the other party or parties in attempting to narrow the technical issues in dispute at the earliest possible stage of the procedure and to eliminate or place in context any peripheral issues. He should co-operate with the other expert(s) in attending without prejudice meetings as necessary and in seeking to find areas of agreement and to define precisely arrears of disagreement to be set out in the joint statement of experts ordered by the court.
4. The expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.

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<sup>157</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005) at 17.11.

<sup>158</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005) at 17.14.

<sup>159</sup> [2000] EWHC Technology 127 (8th March, 2000)

5. 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.
6. An expert witness should make it clear when a particular question or issue falls outside his expertise.
7. Where an expert is of the opinion that his conclusions are based on inadequate factual information he should say so explicitly.
8. An expert should be ready to reconsider his opinion, and if appropriate, to change his mind when he has received new information or has considered the opinion of the other expert. He should do so at the earliest opportunity.”

**(ii)      *Criminal Cases***

**(I)      *Judicial Commentary***

3.182     In criminal cases, the duties of expert witnesses in England are still governed by principles laid down at common law, most notably in the *Ikerian Reefer*, and the duties enumerated in that decision have been approved in many later decisions, both civil and criminal, for example *Stanton v Callaghan*<sup>160</sup>, *Franks & Faith (t/a Ground Rent Securities) v Towse*,<sup>161</sup> *R v Puaca*<sup>162</sup> and *McTear v Imperial Tobacco*.<sup>163</sup>

**(II)      *Criminal Procedure Rules***

3.183     Furthermore, in addition to these common law guidelines, the Criminal Procedure Rules, which came into force in April 2005, also contain provisions relating to expert testimony. These Rules sought to consolidate the existing rules governing the practice and procedure of the criminal courts, which up until that point had been scattered amongst almost 50 sets of rules.<sup>164</sup> The rules are the first step towards to creation of a comprehensive code of criminal

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<sup>160</sup> [1992] Q.B. 936, CA.

<sup>161</sup> [2000] EWLands LRA\_2\_1999.

<sup>162</sup> [2005] EWCA Crim 3001.

<sup>163</sup> [2005] ScotCS CSOH\_69 .

<sup>164</sup> The English Courts Act 2003 sets out the provisions for the making of Criminal Procedure Rules, the creation of the Committee and the making of practice which is responsible for making, updating and reviewing the rules on a regular basis. (see “Explanatory Memorandum to the Criminal Procedure Rules 2005 (2005 No. 384 L.4))”.

procedure as recommended by Auld J in 2001 in the *Review of the Criminal Courts*.<sup>165</sup>

3.184 The Criminal Procedure Rules largely mirror the contents and objectives of the Civil Procedure Rules, in that they seek to ensure that cases are heard fairly, justly and efficiently. Rule 24 of the Rules deal with expert evidence. The provisions in Rule 24 largely mirror those contained in Rule 35 of the Civil Procedure Rules, and provisions relating the overriding duty owed by experts to the court, the requisite contents of an expert's report, pre-trial discussions between experts and the power of the court to direct that evidence be given by a single joint expert are similar or the same as their counterparts in CPR r. 35.<sup>166</sup>

### **(iii) Professional Bodies**

3.185 Many of the professional bodies that train and educate expert witnesses (discussed below) have also created their own Codes of Guidance for experts. For example, the Academy of Experts<sup>167</sup> and the Expert Witness Institute<sup>168</sup> have set out a joint Code of Guidance for Experts which was approved by Master of the Rolls & Chairman of the Civil Justice Committee and which applies to members of both associations.<sup>169</sup> Other bodies governing the conduct of specific professions have also set out their own codes of conducts for professionals within the discipline seeking to act as expert witnesses.<sup>170</sup>

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<sup>165</sup> See Auld *A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld* (September 2001) at Ch 2.2.

<sup>166</sup> Further guidance on the duties expected of experts witnesses instructed by the prosecution in criminal investigations can also be found in the Crown Prosecution Service's Disclosure Manual Annex K "Experts' evidence and unused material - Guidance Booklet for Experts" Available at; [http://www.cps.gov.uk/legal/section20/chapter\\_a\\_annex\\_k.html](http://www.cps.gov.uk/legal/section20/chapter_a_annex_k.html).

<sup>167</sup> See; <http://www.academy-experts.org/>

<sup>168</sup> See; <http://www.ewi.org.uk/>

<sup>169</sup> See; EWI & The Academy of Experts "Code of Practice for Experts" (22 June 2005).

<sup>170</sup> See for example the RICS Expert Witness Registration Scheme, a voluntary scheme which sets standards for chartered surveyors who act as expert witnesses in the UK. See <http://www.rics.org/RICSservices/Findasurveyor/Findanexpertwitness/>. Another example is the Council for the Registration of Forensic Practitioners, an independent regulatory body established to improve the standards of forensic practitioners in the UK. The CRFP's Code of Conduct sets out the standards to which a forensic practitioner must adhere in order to be

3.186 Much of the provisions in the Codes set out by these professional bodies reflect the contents of the guidance set out in the *Ikerian Reefer* decision or in the relevant provisions of the civil or criminal procedure rules, all placing great emphasis on the overriding duty owed by the expert to the court and the necessity for honesty, integrity, objectivity and impartiality at all times.

**(2) Australia**

3.187 In Australia, Section 79 of the *Uniform Evidence Act 1995* (Cth), which has been followed by parallel statutes in several jurisdictions,<sup>171</sup> contains the main provision allowing for the admissibility of expert evidence.<sup>172</sup> However, this provision merely states that the opinion of a person with specialist knowledge is an accepted exception to the rule against opinion evidence, and the Act does not elaborate on how this exception is to operate in practice, and is silent on the duties required of experts.

**(a) The Federal Court**

3.188 The Federal Court of Australia also adopted a Practice Direction for expert witnesses, which largely emulates the guidelines set out in the CPR Rules and the *Ikerian Reefer*, and in fact, it expressly cites these as authorities for the Practice Direction.<sup>173</sup> The explanatory memorandum to this Practice Direction states that it aims to assist expert witnesses in understanding what is expected of them in court, and to ensure that experts avoid being perceived as lacking objectivity, or of having coloured their evidence in favour of the party calling them.

3.189 Like the CPR rules, part one of the Practice Direction commences by stating that experts have a general duty to the court which is paramount to the

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registered with the body. Interestingly, this Code makes it expressly clear that a forensic practitioner cannot discriminate on grounds of race, beliefs, gender, language, sexual orientation, social status, age, lifestyle or political persuasion. (See; <http://www.crfp.org.uk/standards/setting/code/code.htm>)

<sup>171</sup> For example New South Wales, Tasmania and Norfolk Island have all passed mirror legislation to the *Evidence Act 1995*, with other jurisdictions, such as Victoria, in the process of considering similar moves.

<sup>172</sup> Section 79 provides: “If a person has specialised knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.”

<sup>173</sup> The Federal Court of Australia “Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia” (Version 5, 6 June 2007) Available at: [http://www.fedcourt.gov.au/how/prac\\_direction.html](http://www.fedcourt.gov.au/how/prac_direction.html), at fn. 2, 5 & 6.

duty owed to the person retaining the expert. In 1.2 it is stated that an expert does not become a party's advocate "even when giving testimony that is necessarily rather than inferential."

3.190 Furthermore, many of the individual states within Australia have set out their own codes of conduct governing the duties of experts within those states.

**(b) New South Wales**

3.191 For example, in New South Wales in 2005, the Uniform Civil Procedure Rules, made under section 9 of the *Civil Procedure Act 2005*, were enacted, Schedule 7 of which consists of a code of conduct for expert witnesses.<sup>174</sup> This code was greatly influenced by common law principles, and imports many of the guidelines set out in the *Ikerian Reefer* and the Civil Procedure Rules in England, including the general principle that the expert witness must not become a party's advocate and that their evidence must be independent and impartial.

3.192 Like the Civil and Criminal Procedure Rules, the Code also contains a section on the requisite contents of the expert's report, however, interestingly, the New South Wales Law Reform Commission has recommended that this part of the code be amended to delete the provisions dealing with matters of form rather than experts' duties as, in the view of the Commission, "the force of the code of conduct should not be diluted with provisions which are purely procedural in nature."<sup>175</sup> The New South Wales Commission is of the opinion that it would be preferable to include such procedural provisions in a rule or practice note specifically dealing with procedural matters concerning expert witnesses.<sup>176</sup>

**(c) Queensland**

3.193 Similarly in Queensland, the use of experts is governed by the Uniform Civil Procedure Rules 1999 (UCPR) rule 212(2) and rules 423 to 429, as amended. These Rules, unlike the NSW Rules, do not have a code of conduct for experts, and the rules are largely procedural in nature, however,

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<sup>174</sup> The predecessor to these rules; the New South Wales Supreme Court Rules, also provided a Code of Conduct for experts engaged in providing an expert report or giving expert evidence (*Supreme Court Rules 1970 (NSW)* Part 36 rules 13C f.f.

<sup>175</sup> NSW Law Reform Commission "Report 109 – Expert Witnesses" (June 2005) at 9.15.

<sup>176</sup> NSW Law Reform Commission "Report 109 – Expert Witnesses" (June 2005) at 9.17.

they do make reference to the paramount duty owed to the court, and the procedural requirements are designed to reflect the obligations to which an expert is expected to adhere. For example, UCPR r 426 requires the expert report to be addressed to court and signed by the expert, a requirement that is designed to highlight and reflect the expert's overarching duty to the court.<sup>177</sup>

**(d) Australian Capital Territory**

3.194 In the Australian Capital Territory a major overhaul of the court's system took place with the introduction of the Court Procedure Rules 2006. These were introduced to modernise and consolidate the procedural rules governing the ACT Supreme Court and Magistrates Court.<sup>178</sup>

3.195 Part 2.12 of the Rules governs the giving of expert evidence. Rule 1202 provides that any individual wishing to act as an expert witness must give written agreement to be bound by the Code of Conduct set out in Schedule 1 of the Rules.

3.196 This Code of Conduct incorporates the expert witness code of conduct that was previously in a practice direction, with some additional provisions from Queensland and New South Wales. It begins by referring to the overriding duty owed to the court before setting out the required format for the expert reports. The fourth and final part of the Code refers to the capacity of the court to convene a conference between expert witnesses and sets out the provisions relating to such conferences.

3.197 It can be argued that this Code of Conduct is not really a Code of Conduct at all as it does not set out guidelines for experts on how to act while giving evidence but instead focuses on the procedural requirements and rules applicable to experts.

**(e) Professional Bodies**

3.198 Furthermore, as in England, many professional bodies in Australia whose members may be called upon to act as expert witnesses have also set out Codes to give guidelines to experts. For example, the Australian Council of Professions, a national organisation which aims to promote professionalism and ethical practices within its member professions, adopted a guidance paper on

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<sup>177</sup> Wilson J "The New Expert Witness Rules" Breakfast Address to Australian Insurance Law Association Brisbane Club (28 October 2004).

<sup>178</sup> See Explanatory Statement to the Court Procedure Rules 2006 SL2006-29 Available at:

<http://www.courts.act.gov.au/supreme/content/pdfs/Ct%20Procedures%20Rules%202006%20Explanatory%20Statement.pdf>.

the role and duties of an expert witness in litigation to which its members are required to conform when giving expert evidence.<sup>179</sup>

**(3)      *Euroexpert***

3.199     Euroexpert is a European-wide organisation set up by a number of expert witness professional bodies including The Academy of Experts in England and The Fédération (now Conseil) Nationale des Compagnies d'Experts Judiciaires (FNCEJ) in France. The organisation aims to promote common professional standards and cross-frontier cooperation amongst experts across Europe, and to provide a forum for experts and a point of contact between experts and the European Union.<sup>180</sup>

3.200     Euroexpert has also set out its own Code of Practice for its members, which contains the minimum standards that must be maintained.<sup>181</sup> This Code is phrased in a more general format than the other Codes from Australia and England. This is probably due to the fact that Euroexpert is composed of members from both common and civil law jurisdictions, so some duties may not translate across well between different systems of law, and different systems may place emphasis or require additional duties than others.<sup>182</sup> However, most of the Euroexpert member countries are signatories of the European Convention on Human Rights, and therefore the Euroexpert code has been drafted within the context of conforming with Article 6 of the ECHR and the Right to a Fair Trial.

3.201     The code is short, composed of just five provisions, which are largely focused on ensuring a high standard of expert witness and the protection of the

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<sup>179</sup> See Professions Australia “Role and Duties of an Expert Witness in Litigation” (1998) Available at: <http://www.professions.com.au/index.cfm?paralID=61>. See also The Australian and New Zealand Forensic Science Society ‘Code of Ethics’ which sets down what is expected of forensic practitioners in giving evidence, giving results and providing evidence in court. (see ANZFSS “Code of Ethics” Available at: [http://www.anzfss.org.au/code\\_of\\_ethics.htm](http://www.anzfss.org.au/code_of_ethics.htm)).

<sup>180</sup> See; Euroexpert – The Organisation for European Expert Associations Available at; <http://www.euroexpert.de/en/About-us/338>.

<sup>181</sup> Euroexpert “Code of Practice” Available at: <http://www.euroexpert.de/en/Code-of-practice/341>.

<sup>182</sup> This is recognized by Euroexpert in the Code itself; “It is recognized that there are different systems of law and many jurisdictions in Europe, any of which may impose additional duties and responsibilities which must be complied with by the Expert. (See Euroexpert “Code of Practice” Available at: <http://www.euroexpert.de/en/Code-of-practice/341>).

client. Considerable emphasis is placed in these guidelines on full disclosure of potential conflicts of interest, impartiality, independence, confidentiality, and maintaining a high quality of work. Interestingly, the code also requires the expert, for the protection of his client, to ensure that proper insurance with a reputable insurer is maintained for an adequate indemnity.

3.202 In a comprehensive AGIS report created in 2007, where Euroexpert surveyed expert practice in 12 European Union Members states, the common denominator of all contributing member states was an acknowledgment of the need to impose a Code of Practice, based on conditions of objectivity, independence, impartiality and competence, on expert witnesses.<sup>183</sup>

#### **(4) France**

3.203 In France, a civil law system applies and experts are appointed not by the parties, but by the court from a set list, which means that he role, and therefore the duties, of the expert are somewhat different. However the duties that have been identified by the principal representative body in France, the National Council of Experts in Justice<sup>184</sup> remain worthy of note.

3.204 The Euroexpert Code of Conduct referred to above was largely modelled on the Code of Conduct of the French National Council<sup>185</sup> but the Council's Code is significantly more detailed. Membership of the Council implies an undertaking to respect the Code, which is a considerably detailed document, with a far greater number of duties listed than those in the *Ikerian Reefer*, the Civil or Criminal Procedures, or in any of the other Codes of Conduct discussed above.

3.205 The French National Council code is interestingly as it is structured under separate headings for the personal duties of the expert (Part I), the duties of the expert towards judges (Part II), the duties of the expert towards the parties (Part III), the duties of the expert towards his colleagues (Part IV) and the duties owed by experts engaged in private consultation with the parties (Part V).

3.206 As already mentioned, in France, the experts are appointed not by the parties, but by the court from a set list, therefore many of the duties set out

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<sup>183</sup> Conseil Nationale des Compagnies d'Experts de Justice "Report: Access to Judicial Expertise in Criminal Matters Implying More Than One Member State, Especially in Serious Cases and Organised Crime" (AGIS, June 2007) Available at: <http://www.euroexpert.de/sixcms/media.php/61/Report-En-Anglais.pdf>.

<sup>184</sup> See: <http://www.fncej.org/>.

<sup>185</sup> CNCEJ "Regles de Deontologie de L'Expert Judiciaire" Available at; <http://www.fncej.org/>.

in this code, particularly those owed to the judge and the parties, may not be relevant to this jurisdiction. Furthermore, many of the duties in this code reflect those that can be seen as standard in many of the other guidance provisions discussed above.

3.207 However, some of the duties listed in this code that have not be listed in other guidance codes are worthy of note. For example, Part I (2) goes some way towards defining an expert, and stresses the point that experts do not practice as a profession, “but within the defined limits of their competence, an activity corresponding to the mission for which they are appointed.” Also interesting is Part I (5), which requires the expert “to maintain the technical and procedural understanding necessary for the satisfactory accomplishment of his activities as an expert.”

**(5) Ireland**

3.208 As mentioned earlier, in sharp contrast with the developments in other common law jurisdictions, there is lack of legislative guidance in this jurisdiction regarding the extent of the duties owed by expert witnesses coming before the Irish courts in both civil and criminal cases. However, many of those duties discussed above will evidently apply, and although the *Ikerian Reefer* has not been expressly endorsed in the Irish courts, it can be argued that this decision represents a good summary of the principal duties and responsibilities that apply to expert witnesses in this jurisdiction.

**(a) Judicial Commentary on Expert's Duties**

3.209 In a number of judicial review proceedings where delay was raised as a bar to prosecutions for alleged of sexual abuse, the courts have discussed and developed the requisite standard and nature of the evidence expected from expert witnesses. In these cases, it has been repeatedly held that there is an obligation on all professional witnesses to make thorough investigations of all surrounding facts in order to give a completely objective and unbiased opinion.

3.210 In *Fitzpatrick v DPP*<sup>186</sup> an expert witness was put forward by the DPP in order to explain, from a psychologist's point of view, the reasons for the delay between the alleged abuse and the complainants filing a complaint. McCracken J. ruled that he would place little weight on this evidence, based on the “quite astonishing” fact that the witness had failed to mention the abuse of the complainants by family members and the potential psychological effects of this. He stated:

“It is my strongly held view that where a witness purports to give evidence in a professional capacity as an expert witness, he owes a

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<sup>186</sup> High Court, 5 December 1997.

duty to ascertain all the surrounding facts and give that evidence in the context of those facts, whether they support the proposition he is being asked to put forward or not.”<sup>187</sup>

3.211 Similarly, in *AW v DPP*,<sup>188</sup> which involved the same expert that had been criticised in *Fitzpatrick*, Kearns J pointed out that nothing in the expert’s report provided any explanation or reliable evidence as to why one of the two complainants could not have come forward at an earlier stage to make her complaint while in the case of a second complainant she married a member of the Garda Síochána.

3.212 Kearns J concluded that the expert “fell down to a significant degree” and “indeed to such an extent that matters put to him in cross-examination overshadow his entire report.”<sup>189</sup> He criticised the expert’s report in that;

“Where and when requested to carry out a psychological assessment, it is in my view incumbent upon a psychologist to discharge such a function, in detail and depth, even if his brief is mainly to inquire into factors explaining delay. It is not sufficient, in my view, to set out a list of general principles relating to complaints of this nature and then to attach these to a particular complainant without some understanding of the psychological make-up of the individual in question which would suggest whether these general principles, or some of them, were particularly apt or appropriate, or even perhaps irrelevant to the particular complainant.”<sup>190</sup>

3.213 Similar criticisms were also expressed by the Supreme Court in *JOC v DPP*.<sup>191</sup> Here Keane CJ held that the opinion of the expert witness psychologist which gave reasons for the delay in complaining about the alleged sexual abuse “was a gravely inadequate one.” In the report she attributed the ‘cluster of behaviours’ demonstrated by the complainant to sexual abuse but failed to suggest other reasons for these behaviours. However, in cross-examination, she acknowledged that there were other possibilities and other factors involved which she had not listed in the report, and which she had not made the effort to inform herself about in detail.

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<sup>187</sup> High Court, 5 December, 1997. This view was approved in *JL v DPP* [2000] 3 IR 122 where Hardiman J warned that in such cases the “need for caution and for a very full and impartial presentation of psychiatric and psychological evidence.”

<sup>188</sup> High Court, 23 November 2001.

<sup>189</sup> High Court, 23 November 2001 at 31.

<sup>190</sup> High Court, 23 November 2001 at 31.

<sup>191</sup> [2000] IESC 58.

3.214 Furthermore, the expert had failed to interview the complainant's parents or other siblings, which, in the view of the court, would have been relevant "to see if the 'clusters of behaviours' on which she placed emphasis were replicated in other relevant people."<sup>192</sup> Keane CJ also criticised the fact that:

"she has little specific to say about nondisclosure in adulthood by this complainant and indeed had failed to elicit basic facts about it."

For all these reasons, he held that not much weight could be placed in the psychologist's report and the reasons for the delay and, as a result, the Court allowed the applicant's appeal.

3.215 In *RB v DPP*<sup>193</sup> Macken J elucidated more clearly the standard of evidence that would be expected from experts in such cases:

"While it is true that in certain reported cases the expert has stated that in his/her opinion it was quite "reasonable" for the complainant not to complain, it seems to me that this is not really the correct approach. It may be that such experts are asked by legal advisers to give an opinion as to whether it is or is not reasonable not to complain having regard to the effects of abuse. I believe, however, it is preferable for the expert to set out for the Court in as clear language as possible those factors concerning the complainant which will allow the Court to decide whether it was explicable and excusable by reference to the applicant's abuse, for the complainant to refrain from complaining at an earlier point in time."<sup>194</sup>

3.216 These cases show the courts in such cases to place a heavy duty on experts to be thorough in their investigations and ensure they take all relevant factors into account, and where necessary, actively interview individuals whose information may have a considerable bearing on the opinion, in order to give a clear and detailed opinion about the relevant issues in question.

3.217 The large quantity of cases in this vein where expert evidence has been criticised, and in some cases, rejected, highlights that the court requires a high standard of care from professional witnesses.<sup>195</sup> The potential consequences for complainants in these cases in having the prosecution

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<sup>192</sup> [2000] IESC 58 at [169].

<sup>193</sup> High Court, 21 December 2004.

<sup>194</sup> High Court, 21 December 2004.

<sup>195</sup> *FC v DPP* High Court, 7 March, 2003; *TM v DPP* High Court, 20 June 2001; *Fitzgerald v DPP* High Court, 5 December 1997; and *PL v DPP* High Court, 16 April 2002.

dismissed are also considerably onerous, a factor that should also be used to encourage expert's to conduct a thorough investigation from the outset.<sup>196</sup>

3.218 O'Flaherty J in a 1996 Conference of Advances in Forensic Science suggested a checklist or a number of 'commandments' by which any expert seeking to give effect expert testimony should abide.<sup>197</sup> First, he should be properly qualified in the field in which he purports to be an expert, and as can be seen from the above, this involves an ability to demonstrate this knowledge in court.

3.219 Second, the expert should be "a servant of justice rather than act as the hireling of one side or the other."<sup>198</sup> Third, where possible he should enter into discussions with the other side prior to the trial with the view of narrowing contentious issues and thus of possibly speeding up the trial process. Fourth, he should have the ability to communicate his conclusions in a way that will be understandable to way people.

3.220 Fifth, he should be meticulous in his record keeping, ensuring that exhibits are well preserved, which will help reduce mistakes that could lead to appeals or acquittals. Sixth, he should not pretend to have expertise that he does not possess. Finally, he must remain patient at all times and not lose his temper during questioning.

**(b) Professional Bodies**

3.221 As with England and Australia, certain professional bodies in Ireland who regulate and govern certain professions have set out guidelines for their members to help explain their role and duties when called to act as an expert witness.

3.222 For example, the Expert Witness Directory of Ireland consists of a reference-checked list of expert witnesses in over 1,000 areas of expertise. In order to be permitted to use the 'Expert Witness Directory of Ireland Irish Checked' logo, an expert witness will have to prove that they have met with the requirements of the Expert Witness Directory of Ireland Code of Conduct.<sup>199</sup>

3.223 This is a Code of Guidance which aims to assist experts to effectively provide reliable expert testimony. It is split into twelve sections and begins by

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<sup>196</sup> On this issue see the comments of Kearns J in *TH v DPP* High Court, 22 October 2004.

<sup>197</sup> O'Flaherty "The Expert Witness and the Courts" (1997) 3 at 5-7.

<sup>198</sup> O'Flaherty "The Expert Witness and the Courts" (1997) 3 at 6.

<sup>199</sup> See: Expert Witness Directory of Ireland "Code of Practice: Expert Witnesses Engaged by Solicitors" Available at: <http://www.expertwitnessireland.info/>.

stating in the introduction that its provisions are of general application and therefore there may be additional requirements relating to specialised areas. The Code is extremely detailed and does not merely outline the duties and ethical obligations owed by experts but also goes into great detail about the procedural requirements and obligations where a person has agreed to act as an expert witness.

3.224 The second part sets out the procedure for acceptance of instructions from a solicitor or barrister and stresses that clear instructions are required. Interestingly, this clearly explains the admissibility requirements for expert evidence by emphasising that instructions can only be accepted where the expert has the “knowledge, experience, expertise, academic qualifications, professional training and resources appropriate for the assignment,” and an expert may not misrepresent himself in terms of his or her qualifications or experience. It is also underlined here that an expert should not take instructions if they are not able to create a report and carry out other necessary tasks within the agreed timeframe or to the necessary standard.

3.225 Part 3 is procedural in nature and explains that the terms of business, such as timeframe, charges, expenses, rates for court attendance etc, should be agreed prior to the acceptance of instructions. Part 4 simply states that the expert must comply with the Code of Conduct of any professional body of which he or she is a member. Part 5 underlines the obligation on the expert to act in confidence unless under a duty to disclose.

3.226 Part 6 sets out clearly the duty on the expert to act independently and with professional objectivity and impartiality at all times. In doing so, this part requires the expert to disclose any potential conflict of interest and gives examples of the forms such potential conflicts can take.

3.227 The seventh part of the Code sets out detailed requirements relating to the expected standard of investigation (where this is necessary) that must be carried out by an expert in order to give a fully informed report. Particular provisions are set out relating to investigations for the purposes of medical reports.

3.228 The next part sets out in great detail the requisite elements of the expert report. This sets out both form and substantive contents requirements and explains the permitted scope of the evidence by emphasising that an expert must stay within his area of expertise and where possible should distinguish between matters of fact and matters of opinion.

3.229 Part 9 of the Code of Practice provides for the convening of meetings between experts and gives some practical guidelines relating to how such discussions should take place.

3.230 Part 10 places a duty on experts to take all reasonable steps to ensure that he or she is available to give evidence in court, and this part also strongly emphasises that when giving evidence in court, the role of the expert is to assist the court independently of the parties. As the overriding duty owed to the court is such a central tenet in the expert witness system it is submitted that it should take a more centre stage place in the Code of Practice.

3.231 Placing this in a provision which deals solely with the duty to attend court may lead one to believe that the overriding duty to the court is owed only while giving evidence in court, and therefore no such duty is owed when creating the expert report. This is clearly an erroneous belief.

3.232 The last two provisions are very significant in that they refer to the accountability of experts. Part 11 states that expert should provide a procedure for the resolution of complaints of solicitors or barristers. Part 12 requires an expert to maintain appropriate professional indemnity cover for the giving of expert testimony.

3.233 The Irish National Teachers Organisation (INTO) has also created a guidance direction for teachers acting as expert witnesses in cases involving such issues as family law, custody, child protection or negligence.<sup>200</sup> While this guidance note does not refer to an overriding duty to the court, or that the expert should always be impartial, independent and unbiased, it does place considerable emphasis on ensuring that teachers realise the extent of their area of expertise;

“The teacher is there in his/her professional capacity as a teacher and should generally be expected only to comment in relation to the teaching/learning situation, for example in relation to the child's attendance, progress or other school related matters. Teachers should note that they are not psychologists or social workers and that their professional expertise relates to the teaching/learning situation.”<sup>201</sup>

3.234 Similarly, the Society of Actuaries in Ireland also provides a Standard of Practice guidance note for actuaries acting as experts.<sup>202</sup> This is an extremely

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<sup>200</sup> See INTO “Teachers and Court Cases” Available at:  
<http://www.into.ie/ROI/LegalAndIndustrialRelations/ParentTeacherRelations/TeachersandCourtCases/#top>.

<sup>201</sup> INTO “Teachers and Court Cases” Available at:  
<http://www.into.ie/ROI/LegalAndIndustrialRelations/ParentTeacherRelations/TeachersandCourtCases/#top>.

<sup>202</sup> See Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;

detailed document which has a very clear and comprehensible structure. It is well organised into different sections entitled ‘background’, ‘background preparation,’ ‘preparation of evidence,’ and ‘communication and disclosure.’

3.235 In the ‘Background’ section, the guidelines explain the burgeoning use of experts in court proceedings, and also the fact that competing and conflicting expert opinions can lower public confidence in them. The guidelines stated aim, therefore, is to focus on the preparation and delivery of sound expert evidence by actuaries.<sup>203</sup> Examples of the different types of issues for which actuaries are invited to give expert evidence are outlined.

3.236 In the ‘Background Preparation’ section, experts are obliged to be familiar with all relevant actuarial standards of practice, and to have sufficient expertise as is necessary for the issues involved in the case.<sup>204</sup> This part also requires an expert to avoid potential conflicts of interest and notify the court and the parties about potential conflicts.<sup>205</sup> This section is very detailed and for the benefit of those professionals who may be unaware of what may amount to a conflict of interest, the guidelines give examples of what format this may take.<sup>206</sup>

3.237 The ‘Preparation of Evidence’ section interestingly requires the actuary to be satisfied of the reasonableness of the data provided, and to disclose any data limitations which may affect the result. This requirement would go a long way towards ensuring that the expert genuinely held the

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<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>.

<sup>203</sup> Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;  
<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>, at 2.1-2.2.

<sup>204</sup> Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;  
<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>, at 3.1.

<sup>205</sup> Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;  
<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>, at 3.2 -3.3.

<sup>206</sup> Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;  
<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>, at 3.2.4-3.2.5.

opinion given. This part is also important as it gives very clear guidance about the type of evidence that can be given by actuaries, explaining that they can give valuations based on assumptions once it is made clear to the court and the parties which assumptions are reasonable.

3.238 It is also strongly emphasised in the ‘Preparation of Evidence’ section that the fundamental obligation of the expert is to provide impartial evidence to the court and that the opinion must be confined to matters within the expert’s own experience and expertise. This part is reminiscent of the *Ikerian Reefer* going so far as to point out that expert evidence must “not be modified to suit the exigencies of litigation.”<sup>207</sup>

3.239 Guideline 4.4.4 is also noteworthy as it demonstrates an understanding of the possibility that a party’s legal advisers may wish to direct the opinion to suit their needs. This part highlights the supremacy of the duty owed to the court by emphasising if this is the case the expert should consider advising that another expert be instructed rather than depart from these guidelines:

“If legal advisers propose that the actuary should avoid reference to particular information or, in some other way, depart from the general tenor of these guidelines, the actuary should comply only if entirely at ease with the adviser’s proposal, having fully considered the implications. It may be appropriate in exceptional circumstances for the actuary to seek independent advice or to suggest that, if the tenor or method of presentation of the evidence is not acceptable to the client, another expert should be instructed.”<sup>208</sup>

3.240 The ‘Communications and Disclosures’ section explains the necessity for the expert’s opinion to be expressed in clear, understandable language and in terms that can be comprehended by those unacquainted with the jargon of the profession. This section also explains the duties owed by the experts to produce a report, and explains potential pre-trial procedures such as meetings between experts, as well as referring to legal terminology that might apply such as a meeting ‘without prejudice.’ It also clearly outlines potential

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<sup>207</sup> Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;  
<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>, at 4.4.2.

<sup>208</sup> Society of Actuaries in Ireland “Actuarial Standard of Practice EXP1 - The Actuary as Expert Witness” (2006) Available at;  
<http://www.actuaries.ie/Professional%20Standards/professional%20guidance/Expert%20Witness/ASP%20EXP-1%20v1.1.pdf>, at 4.4.4.

traps for experts during cross examination and the need to ensure consistency in answers. This part reveals that the writers of the guidance note understand clearly that professionals depending on it will be unaccustomed to many aspects of the legal system and to the role of an expert witness.

3.241 Finally, the expert is encouraged to refrain from becoming a party's advocate, and interestingly, not to be afraid to characterise an opinion as nothing more than speculation, again stressing that the fundamental duty is to provide independent evidence and not to defend the instructing party.

3.242 Overall, these guidelines explain the principal role and duties of an expert while at the same time not forgetting that those relying on the guidelines are likely to be inexperienced in relation to aspects of the legal system. These guidelines could therefore provide a good model on which to base any legally binding code or practice direction for experts.

## **E Conclusion**

3.243 As demonstrated by the foregoing discussion, most other common law jurisdictions have made some attempts at introducing a formal list of duties owed by persons seeking to act as expert witnesses that reflect the duties set out in the seminal English decision *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)*.<sup>209</sup>

3.244 Although specific duties have been mentioned in Irish case law as being owed by experts, and although several professional bodies in Ireland have set down their own list of expert's duties, as of yet there has been little judicial or legislative guidance for experts on the complete list of duties which are owed by them in their role as expert witnesses.

3.245 The Commission considers that more complete judicial or legislative guidance would greatly improve the standard of expert evidence and of expert witnesses by clearly elucidating the parameters of the role of an expert witness. The Commission therefore provisionally recommends that a formal guidance code for expert witnesses, based on the principles set down in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)*<sup>210</sup> should be developed which would outline the duties owed by expert witnesses and which would be made available to all persons seeking to act as expert witnesses. The Commission invites submissions on the form, statutory or non-statutory, this guidance should take and whether all the specific duties identified in *The Ikerian Reefer* should be adopted.

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<sup>209</sup> [1993] 2 Lloyd's Rep 68.

<sup>210</sup> [1993] 2 Lloyd's Rep 68.

3.246 *The Commission provisionally recommends that a formal guidance code for expert witnesses, based on the principles set down in National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)<sup>211</sup> should be developed which would outline the duties owed by expert witnesses and which would be made available to all persons seeking to act as expert witnesses. The Commission invites submissions on the form, statutory or non-statutory, this guidance should take and whether all the specific duties identified in The Ikerian Reefer should be adopted.*

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<sup>211</sup> [1993] 2 Lloyd's Rep 68.



## **CHAPTER 4 ADVERSARIAL BIAS, PARTISANSHIP & CONFLICTS OF INTEREST**

### **A Introduction**

4.01 The corollary of the identification a number of fundamental duties owed by experts is the acknowledgment that at times these duties are not always fulfilled, or in some cases, even recognised. Although the role and function of the expert as an impartial aid to the court has been repeated time and time again, in reality, where an expert has been retained by a party to judicial proceedings, this has not been done in the overriding quest for truth, but in order to enhance the arguments that the particular party seeks to advance and offset the evidence of experts for the other side.

4.02 Bias or partisanship, which goes completely against the duty owed by the expert to be impartial and independent, can take place in a number of ways in the giving of expert testimony and a number of different sources of adversarial bias have been identified. ‘Conscious bias,’ ‘unconscious bias’ or ‘selection bias’ may all occur in the giving of expert testimony.<sup>1</sup>

4.03 This chapter will examine the various sources of adversarial bias that have been identified in an effort to determine how best to reduce the prevalence of bias in expert testimony.

### **B Conscious Bias**

4.04 Conscious or deliberate bias refers to the problem of the partisan expert, or the ‘hired gun.’ Here, the expert does appreciate the extent of the role and the overriding duty owed to the court, but is biased in favour of the instructing party due to the fact that the party is paying them, or in some cases, due to the expert’s personal feelings on issues involved in the case.

4.05 Although it is clear that there is an equal potential for conscious bias in the context of lay witnesses, the likelihood of this occurring is stronger with

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<sup>1</sup> For more discussion on the various forms of adversarial bias, see: Bernstein “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution” (February 2007). George Mason Law & Economics Research Paper No. 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 4.

professional expert witnesses for a number of reasons. Dwyer explains that the causes of expert bias, conscious or unconscious, can be separated into three categories; personal interest, financial interest and intellectual interest; all of which may exist both externally and in direct relation to the litigation in question.<sup>2</sup>

### **(1) Personal Interest**

4.06 A person giving expert testimony may be, or may be perceived to be, predisposed to giving a particular type of opinion due to their own beliefs or moral viewpoints on certain issues.<sup>3</sup> They may also have formed preconceived opinions due to personal relationships, or due to an affiliation with or membership of the same organisation as one of the parties to the proceedings,<sup>4</sup> all of which may have a negative effect on their personal trustworthiness as an independent expert witness.

4.07 In *Liverpool Roman Catholic Archdiocesan Trust v. Goldberg*<sup>5</sup> the court refused to admit an expert adduced by the defence because the defendant had had a close personal and professional relationship with the expert for several years. Evans-Lombe J explained that the refusal was based on the fact that a reasonable observer might think that this relationship was capable of affecting the views of the expert so as to make them unduly favourable to that party.

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<sup>2</sup> Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 CJQ 425 at 427

<sup>3</sup> Dwyer states that examples of moral opinions affecting the independence of expert evidence are relatively rare. She cites the Wyoming state family decision *Hertzler v Hertzler* (1995) WY 206; 908 P. 2d 946 where the expert appointed by one of the parties admitted under cross-examination that his religious beliefs regarding homosexuality affected his opinions in the case. (See American Psychology Association "Brief of Amici Curiae American Psychology Association and Wyoming Psychology Association" Available at: <http://www.apa.org/psyclaw/hertzler.pdf>; (Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 CJQ 425 at 427).

<sup>4</sup> In *Toth v Jarman* [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul) the appellant argued that the judgment should be set aside where the expert failed to disclose the potential conflict of interest due to his membership of a committee associated with the defence. The court here did not find the expert to be biased but did emphasise the duty on the expert to disclose any potential conflict of interest at an early stage in proceedings.

<sup>5</sup> [2002] 1 WLR 237

4.08 Expert witnesses might also find themselves becoming emotionally involved with the instructing party, or identifying and sympathising with their arguments, in circumstances where they have spent considerable time analysing the issues, or where they have been repeatedly instructed by the same party and thus have become almost akin to that party's adviser.

4.09 Particularly where emotive or sensitive issues are in question, this may lead the expert to become attached to their instructing party, thus exacerbating the possibility that they will, either consciously or unconsciously, sway the opinion in their favour.

4.10 This danger that an expert witness who has a well established relationship with a party might develop sympathy for or identification with that party which jeopardises objectivity was referred to in *Vernon v Bosley*.<sup>6</sup> Here, the plaintiff claimed damages for nervous shock or psychiatric injury sustained by him when he witnessed unsuccessful attempts to rescue his two daughters from a motor car which had been driven into a river by the defendant.

4.11 Thorpe J found the claimant's expert witness's evidence to be "thoroughly partisan reports." He explained that:

"...their loss of objectivity might be ascribed to their daily attendance at the trial which had tempted them into sharing attitudes, assumptions, and goals with the defendant's litigation team."

4.12 It is also worth noting that where emotive issues such as this are involved, it is human nature to become sympathetic to the person involved and seek to further his or her case. This is particularly so in situations where, as occurred in this case, the experts were "sucked into" the litigation as a result of spending considerable time in court, particularly when only a small proportion of this time was necessary for their testimony. One way of reducing this danger is to limit the expert's attendance at trial, only permitting them to attend court when they are due to be examined.

4.13 Another possible cause of bias generated by the personal interest of experts is where they develop a belief that they owe an allegiance to their particular profession, making them reluctant to fuel an attack against a fellow practitioner. As Healy puts it, "members of professions tend to be institutionally and socially collegial."<sup>7</sup>

4.14 This possibility has an added effect in the context of medical negligence cases as a result of the ultimate importance attached to the opinion of medical experts in determining whether a professional has acted negligently.

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<sup>6</sup> [1996] EWCA Civ 1217.

<sup>7</sup> Healy *Irish Laws of Evidence* (2004 Thomson Roundhall).

The test for medical negligence in this jurisdiction was set down by Finlay CJ in *Dunne v National Maternity Hospital*.<sup>8</sup> A medical practitioner will be considered as having acting negligently if he has been proved to be “guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.”

4.15 Therefore, a plaintiff will fail to establish negligence once a defendant can adduce a credible expert witness to condone the course of action taken in the circumstances. Without wilfully meaning to be partisan, there is the possibility that a medical expert may express a willingness to testify on behalf of the defendant practitioner that is more motivated by a desire to support one of their own, than an actual support of the medical action taken in the case.

4.16 Furthermore, it has often been pointed out that in such medical negligence cases, defence expert witnesses can dominate proceedings as there is reluctance on the part of the expert to help in what is seen as an attack on a fellow practitioner.<sup>9</sup> Carter J referred to this trend in the Californian decision *Huffman v Lindquist*.<sup>10</sup>

“...physicians who are members of medical societies flock to the defense of their fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy.”<sup>11</sup>

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<sup>8</sup> [1989] IR 91 (SC).

<sup>9</sup> Healy refers to a survey, referred to in *Morris v Metriyakool* (1981) 309 N.W. 2d 910, where they were a number of medical practitioners presented with a scenario of a doctor who grossly negligently removes the wrong kidney from a patient. Only 31% of specialists and 27% of general practitioners said they would be willing to testify as an expert witness on behalf of the plaintiff patient. (See Healy *Irish Laws of Evidence* (2004 Thomson Roundhall) at 366.

<sup>10</sup> (1951) 37 Cal 2d 465; 234 P.2d 34 Cited in Nockelby & Curreri “100 Years of Conflict; The Past and Future of Tort Retrenchment” *Loyola of Los Angeles Law Review* Vol XX:nnn 101 at 140.

<sup>11</sup> (1951) 37 Cal 2d 465 at 484; 234 P.2d 34 at 46 Cited in Nockelby & Curreri “100 Years of Conflict; The Past and Future of Tort Retrenchment” *Loyola of Los Angeles Law Review* Vol XX:nnn 101 at 140.

**(2)      *Financial Interest***

4.17      An expert may be revealed to have a financial interest, either pre-existing or developed during the trial process, in the outcome of the case or in one of the parties in a number of ways that may not be obvious at first glance.

**(a)      *Pecuniary Interest in One of the Parties***

4.18      The expert witness could be revealed to have invested in or have shares in one of the instructing parties' businesses, or in an enterprise related to one of the parties. Depending on the context of the litigation, this fact may influence their opinion, as they would be reluctant to give an expert opinion that would be likely to have a negative financial effect on the party's business, as this might in turn harm the expert's pecuniary interest.

**(b)      *Desire to Develop a Professional Expert Witness Career***

4.19      Similarly, a person who wishes to develop a career as a professional expert witness has an obvious interest in promoting a reputation that he or she presents the party's case in the best possible light. The more successful cases an expert is associated with, the better for his or her career as an expert, which highlights a natural underlying interest in the instructing party's success.<sup>12</sup>

**(c)      *Expert Employed by One of the Parties***

4.20      Furthermore, an expert, who is, prior to and after the proceedings, an employee of the instructing party, or of another interested party, could also evidently be considered as having their independence compromised due to the financial element of their employment. It is possible that the employee may feel pressured into expressing a particular opinion to avoid potential dismissal or other professional repercussions.

4.21      For example in *Mohammed v Financial Services Authority*<sup>13</sup> the applicant argued that the respondent's expert witness should not be admitted due to the fact that a senior staff member of the company the expert was employed by was a member of the respondent organisation's regulatory committee, and thus was involved in the decision to bring proceedings against the applicant.

4.22      It was argued that the fact of employment brought the expert's independence into question as it was contended the expert would be reluctant to depart from the views of a senior member of his own company on the issues in question. The court here emphasised that they were not criticising the expert,

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<sup>12</sup>      For more on this see Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 CJQ 425 at 430-433.

<sup>13</sup>      [2005] UKFSM FSM013 (18 January 2005).

but did hold that the expert could not be considered truly independent and that “insofar as he has been tendered as an independent expert giving an opinion as to the views of a regular user of the market, we have been unable to give his evidence much weight.”<sup>14</sup>

4.23 The correct approach to be taken in the context of experts who are also employees of a party to proceedings was discussed in Chapter 3,<sup>15</sup> where it was explained that the preferred approach taken in the case law from this jurisdiction, for example *Galvin v Murray*,<sup>16</sup> and in England is not to treat the fact of employment of an expert as demonstrating apparent bias, but rather to take this fact into account when assessing the weight to be accorded to the evidence of the expert.<sup>17</sup>

4.24 It has also been argued that problems may arise where a therapist is treating an individual and at the same time is asked to act as an expert witness in a case involving the individual.<sup>18</sup> This assumption of a dual role could lead to a very real conflict of interest and have negative impact on the therapist-patient relationship, or may adversely affect the way in which the evidence is presented to the court.

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<sup>14</sup> [2005] UKFSM FSM013 (18 January 2005) at [60].

<sup>15</sup> See above at 3.42-3.51.

<sup>16</sup> [2000] IESC 78.

<sup>17</sup> As Lord Phillips MR stated in *R (Factortame) v Secretary of State for Transport* [2002] EWCA 932 at [70]: “This passage seems to us to be applying to an expert witness the same test of apparent bias that would be applicable to the tribunal. We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management. In considering that question the Judge will have to weigh the alternative choices open if the expert’s evidence is excluded, having regard to the overriding objective of the Civil Procedure Rules.”

<sup>18</sup> See Slovenco “On a Therapist Serving as a Witness” (2002) 30 J Am Acad Psychiatric Law 10.

4.25 For example, in the infamous American case in the 1990s of Erik and Lyle Menendez, who were charged with the murder of their parents, a forensic psychiatrist who treated Erik and also gave evidence in his capacity as forensic psychiatrist later admitted to have altering notes of his sessions as he thought this would harm the defence. As explained by fellow psychiatrist Dr. Schetky:

“Amid pressures to protect his patient and appease his attorney client and his belief that his testimony was critical to the case, he lost sight of the need for the psychiatrist at all times to testify truthfully. When we allow our integrity to be compromised by competing pressures, we do a disservice to our patients, the profession, and the legal system.”<sup>19</sup>

4.26 However, it is also clear that in determining issues such as sanity of an accused such therapists are arguably best placed to testify accurately about the patient, having had first-hand experience with them at the relevant time, rather than a practitioner who makes an opinion based on a therapist’s notes of examinations.

4.27 Based on the added value that first-hand experience will give to an opinion, any prohibition on treating therapists acting as expert witnesses is clearly undesirable. It is submitted that the correct approach to take in such cases is once again take into account this fact at weight, rather than admissibility stage. The Commission therefore provisionally recommends that there should not be a prohibition on treating therapists acting as expert witnesses.

4.28 *The Commission provisionally recommends that there should not be a prohibition on treating therapists acting as expert witnesses.*

**(d) Expert Paid by the Instructing Party**

4.29 The most obvious source of the financial interest that an expert has in court proceedings lies in the fact that experts are being paid by the instructing party for their service in giving evidence. This is in contrast with the situation of ordinary witnesses, who are not paid for their testimony, and who can be compelled to give evidence, so do not do it as a ‘service’.<sup>20</sup> As pointed out by Jessell LJ in *Abinger v Ashton*.<sup>21</sup>

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<sup>19</sup> “Letter to the Editor” (1996) 9 *Psychiatry News* 4 Cited in: Slovenko “On a Therapist Serving as a Witness” (2002) 30 J Am Acad Psychiatric Law 10.

<sup>20</sup> It is noted that an expert can be compelled to give evidence just as an ordinary witness can, however, in practice this will rarely occur.

<sup>21</sup> L.R. 17 Eq. 358, 373 (1873).

"Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him. Now it is natural that his mind, however honest he may be, should be biased [sic] in favour of the person employing him, and accordingly we do find such bias."<sup>22</sup>

4.30 It will also be more difficult for the other party to reveal an expert to be a partisan hired hand than it will be to discredit an ordinary witness whose personal affiliations with a party are detectable, due to the fact that the other party is likely to be funding their own expert, which would prevent them raising pecuniary reasons for the alleged bias.

4.31 In the context of payment of experts, the existence of a contingency fee basis for payment is potentially indicative of a pecuniary bias on the part of the expert during the trial process. In England, the appropriateness of contingency fees was considered in *R (Factortame) v Secretary of State for Transport*<sup>23</sup> where the court held that such arrangements would not automatically preclude evidence, but such an interest should be disclosed and may affect the weight of the evidence.<sup>24</sup>

### **(3) Intellectual Interest**

4.32 Intellectual interest is another factor that may generate bias in cases where there is general scope for differing opinions between experts; an interest which may be motivated by a desire on the part of the witness to promote a

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<sup>22</sup> *Abinger v Ashton* L.R. 17 Eq. 358, 373 (1873).

<sup>23</sup> [2002] EWCA 932.

<sup>24</sup> Similarly, in *Davis v Stena Line Ltd* [2005] EWHC 420 (QB) the defendant argued that the claimant's expert witness should not be permitted to give evidence due to the fact that he had been hired on a 'no win no fee' basis and had thus carried out his task in circumstances where he had a significant financial interest in the outcome of the proceedings, a fact that may "nullify his neutrality." (at [20]) However, on the evidence Forbes J considered that neither the expert nor the party involved had understood that contingency fees were an inappropriate remuneration arrangement for experts, and rejected the contention that their evidence was lacking in objectivity in any way or was biased. (at [29]).

particular theory in their field of expertise through the medium of court proceedings.<sup>25</sup>

4.33 The desire to increase one's expert status in a particular subject may lead a person to be biased in favour of their own theories, either consciously or subconsciously. This could have significant effects on the way in which they present expert evidence in court. The development of novel scientific theories can significantly improve a scientist's standing in their field. The witness may use the courtroom setting as a vehicle for promoting their career without fully considering other possibilities with regard to the specific issues involved in the case, if such alternatives would detract from their personal theories.

4.34 This possibility is aggravated by the distinction which exists between ordinary and expert witnesses. Since lay witnesses must restrict their evidence to matters personally perceived by them the available choice, if any, of such witnesses is limited. Both parties, however, are free to survey a wide range of expert witnesses to find one sympathetic to the party's own arguments.

4.35 Although it is inevitable that a person who is considered to be an expert will submit their own experience as representing best knowledge and practice in the subject area, an expert witness should be willing to consider alternative theories rather than uncompromisingly sticking to their own viewpoint. All theories should be judged in the light of the facts of the case.

4.36 An English example where an expert was held to have been giving biased evidence appearing to have been motivated by his professional viewpoint is *Petursson & Ors v Hitchison 3G UK Ltd*.<sup>26</sup> In this case the claimants claimed that the defendant's telecommunications mast had had substantial adverse effects on their physical health and well-being and on their enjoyment of their property, an issue that in recent years is attracting increasingly zealous and fervent views.<sup>27</sup>

4.37 Here, the claimant's expert claimed that a number of expert reports and studies on this issue that were submitted in evidence "lacked honesty, independence and were economical with the truth."<sup>28</sup> In considering this evidence, Kirkham J considered that the expert's criticisms must be viewed in the light of his own partiality in giving evidence. She criticised the expert for his

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<sup>25</sup> Dwyer "The Causes and Manifestations of Bias in Civil Expert Evidence" (2007) 26 CJQ 425 at 434.

<sup>26</sup> [2005] EWHC 920 (TCC) (09 May 2005).

<sup>27</sup> Mahendra "Mistakes in Court" (2007) New Law Journal 462.

<sup>28</sup> [2005] EWHC 920 (TCC) (09 May 2005) at [74].

lack of balance and partiality in giving evidence and held that he lacked the objective approach the court expects from an expert witness.

4.38 This case demonstrates the range of negative consequences of an expert adopting a biased approach. Here, the expert had for many years been concerned with the potential health hazards associated with the radiation used in such masts and so had considerable expertise on this issue and clearly his opinion could have been of important evidential value. However, as a result of his “bold and startling contention” about the expert reports, Kirkham J appeared very reluctant to consider the rest of his evidence and ultimately rejected the claimant’s argument. Considerably more weight may have been attributed to the claimant’s theories had he outlined them in an objective, balanced manner.

4.39 It has also been argued that jurors are more likely to perceive a professional expert witness to be an unbiased contributor to the case than an ordinary witness.<sup>29</sup> This may lead the judge or jury to be more wary of potential bias in the case of ordinary witnesses, as the causes of this potential bias, such as a relationship with the party, are more visible. Jurors may thus lower their guard where expert witnesses, particularly scientific experts, are testifying, in the (potentially erroneous) belief that such experts will give neutral evidence.

#### **(4) Bias or Genuine Disagreement**

4.40 It is clear that difficulties can occasionally arise in distinguishing conscious bias from an honestly held dissenting opinion or genuine disagreement. Determining whether or not a person genuinely holds a particular opinion is clearly impossible, so where the opinion is not so extreme as to amount to an obvious manifestation of bias, but instead comes within the range of opinion which could be applied to a particular subject, it can be impossible to discover the true intent of the expert; i.e. if they are merely adopting that viewpoint to coincide with the party’s arguments.

4.41 The difficulty in distinguishing disagreement from bias is aggravated in certain subject matters that can be considered ‘theory-rich disciplines’.<sup>30</sup> The Commission has already discussed in Chapter 2 how new and emerging disciplines or ‘sciences’ are emerging all the time, and determining what amounts to a ‘junk science’ has proved problematic.

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<sup>29</sup> Bernstein “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution” (February 2007). George Mason Law & Economics Research Paper No. 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 4.

<sup>30</sup> Dwyer “The Causes and Manifestations of Bias in Civil Expert Evidence” (2007) 26 CJQ 425 at 438.

4.42 Even experts within a particular subject area may disagree on certain theoretical aspects of their subject area, or on the appropriate way in which a subject is to be analysed, and in some instances there may be more than one possible reason for or interpretation of a particular result, all of which makes it even harder to detect if the expression of a contradictory view by an expert is legitimate or motivated by bias.

## C Unconscious Bias

4.43 Unconscious bias occurs where the expert sways their opinion in favour of the instructing party without realising they are doing so, often subconsciously feeling they owe a duty to do the best for the party they are acting for. It is evident that frequently the line separating conscious and unconscious bias will be blurred as both are rooted in the same causes.

4.44 In this jurisdiction Hardiman J expressly acknowledged the possibility of an expert being unconsciously prejudiced in favour of their instructing party where he explained that one of the functions of the system whereby each party appoints their own expert is “to counter any unconscious sympathy with one’s own patient or client.”<sup>31</sup>

4.45 Similarly, over a century ago Jessel LJ showed an understanding of the potential for such bias in *Abinger v Ashton*<sup>32</sup> where he pointed out that:

“...undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.”<sup>33</sup>

### (1) **Forensic Experts**

4.46 Bernstein points out that testimony from forensic scientists is particularly prone to the allegation of being unconsciously biased due to the fact that most forensic scientists work for government crime labs and will testify on behalf of the prosecutor, so they “naturally identify with the prosecutors’ goal of convicting a particular defendant,” a fact that may affect their conclusions.<sup>34</sup>

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<sup>31</sup> *JF v DPP* [2005] IESC 24 (26 April 2005).

<sup>32</sup> L.R. 17 Eq. 358, 373 (1873).

<sup>33</sup> L.R. 17 Eq. 358, 373 (1873) at 374.

<sup>34</sup> Bernstein “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution” (February 2007). George Mason Law & Economics

4.47 Glidewell J in *R v Ward*<sup>35</sup> made reference to this fact;

"For lawyers and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tends to promote this process. Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity."<sup>36</sup>

4.48 One of the clearest examples of outright bias on the part of experts arose in the case *R v Ward*<sup>37</sup> Here, a number of forensic experts in a bombing investigation and trial were found to have been acting in a partisan manner as they concealed certain results and data, misrepresented other results and placed a misleading picture of the evidence before the jury. According to Glidewell J;

"In Miss Ward's case the disclosure of scientific evidence was woefully deficient. Three senior RARDE scientists took the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial."<sup>38</sup>

4.49 More specifically, the presence of traces the chemical nitro-glycerine, which was used in the manufacture of bombs, on the accused's clothes was a major factor leading to her conviction. However, the prosecution experts failed to disclose the fact that traces of this substance could be present in such innocuous substances as shoe polish. Furthermore, it was held that they grossly exaggerated the significance of certain test results, lied to a defence expert witness about these test results, and suppressed evidence in order to further the prosecution case.<sup>39</sup>

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Research Paper No. 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 4.

<sup>35</sup> (1993) 96 Cr App R 1.

<sup>36</sup> (1993) 96 Cr App R 1 at 51.

<sup>37</sup> (1993) 96 Cr App R 1.

<sup>38</sup> *R v Ward* (1993) 96 Cr App R 1.

<sup>39</sup> For more information on the exact nature of the misleading evidence given by the prosecution forensic experts in this case see; Schurr "Expert Witnesses and the

4.50 As a result, the court concluded that the forensic evidence could not be relied on and ultimately found the conviction to be unsafe and the accused had her conviction quashed. Prior to the acquittal however, Judith Ward had served 18 years of a custodial sentence, highlighting the serious miscarriages of justice that can result from bias on the part of expert witnesses.

4.51 Many commentators have expressed dissatisfaction with a situation whereby the system of forensic science remains under state control, as this could lead government scientists to become prejudiced, or at the very least lead to the perception of partisanship.

4.52 Furthermore, even if they do not become prejudiced, their services are only available to the prosecution, who therefore retain a monopoly on forensic scientists, which leads to a very small pool of scientists available to the defence.<sup>40</sup>

4.53 The recognition of the heightened potential for unconscious bias in the context of forensic science has led many jurisdictions to reform the structure of forensic evidence so that all forensic laboratories and scientists are made independent of law enforcement and government agencies.

4.54 For example, in England, the Royal Commission on Criminal Justice produced a report entitled “The Role of Forensic Science Evidence in Criminal Proceedings” in 1993.<sup>41</sup> In this report, the Royal Commission recommended that the government Forensic Science Service be changed into

“...an agency whose expertise is available equally to the Prosecution and Defence, and whose independence and efficiency are generally recognized and respected by all.”

4.55 Pursuant to the recommendations in the Royal Commission report, in 1991 the Forensic Science Service (FSS)<sup>42</sup> and the Metropolitan Police Forensic Science Laboratory, both of which had previously been attached to the police, were given executive agency status, making them independent from the

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Duties of Disclosure and Impartiality: The Lessons of the IRA Cases in England”  
Paper presented at the Law, Medicine and Criminal Justice Conference (Surfer’s Paradise, 6-8 July 1993).

<sup>40</sup> Bernstein “Junk Science in the United States and the Commonwealth” (1996) 21 Yale Jn'l of Int'l L. 123 at 171; Stockdale “Running with the Hounds” (1991) 141 NLJ 772.

<sup>41</sup> The Royal Commission on Criminal Justice ‘The Role of Forensic Science Evidence in Criminal Proceedings” (Stationery Office Books, 1993).

<sup>42</sup> See; [http://www.forensic.gov.uk/forensic\\_t/inside/services/legal.htm](http://www.forensic.gov.uk/forensic_t/inside/services/legal.htm).

police and competent to accept cases from both the defence and the prosecution.<sup>43</sup>

4.56 In contrast, in Ireland the Forensic Science Laboratory (FSL) remains under the auspices of the Department of Justice, Equality and Law Reform, thus works solely for the Gardaí or other law enforcement agency, and for the Director of Public Prosecution. The Laboratory is not available to carry out examinations for private citizens; therefore it will not be available to the defence in court proceedings. Its mission, as set out in its Strategy Statement, is to;

“Assist in the investigation of crime and to service the administration of Justice in an effective manner by a highly trained and dedicated staff providing scientific analysis and objective expert evidence to international standards.”<sup>44</sup>

4.57 In its *Report on the Establishment of a DNA Database*, the Commission discussed the range of available options for custodianship of the proposed DNA database.<sup>45</sup> The Commission commended the FSL for its integrity, competence and efficiency, and acknowledged that in practice it is independent from and not subject to direction from the Gardaí.

4.58 However, at the same time the Commission expressed concern that the FSL may be not be publicly perceived as being distinct from and independent of An Garda Síochána, which may have a negative impact on the way in which profiles are perceived as being generated.<sup>46</sup>

4.59 As a result, the Commission recommended the creation of an independent statutory body which would incorporate the existing FSL and also a department responsible for the custodianship of the DNA database, and which would be known as the Forensic Science Agency. This body would be thus

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<sup>43</sup> However, it has been argued that this change is more “nomenclature than substance” and has not improved defence access to forensic scientists. See; Alldridge “Forensic Science and Expert Evidence” (1994) 21 Jnl L. & Soc'y 136 at 139; Bernstein “Junk Science in the United States and the Commonwealth” (1996) 21 Yale Jnl of Int'l L. 123 at 172.

<sup>44</sup> See; <http://www.forensicscience.ie/>.

<sup>45</sup> See Law Reform Commission *Consultation Paper on The Establishment of a DNA Database* (LRC CP 29-2004) at 8.04-8.23 and Law Reform Commission *Report on The Establishment of a DNA Database* LRC (78-2005) at 4.02-4.13.

<sup>46</sup> See Law Reform Commission *Consultation Paper on The Establishment of a DNA Database* LRC CP 29-2004 at 8.06; Law Reform Commission *Report on The Establishment of a DNA Database* LRC 78-2005 at 4.06-4.07.

independent from law enforcement and government agencies both in form and in structure.

4.60 It is submitted that the creation of such a body would also go a long way towards improving public perception of forensic expert witnesses. Making the body independent would lessen the possibility of 'government forensic scientists' becoming, or being perceived as, partisan hired guns. Allowing the body to operate independently, and thus to accept work from anyone, not just law enforcement agencies, would also enable a wider range of clients to have increased access to forensic services, and thus improve defence access to forensic science evidence.

4.61 In the Consultation Paper the Commission provisionally recommended that the new statutory body should require all clients to pay for services, including Gardaí. However, after receiving submissions on this issue, in the Report the Commission was of the view that a commercial model for the proposed agency would be undesirable;

"The Commission is of the opinion that any such model would require focused and detailed debate regarding the advantages and disadvantages of what would be a far-reaching transformation of the forensic science service in Ireland."

4.62 It can be argued that this commercial element is very important in both promoting transparency and improving public perception of the new agency as being an independent body. This would also reduce the possibility of the forensic scientists unconsciously viewing themselves as aligned with government law enforcement agencies.

4.63 Furthermore, requiring all clients to pay for forensic services would ensure equal access for both prosecution and defence to forensic services and reduce the disparity of resources between prosecution and defence that could affect the ability of defendants to challenge forensic expert evidence. It could also be argued that making the service independent and profit-run would have the effect of increased efforts to ensure high standards of objective productivity as any loss of credibility or a public perception of bias would have a detrimental effect on the business.

## **(2) *Misunderstanding of the Role of the Expert Witness***

4.64 At other times, professionals purporting to offer their services as expert witnesses may be unaware of their overriding duty to be an objective aide to the court, and actually believe that they owe a paramount duty to the instructing party to present the case in a light favourable to them.

4.65 Barr J gives a good example of where the expert witness confused his role with that of an advocate.<sup>47</sup> He cites a personal injuries case he was involved in where the expert witness for the plaintiff was a medical examiner who testified that the permanent shortening of the plaintiff's leg as a result of the accident was likely to lead to arthritic pain and long term pain and disablement. Barr J relates that the cross-examination proceeded as follows:

"Mr. X, I have to put it to you that a number of times in these courts, in answer to me, you have positively stated that anything less than three-quarters of an inch shortening of a leg is of no practical significance."

The immortal reply was:

Mr. Fitzgerald, if I said that I was wrong!"<sup>48</sup>

4.66 Barr J goes on to explain the apparent anomaly in the expert's view as the result of a "fundamental failure...to appreciate that it was no part of his function to don the mantel of advocate on his client's behalf."<sup>49</sup> He goes on to explain:

"It appears that [the expert's] approach to expert testimony was that in circumstances where a divergence in established professional opinion regarding possible sequelae of particular injuries existed, he was entitled to look at the spectrum of opinion and advance the view most favourable to his side of the particular case."<sup>50</sup>

4.67 Another oft-cited example of an expert witness who was clearly mistaken about the role of an expert witness is the following extract from *Ladner v Higgins*,<sup>51</sup> a decision of the Louisiana Court of Appeals:

"Is that your conclusion that this man is a malingerer?"

The expert responded,

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<sup>47</sup> Barr "Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development" (1999) 4 (4) BR 185.

<sup>48</sup> Barr "Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development" (1999) 4 (4) BR 185.

<sup>49</sup> Barr "Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development" (1999) 4 (4) BR 185.

<sup>50</sup> Barr "Expert Evidence - A Few Personal Observations and the Implications of Recent Statutory Development" (1999) 4 (4) BR 185.

<sup>51</sup> 71 So.2d 242 (La. Ct. App. 1954).

"I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a posttraumatic condition.""<sup>52</sup>

4.68 More recently, the criticisms by Lady Clark of Calton in the Scottish case *Smith v Lothian University Hospitals NHS Trust*<sup>53</sup> are also demonstrative of the possibility of the expert being confused about the extent of his role. This case also demonstrates that the courts have shown themselves to be vigilant in the detection of inconsistencies in the theories put forward by experts, which may be indicative of a lack of conviction by the experts themselves in the theory.

4.69 Here, the defendant's medical expert was criticised for displaying evidence of partisanship where he attempted to give reasons for the plaintiff's paraplegia as being based on a defective dura and not the negligence of the doctor by failing to halt the procedure when he felt resistance. Lady Clark stated:

"Professor Miles appeared to search about towards the end of evidence for hypotheses which even he said were untenable and incredible. I am of the opinion that the reason he did this was because, in the course of evidence, it became clear that the explanation which had been relied upon by the defenders since 1977, and supported by him, was ill-founded.

4.70 Later in her judgment Lady Clark continued:

"For an expert witness to start speculating about new theories in his own evidence without even communicating these theories to counsel, is unusual and not helpful. It demonstrates in my opinion a failure to fully understand his own role as an expert. In addition, when Professor Miles made comments about the circumstances in which negligence might occur, he appeared to be influenced by the number of times damage was caused rather than the issue of care and skill in a particular case. I was also concerned by a passage in his evidence which I interpret as indicating a partisan rather than independent attitude. I refer in particular to his evidence summarised in paragraph 65 where he appears to accept that contact with the spinal cord is another opportunity to feel resistance. But when faced with the implication of that answer he appears to alter his position. I was left with serious reservations about his evidence.....In my opinion

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<sup>52</sup> 71 So.2d 242 (La. Ct. App. 1954) at 244 Cited in Alldridge "Forensic Science and Expert Evidence" (1994) 21 Jnl L. & Soc'y

<sup>53</sup> [2007] ScotCS CSOH\_08.

Professor Miles had a closed mind about this and that is why he apparently sought out various theories, which I reject.”

#### D Selection Bias

4.71 A third form of bias is selection, or structural, bias. As a result of the ability of any party to ‘shop’ for a suitable expert, the judge or jury are not presented with a balanced overview of mainstream expert opinion on the issue, but are given a specific slant of opinion from an expert that has specifically been recruited due to his willingness to present the viewpoint sought by that party.

4.72 The existing system of expert testimony enables a party to court proceedings to consult as many potential experts as they wish until they find the person who will support their case, or an expert who has a particular reputation which indicates they will be sympathetic to their views. It is possible therefore that prior to the selection of the party’s expert, several other possible experts will have been consulted but rejected for not agreeing with the arguments sought to be proven.

4.73 While this chosen expert may not be consciously prejudiced, there is an inherent bias operating against the party’s argument in circumstances where it has been previously rejected by a large number of experts in the field, and accepted by only one, a fact that remains hidden from the judge or jury. This results in a situation whereby, according the Bernstein “the jury will receive a false sense that the issue is a very close one, when expert opinion actually overwhelmingly favours one side.”<sup>54</sup>

4.74 The courts have realised the potential problem of selection bias since the 19<sup>th</sup> century. Jessel LJ in *Abinger v Ashton* pointed out;<sup>55</sup>

“There is also this to be said against them, namely, that their evidence is not the evidence of fair professional opinion. The men are selected according as their opinion is known to incline....The consequence is you do not get fair professional opinion, but an exceptional opinion by evidence selected in this way.”

4.75 In the later case, *Thorn v Worthing Skating Rink Co.*<sup>56</sup> Jessel LJ stated:

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<sup>54</sup> Bernstein “Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution” (February 2007). George Mason Law & Economics Research Paper No. 07-11 Available at SSRN: <http://ssrn.com/abstract=963461>, at 6.

<sup>55</sup> L.R. 17 Eq. 358, 373 (1873).

<sup>56</sup> (1877) 6 Ch D 415.

"A man may go, and does sometimes, to half-a-dozen experts. I have known it in cases of valuation within my own experience at the Bar. He takes their honest opinions, he finds three in his favour and three against him; he says to the three in his favour, will you be kind enough to give evidence? And he pays the three against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one."

4.76 Selection bias is a direct result of the current system of appointment of experts by the parties to a case. In the adversarial system, the judge's role is the neutral overseer of the dispute between the parties. Both sides are given the right to advance their arguments as best they can, which necessarily involves retaining experts whose views are congenial to each party's version of events. However, the desire to retain the advantages of the adversarial system can lead to difficulties within the context of expert testimony.

#### **E Conflicts of Interest**

4.77 It has already been explained that one of the main causes of deliberate bias, or the perception of this, is the existence of a relationship or connection between one of the parties to proceedings and the expert. This can be a personal relationship, as can be seen in *Liverpool Roman Catholic Archdiocese v Goldberg*,<sup>57</sup> or an affiliation with an organisation connected to one of the parties, as in *Toth v Jarman*,<sup>58</sup> and *Mohammed v Financial Services Authority*<sup>59</sup> or a financial relationship, such as those cases where the expert was an employee of one of the parties for example *Galvin v Murray*.<sup>60</sup>

4.78 As discussed above, the courts are reluctant to hold that evidence of a connection between a party and an expert leads to an automatic exclusion of bias as it has been repeatedly explained that such a finding would significantly reduce the pool of potential experts available in a given case, and lead to considerably more delays and expense.

4.79 *Galvin v Murray*<sup>61</sup> in this jurisdiction reiterated that a person is not automatically excluded from being an expert by reason of employment by one

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<sup>57</sup> [2002] 1 WLR 237.

<sup>58</sup> [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul).

<sup>59</sup> [2005] UKFSM FSM013 (18 January 2005).

<sup>60</sup> [2000] IESC 78.

<sup>61</sup> [2000] IESC 78.

of the parties. Here it was held that the existence of such a potential conflict of interest should be a matter going to the weight to be accorded to the expert evidence, and not a matter going to the admissibility. However, as already mentioned, this case failed to deal with the extent of the obligation, if any, on a party or a potential expert to disclose such a potential conflict of interest.

4.80 In England, the case of *Toth v Jarman*<sup>62</sup> dealt with the issue of whether or not an expert witness needed to disclose a potential conflict of interest. In the course of this judgment the court recognised such conflict could take many forms, including a financial interest, a personal connection or an obligation such as a member or officer of some interested body.

4.81 Potter LJ found that a conflict of interest should not automatically disqualify an expert, as the key question is not the existence of a conflict of interest but whether the expert's opinion is independent.<sup>63</sup> However, the court went on to state that a party who wishes to call an expert with a potential conflict of interest should disclose details of that conflict at as early a stage in the proceedings as possible.<sup>64</sup> Potter LJ explained the reasons for this disclosure obligation:

"The obligation to disclose the existence of a conflict of interest in our judgment stems from the overriding duty of an expert, to which we have already referred and which is clearly laid down in CPR 35.3, and also from the duty of the parties to help the court to further the overriding objective of dealing with cases justly (CPR 1.3). The court needs to be assisted by information as to any potential conflict of interest so that it can decide for itself whether it should act in reliance on the evidence of that expert."<sup>65</sup>

4.82 Having examined the extensive literature in this area, it is clear that a major issue is whether there should be a mandatory requirement imposed on any expert witness to disclose any potential conflict of interest. It can plausibly be argued that this would go a long way towards reducing potential bias, or the perception of such bias, and ensure that the court is given an informed opportunity to evaluate the exact weight to accord to the evidence of a particular expert. It can also be argued that such an obligation is not excessively onerous given the wide discretion a party is given in the choice of expert from the outset. The Commission now turns to consider whether such an approach should be

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<sup>62</sup> [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul).

<sup>63</sup> [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul) at [100].

<sup>64</sup> [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul) at [102].

<sup>65</sup> [2006] EWCA Civ 1028, [2006] All ER (D) 271 (Jul) at [113].

adopted and the consequential recommendations for reform that would flow from this.

## F           **Judicial Commentary on Bias and Partisanship**

4.83       The courts well appreciate the potential for bias and deception on behalf of experts and concern about the possible partiality or bias of expert witnesses has formed the basis for many decisions and rules relating to the admissibility of expert evidence. In many jurisdictions, there has been copious judicial complaint about the effects that bias, prejudice, and mistaken belief that an expert must act as the advocate of the instructing party, have had on the giving of expert testimony.

### (1)       **Ireland**

4.84       Although there are few Irish cases where expert bias has been expressly dealt with, the courts in this jurisdiction do take a strict approach where such bias is detected.

4.85       In *McG (P) v F(A)*,<sup>66</sup> Budd J cited with approval the approach taken by the English Court of Appeal in *Thompson v Thompson*.<sup>67</sup> In that case, the expert was a court appointed medical inspector appointed to examine the parties' arguments to help the court decide on the husband's petition for an annulment of marriage. The report of the medical examiner did not conflict with the wife's argument. At the hearing, however, the expert gave evidence which supported the husband's argument. It later emerged that the husband's solicitors had had considerable contact with the medical inspector. As a result the Court of Appeal rescinded the annulment as there had been communication other than through the court which, as Budd J noted in the Irish case *McG (P) v F(A)*, "gave the impression that something untoward had happened."

4.86       Similarly, in *News Datacom v Lyons*<sup>68</sup> Flood J refused the plaintiff's application for an interlocutory injunction stating that their case was based on the evidence of a 'partisan expert' without any scientific basis.

### (2)       **Australia**

4.87       A survey conducted in 1999 on Australian Judicial Perspectives on Expert Evidence<sup>69</sup> revealed significant numbers of the judges surveyed said

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<sup>66</sup> [2000] IEHC 11 (28th January, 2000).

<sup>67</sup> Solicitors' Journal of 3rd February, 1961, Volume 105.

<sup>68</sup> [1994] IEHC 1; [1994] 1 ILRM 450 (20th January, 1994).

<sup>69</sup> Freckleton, Reddy & Selby Australian Judicial Perspectives on Expert Evidence; an Empirical Study (Australian Institute of Judicial Administration, 1999).

they had experienced some form of bias or partisanship on the part of experts coming before them in the Australian courts. The results amounted to approximately 1 in 4 judges - 27% - saying they encountered bias 'often,' and 67% considering that experts are 'occasionally biased.'<sup>70</sup>

4.88 Some of the individual comments of the judges were very critical of expert witnesses. Sperling J commented:

"In the ordinary run of personal injury work and to a lesser extent in other work, the expert witnesses are so partisan that their evidence is useless. Cases then have to be decided on probabilities as best one can."<sup>71</sup>

4.89 Similarly, Windeyer J in *Clark v Ryan*<sup>72</sup> had the following view on potential bias in expert testimony:

4.90 "The acrid remarks in Taylor on Evidence concerning expert witnesses do not lose significance when the expertise is spurious: "These witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."<sup>73</sup>"<sup>73</sup>

### (3) ***England & Wales***

4.91 The majority of the above mentioned cases demonstrating the major causes and manifestations of bias in the context of expert testimony are cases that come from the courts of England and Wales. This highlights a keen understanding by the English courts about the strong possibility for bias, and they have on numerous occasions expressly acknowledged this possibility. In *Abbey National Mortgages Plc v Key Surveyors Nationwide Ltd & Ors*<sup>74</sup> the Court of Appeal remarked:

4.92 "For whatever reason, whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend to

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<sup>70</sup> These are a summary of the results of the survey as outlined by Williams "Accreditation and Accountability of Experts" Paper presented at the Medico-Legal Conference (Gold Coast, 5 August 2000).

<sup>71</sup> Sperling J in "Expert Evidence: The Problem of Bias and Other Things" (2000) 4 JR 347.

<sup>72</sup> (1960) 103 CLR 486.

<sup>73</sup> *Clark v Ryan* (1960) 103 CLR 486 at 510.

<sup>74</sup> (1996) EGCS 23.

espouse the cause of those instructing them to a greater or lesser extent, on occasion, becoming more partisan than the parties.”<sup>75</sup>

4.93 This widespread concern that experts were acting in a partisan fashion and were failing to maintain their independence from the instructing party was one of the major instigators of the Woolf reforms. In his 1995 Interim Report *Access to Justice* Lord Woolf summarised the inherent difficulty:

“Most of the problems with expert evidence arise because the expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide the independent expert evidence which the court is entitled to expect....

In many cases the expert...has become, in the words of the submission of the London Solicitors' Litigation Association to the Inquiry, “a very effective weapon in the parties' arsenal of tactics.”<sup>76</sup>

4.94 The above mentioned cases also demonstrate that the courts in England and Wales are vigilant in their detection and desire to eradicate bias. This rigorousness is well demonstrated in *Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd.*<sup>77</sup> Here expert evidence was refused where bias was found to exist, even though it was located in a source exterior to the issues involved in the case. Laddie J castigated the evidence of the defence expert witness, a Mr. Goodall, which he deemed to be nothing but a “partisan tract.”

4.95 It is interesting that the basis for the criticisms for the expert in this case was not that his actual evidence displayed partisanship, but rather an article written by the expert prior to the case in the Journal of the Chartered Institute of Arbitrators in 1990 entitled “The Expert Witness: Partisan with a Conscience.”<sup>78</sup> In this article, which was revealed in *Cala Homes* during cross-examination, the expert had outlined what he perceived to be a legitimate approach for an expert witness to take when creating an expert report.

4.96 Goodall argued that just as the person operating the Three Card Trick is not cheating, as those who opt to challenge him are ‘fair game,’ an

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<sup>75</sup> Cited in: McConnell “Strange Bedfellows in the Witness Box” (1996) NLJ 1746 at 1749.

<sup>76</sup> Woolf, *Access to Justice* (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995) Ch. 23 at [5].

<sup>77</sup> [1995] EWHC 7 (Ch) (06 July 1995).

<sup>78</sup> Goodall “The Expert Witness: Partisan with a Conscience” (1990) Journal of the Chartered Institute of Arbitrators.

expert witness who, through “pragmatic flexibility” plays down or omits some material consideration in order to present the data more favourable to the instructing side does nothing wrong, as it is “only a suggestion about the data, not an outright misrepresentation of them.” He was thus of the view that the expert’s work required him to be a “candid friend” and a “hired gun” to the instructing party.<sup>79</sup>

4.97 In *Cala Homes* Laddie J strongly criticised this approach as being completely wrong and put forward a weighty counter-argument based on an alternative interpretation of the role and duty of an expert witness. He argued that the “function of a court of law is to discover the truth relating to the issues before it.” Therefore the judge is not someone who has opted to play a game of Three Card Trick. “He is not fair game. Nor is the truth.” He acknowledged that a party is likely to choose an expert whose view reflects that of the party, but at the same time that “the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins.

4.98 He rejected Goodall’s view of the expert as a hired gun, concluded that evidence he sought to give in the case at hand could not be the independent unbiased product it purported to be and was in fact drafted with the objective of furthering the defence case by ignoring anything that harmed that objective. He continued:

“Most witnesses would not be prepared to admit at the beginning of cross examination, as Mr. Goodall effectively did that he was approaching the drafting of his report as a partisan hired gun. The result is that the expert’s report and then his oral evidence will be contaminated by this attempted sleight of mind. This deprives the evidence of much of its value. I would like to think that in most cases cross-examination exposes the bias. Where there is no cross-examination, the court is clearly at much greater risk of being misled.”<sup>80</sup>

4.99 Laddie J also acknowledged in this case that it is rare that an expert will express an outright intention to give evidence that was biased in favour of the instructing party, but the extracts from the article are disconcerting if one is to assume that many experts, even those well-acquainted with the giving of

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<sup>79</sup> Goodall “The Expert Witness: Partisan with a Conscience” (1990) Journal of the Chartered Institute of Arbitrators.

<sup>80</sup> Per Laddie J *Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch) (06 July 1995).

expert testimony, view their role in such terms.<sup>81</sup> In this respect, this judgment is to be commended as it enabled the court to firmly endorse that evidence of partisanship will not be tolerated and to reiterate clearly that the overriding duty of the expert is the provision of independent evidence to the court to enable it in its fact-finding role.

4.100 The consequences of a finding of bias on the part of an expert were discussed to some extent by Jacob LJ in *Pearce v Ove Arup Partnership Ltd & Ors*.<sup>82</sup> In this case the court rejected as “preposterous fantasy” the claimant’s allegation that the defendant – a world famous architect – had plagiarised a design used in one of his works from the claimant’s final year project.

4.101 In the course of the judgment Jacob LJ gave a scathing criticism of the claimant’s expert witness, finding that his “expert” evidence fell far beyond the standards of objectivity required of an expert witness.<sup>83</sup> He outlined in great detail the “blunder after blunder” made by the expert witness and continued;

“So biased and irrational do I find his “expert” evidence that I conclude he failed in his duty to the court..... He came to argue a case. Any point which might support that case, however flimsy, he took. Nowhere did he stand back and take an objective view as an architect as to how the alleged copying could have been done. Mr Wilkey bears a heavy responsibility for this case ever coming to trial - with its attendant cost, expense and waste of time, including Mr Koolhaas’ loss of professional time.”<sup>84</sup>

4.102 Jacob LJ then went on to consider the consequences of a finding that an expert had breached his duty. He acknowledged that there is no rule providing for specific sanctions in such cases, nor does a specific accrediting body exist to whom an expert could be referred. However, he found that there is “no reason no reason why a judge who has formed the opinion that an expert had seriously broken his Part 35 duty should not, in an appropriate case, refer the matter to the expert’s professional body if he or she has one.”

4.103 Jacob LJ therefore appeared quite ready to take proactive measures to sanction an expert for displaying evidence of partisanship in the giving of his

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<sup>81</sup> In the course of his judgment, Laddie J referred to the fact that Mr. Goodall had been called upon to give expert evidence in over 120 proceedings in litigation or arbitration. (*Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd* [1995] EWHC 7 (Ch) (06 July 1995).

<sup>82</sup> [2001] EWHC Ch 455 (2nd November, 2001).

<sup>83</sup> [2001] EWHC Ch 455 (2nd November, 2001) at [58].

<sup>84</sup> [2001] EWHC Ch 455 (2nd November, 2001) at [60].

expert testimony. It is submitted that the threat of such sanctions could help to reduce the prevalence of such bias. Other ways in which this might be accomplished will now be outlined.

## **G           Ways to Reduce Possibility of Bias**

4.104 There are two discernible lines of thought on the presence of bias in the current system of expert testimony. The first is that although prevalent, the current adversarial structure is competent to detect the presence of bias and partiality, and therefore no changes are necessary.

4.105 The alternative view is that the current structure is not only inadequate in detecting bias, but furthermore that it is the inherent structure of the system that encourages experts to become partisan hired guns. The many concrete examples where courts have actively detected expert bias and partisanship discussed above add to the argument in favour of reform, as it would appear that the presence of expert bias, as the situation stands, remains a distinct reality.

### **(1)       *Argument One: The Current Adversarial Expert Testimony System is Adequate to Combat Bias***

4.106 The above mentioned cases all reveal the courts to be alive to the issue of detecting bias, and although there have been notorious miscarriages of justice these are rare, with most partisanship being exposed before or during the trial process. There is therefore a strong argument to be made that there are sufficient safeguards in the existing structure of the adversarial system that are more than competent to detect the presence of partiality of an expert.

#### **(a)       *Experience & Vigilance of the trial Judge***

4.107 First, it is argued, the trial judge will normally have many years of experience in evaluating the appropriate weight to accord to evidence and in assessing the authenticity and motivations of the experts. The judge is therefore well placed to consider any expert evidence coming before the court, and where necessary to direct that little weight be given to an expert's evidence, or in some cases, strike out the expert's testimony entirely.

4.108 Brandon LJ made reference to the strong capability of trial judges to detect bias during the trial in *Joyce v Yeomans*<sup>85</sup> where he said:

"In my judgment, even when dealing with expert witnesses, a trial judge has an advantage over an appellate court in assessing the value, the reliability and the impressiveness of the evidence of the experts called on either side. There are various aspects of such

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<sup>85</sup> [1981] 1 WLR 549.

evidence in respect of which the trial judge can get the 'feeling' of a case in a way in which an appellate court, reading the transcript, cannot. Sometimes expert witnesses display signs of partisanship in a witness box or lack of objectivity. This may or may not be obvious from the transcript, yet it may be quite plain to the trial judge. Sometimes an expert witness may refuse to make what a more wise witness would make, namely, proper concessions to the viewpoint of the other side. Here again this may or may not be apparent from the transcript, although plain to the trial judge. I mention only two aspects of the matter, but there are others.”<sup>86</sup>

4.109 However, the danger remains that once any evidence is brought before the jury, despite subsequent judicial directions to accord it little or no weight, the jury may find it difficult to do so. As a result, it would appear that preventing bias prior to the trial process is what is necessary to more fully eradicate the possibility of bias. This would seem to encourage a process whereby the admissibility of all expert testimony be considered at a pre-trial stage.

**(b)      *Examination-in-Chief and Cross-Examination***

4.110 Second, under the current structure of the adversarial system, both parties are free to select the expert they wish and, in the interests of promoting the ‘equality of arms’ principle, both sides are entitled to cross examine the other party’s expert.<sup>87</sup> As Hardiman J stated in *JF v DPP*:<sup>88</sup>

“...it is not only common but routine for civil or criminal parties against whom expert or professional evidence is to be deployed to explore that evidence with the aid of experts retained on their own behalf, and where possible to counter it with the oral evidence of such persons.”

4.111 Therefore all parties to litigation are given equal opportunity to enlist the aid of experts. It can be argued that these experts are best placed to discern the presence of bias, as they are less likely to be blinded by science than the judge or jury, and thus more likely to detect if an expert opinion has been more

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<sup>86</sup> [1981] 1 WLR 549 at 556.

<sup>87</sup> See *JF v DPP* [2005] IESC 24 (26 April 2005); *McGroarty v Electricity Supply Board* [2003] IESC 45 (24 July 2003); Law Society of Ireland Litigation Committee “Medico-Legal Recommendations” (September 2003) Available at: <https://www.lawsociety.ie/newsite/documents/Committees/medicolegal.pdf>.

<sup>88</sup> [2005] IESC 24 (26 April 2005).

motivated by sympathy for the instructing party than a rational analysis of the facts of the case.

4.112 Hardiman J acknowledged this where he explained that the reasons for adducing an expert on the other side include “to counter any unconscious sympathy with one’s own patient or client” and “to detect any unwarranted assumptions or conclusions.”<sup>89</sup> *Cala Homes (South) Ltd & Ors v Alfred McAlpine Homes East Ltd*, discussed above,<sup>90</sup> is a good example of where cross-examination was used to reveal the expert’s potential bias where an article written by the expert in question was adduced by the other party which Laddie J used as the basis for a finding that the expert wrote his report as “a partisan hired gun.”<sup>91</sup>

**(c) Disclosure Rules & Modification of Litigation Privilege**

4.113 The *Rules of the Superior Courts (Disclosure of Reports and Statements)* 1998 (SI No 391 of 1998) require that both parties must disclose all reports and statements of experts whom they intend to call as witnesses, and those containing the ‘substance of the evidence to be adduced’ by them. The interpretation given to this provision by the Supreme Court in *Payne v Shovlin*<sup>92</sup> means that all reports, including preliminary expert reports not adduced at trial, must be disclosed.

4.114 These rules will be discussed in greater detail in Chapter 6 but for the purposes of the present discussion, it is submitted that in the context of reducing bias the rules are very significant, as they ensure that the thought processes of the expert witnesses in coming to their opinion are available to the other side for scrutiny. This requires an expert to demonstrate their reasons for reaching a particular opinion which greatly limits the potential for an unreasoned, prejudiced opinion.

**(2) Argument Two: There is a need for the Amendment of the Adversarial Structure**

4.115 The structure in place for the giving of evidence within the adversarial model is designed to give a rounded view of the facts in a particular case, by allowing both sides to express their own opinion. In *JF v DPP*<sup>93</sup> Hardiman J

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<sup>89</sup> [2005] IESC 24 (26 April 2005).

<sup>90</sup> [1995] EWHC 7 (Ch) (6 July 1995).

<sup>91</sup> [1995] EWHC 7 (Ch) (6 July 1995).

<sup>92</sup> [2006] IESC 5 (9 February 2006).

<sup>93</sup> [2005] IESC 24 (26 April 2005).

explained that the purpose of allowing both sides to adduce their own experts is to more fully inform the court in order to obtain a clearer idea of the truth:

"It is done to ensure that everything is taken into account, to counter any unconscious sympathy with one's own patient or client, to ensure that the latest techniques and interpretations are brought to bear, to detect any unwarranted assumptions or conclusions and to test and challenge the other side's expert opinion insofar as that can properly be done."<sup>94</sup>

4.116 However, it has been recognised by many commentators that system of the giving of expert evidence does not fit in well with the adversarial model and that in this way expert evidence is being used as a "weapon" by litigators.<sup>95</sup>

4.117 As Lord Woolf stated in his 1996 Final Report *Access to Justice*, which led to the introduction of the Civil Procedure Rules in England:

"The purpose of the adversarial system is to achieve just results. All too often it is used by one party or other to achieve something which is inconsistent with justice by taking advantage of the other side's lack of resources or ignorance of relevant facts or opinions."<sup>96</sup>

4.118 Others argue that the inherent structure of the adversarial system is conducive to the prevalence of all forms of bias. Tompkins explains;

"...our system is adversarial. It is not an exercise in consensus building, nor does it operate by consensus....what is being sought is not the absolute or universal truth, but the rather different goal of justice between the parties. Bias on the part of the parties and their lawyers is accepted, at least to a limited extent. Independence on the part of expert witnesses is expected, but not universally."<sup>97</sup>

4.119 It is argued that in reality, it is rare that the court will be presented with an objective overview of relevant information, as both sides will seek to present those facts most favourable to his or her case. Langbein expressed a very cynical view of expert witnesses when he stated;

If we had deliberately set out to find a means of impairing the reliability of expert testimony, we could not have done much better

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<sup>94</sup> [2005] IESC 24 (26 April 2005).

<sup>95</sup> Woolf, MR Lord (1996) *Access to Justice*, Final Report, HMSO at ch 13.7.

<sup>96</sup> Woolf, MR Lord (1996) *Access to Justice*, Final Report, HMSO at ch 13.7.

<sup>97</sup> Tompkins J "The Disconnect between Scientific and Legal Method" Paper delivered at the Legal Research Foundation Conference *The Role and Use of Expert Witnesses in Trials* (7 November 2002).

than the existing system of having partisans prepare witnesses in advance of trial and examine and cross-examine them at trial.”<sup>98</sup>

4.120 A very fitting demonstration of the extent to which the court will assume bias in the adversarial setting, or at least some sort of influence from the instructing side, was given in the second appeal in *R v Clarke*.<sup>99</sup> Amongst the various medical expert witnesses called for both sides here was a doctor who, it was explained in court, had originally been hired by the Family Court to carry out an independent review, as the appellant had since had a third child. This review favoured the defence who then requested to rely on his evidence. Kay LJ in the appeal made the following interesting comments;

“Recording these matters is not in any way to suggest that other experts did not do their best to give evidence which was independent of the side that instructed them but the value of an expert free from any influence, however innocently manifesting itself, cannot be discounted.”<sup>100</sup>

4.121 As can be seen the evidence of this ‘free from influence’ expert was highly commended by the court. However, if the experts for both sides were truly regarded as likely to carry out their duty to remain independent, it should not matter for which side they are giving evidence. This decision shows a keen understanding that, whether consciously or not, this will not always occur and an expert is likely to be influenced, to some extent at least, by their instructing party.

4.122 Academic commentators who have written about the problem of bias have outlined a number of suggestions for reform aimed at reducing the presence of bias, either deliberate or unintentional, in the giving of expert testimony.

4.123 These reforms will be discussed in greater detail in the following chapters, however, it is useful to briefly flag them here.

**(a)      *The Single Joint or Court Appointed Expert***

4.124 One of the principal reforms suggested to counter the possibility of bias, particularly selection bias, is the introduction of a system whereby a single expert is appointed either by the court, or by agreement between the two parties. Dwyer explains the reasoning behind this suggested solution:

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<sup>98</sup> Langbein “The German Advantage in Civil Procedure” (1985) 52 U. Chic. LR 823 at 832.

<sup>99</sup> [2003] EWCA Crim 1020.

<sup>100</sup> *R v Clark* EWCA Crim 1020 (11 April 2003) at (40).

"Since expert bias currently arises from favouring the case of the instructing party, then by removing the instructing party from the equation bias will also be removed."<sup>101</sup>

4.125 Such a structure, it is argued, will ensure that the appointed experts will be representative of the mainstream view of the range of experts in a particular area, rather than the possibly minority view of a particular party expert. It would also remove the likelihood of an expert feeling they owe an allegiance to the instructing party due to the fact that they are being paid by them, or due to the fact that they have become unduly sympathetic to their party's arguments as a result of the amount of time spent with them. Such a reform would also eliminate the possibility of selection bias, or 'expert shopping' and, also reduce the possibility of potential conflicts of interest.

4.126 Several common law jurisdictions have recommended that the current adversarial system of party-appointed experts be replaced by such a system. The advantages and disadvantages of a system of court appointed experts, or a joint expert appointed by agreement between the parties, will be discussed in greater detail in the following chapter.

**(b) *Prohibition on the Giving of Expert Evidence by Experts who have a Pre-Existing Relationship with one of the Parties***

4.127 Another reform suggested by many commentators aimed at reducing the bias generated by an expert feeling they owe an allegiance to their instructing party, is the reduction, as far as possible, of any opportunities for personal involvement.<sup>102</sup> This could involve for example preventing an expert from giving evidence where they have a pre-existing relationship or other type of personal involvement with the party to a case or with the issues involved in a case.

4.128 However, we have seen in *Galvin v Murray*<sup>103</sup> that the Irish courts have decided that the fact of a pre-existing relationship with a party such as an employer-employee relationship should not represent an automatic bar on the giving of expert evidence. Instead, the fact of employment is to be taken into account when assessing the weight to be given to the evidence.

4.129 The approach in *Galvin*, it is submitted, is the correct approach to take. Requiring a completely independent expert in all circumstances may

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<sup>101</sup> Dwyer "The Effective Management of Bias in Civil Expert Evidence" (2007) 26 CJQ 57.

<sup>102</sup> See Dwyer "The Effective Management of Bias in Civil Expert Evidence" (2007) 26 CJQ 57 at 70 for more on this suggested reform.

<sup>103</sup> [2000] IESC 78.

significantly aggravate the costs of litigation, and there is little certainty that such ‘independent’ experts are likely to be any less biased. Furthermore, particularly in this jurisdiction where in certain subject areas, the existing pool of experts is likely to be quite small, any potential reform that is likely to further decrease the number of possible experts is to be avoided. A better approach is to examine the pre-existing relationship in the context of the weight to be placed on the evidence.

4.130 However, one reform in this vein which may have the desired result of limiting the development of an unhealthy affiliation between an expert and his instructing party without reducing the possible pool of experts is the introduction of a restriction on the amount of time an expert spends in court, limiting court appearance to that reasonably necessary to give their testimony.

4.131 In the light of this discussion the Commission can now set out its provisional recommendations in this area.

4.132 *The Commission provisionally recommends that there should not be a prohibition on the giving of evidence by experts who have a pre-existing relationship with one of the parties to an action.*

4.133 *The Commission provisionally recommends that an expert witness should be obliged to disclose the existence of any pre-existing relationship with a party to a case or any other potential conflict of interest.*

4.134 *The Commission also provisionally recommends that the court should be encouraged as far as possible to limit the amount of time spent by an expert witness in court to that which is reasonably necessary to give their expert evidence.*

**(c) *Amendment of the Duty owed by Experts to the Court & Their Instructing Party***

4.135 The Commission accepts that, regardless of any proposed amendments, where an expert is selected and remunerated by a particular party, they may, even unconsciously, be inclined to give evidence that is favourable to that party. In this respect, it may be appropriate to instruct experts that their overriding duty remains to the court, and that they must not omit from their evidence any relevant facts which may have a bearing on their case, whether or not they support or detract from the argument that the party is attempting to put forward. It may also be appropriate to further instruct the experts that they are simultaneously entitled to do all that is reasonably possible to put forward their instructing party’s argument in the most favourable light possible.

4.136 *The Commission provisionally recommends that there should be no change to the overriding duty owed by the expert witness to the court. The*

*Commission also provisionally recommends that the expert witness should continue to owe a duty to the court which supersedes any duty owed to the instructing party.*

**(d) Greater Training & Education of Experts about their Role & Duties**

4.137 As discussed in the previous chapter, there is currently little judicial or legislative guidance for expert witnesses in this jurisdiction about the extent of their role and function. In the absence of such guidance, one can forgive an expert witness who is under the mistaken belief that they must act as the advocate of their instructing party.

4.138 Therefore, the imposition of additional emphasis on the role and duties of an expert, for example through the creation of a formal code of ethics for expert witnesses, would go a long way towards ensuring that experts are aware, at the time they agree to act as an expert witness, of their overriding duty to the court and the necessity to remain independent and impartial at all times.<sup>104</sup> Another solution to this would be to require all expert witnesses to undergo specialist training with a specialist accredited body to ensure that all experts are fully aware of the essentials of their role and function. The Commission discusses the possibility of introducing a system of training and accreditation for expert witnesses in Chapter 6.

## **H Conclusion**

4.139 It is clear from the foregoing that bias has proved to be a real and tangible problem in the giving of expert testimony in this jurisdiction. Such bias can take a number of forms and its causes are diverse, making its elimination more problematic.

The Commission considers that, although the current adversarial system contains strong safeguards to detect and prevent the prevalence of bias in the context of expert testimony, there are a number of reform options that could be introduced to further reduce the potential for bias. These potential reforms are discussed in the following chapters. The range of options for the appropriate course of action to be taken where an expert has found to be biased are discussed in Chapter 6. Other reforms, more procedural in nature, but which may have the effect of reducing the potential for bias are discussed in the next chapter.

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<sup>104</sup> This is also the approach advocated by Morris J in Morris “Getting Real About Expert Evidence” (2006) Paper delivered at the *Dealing with Expert Witnesses* Seminar hosted by the Victorian Planning and Environmental Law Association (16 November 2006).



## **CHAPTER 5      PROCEDURAL ASPECTS OF THE GIVING OF EXPERT TESTIMONY**

### **A            Introduction**

5.01       The previous chapters have discussed a range of possible reforms in terms of the substantive nature of what constitutes expert evidence and what constitutes an expert for the purposes of expert witnesses.

5.02       However, a comparative analysis of other jurisdictions reveals that there are many reforms of a procedural nature, some radical and some relatively minor, that may have a very beneficial impact on the current system of expert testimony in terms of improving access to the courts and limiting delays, expense and the possibility for abuse of the system.

5.03       This chapter commences in Part B by explaining why there is a need for procedural as well as substantive reform of the expert testimony structure.

5.04       Part C examines a range of provisions that could be introduced to facilitate and improve on arrangements relating to the selection and appointment of expert witnesses.

5.05       Part D examines provisions which govern communication between expert witnesses for both parties to a case, and between an expert witness and the court and suggest reforms in this context which have the aim of greater understanding between the parties and amongst the experts and thus reduce the possibility of misunderstandings and delays.

5.06       Part E examines the provisions governing the report that will be created by an expert witness containing their expert opinion. Finally Part F examines some of the alternative structures to party appointed experts that are used in other jurisdictions and the merits of adopting an alternative structure are considered.

### **B            The Need for Procedural Reforms**

5.07       Some of the criticisms levelled at the current system of expert testimony have been alluded to in previous chapters. Problems such as unreliable evidence and biased experts need to be addressed by the introduction of substantive changes in the admissibility requirements governing the use of experts in court.

5.08 However, other criticisms about the expert testimony system have also been raised, which, it can be considered, necessitate the introduction of procedural changes such as improved case management and structural reforms.

**(1) Expense**

5.09 One of the main complaints raised about expert evidence is that, as Lord Woolf put it, it is one of the “major generators of unnecessary cost in civil litigation.”<sup>1</sup> This was one of the principal reasons for his suggestion that expert evidence should come under the complete control of the court. As Lord Woolf pointed out:

“Look at statistics about the average cost of hiring an expert witness and the reality that this can lead to an unfair advantage for some parties, particularly where large companies are engaging in litigation with individuals.”

5.10 The fees charged by experts have also been the subject of much commentary. It has been recognised that experts can charge exorbitant fees for their services, which can affect the ability of parties to litigation to access the necessary expertise. In 2004, Howlin summarised then recent Irish statistics on the cost of expert witnesses;

“It was recently estimated that criminal legal aid cost the State €37.35million in 2003, some €10 million of which was spent on expert witness fees. This represents a jump of almost 30% from the previous year.<sup>2</sup> Payments to expert witnesses represent a significant drain on the State’s resources with respect to the numerous tribunals of inquiry. In 2000, the Minister for Health and Children, agreed to provide £300,000 inclusive of VAT to assist the Haemophilia Society<sup>3</sup> of Ireland in retaining medical, scientific and technical experts to advise it during the course of the Haemophilia Tribunal. In motor insurance cases, it has repeatedly been asserted that lawyers’ and experts’ fees account for 40% of the amount awarded.<sup>4</sup> It is claimed that these expenses are major factors in the escalating costs of motor insurance.<sup>5</sup>

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<sup>1</sup> Lord Woolf *Access to Justice, Final Report*, HMSO (1996).

<sup>2</sup> *The Irish Examiner*, 30 June 2004.

<sup>3</sup> 518 Dáil Debates, col. 164 (18 April 2000).

<sup>4</sup> 165 Seanad Debates, col. 1538 (29 March 2001), per Senator Glennon.

<sup>5</sup> Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19 at 25-26.

5.11 A recent survey of the UK Register of Expert Witnesses revealed that medical expert witnesses, who make up the majority of expert witnesses coming before the courts, seek on average £171 per hour for the creation of an expert report, and £1,163 per day for a court appearance.<sup>6</sup>

5.12 Expert evidence, viewed from the perspective of its cost, is a powerful weapon which can be used by litigants to take advantage of the lack of resources of impecunious litigants, and their resulting ignorance of relevant facts or opinions.

5.13 High expenses can impose a significant barrier to potential litigants, or may greatly stifle their claim, particularly in personal injuries cases, where one may not have the same resources available as the other party, who is often a corporate entity. The same problem arises in the context of family law cases where the parties are predominantly private individuals and the ability or inability to adduce expert evidence can have a significant effect on the outcome of the case.

5.14 As a result, any reforms that are likely to reduce the cost burden of expert testimony, thus reducing the possibility of biased experts enticed by exorbitant fees and also promoting access to justice to all potential litigants, are to be welcomed.

## **(2)      *Delay***

5.15 The point has been raised on numerous occasions that a proliferation of experts in court can lead to a situation where litigation is unreasonably prolonged by expert witnesses giving lengthy evidence on issues that are not contested by the other party.

5.16 The expert is also required to prove their expertise in court by outlining their relevant experience and qualifications. If this is not contested by the other party it could be considered a waste of time within the trial setting and might be more appropriately determined prior to the trial.<sup>7</sup>

5.17 Furthermore, there is the possibility that, in the absence of any reliability requirement for admissibility, an expert witness may seek to use the trial process as a way of advancing novel theories or ideas. New or emerging forms of expertise are always likely to be the subject of much contention and experts for the other party are likely to contest such theories strongly.

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<sup>6</sup> UK Register of Expert Witnesses “Your Witness Newsletter” (No 49 Sept 2007, JS Publications) at 2.

<sup>7</sup> See the Commission’s comments at paragraph 3.66, above, to the effect that the actual qualifications of an expert are not, in practice, often challenged.

5.18 There is the possibility that such contentious claims, which are unlikely to form the subject matter of the central issues of the case, will develop into a ‘trial within a trial’ situation, both generating much confusion for the judge and jury and leading to long drawn out court proceedings.

## C Selection, Appointment and Examination of Experts

5.19 A party to litigation will be entitled to enlist the aid of an expert witness once the presiding judge is satisfied that the issue is one which necessitates expertise and the individual in question is suitably qualified to be considered an expert. Beyond this however there is little judicial or statutory control or guidance on the admission of expert witnesses. The decision to adduce expert evidence and the choice of expert are completely within the remit of the individual party.

5.20 Many expert witnesses will be recruited through word of mouth, where they have given evidence in cases similar to the one in question. Lists of available experts are also available in directories such as the commercially-published Expert Witness Directory of Ireland. Furthermore, many professionals also advertise their services as including the capacity to give expert evidence on their companies’ websites.

5.21 The terms and conditions governing the appointment of such experts, and the instructions they are given will be determined by the instructing party. It can be argued however, that in the interests of maintaining high standards of expert evidence across the board, there should be some governing principles followed by all parties when hiring experts.

### (1) Disclosure of Intent to Adduce Expert Evidence

5.22 At present although it is a matter for the court whether expert evidence can be adduced, in reality once a party can demonstrate a need for expert evidence in the circumstances the court will not stand in the way of a party who wishes to adduce expert evidence.

5.23 In recent times there have been some statutory amendments requiring a party to disclose intent to adduce expert evidence. The disclosure requirements differ depending on whether it is a civil or criminal case.

#### (a) Civil Cases

5.24 Section 45 of the *Courts and Court Officers Act 1995* grants further powers to the Superior Courts and Circuit Court Rules Committees to make orders relating to disclosure in personal injuries actions. Pursuant to section 45 of the 1995 Act, Order 39 Rule 46 of the *Rules of the Superior Courts 1986* provides;

"The Plaintiff in an action shall furnish to the other party or parties or their respective solicitors (as the case may be) a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the court.

**(b)      *Criminal Cases***

5.25      Although the prosecution is required to furnish the defence, prior to the trial, with details of all witnesses intended to be called in the course of the trial, the defence is not, subject to a few exceptions, required to furnish such information.<sup>8</sup>

5.26      The 2007 Report of the Balance in the Criminal Law Review Group recommended in their Final Report that the defence be required to furnish statements of the expert or technical reports, or witness statements of experts, which they propose to rely upon in court.<sup>9</sup>

**(2)      *Court Permission to Adduce Expert Evidence***

5.27      As already mentioned, the permission of the court is necessary before a party will be allowed to adduce expert evidence. However, in practice, each party will enlist the aid of as many experts as they consider necessary and it will be only at the trial stage that the court will, if it considers necessary, rule that a particular expert should not be permitted to give evidence, either because the evidence sought to be given is outside that which expert evidence is permitted to be given, or because the witness put forward is not suitably qualified to be considered an expert.

5.28      There is therefore, no requirement that a party seek formal court approval prior to appointing an expert witness to give evidence. In other jurisdictions, however, it is seen as important that express court permission be required.

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<sup>8</sup>      Balance in the Criminal Law Review Group Final Report (15 March 2007, Department of Justice, Equality and Law Reform) Available at: [http://www.justice.ie/en/JELR/Pages/Balance\\_in\\_criminal\\_law\\_report](http://www.justice.ie/en/JELR/Pages/Balance_in_criminal_law_report), at 167.

<sup>9</sup>      Balance in the Criminal Law Review Group Final Report (15 March 2007, Department of Justice, Equality and Law Reform) Available at: [http://www.justice.ie/en/JELR/Pages/Balance\\_in\\_criminal\\_law\\_report](http://www.justice.ie/en/JELR/Pages/Balance_in_criminal_law_report), at 173. At the time of writing, the recommendations of the Review Group are under consideration by Government and the Commission does not therefore propose to make any specific recommendation on this matter.

5.29 Such a rule would be beneficial in the context of case management as it would enable the court to retain a certain degree of control over the quantity of expert evidence in litigation and thus help save time and costs for parties.

5.30 In other jurisdictions, statutory provisions expressly provide that court permission is needed by a party in order for an expert witness to be permitted to give evidence.

**(a) England**

5.31 In civil cases, Rule 35.4(1) of the Civil Procedure Rules 1998<sup>10</sup> provides that no party may call an expert or put in evidence an expert's report without the permission of the court. Any party seeking to reply on expert evidence must identify the field in which expert evidence is sought to be relied on, and where practicable identify the name of the expert.<sup>11</sup>

5.32 In criminal cases, Part 24 of the Criminal Procedure Rules requires a party wishing to adduce expert evidence in both the Magistrates and Crown Court to give notice to the other party of the contents of such evidence. Where no such notice is given, expert evidence can only be adduced if the court gives its permission.<sup>12</sup>

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<sup>10</sup> This replaced Order 38 Rule 36 *Rules of the Superior Courts* 1962 which provided that expert evidence could be adduced by agreement between the parties or with leave of the court.

<sup>11</sup> Civil Procedure Rules 35.4.2.

<sup>12</sup> The 2001 Auld Report also recommended that the criminal court's power to control the admission of expert evidence should be formalised in the new Criminal Procedure Rules and also recommended that judges and magistrates rigorously apply the newly introduced test governing their power and duty to admit expert evidence: *Auld A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld* (September 2001) at Ch 2.2.

**(b) Family Court of Australia**

5.33 The approach taken in England to court permission to give expert evidence was followed in the Family Court of Australia in the Family Law Rules 2004. Part 15.5 requires the court to consider if expert evidence is necessary in the circumstances, and if so, if the submitted expert is appropriate to give such evidence.

5.34 Rule 15.52 sets out the relevant information that a party must provide in their application to adduce expert evidence,<sup>13</sup> and it also gives a comprehensive list of factors that the court must consider when deciding whether or not to permit the expert to give expert evidence.

5.35 Such factors include the purpose behind Part 15.5, the impact the appointment of an expert witness would have on the costs of the case, the likelihood of the appointment expediting or delaying the case, the issues in the case and their complexity, whether the evidence should be given by a single expert witness rather than an expert witness appointed by one party only, and the extent of the expert witnesses' specialised knowledge, based on the person's training, study or experience.<sup>14</sup>

5.36 This provision provides very useful guidance to the court and provides a firm checklist on which to base the court can base its decision to admit expert evidence.

**(c) New South Wales**

5.37 In its Report on Expert Witnesses, the Law Reform Commission of New South Wales recommended the introduction of a 'permission rule' which would require express permission from the court before evidence can be given. The Commission argued that such a rule would:

"....assist in ensuring that the importance of the courts' control expert evidence is unequivocally expressed and widely understood, and

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<sup>13</sup> This includes (a) whether the party has attempted to agree on the appointment of a single expert witness with the other party and, if not, why not; (b) the name of the expert witness; (c) the issue about which the expert witness's evidence is to be given; (d) the reason the expert evidence is necessary in relation to that issue; (e) the field in which the expert witness is expert; (f) the expert witness's training, study or experience that qualifies the expert witness as having specialised knowledge on the issue; and (g) whether there is any previous connection between the expert witness and the party. (*Family Law Rules 2004 (Cth)* r 15.52(1)).

<sup>14</sup> *Family Law Rules 2004 (Cth)* r 15.52(2).

thereby encourage the close judicial management of expert evidence.”<sup>15</sup>

5.38 The New South Wales Law Reform Commission also argues that such a rule would ensure that any gaps in existing provisions relating to expert evidence would be filled, affirming the court’s ultimate control over the admissibility of such evidence where any uncertainty arises.<sup>16</sup>

5.39 In civil cases, Division 2 of the Uniform Civil Procedure Rules introduced in 2005 now contains provisions relating to this. Rule 31.19 provides that a party seeking to adduce expert evidence “must promptly seek court directions in that regard.”<sup>17</sup> Rule 31.17 sets out that one of the main purposes of Division 2 is to ensure that the court has control over expert evidence.

**(d) Conclusion**

5.40 In light of the above discussion, the Commission sees merit in a requirement, similar to that of the Family Court of Australia, that court permission is expressly required before a party can adduce expert evidence, but would prefer at present to invite submissions on the desirability of introducing a general requirement to that effect.

5.41 *The Commission invites submissions on whether there should be a general requirement that court permission is expressly required before a party can adduce expert evidence.*

**(3) Pre-Trial Determination of Admissibility of Expert Evidence and of Expertise**

5.42 It has been noted earlier that deciding whether or not to allow expert evidence on a particular issue, and whether a person put forward by a party to act as an expert witness has sufficient skills and qualifications to be considered an expert, are matters for the presiding judge during examination in chief. An individual’s alleged expertise can be further challenged by the other party during cross examination.

5.43 It can be argued that, in the interests of effective case management, deciding whether expert evidence is necessary in relation to the issues in question, and whether a person purporting to act as an expert witness is sufficiently competent and qualified either academically or through experience

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<sup>15</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 6.8.

<sup>16</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 6.8.

<sup>17</sup> Rule 31.19 *Uniform Civil Procedure Rules 2005* (NSW).

to be considered an expert in the issue in question, should take place at a pre-trial stage, or at least outside of the courtroom itself and where necessary, away from the jury.<sup>18</sup>

5.44 The Balance in the Criminal Law Review Group of the Department of Justice considered the merits of pre-trial disposal of admissibility issues relating to expert evidence in their final report.<sup>19</sup>

5.45 They considered the current system of swearing in a jury prior to determination of admissibility issues to be “illogical and inconvenient” and “only explicable by historical considerations which no longer apply.”

5.46 The Group also pointed out that the current system leads to the jury “waiting in the jury room for long periods, or being sent away, and increases the chances of jurors becoming unavailable during a long trial.”<sup>20</sup>

5.47 As a result of this, the Balance in the Criminal Law Review Group recommended that admissibility issues should be determined in the first day or days of the trial, and prior to the swearing in of a jury.

**(a) *Advantages of Pre-Trial Determination***

- Such a structure could reduce the length of trials as the admissibility of expert evidence is less likely to be challenged in court where it has already been held admissible at a pre-trial stage.
- Expense could also be lessened as the amount of time an expert spends giving evidence during the actual trial would be reduced. Expert witnesses would not need to spend time outlining their knowledge or experience as it could be assumed that once the judge (and/or jury) has been satisfied of this at the outset, their status as an expert witness would be *prima facie* established.
- Furthermore, once the proceedings reach the trial stage, the court’s attention would be firmly focused on the expert opinion the witness is giving and determining the credibility of this, and would not be

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<sup>18</sup> See the comments of Schiemann LJ in *Woodford & Ackroyd v Burgess* 1999 Lloyd's (PN) at 231 and Evans-Lombe J in *Barings Plc (in liquidation) v Coopers & Lybrand* [2001] EWHC Ch 17 (9th February, 2001) at 20.

<sup>19</sup> Balance in the Criminal Law Review Group Final Report (15 March 2007, Department of Justice, Equality and Law Reform) Available at: [http://www.justice.ie/en/JELR/Pages/Balance\\_in\\_criminal\\_law\\_report](http://www.justice.ie/en/JELR/Pages/Balance_in_criminal_law_report), at 175.

<sup>20</sup> Balance in the Criminal Law Review Group Final Report (15 March 2007, Department of Justice, Equality and Law Reform) Available at: [http://www.justice.ie/en/JELR/Pages/Balance\\_in\\_criminal\\_law\\_report](http://www.justice.ie/en/JELR/Pages/Balance_in_criminal_law_report), at 175.

sidetracked by secondary matters such as the extent of their expertise. This would enable the judge or jury to completely devote their assessment of the expert to considering whether or not his expert opinion is to be accepted, and they would not be taken up by trying to simultaneously assess whether the expert's purported expertise is to be accepted.

- Pre-trial determination would also reduce the risk of undue weight being given to certain evidence based on the fact that where evidence is adduced that is subsequently discredited or ruled inadmissible, the jury might find it difficult in practise to comply with the judge's directions to disregard or attach little weight the evidence.

**(b) *Disadvantages of Pre-Trial Determination***

- Although pre-trial disposal of admissibility issues has theoretical potential to reduce delays and expense, in reality this may not actually occur. It could be argued that introducing a pre-trial stage would in fact merely add another layer to the judicial process leading to second layer of costly advocacy.
- Both parties are likely to have counsel and the experts present at the pre-trial stage to ensure the best possible chance that the evidence and the expert will be admitted which may lead to greater rather than lesser costs as expert witnesses normally charge per hour for court appearances.
- In practice,<sup>21</sup> outlining the qualifications and experience that indicate expertise does not take long in most trials, particularly as the expert witness pool in Ireland is so small that the trial judge will inevitably have the same experts appearing before him or her again and again and so proof of expertise will be established quickly in such instances.
- It could also be argued that having a formal pre-trial admissibility procedure would make it difficult for a party to adduce expert evidence at a later stage where it became apparent that additional evidence was necessary.
- It may be impossible to determine fully the relevancy and reliability of evidence without hearing it presented in full in the context of the central issues of the case and without hearing the cross examination by the other party. The court is likely to err on the side of caution as a result which lessens the likelihood of a pre-trial procedure effectively filtering all unreliable irrelevant evidence from the jury.

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<sup>21</sup> See the discussion at paragraph 3.66, above.

**(c) Conclusion**

5.48 Based on the foregoing, the Commission does not believe it necessary or appropriate to recommend the introduction of a mandatory pre-trial system for the determination of admissibility of expert evidence and expert witnesses.

5.49 The Commission believes that such a procedure would not have any significant beneficial impact on delay or expense within the trial process and in fact, could lead to additional delays and expenses rather than reducing this.

5.50 However, the Commission does consider that there may be certain cases where pre-trial determination may be appropriate and beneficial. For example, where it is apparent that determining the admissibility of certain evidence is likely to be unusually time-consuming, such as where a party seeks to rely on a theory that is novel or untested and so controversial.

5.51 The Commission therefore provisionally recommends that determination of admissibility of expert evidence and expert witnesses should continue to give their evidence during the trial process but that the court should have the discretion to order pre-trial determination where this is likely to have a significant impact on the length and costs of a trial.

*5.52 The Commission provisionally recommends that determination of the admissibility of expert evidence and expert witnesses should continue to take place during the trial process but that the court should have discretion to order pre-trial determination where this is likely to have a significant impact on the length and costs of a trial.*

**(4) Terms and Conditions of Appointment**

5.53 At present where a party enlists the aid of an expert witness to advise the party, to give evidence in court, or to create an expert report, the terms and conditions governing the appointment of the expert are entirely at the discretion of the parties involved.

5.54 It is clear however that in the interests of the effective and expedient administration of justice, there should be clear and complete communication between experts and those instructing them about the extent of their role and the conditions governing their appointment, to ensure that both parties are clear about the services required by the expert and the reason for their appointment.

5.55 The issues that should be resolved from the outset include terms of payment and expenses, extent of services required, time limits for giving of report and the likely duration of trial, the consequences of withdrawal or cancellation of the contract between the expert and the instructing party.

5.56 Encouraging initial communication between experts and their parties, and recommending the adoption of some form of written confirmation of the

terms and conditions of appointment, greatly reduces the possibility of the expert being confused about what they are being asked to do and when, and subject to what recompense.

5.57 The UK Register of Expert Witnesses recognised the advantages of placing the encouragement to agree terms of engagement on a formal footing where they highly commended the inclusion by the Civil Justice Council of such a provision in their Expert Witness Protocol;

“We also welcome the inclusion of §7.2 for the weight it adds to our own calls for expert witnesses to adopt written terms of engagement at the outset. So many of the helpline calls we handle arise from the potential for confusion and misunderstanding that flows from an expert not putting in place the proper contractual framework for an instruction”<sup>22</sup>

5.58 The Civil Justice Council’s Protocol for Expert witnesses advises that terms of engagement are agreed from the outset and sets out some of the express terms which should be agreed on. This provides a helpful model on which to draft a similar provision in this jurisdiction.

- a) “the capacity in which the expert is to be appointed (e.g. party appointed expert, single joint expert or expert advisor);
- b) the services required of the expert (e.g. provision of expert’s report, answering questions in writing, attendance at meetings and attendance at court);
- c) time for delivery of the report;
- d) the basis of the expert’s charges (either daily or hourly rates and an estimate of the time likely to be required, or a total fee for the services);
- e) travelling expenses and disbursements;
- f) cancellation charges;
- g) any fees for attending court;
- h) time for making the payment; and
- i) whether fees are to be paid by a third party.”<sup>23</sup>

5.59 The UK Legal Services Commission also recommended that certain terms must apply to the agreement between an expert and a party and set out these in a Draft Terms of Appointment schedule in their report on The Use of Experts.<sup>24</sup>

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<sup>22</sup> UK Register of Expert Witnesses “CJC Experts Protocol – It’s Official!” Available at: [http://www.jspubs.com/Experts/library/lib\\_g4e.cfm](http://www.jspubs.com/Experts/library/lib_g4e.cfm).

<sup>23</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 7.2.

<sup>24</sup> Legal Services Commission “The Use of Experts Consultation Paper: Quality, Price and Procedures in Publicly Funded Cases” (2004) Available at:

5.60 This Draft requires the appointer to ensure that the purpose of the appointment and what is required of the expert is discussed at the outset. The appointer is also required to furnish the expert will copies of all relevant protocols and practice directions with which both the appointer and the expert must comply. The Draft also contains provision relating to ongoing communication and instructions between the party and the expert, and terms relating to payment.<sup>25</sup> This Draft also provides a useful model on which to base any suggested reform in this area.

5.61 In light of this discussion, the Commission has provisionally concluded that parties to litigation should formally agree terms of engagement in writing from the outset with expert witnesses instructed by them. This requirement could be included as part of a draft code of guidance for expert witnesses and their instructing parties. The Commission has also provisionally concluded that any such guide should set out the specific issues which should be agreed, that this should be a non-exhaustive list and invites submissions on what should be included in this, particularly in the context of individuals not accustomed to the giving of expert testimony.

5.62 *The Commission provisionally recommends that parties to litigation should formally agree terms of engagement in writing from the outset with expert witnesses instructed by them, and that this requirement could be included as part of a draft code of guidance for expert witnesses and their instructing parties. The Commission also provisionally recommends that any such guide should set out the specific issues which should be agreed, that this should be a non-exhaustive list. The Commission invites submissions on what should be included in such guide, particularly in the context of individuals not accustomed to the giving of expert testimony.*

#### **(5) Information and Instructions for Experts**

5.63 It is clear that in order for an expert witness to give a comprehensive and balanced examination of the issue calling for his expertise, he will be required to have necessary information at his disposal.

5.64 It is also clear that expert witnesses will need to be kept advised of all developments in the case which may affect them, for example where a date has been set for trial.

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[http://www.legalservices.gov.uk/docs/criminal\\_consultations/use\\_of\\_experts\\_consultation\\_paper.pdf](http://www.legalservices.gov.uk/docs/criminal_consultations/use_of_experts_consultation_paper.pdf), at 10.10 See Annex H for Draft Terms of Appointment.

<sup>25</sup> Legal Services Commission “The Use of Experts Consultation Paper: Quality, Price and Procedures in Publicly Funded Cases” (2004) Available at: [http://www.legalservices.gov.uk/docs/criminal\\_consultations/use\\_of\\_experts\\_consultation\\_paper.pdf](http://www.legalservices.gov.uk/docs/criminal_consultations/use_of_experts_consultation_paper.pdf), at 10.10 See Annex H for Draft Terms of Appointment.

5.65 Where there is confusion between the instructing party and the expert witness this may have a significantly detrimental effect on the quality of the expert testimony, as the expert may not have essential information relevant to their opinion, or they may not have sufficient time due to a failure of communication about deadlines.

5.66 It would be beneficial therefore to include in any draft code of guidance for expert witnesses and their instructing parties a provision that encourages ongoing communication between the party and the expert to the effect that the expert has complete and up to date instructions on their task.

5.67 In England, some consideration has been given to the requirement that parties give suitable and accurate instructions to expert witnesses hired by them.

5.68 CPR r. 35.10 (3) requires an expert's report to "state the substance of all material instructions, whether written or oral, on the basis of which the report was written."<sup>26</sup> This provision enables the court to assess the ability of the instructions and information given to the expert to form the basis for a valid expert opinion, and thus, encourages the giving of more comprehensive instructions and information by the party.

5.69 The requirement to give full instructions is developed in the Civil Justice Council's Protocol for expert witnesses. Paragraph 7.5 provides that:

"Experts should be informed regularly about deadlines for all matters concerning them. Those instructing experts should promptly send them copies of all court orders and directions which may affect the preparation of their reports or any other matters concerning their obligations."

5.70 The UK Register of Expert Witnesses highly commended this provision of the Civil Justice Council's protocol, finding that it greatly facilitates the giving of expert evidence.

"Of particular note is the duty imposed by §7.5. We have long sought to have an express duty placed upon lawyers to pass on court orders, etc., that have a relevance to expert witnesses in a case. It is tempting to think that some lawyers attempt to conceal their own administrative failings behind a refusal to disclose a court order. Experts should welcome the support §7.5 give them in pursuing such requests."<sup>27</sup>

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<sup>26</sup> Civil Procedure Rule 35.10 (3).

<sup>27</sup> UK Register of Expert Witnesses "CJC Experts Protocol – It's Official!" Available at: [http://www.jspubs.com/Experts/library/lib\\_g4e.cfm](http://www.jspubs.com/Experts/library/lib_g4e.cfm).

5.71 The Legal Services Commission Draft Terms of Appointment also requires the appointer to notify the expert of any change throughout the appointment and comply with the expert's request for further information.<sup>28</sup>

5.72 On this matter, the Commission has provisionally concluded that there should be included in any relevant guidance a provision recommending that full information be given by the instructing party to expert witnesses throughout the extent of their appointment by the party, in particular concerning procedural requirements. Any such full instructions should not, of course, in any way prejudice the general duties of the expert witness or seek to influence how the expert prepares their evidence for court.

5.73 *The Commission provisionally recommends the inclusion in any guidance of a provision recommending that full information be given by the instructing party to expert witnesses throughout the extent of their appointment by the party, in particular concerning procedural requirements, which should not prejudice the manner in which the expert witness prepares his or her evidence for court.*

#### **(6) Experts Costs and Fees**

5.74 As already mentioned, the terms of appointment, which should be formally agreed at the outset, should include terms of payment, which cover what expenses should will be given and what charges will be incurred due to delay or other breach of contract.

##### **(a) Types of Fees**

5.75 One issue that arises in terms of the payment of experts is the type of fees that can be charged. Most expert witnesses will charge a flat rate for their services per hour, per day or per report. Most of the fee-related disputes that arise between experts and the instructing party involve issues such as whether or not the amount of time claimed by the expert was reasonable or whether or not the work agreed was completed satisfactorily within the specified time limits. Another common cause for dispute is the timing of the payment of an expert's fee for work completed.<sup>29</sup>

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<sup>28</sup> Legal Services Commission "The Use of Experts Consultation Paper: Quality, Price and Procedures in Publicly Funded Cases" (2004) Available at [http://www.legalservices.gov.uk/docs/criminal\\_consultations/use\\_of\\_experts\\_consultation\\_paper.pdf](http://www.legalservices.gov.uk/docs/criminal_consultations/use_of_experts_consultation_paper.pdf), at 10.10 See Annex H for Draft Terms of Appointment.

<sup>29</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 12-001.

**(i) Ireland**

5.76 In Britain, contingency and conditional fee payment options are also occasionally offered by expert witnesses proffering their services. Such forms of payment have generated considerable debate, not only within the context of expert witnesses, but largely in relation to the fees that can be charged by solicitors and barristers.

5.77 A conditional fee is one that provides that the expert's fee is not given (or will be given at a predetermined lower rate) where the case does not end in success for the party.<sup>30</sup> These have also been called 'no win no fee' or 'no fault no fee' arrangements. The fee that will be awarded will be based on the rates normally charged by the expert, subject to an increase in the case of success.

5.78 A contingency fee is one where the expert is paid a predetermined percentage of the award recovered by the party. Both types are conditional on the outcome of the case, but the contingency fee makes the amount of the recovered award more important.<sup>31</sup>

5.79 In the context of solicitors, conditional fees are permitted and lawful but contingency fees are unlawful. Section 68 (2) of the *Solicitors (Amendment) Act 1994*<sup>32</sup> provides that a solicitor cannot charge fees:

"....on the basis that all or any part of the charges to the client are to be calculated as a specified percentage or proportion of any damages or other moneys that may be or may become payable to the client, and any charges made in contravention of this subsection shall be unenforceable in any action taken against that client to recover such charges."

**(ii) England**

5.80 Contingency fee arrangements between solicitors and clients are considered unlawful in England.

5.81 It was explained by Denning LJ that public policy considerations<sup>33</sup> shape this ban, because of "the temptations to which it exposes [the solicitor].

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<sup>30</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 12-003.

<sup>31</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 12-003.

<sup>32</sup> No. 27 of 1994.

<sup>33</sup> Such agreements can also be seen as illegal because they effectively amount to the offence of champerty (Per Lord Denning MR in *Wallersteiner v Moir (No. 2)* [1975] Q.B. 373 at 393).

At best he may lose his professional objectivity; at worst he may be persuaded to attempt to pervert the course of justice.”<sup>34</sup>

5.82 Greater detail was given on the public policy reasons underlying the prohibition by Buckley J in *Wallersteiner v Moir (No. 2)*:<sup>35</sup>

“First, in litigation a professional lawyer’s role is to advise his client with a clear eye and an unbiased judgment. Secondly, a solicitor retained to conduct litigation is not merely the agent and adviser to his client, but also an officer of the court with a duty to the court to ensure that his client’s case, which he must, of course, present and conduct with the utmost care of his client’s interests, is also presented and conducted with scrupulous fairness and integrity. A barrister owes similar obligations. A legal adviser who acquires a personal financial interest in the outcome of the litigation may obviously find himself in a situation in which that interest conflicts with those obligations.”<sup>36</sup>

5.83 It is clear that the argument can be made that the same public policy reasoning could apply to the relationship between an expert witness and the instructing party. It could be considered that giving the expert witness an interest in the outcome of the case, either in the form of conditional fee arrangements or contingency fee arrangements could significantly compromise the independence and impartiality of an expert, as they may be tempted to alter their opinion to increase their fee.

5.84 It has been argued on several occasions in England that such fee arrangements between expert witnesses and their clients should be prohibited, bearing in mind the well established principle that an expert witness should not have any interest in the outcome of the case.<sup>37</sup>

5.85 In *R (Factortame Ltd) v Secretary of State for Transport (No. 8)*<sup>38</sup> the English Court of Appeal appeared to be of the opinion that while such arrangements were not to be encouraged, they were at the same time not

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<sup>34</sup> Lord Denning M.R. in *Trendtex Trading Corporation v Credit Suisse* [1980] Q.B. 629 at 789.

<sup>35</sup> [1975] Q.B. 373.

<sup>36</sup> [1975] Q.B. 373 at 401.

<sup>37</sup> *Field v Liverpool City Council* [1999] EWCA Civ 3013 (8 December 1999); *Liverpool Roman Catholic Archdiocesan Trustees Inc. v Goldberg (No. 3)* [2001] 1 WLR 2337.

<sup>38</sup> [2002] EWCA Civ 932.

considered to be unlawful. Lord Phillips MR made the following observations on the issue:

"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."<sup>39</sup>

5.86 The issue was also considered in *Davis v Stena Line Ltd*.<sup>40</sup> Here, the defendant argued that the claimant's expert evidence should not be admitted due to the fact that the funding arrangements between the claimant and his expert had proceeded on a 'no win no fee' basis.

5.87 Forbes J held that the evidence should be admitted, however, he justified this decision largely on the fact that neither the expert nor the claimant's counsel had appreciated that experts should not be retained on contingency basis. Furthermore, once they had realised this they had altered the fee arrangement accordingly. As a result Forbes J rejected the contention that the expert evidence "might have been influenced, biased or lacking in objectivity as the result of the expert's apparent financial interest in the outcome of the case."<sup>41</sup>

5.88 The comments of Forbes J imply that the evidence in this case was only admitted due to the fact that the parties involved were not aware that contingency fee arrangements were not appropriate, and thus that in a case where both parties intended such an arrangement, the expert evidence might be ruled inadmissible as such an arrangement creates a presumption of bias or a lack of objectivity.

5.89 Despite the above judicial commentary criticising conditional fee arrangements with expert witnesses, there has not yet been a common law or

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<sup>39</sup> [2002] EWCA Civ 932 at [73].

<sup>40</sup> [2005] EWHC 420 (QB).

<sup>41</sup> [2005] EWHC 420 (QB) at [28].

statutory ban on such arrangements. However, some of the guidance protocols governing expert witnesses in England have made reference to this.

5.90 Although the CPR Rules and its supplementing Practice Direction contain no provisions relating to the payment of experts, the Civil Justice Council's Protocol for Experts, which aims to give guidance for their duties under the CPR rules, does provide that expert's fees should not be on a contingency basis. Paragraph 7.2 states;

"Payments contingent upon the nature of the expert evidence given in legal proceedings, or upon the outcome of a case, must not be offered or accepted. To do so would contravene experts' overriding duty to the court and compromise their duty of independence."<sup>42</sup>

5.91 Furthermore, many of the codes of guidance introduced by the various professional bodies governing expert witnesses contain similar provisions. For example, The Joint Code of Practice of The Academy of Experts and the Expert Witness Institute provides;

"An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses." <sup>43</sup>

#### **(b) Court Authority to Cap Fees**

5.92 The burgeoning cost of expert testimony has also led some commentators to question the appropriateness of giving the court the ability to cap an expert's fees where it considers necessary. This could have the beneficial effect of preventing experts from leading a professional expert witness career based on the high fees that can be earned.

5.93 In England, CPR r. 35.4 (4) gives the court the power to limit expert's fees and expenses that a party seeking to rely on an expert can recover from another party. The Commission does not consider at this stage that it is necessary to express a view on this aspect of the CPR.

#### **(c) Conclusion**

5.94 While the issue of costs could be left for consideration in case law, as in the United Kingdom, the Commission has come to the provisional conclusion

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<sup>42</sup> Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005).

<sup>43</sup> See; EWI & The Academy of Experts "Code of Practice for Experts" (22 June 2005).

that it would be preferable to introduce an express provision prohibiting fee arrangements which are conditional on the outcome of a case as such arrangements are likely to impede the independence of the expert witness.

5.95 *The Commission provisionally recommends that there should be an express provision prohibiting fee arrangements with expert witnesses which are conditional on the outcome of a case, as such arrangements are likely to impede the independence of the expert witness.*

## **D Communication between Experts and between Experts and the Court: Pre-trial and At the Hearing**

5.96 At present there are no formal arrangements governing communication between experts prior to and during the trial process, or any conditions governing the ability of an expert to communicate with the court for any reason. Such communication could result in more effective and smoother running of the use of experts.

### **(1) *Pre-Trial Meetings between Experts***

5.97 An increasingly common feature in any suggested recommendations for reform of the expert testimony system is the provision for pre-trial expert negotiations or meetings in order to decide on non contentious issues with the aim of narrowing contentious issues and thus reducing the time spent on cross examination.

5.98 In these pre-trial meetings, both parties should exchange expert reports and from this determine if they will need to ask each other questions, clarify certain points, or raise certain points about the other's reports thus reducing contentious issues as far as is possible prior to the trial.

5.99 This meeting could also act as a forum for considering alternative dispute resolution options, particularly in the context of family law cases. The court could be permitted, where it considers necessary and appropriate, to refer any point of issue to mediation for resolution rather than expert witnesses battling it out.

5.100 As the Australian judge Williams J acknowledged, no expert likes to concede a point during cross examination, so that, particularly where there are several experts, the litigation is often side tracked. No professional likes to make a concession when faced with the report from an expert from the other side. This, he argues, can lead to false issues being raised and much time spent endeavouring to resolve them.

"The dispute between the experts generates a trial within a trial at the expense of the litigants."<sup>44</sup>

5.101 The well known observation of Tomlin J. in *Graigola Merthyr Co Ltd v. Swansea Corporation*<sup>45</sup> is also relevant:

"...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 a duty which exists notwithstanding that it may not always be easy to discharge."<sup>46</sup>

5.102 Referring to this case, Toulmin J in *Anglo Group Plc v Winther Brown & Co Ltd and BML (Office Computers) Ltd*<sup>47</sup> stated:

"The Woolf reforms, building largely on the approach which was developed in this Court and the Commercial Court (with the support and encouragement of the users of these Courts) sees no inherent conflict between dispute resolution by parties in the course of the procedure and dispute resolution by the court at a full hearing at the end of the procedure. Dispute resolution in the course of the procedure may be achieved with assistance outside the court procedure by way of independent mediation; but it may also be achieved by techniques of case management pioneered in this court, e.g. by "without prejudice" meetings of experts, joint statements of experts setting out the matters on which they agree or disagree, early neutral evaluation or by the appointment of a single jointly appointed expert who may effectively resolve the technical issue or issues which are preventing the parties from settling their disputes; or by a combination of constructive case management and mediation. Many of these innovations underline the importance of experts retained by the parties acting at all stages as independent experts in order to assist the parties in reaching a resolution of their disputes or in narrowing the issues in dispute thus saving time and costs at trial"

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<sup>44</sup> Williams "Accreditation and Accountability of Experts" Paper presented at the Medico-Legal Conference (Gold Coast, 5 August 2000).

<sup>45</sup> [1928] 1 Ch 31.

<sup>46</sup> [1928] 1 Ch 31 at 38.

<sup>47</sup> [2000] EWHC Technology 127 (8 March 2000).

5.103 It is submitted that experts might be more willing to make concessions and compromises where this occurs outside the accusatorial framework of cross examination. The expert would feel under less pressure to defend his viewpoint if it is not being discussed in terms of a direct conflict with the other side.

**(a) Ireland**

5.104 Although there are no general provisions relating to pre-trial meetings between expert witnesses in this jurisdiction, some recent reforms in this vein have taken place in the context of experts used in the competition and commercial courts.

5.105 Order 63B of the *Rules of the Superior Courts 1986*,<sup>48</sup> which deals with pre-trial procedure in Competition Proceedings, provides that a judge may, at the initial directions hearing, give any of a number of listed directions to facilitate the determination of the proceedings, including, in the context of expert witnesses:

“directing any expert witnesses to consult with each other for the purposes of –

- (a) identifying the issues in respect of which they intend to give evidence,
- (b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and
- (c) considering any matter which the Judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations

provided that any such outcome shall not be in any way binding on the parties.<sup>49</sup>

5.106 The proviso in the latter part of this provision is very significant, as it facilitates greater disclosure between experts as they will not be bound by any comments they make which could potentially conflict with the opinion they give in court. Such full and frank disclosure is essential if the pre-trial negotiations are to result in any significant reduction in the contentious issues left to be dealt with at trial.

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<sup>48</sup> As inserted by the *Rules of the Superior Courts (Competition Proceedings) 2005* (SI No. 130 of 2005).

<sup>49</sup> Order 63B Rule 6(1)(ix), *Rules of the Superior Courts 1986*.

5.107 Order 63A of the *Rules of the Superior Courts 1986*<sup>50</sup>, which deals with Commercial Court proceedings, contains similar provisions but, notably, also requires witnesses to give a written summary of the negotiations:

“...requiring that such witnesses record in a memorandum to be jointly submitted by them to the [Court] Registrar and delivered by them to the parties particulars of the outcome of their consultations.”<sup>51</sup>

**(b) England**

5.108 In England, the convening of pre-trial meetings between all expert witnesses was originally provided for in Order 38 rule 38 Rules of the Superior Court. This sought to encourage such meetings by providing that the court can order a ‘without prejudice’ meeting between the experts.

5.109 It was held in *Stanton v Callaghan*<sup>52</sup> that both parties have immunity from suit regarding the discussions in such meetings, which helped to further encourage such meetings. In this case it was held that an expert witness could not be sued for agreeing to a joint experts' statement in terms which the client thought detrimental to his interests.

5.110 The ability to convene pre-trial meetings on a ‘without privilege’ basis provided for Rule 38 RSC has now been incorporated into Part 35.12 of the Civil Procedure Rules. CPR r.35.12 provides:

(1) The court may, at any stage, direct a discussion between experts for the purpose of requiring the experts to

(a) identify and discuss the expert issues in the proceedings; and

(b) where possible, reach an agreed opinion on those issues.

(2) The court may specify the issues which the experts must discuss.

(3) The court may direct that following a discussion between the experts they must prepare a statement for the court showing –

(a) those issues on which they agree; and

(b) those issues on which they disagree and a summary of their reasons for disagreeing.

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<sup>50</sup> This was inserted the *Rules of the Superior Courts (Commercial Law Proceedings) 2004* (SI No. 2 of 2004).

<sup>51</sup> Order 63A Rule 6(1)(ix), *Rules of the Superior Courts 1986*.

<sup>52</sup> [1998] EWCA Civ 1176 (8 July 1998).

(4) The content of the discussion between the experts shall not be referred to at the trial unless the parties agree.

(5) Where experts reach agreement on an issue during their discussions, the agreement on an issue during their discussions, the agreement shall not bind the parties unless the parties expressly agree to be bound by the agreement.”<sup>53</sup>

5.111 The procedures to be followed when convening pre-trial meetings are set out in great detail in the Guidance protocol of the Civil Justice Council. This also explains the purpose for such meetings;

“18.3 The purpose of discussions between experts should be, wherever possible, to:

- a) identify and discuss the expert issues in the proceedings;
- b) reach agreed opinions on those issues, and, if that is not possible, to narrow the issues in the case;
- c) identify those issues on which they agree and disagree and summarise their reasons for disagreement on any issue; and
- d) identify what action, if any, may be taken to resolve any of the outstanding issues between the parties..”<sup>54</sup>

5.112 The extent of the without privilege immunity given by CPR r.35.12 was discussed in *Aird & Anor v Prime Meridian Ltd*.<sup>55</sup> Here, both experts had signed a statement stating what was agreed and what was disagreed, which, the court held would ordinarily be sufficient to waive the privilege.

5.113 Coulson QC went on to find that, on the facts, if the claimants' expert had known that the joint statement was to be used in the litigation if the mediation was unsuccessful, then he would not have signed it.

5.114 This case shows willingness on the part of the court to retain the privilege where possible, thus promoting as far as possible free communication between experts prior to the trial.

### **(c) Conclusion**

5.115 In light of the above discussion, the Commission has provisionally concluded that it would be appropriate for the court and the parties to be empowered to encourage pre-trial meetings between experts. The Commission does not have a fixed view at this stage on whether, for example, where minor

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<sup>53</sup> Civil Procedure Rules 35.12.

<sup>54</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005).

<sup>55</sup> [2006] EWHC 2338.

cases are at issue, the discussion could be by telephone or in written form (in the interests of reducing expenses and delays).

5.116 *The Commission provisionally recommends that it would be appropriate for the court and the parties to be empowered to encourage pre-trial meetings between experts, and invites submissions on the form or forms this might take.*

**(2) Experts Questions**

5.117 Any provisions introduced to provide for pre-trial communication between experts should include a procedure whereby experts should have the ability to put questions to the other party, subsequent to receipt of that party's initial expert report, where they are uncertain about elements contained in the report, or where they feel relevant information is absent from the report. Both parties should be required to answer questions put to them by the opposing side, and these answers should then form part of the final expert report.

5.118 In England, provision is made for a party to put written questions to the other party in CPR r. 35.6. This is a comprehensive provision which outlines the procedure for and consequences of such questions. CPR r. 35.6 provides;

**35.6 Written questions to experts**

- (1) A party may put to –
  - (a) an expert instructed by another party; or
  - (b) a single joint expert appointed under rule 35.7, written questions about his report.
- (2) Written questions under paragraph (1) –
  - (a) may be put once only;
  - (b) must be put within 28 days of service of the expert's report; and
  - (c) must be for the purpose only of clarification of the report, unless in any case –
    - (i) the court gives permission; or
    - (ii) the other party agrees.
- (3) An expert's answers to questions put in accordance with paragraph (1) shall be treated as part of the expert's report.
- (4) Where –
  - (a) a party has put a written question to an expert instructed by another party in accordance with this rule; and

(b) the expert does not answer that question, the court may make one or both of the following orders in relation to the party who instructed the expert –

- (i) that the party may not rely on the evidence of that expert; or
- (ii) that the party may not recover the fees and expenses of that expert from any other party.

5.119 In this jurisdiction, the *Rules of the Superior Courts (Disclosure of Reports and Statements)* 1998 (SI No. 391 of 1998) require both parties' experts to disclose their reports within a certain time limit prior to the trial. However, no provision is included that enables the parties to put questions to each other about the contents of the report. The Commission has reached the provisional view that both parties should be required to answer questions about the contents of their expert reports prior to the trial when these are put by the other party.

5.120 *The Commission provisionally recommends that both parties be required to answer questions about the contents of their expert reports prior to the trial when these are put by the other party.*

### **(3) Court Directions**

5.121 It may also be the case that the court, rather than the legal counsel instructing an expert, may be better placed to advise an expert on a particular issue. This may ensure that the expert witness carries out his role to the satisfaction of the court thus reducing the chance of his evidence later being ruled inadmissible.

5.122 Based on this consideration, there is a certain merit to the suggestion that there should be a provision whereby the expert may apply to the court for assistance or directions to enable him to carry out his function as expert

5.123 In England, this is provided for in CPR r 35.14 which provides;

“35.14 Expert’s right to ask court for directions

(1) An expert may file a written request for directions to assist him in carrying out his function as an expert.

(2) An expert must, unless the court orders otherwise, provide a copy of any proposed request for directions under paragraph (1)–

(a) to the party instructing him, at least 7 days before he files the request; and

(b) to all other parties, at least 4 days before he files it.

(3) The court, when it gives directions, may also direct that a party be served with a copy of the directions.<sup>56</sup>

5.124 On this issue, the Commission has concluded that it might be appropriate for an expert witness to put a request to the court for information about issues relating to how he or she can satisfactorily fulfil their role and duties as an expert witness where they feel they have not received sufficient information from those instructing them. This should not, of course, be allowed to give rise to delay, in particular where there have been proper pre-trial meetings. For this reason, the Commission would welcome submissions on this point.

*5.125 The Commission invites submissions on whether it would be appropriate for an expert witness to put a request to the court for information about issues relating to how he or she can satisfactorily fulfil their role and duties as an expert witness where they feel they have not received sufficient information from those instructing them.*

#### **(4) Disclosure of all Relevant Information**

5.126 In some cases, particularly where sensitive issues are involved, expert witnesses may find it difficult to access all relevant information necessary to formulate an expert opinion, as the parties may be reluctant to reveal such information.

5.127 However, it is also recognised that in order for a party to be given a fair trial, their expert witness must be entitled to full disclosure of all necessary documents and materials. Equality of access to relevant information to all parties is essential.

5.128 It may therefore be desirable to introduce a provision to allow an expert witness who is being prevented from accessing essential documents to apply to the court for an order requiring the other party to disclose such documents.

##### **(a) Ireland**

5.129 A number of Irish cases have considered access of a party to information and the ability of a party's medical expert to conduct their own examination of an individual.

5.130 For example in *McGrory v ESB*<sup>57</sup> the plaintiffs refused to permit the plaintiff's medical adviser to be questioned by the defence expert witness. Keane CJ stated, in ordering a stay in the proceedings until such time as the

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<sup>56</sup> Civil Procedure Rules 35.14.

<sup>57</sup> [2003] IESC 45.

plaintiff consented to the defendant's medical adviser consulting with his medical advisers, that:

"The plaintiff who sues for damages for personal injuries by implication necessarily waives the right of privacy which he would otherwise enjoy in relation to his medical condition. The law must be in a position to ensure that he does not unfairly and unreasonably impede the defendant in the preparation of his defence by refusing to consent to a medical examination. Similarly, the court must be able to ensure that the defendant has access to any relevant medical records and to obtain from the treating doctors any information they may have relevant to the plaintiff's medical condition, although the plaintiff cannot be required to disclose medical reports in respect of which he is entitled to claim legal professional privilege."

5.131 Similarly, in *JF v DPP*<sup>58</sup> the applicant, who was accused of indecent assault on the respondent, sought to have certain paragraphs of the statement of opposition struck out as the respondent had refused permission to be medically examined by a psychologist appointed by the applicant for the purposes of ascertaining the reasons for delay in bringing the complaints.

5.132 The applicant argued that the inability to have an independent psychiatric evaluation of the respondent prevented him from countering the respondent's expert with his own expert evidence, which meant he would be "at a wholly unjustified disadvantage" in fighting the proceedings. The applicant cited *Re Haughey*,<sup>59</sup> *Maguire v Ardagh*<sup>60</sup> and *McGrory v ESB*<sup>61</sup> in support of his argument that he should be entitled to an independent examination.

5.133 The applicant's arguments were accepted by the Court which held that in the interests of fair procedures and the equality of the two sides - or *égalité des armes*<sup>62</sup> principle - that the applicant had a right to counter the respondent's expert evidence with his own expert evidence, and this necessitated being given the opportunity to personally assess the individual.

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<sup>58</sup> [2005] IESC 54.

<sup>59</sup> [1971] IR 217.

<sup>60</sup> [2002] 1 IR 385.

<sup>61</sup> [2003] IESC 45.

<sup>62</sup> This concept was explained by the European Court of Human Rights in *Steel and Morris v United Kingdom* (15 February 2005) where the Court stated: "It is central to the concept of fair trial in civil as in criminal proceedings that a litigant is not denied the opportunity to present his or her case effectively before the Court and that he or she is able to enjoy equality of arms with the opposing side."

**(b)      England**

5.134 In England, there is also much case law to the effect that a party cannot withhold information or access to witnesses from another party's expert witness.<sup>63</sup> The reasons for this were explained by Lord Denning MR in *Harmony Shipping Co v Saudi Europe*,<sup>64</sup>

“So far as witnesses of fact are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena.”

5.135 The Civil Procedure Rules 1998 have further strengthened the ability of a party to access all necessary information. CPR r. 35.9 provides that where one party has access to information which is not readily available to the other party, the court may direct the party who has access to the information to prepare, file and copy to the other party a document recording the information.

5.136 The Civil Justice Council's protocol tempered the effect of this provision by recommending that it only be used where necessary;

“If experts require such information which has not been disclosed, they should discuss the position with those instructing them without delay, so that a request for the information can be made, and, if not forthcoming, an application can be made to the court. Unless a document appears to be essential, experts should assess the cost and time involved in the production of a document and whether its provision would be proportionate in the context of the case.”<sup>65</sup>

**(c)      Conclusion**

5.137 On this issue, the Commission has concluded that it might be appropriate to introduce a provision enabling the court to order that a party disclose all necessary information to the other party where this is not

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<sup>63</sup> *Edmeades v Thames Board* [1969] 2 QB 68; *Dunne v British Coal Corporation* [1993] ICR 601; *Harmony Shipping Co v Saudi Europe* [1979] 1 WLR 1381.

<sup>64</sup> [1979] 1 WLR 1380

<sup>65</sup> Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005) at 12.2.

forthcoming and where needed in order to create a comprehensive expert report. The Commission would welcome submissions on this point.

5.138 *The Commission invites submissions as to whether the court should be empowered to order that a party disclose all necessary information to the other party where this is not forthcoming and where needed in order to create a comprehensive expert report.*

## **E        Expert Reports**

5.139 Expert witnesses give their opinion in the form of report, which is accessible by the other party, and which will form the basis of the opinion given in court.

5.140 Significant statutory amendment has taken place in recent years in this jurisdiction to the effect that expert reports must be disclosed to the other party prior to the trial.

5.141 However, there is comparably little guidance relating to the requisite content of such reports. This is surprising, considering that the report forms the fundamental basis of all expert evidence.

### **(1)      Disclosure of Expert Reports & Rules of Privilege**

5.142 Significant exceptions to the privilege rules have been made in the context of expert reports in civil proceedings, as it is considered necessary in the interests of a fair trial that neither party be able to 'ambush' the other so both party should be aware, prior to the trial, of the contents of all expert reports of the other party.

5.143 In comparison with the relative lack of judicial or legislative intervention into other aspects of the system of expert testimony, the rules of disclosure applying to the reports of expert witness have received considerable legislative and judicial scrutiny in this jurisdiction.

#### **(a)      Disclosure in Personal Injuries Proceedings**

5.144 A significant exception to legal professional privilege was added to the *Rules of the Superior Courts 1986* by the *Rules of the Superior Courts (Disclosure of Reports and Statements) 1998* (SI No. 391 of 1998).<sup>66</sup> These replaced the *Rules of the Superior Courts (Disclosure of Reports and Statements) 1997* (SI No 348 of 1997), which had been criticised as imposing

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<sup>66</sup> The 1998 Rules were made under section 45(3) of the *Courts and Court Officers Act 1995* which provides that notwithstanding the existence of the rule of privilege for legal advice, the court may order disclosure of any reports from an expert who is to be called to give evidence in relation to an issue in question.

excessively onerous disclosure requirements and huge practical difficulties on parties to personal injuries proceedings.<sup>67</sup>

5.145 The 1998 Rules aim to prevent ‘trial by ambush’ and provide that in High Court personal injuries cases, the plaintiff must disclose within one month of the service of the notice of trial a schedule of all reports and statements of experts whom they intend to call as witnesses, that contain the ‘substance of the evidence to be adduced’ by them.<sup>68</sup>

5.146 Within seven days of receipt of this schedule, or such time as is agreed by the parties or the court, the defendant must furnish to the plaintiff and any other parties a schedule of all reports of expert witnesses intended to be called. Within seven days of receipt of the defendant’s schedule the parties are required to exchange copies of all reports listed in the relevant schedules.

5.147 The definition of report includes that give by those experts specified and ‘any other expert whatsoever,’ and so would appear sufficiently broad to encompass any person who, in the court’s opinion, has a particular degree of expertise in the subject matter in question.<sup>69</sup>

5.148 The definition of report also includes all materials used by the expert in coming to his or her opinion such as “maps, drawings, photographs, graphs, charts, calculations or other like matter referred to in any such report.”<sup>70</sup>

5.149 Rule 45(2) requires the parties to exchange, within one month of the service of the notice of trial or other such time agreed by the court or the parties, the information and statements referred to in section 45 (1) (a) (iii), (iv) and (v) of the *Courts and Court Officers Act 1995* namely:

the names and addresses of all witnesses intended to be called to give evidence as to facts in the case,

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<sup>67</sup> Per Kearns J in *Payne v Shovlin* [2006] IESC 5 (9 February 2006).

<sup>68</sup> Order 39, Rule 46 (1) of the 1986 Rules, as inserted by the 1998 Rules.

<sup>69</sup> The issue of who can be an expert was also dealt with in the case of *Galvin v Murray* [2000] IESC 78 where Murphy J made the point that the problem (in defining an expert) created by the 1998 Rules is serious and may not be easily solved. He held that where a County Council relied on their own engineers, they should still be considered as expert witnesses for the purpose of the Rules. However, he recognised that the report of the Council’s engineers may contain certain observations that would not be present in an independent engineer’s report therefore he afforded the respondents the opportunity to argue that certain parts of the engineer’s report should be deleted before disclosure.

<sup>70</sup> Order 39, Rule 45 (1)(e) of the 1986 Rules, as inserted by the 1998 Rules.

a full statement of all items of special damage together with appropriate vouchers, or statements from witnesses by whose evidence such loss would be proved in the action, and

a written statement from the Department of Family and Social Affairs showing all payments made to a plaintiff subsequent to an accident or an authorisation from the plaintiff to the defendant to apply for such information

**(i) *Withdrawal of Report or Statement & Disclosure***

5.150 The precise obligations imposed by the 1998 Rules were considered in *Kincaid v Aer Lingus Teoranta*.<sup>71</sup> Here, the defendant had listed an orthopaedic surgeon in his schedule of experts, but when furnishing his experts' reports to the plaintiffs omitted to send a report from the surgeon as he informed the plaintiffs he no longer intended to call the surgeon at trial.

5.151 The plaintiff claimed, on a literal interpretation of Rule 46(6), that the defendant was not entitled to withdraw reliance on the expert until he had furnished reports from all experts listed in the schedule. Rule 46(6) provides:

"Any party who has previously delivered any report or statement or details of a witness may withdraw reliance on such by confirming by letter in writing that he does not now intend to call the author of such report or statement or such witness to give evidence in the action. In such event the same privilege (if any) which existed in relation to such report or statement shall be deemed to have always applied to it notwithstanding any exchange or delivery which may have taken place."

5.152 The Supreme Court held that a literal interpretation to the effect that a party is prohibited from withdrawing reliance unless he has previously delivered the report was "fallacious." Geoghegan J found that the situation that arose in this case was not expressly covered by Rule 46(6) and so in order to apply a proper interpretation of the Rules to the facts of the case it was necessary to look at the statutory provision underlying the 1998 Rules, section 45 of the *Courts and Court Officers Act 1995*.

5.153 Based on this interpretation, Geoghegan J held that only expert reports intended to be relied on in evidence were subject to the disclosure rules, and therefore once the defendant had changed his mind about the witness, the surgeon's report became a privileged document and so did not have to be disclosed.

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<sup>71</sup> [2003] IESC 31 (9 May 2003).

**(ii) Preliminary Reports & Disclosure**

5.154 The duty of disclosure under the rules was also considered by the Supreme Court in *Payne v Shovlin*,<sup>72</sup> a decision which has greatly clarified the precise application of the rules and what exactly constitutes an expert report.

5.155 Here, the question arose as to whether there was a duty on the plaintiff to disclose the preliminary report of the medical expert as well as the final, more refined report. The plaintiff argued that after further consultation, the view of the expert in relation to causation and liability had developed since the preliminary report and therefore it would be unfair to require him to disclose a report created when proceedings were just getting under way, based on a more reliable report. The defendant argued that, on the wording of the 1998 Rules, all expert reports must be adduced, and that not disclosing this report would mean that the defendant could be ambushed at trial with the expert's views from an earlier report.

5.156 The Supreme Court held that once the report in question formed part of the substance of the evidence, it must be disclosed pursuant to the 1998 rules, regardless of the existence of a later more comprehensive version of the report.

5.157 Kearns J considered that, while the 1998 Rules introduced an exception to the general privilege attaching to communications made in contemplation of litigation, that privilege is itself an exception to the general principle that all relevant information should be brought before the court, and as such it should be strictly interpreted. He went on to explain that such disclosure is necessary in the interests of expedition and efficiency:

“...the failure to produce an earlier report, providing it contains the substance, or part of the substance, of the evidence which, at the time of its compilation it was intended to give, may lead to a situation where in the course of cross-examination, it may emerge that the author expressed a different view, for example in relation to causation in a medical negligence action, at an earlier time and adverted to same in a first report. How can the interests of expedition and efficiency be served if such information only emerges in cross-examination? It might well require that the trial be adjourned while further lines of enquiry are pursued in the light of the particular revelation. Further, it would always be possible that such additional inquiries might lead to the claim being dropped altogether. All of these costly and undesirable consequences are avoided by

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<sup>72</sup> [2006] IESC 5 (9 February 2006).

disclosure of all reports which contain any of the substance of the evidence intended to be led.”<sup>73</sup>

**(iii) Disclosure of Documents Mentioned in Expert Reports**

5.158 The extent to which documents which are referred to in the report of an expert or documents to which the expert had regard to retain their privilege or are required to be disclosed was considered in *Doherty v North Western Health Board, Davison and Medical Defence Union and MDU Services Ltd.*<sup>74</sup>

5.159 Here the defendant Health Board (now the Health Service Executive) sought disclosure of certain documents of the first and third parties, Davison and MDU Services Ltd, which had been referred to in the reports of two expert witnesses in the case.

5.160 The defendant claimed such documents came under the definition of that required to be disclosed under the rules as which refer to “any maps, drawings, photographs, graphs, charts, calculations other like matter referred to in any such report.”<sup>75</sup>

5.161 The documents in question here included solicitor/client correspondence and certain statements by witnesses, and the defendant argued this was “other like matter” as mentioned under the rules.

5.162 The court disagreed with this argument finding that the phrase “other like matter” must be interpreted in the context of the preceding words which referred to maps, drawings etc and that the documents referred to in this case could not be considered as a like matter to those specifically mentioned in the Rules.

**(iv) 1998 Rules in Practice**

5.163 Although the 1998 Rules themselves have been criticised as unclear, the interpretation given by Court in *Payne* and other decisions has gone a long way towards clarifying some of the uncertainties generated by the 1998 Rules.

5.164 Nevertheless, some difficulties still remain. First, the court failed to define clearly the meaning of the term the “substance of the evidence to be adduced.”<sup>76</sup> Kearns J in *Payne* opined that it was an “arguable point” that, as

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<sup>73</sup> [2006] IESC 5 (9 February 2006).

<sup>74</sup> [2005] IEHC 404.

<sup>75</sup> Order 39 Rule 45 (1)(e), Rules of the Superior Courts 1986, as inserted by the 1998 Rules.

<sup>76</sup> See Carthy “Expert Assistance” (2006) Aug/Sept Law Society of Ireland Gazette 30 at 33.

held in English decision of *Kenning v Eve Construction Ltd*,<sup>77</sup> the substance of the evidence includes not only matters that may arise from the direct evidence of the expert in examination-in-chief but also matters that may arise during cross-examination. The court however, refrained from giving any set view if this should be the case in this jurisdiction.

5.165 Second, it can be recognised that the decision in *Payne* has placed a very high onus on parties to personal injuries litigation to disclose all expert reports that form part of the evidence in court, even if the opinions expressed by the expert have altered due to changing circumstances or increased information.

5.166 The parties will therefore seek to ensure that there is nothing in a preliminary expert report which may undermine their arguments in court. This has led to a situation in practice where experts are encouraged to refrain from formally creating their report until they have thoroughly completed their investigations, finalised their opinions and liaised with the instructing party. Such an approach is clearly not what was envisaged by the rules and could in fact result in misunderstanding of verbal communications and advice particularly where complex issues are in question.<sup>78</sup>

**(b) Disclosure in Criminal Proceedings**

5.167 In the context of criminal proceedings, the law recognises the right of an accused person to information regarding the evidence to be adduced against him or her at trial. As a result, under Part 4 of the *Criminal Procedure Act 1967*, as amended by Part 9 of the *Criminal Justice Act 1999*, where the accused is being tried on indictment, the prosecution in a criminal trial is required to furnish the accused with details of the evidence to be given at trial, which is commonly known as the Book of Evidence.

5.168 The material that must be disclosed is set out in Part 4B & 4C of Part IA of the *Criminal Procedure Act 1967*, which was inserted by section 9 of the *Criminal Justice Act 1999*. Material that must be disclosed which has relevance to the context of expert witnesses includes:

- “4B (1) (c) a list of the witnesses the prosecutor proposes to call at the trial
- (d) a statement of the evidence that is expected to be given by each of them...

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<sup>77</sup> [1989] 1 WLR 1189 This decision was later overturned in *Derby & Co. v Weldon* (No.9) (The Times, November 9, 1990).

<sup>78</sup> Carthy “Expert Assistance” (2006) Aug/Sept LSG 30 at 33.

- 4C (1) (a) a list of any further witnesses the prosecutor proposes to call at the trial;
- (b) a statement of the evidence that is expected to be given by each witness whose name appears on the list of further witnesses
- (c) a statement of any further evidence that is expected to be given by any witness whose name appears on the list already served under section 4B(1) (c.)”

**(c) Disclosure in Commercial Proceedings**

5.169 Similar disclosure requirements to those provided for in personal injuries cases by the 1998 Rules are also provided for in commercial proceedings by the *Rules of the Superior Courts (Commercial Proceedings) 2004* (SI No. 2 of 2004).

5.170 The 2004 Rules provide that a party seeking to rely on an expert's evidence must furnish, not later than one month prior to the date of trial in the case of the plaintiff, and not later than seven days prior to the date of trial in the case of the defendant, a written statement outlining the essential elements of that evidence signed and dated by the expert.

**(d) Disclosure in Competition Proceedings**

5.171 Mirror provisions to the 2004 disclosure rules in commercial proceedings are provided for in competition proceedings by the *Rules of the Superior Courts (Competition Proceedings) 2005* (SI No 130 of 2005).

5.172 The 2005 Rules provide that a party seeking to rely on an expert's evidence must furnish, not later than one month prior to the date of trial in the case of the plaintiff, and not later than seven days prior to the date of trial in the case of the defendant, a written statement outlining the essential elements of that evidence signed and dated by the expert.

**(e) Conclusion**

**(2) Exchange of Expert Reports**

5.173 None of the above mentioned rules providing for exchange of expert reports expressly state the method whereby the reports that are intended to be used are to be exchanged between the parties. However, in the context of personal injuries actions, the Supreme Court in *Kincaid v Aer Lingus Teoranta*,<sup>79</sup> sought to clarify how the exchange of expert reports was to take place in practice. Geoghegan J stated:

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<sup>79</sup> [2003] IESC 31 (9 May 2003).

"The obligation under O. 39, r. 46(1) is to "exchange" scheduled reports. If a party's solicitor ensures that the "exchange" is contemporaneous there is no danger of the so called "abuse" arising."

5.174 The Commission has provisionally concluded that, having regard in particular to the clarification given in the case law discussed to the operation of the 1998 Rules, it might be appropriate to recommend the extension of a requirement to exchange expert reports to apply to all categories of civil claims, and the Commission invites submissions on this.

*5.175 The Commission invites submissions on whether it would be appropriate to recommend the extension of a requirement to exchange expert reports, currently confined to personal injuries actions, to all categories of civil claims.*

**(3) Requisite Contents of the Expert Report**

**(a) Ireland**

5.176 At present there is no set form and structure required for the expert reports and it is at the discretion of the individual expert witness to decide what the contents of these should be.

5.177 The majority of expert reports will be very detailed outlining the investigations made, the opinions reached, and setting out any materials used in the making of the expert report, because an expert report that does not contain sufficient detail is unlikely to be admitted as evidence, and even if it is, its shortcomings are likely to be exposed during cross examination.

5.178 However, other jurisdictions have put down in written format the necessary elements of expert reports. This provides useful guidance for experts and helps to promote consistent high standards in expert reports.

**(b) England**

**(i) Civil Cases**

5.179 In England, Part 35 of the Civil Procedure Rules, the accompanying Practise Direction to Part 35, and the Civil Justice Council's Protocol for the use of Experts in Civil Claims all provide extensive guidance about the requisite contents of expert reports created in cases under the CPR Rules.

**(I) CPR Rule 35.10**

5.180 CPR Rule 35.10, entitled 'contents of reports,' states that an expert report must comply with the requirements set out in the relevant Practice Direction.<sup>80</sup> However CPR r.35.10 then goes on to specifically mention certain

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<sup>80</sup> Civil Procedure Rule 35.10(1).

elements that must be included, which underlines the importance of these elements.

5.181 The expert is required to sign a declaration that he understands and has complied with his or her overriding duty to the court.<sup>81</sup> He or she is also obliged to ensure that the report contains the substance of all materials instructions, written or oral, on the basis of which the report was written.<sup>82</sup>

(II) *Practice Direction Part 35*

5.182 Part 2 of the Practice Direction covers the form and content of the expert's reports. It begins by clarifying that the report is to be addressed to the court and not to the party from whom the expert has received instructions.<sup>83</sup>

5.183 Part 2.2 then expressly enumerates certain mandatory requirements;

"2.2 An expert's report must:

- (1) give details of the expert's qualifications;
- (2) give details of any literature or other material which the expert has relied on in making the report;
- (3) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- (4) make clear which of the facts stated in the report are within the expert's own knowledge;
- (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
- (6) where there is a range of opinion on the matters dealt with in the report –
  - (a) summarise the range of opinion, and
  - (b) give reasons for his own opinion;
- (7) contain a summary of the conclusions reached;
- (8) if the expert is not able to give his opinion without qualification, state the qualification; and

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<sup>81</sup> Civil Procedure Rule 35.10(2)(a)(b).

<sup>82</sup> Civil Procedure Rule 35.10(3).

<sup>83</sup> Practice Direction Part 35 2.1.

(9) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty.”

5.184 Part 2.3 requires the expert to verify the report by signing a declaration of truth and 2.4 states the exact wording of the statement of truth to be used:

“I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion.”

5.185 Finally, Part 2.5 gives further guidance to the expert about the duty owed by an expert witness to act truthfully and with integrity at all times by drawing the expert’s attention to CPR r. 35.14 which sets out the consequences of making a statement without an honest belief in its truth.

*(III) Civil Justice Council Protocol for Experts in Civil Claims*

5.186 Part 13 of this guidance protocol summarises the requirements relating to contents of expert reports outlined in CPR r 35 and the Practice Direction, in particular the overriding duty owed to the court, the requirement to sign a declaration of truth, and the requirement to maintain independence and objectivity at all times when preparing reports.<sup>84</sup>

*(IV) Professional Expert Witness Bodies*

5.187 Furthermore, as explained in the Civil Justice Council’s Protocol, model form expert reports are available for experts from bodies such as the Expert Witness Institute and the Academy of Experts.<sup>85</sup> Such groups also run

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<sup>84</sup> Part 13 Civil Justice Council “Protocol for the Instruction of Experts to Give Evidence in Civil Claims” (June 2005)).

<sup>85</sup> UK Register of Expert Witnesses “Factsheet No 27: Expert Reports: Requirements and Characteristics” Available to members at: [http://www.jspubs.com/Experts/library/lib\\_fsidx.cfm](http://www.jspubs.com/Experts/library/lib_fsidx.cfm); Academy of Experts Available at: <http://www.academy-experts.org>; Expert Witness Institute “Model Form of Reports” Available at: <http://www.ewi.org.uk/lawandyou/lawandyou.asp>. See also the very detailed and helpful *Psychologists as Expert Witnesses: Guidelines and Procedure for England and Wales* (Final Report August 2007). This was a Report commissioned by the Professional Practice Board (PPB) and Research Board (RB) of the British Psychological Society. Produced by the British Psychological Society Expert Witnesses Working Party. Available at [http://www.bps.org.uk/downloadfile.cfm?file\\_uuid=3393E220-1143-DFD0-7EC1-94B653B296A6&ext=pdf](http://www.bps.org.uk/downloadfile.cfm?file_uuid=3393E220-1143-DFD0-7EC1-94B653B296A6&ext=pdf)

training courses for their members which give training on excellence in report writing.<sup>86</sup>

**(ii)      *Criminal Cases***

5.188 The Criminal Procedure Rules also give comprehensive consideration to the requisite content of expert reports created under the Rules. Rule 33.3(1) and (2) provide:

- "(1) An expert's report must –
  - (a) give details of the expert's qualifications, relevant experience and accreditation;
  - (b) give details of any literature or other information which the expert has relied on in making the report;
  - (c) contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
  - (d) make clear which of the facts stated in the report are within the expert's own knowledge;
  - (e) say who carried out any examination, measurement, test or experiment which the expert has used for the report and –
    - (i) give the qualifications, relevant experience and accreditation of that person,
    - (ii) say whether or not the examination, measurement, test or experiment was carried out under the expert's supervision, and
    - (iii) summarise the findings on which the expert relies;
  - (f) where there is a range of opinion on the matters dealt with in the report –
    - (i) summarise the range of opinion, and
    - (ii) give reasons for his own opinion;
  - (g) if the expert is not able to give his opinion without qualification, state the qualification
  - (h) contain a summary of the conclusions reached;
  - (i) contain a statement that the expert understands his duty to the court, and has complied and will continue to comply with that duty; and

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<sup>86</sup> These training courses are discussed in greater detail in Chapter 6.

(j) contain the same declaration of truth as a witness statement."

**(c) Australia**

**(i) Federal Court of Australia**

5.189 The Explanatory Memorandum attached to the Federal Court of Australia's Practice Direction on Expert Evidence's Explanatory Memorandum is interesting as rather than focusing on the form and structure of the expert report it makes some suggestions relating to the substance and content of the report. More specifically, it sets out a number of suggestions for ensuring that the expert report avoids being perceived as lacking objectivity and of being coloured in favour of the instructing party;

"Ways by which an expert witness giving opinion evidence may avoid criticism of partiality include ensuring that the report, or other statement of evidence:

- (a) is clearly expressed and not argumentative in tone;
- (b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- (c) identifies with precision the factual premises upon which the opinion is based;
- (d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
- (e) is confined to the area or areas of the expert's specialised knowledge; and
- (f) identifies any pre-existing relationship (such as that of treating medical practitioner or a firm's accountant) between the author of the report, or his or her firm, company etc, and a party to the litigation."<sup>87</sup>

5.190 The Practice Direction itself also contains considerable detail on the requisite Form of the Expert Evidence in Part 2. This requires the expert report to give details of the expert's qualifications and other literature used in making the report,<sup>88</sup> as well as detailing the qualifications of each person who carried

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<sup>87</sup> Federal Court of Australia "Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court" Version 5 (Current) 6 June 2007.

<sup>88</sup> Federal Court of Australia "Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court" Version 5 (Current) 6 June 2007 at 2.1.

out tests relied on by the expert in the report.<sup>89</sup> Any extrinsic material referred to in the report such as “photographs, plans, calculations, analyses, measurements, survey reports” must be included with the report.<sup>90</sup>

5.191 The expert must clearly state where assumptions of fact have been made,<sup>91</sup> and ensure that all opinions given, along with the reasons for the opinions, are clearly summarised.<sup>92</sup> The expert must clearly state if the opinion is incomplete due to lack of data, provisional, or incomplete or inaccurate without some qualification.<sup>93</sup> The expert must also state where a particular issue falls outside of the expert’s area of expertise.<sup>94</sup>

5.192 A statement of truth is required to be signed at the end of the report and the appropriate wording for this is given:

“At the end of the report the expert should declare that “[the expert] has made all the inquiries that [the expert] believes are desirable and appropriate and that no matters of significance that [the expert] regards as relevant have, to [the expert’s] knowledge, been withheld from the Court.”<sup>95</sup>

**(ii) Australian Capital Territory**

5.193 The ACT Court Procedure Rules 2006 deal with Expert Evidence in Chapter 2 Part 2.12.<sup>96</sup> Although this part does not contain a sub-heading setting out the necessary elements to be contained in the expert report, some guidance

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<sup>89</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.3.

<sup>90</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.11.

<sup>91</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.2.

<sup>92</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.4-2.5

<sup>93</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.9

<sup>94</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.10

<sup>95</sup> Federal Court of Australia “Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court” Version 5 (Current) 6 June 2007 at 2.6

<sup>96</sup> Australian Capital Territory *Court Procedure Rules* 2006 made under the *Court Procedure Act* 2004

is given in Division 2.12.1 Part 1201 which defines expert report for the purpose of the Rules thus indicating what requirements must be complied with in its compilation.

5.194 Rule 1201(2) states that an expert report is a written statement that includes:

- the expert's opinion and facts on which this is based [this requirement is repeated in Rule 1244]
- the substance of the evidence that the expert intends to adduce at evidence in chief stage of the trial process [this requirement is repeated in Rule 1243].

5.195 Part 1202(3) requires the expert witness to agree to be bound by the code of conduct in Schedule 1 of the Rules, and to include an acknowledgement that this code has been read in the text of the expert report.

**(iii) Queensland**

5.196 Section 423 of the Uniform Civil Procedure Rules (UCPR) 1999, which deals with expert evidence, does not go into great detail about the form and structure of the expert reports. In fact, Section 423 does not refer to a 'report' at all but merely states that an expert witness must give a written statement of the expert evidence to the other party.

5.197 Like the ACT rules, the three main requirements of this written statement are that it gives the name and address of the expert, outlines the qualifications of the expert, and that it contains the substance of the evidence to be given by the expert at trial.<sup>97</sup>

**(iv) New South Wales**

5.198 In contrast with the Queensland UCPR Rules, the New South Wales Uniform Civil Procedure Rules 2004 contain extensive guidelines on the form and structure of the expert report. Rule 31.27 entitled Expert Reports provides that an expert's report must include, either in the body of the report or in an annex to the report, the following;

- "(a) the expert's qualifications as an expert on the issue the subject of the report,
- (b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
- (c) the expert's reasons for each opinion expressed,

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<sup>97</sup> Section 423(1) Uniform Civil Procedure Rules 1999 (Qld)

- (d) if applicable, that a particular issue falls outside the expert's field of expertise,
  - (e) any literature or other materials utilised in support of the opinions,
  - (f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
  - (g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
- (2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
- (3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
- (4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subrule (1) as is appropriate."

**(d) Conclusion**

5.199 There is a strong argument to be made that there should be a list of compulsory elements set out which must be present in all reports. The above discussion reveals that other jurisdictions have opted to give extensive guidelines for experts about what they must put in a report which, it is submitted, helps to ensure consistency within the reports making it easier for the court to compare and contrast expert evidence from opposing parties.

5.200 Having a set form and structure also helps to ensure a high standard of report writing across the board and reduces the risk that the evidence of an expert will be rejected as being inadequate. From analysis of the requisite elements identified in other jurisdictions, it would appear that the main requirements are that the report outline the qualifications of the expert, the substance of the evidence to be given by the expert, all opinions and the reasons for the opinion, a statement of veracity relating to the contents of the report, and an agreement to comply with the overriding duty owed to the court.

5.201 On this basis, the Commission has provisionally concluded that there should be a set form and structure for expert reports, which might include the following elements:

- The report must be addressed to the court and not to the party or parties from whom instructions have been received.
- The expert's qualifications and experience should be outlined in detail and relevant certificates of proof attached.
- The terms and conditions of the appointment of the expert witness including the payment arrangements should be explained.
- All material instructions, oral and written, which were given to the expert, and on the basis of which the report was written must be outlined.
- If a potential conflict of interest arises, the facts relating to this should be stated.
- All relevant information relating to the issue, including that which is capable of detracting from the expert's opinion, should be outlined.
- All materials used by the expert in coming to the opinion, clearly distinguishing between matters of fact and matters of opinion.
- Where tests or experiments have been conducted in the course of creating the report all related information must be included such as methodologies, results and details about the individuals and qualifications of those involved in the carrying out of these tests.
- The expert should indicate if the opinion is provisional or conditional on certain factors, or if they believe they cannot give a formal opinion on the issue without further information, or where they believe they cannot make an opinion without qualification.
- A signed declaration that the contents of the report are true and that the expert understands the overriding duty owed to the court and that the report has been created in compliance with this.
- If, subsequent to the completion of a report, an expert changes his or opinion on any material issue in the report, the expert witness must state this in a supplementary report. [Paragraph 5.202]

**5.202** *The Commission provisionally recommends that there should be a set form and structure for expert reports, which might include the following elements:*

- *The report must be addressed to the court and not to the party or parties from whom instructions have been received.*
- *The expert's qualifications and experience should be outlined in detail and relevant certificates of proof attached.*

- *The terms and conditions of the appointment of the expert witness including the payment arrangements should be explained.*
- *All material instructions, oral and written, which were given to the expert, and on the basis of which the report was written must be outlined.*
- *If a potential conflict of interest arises, the facts relating to this should be stated.*
- *All relevant information relating to the issue, including that which is capable of detracting from the expert's opinion, should be outlined.*
- *All materials used by the expert in coming to the opinion, clearly distinguishing between matters of fact and matters of opinion.*
- *Where tests or experiments have been conducted in the course of creating the report all related information must be included such as methodologies, results and details about the individuals and qualifications of those involved in the carrying out of these tests.*
- *The expert should indicate if the opinion is provisional or conditional on certain factors, or if they believe they cannot give a formal opinion on the issue without further information, or where they believe they cannot make an opinion without qualification.*
- *A signed declaration that the contents of the report are true and that the expert understands the overriding duty owed to the court and that the report has been created in compliance with this.*
- *If, subsequent to the completion of a report, an expert changes his or opinion on any material issue in the report, the expert witness must state this in a supplementary report.*

**(4) Producing Expert Reports in Court**

**(a) England**

5.203 Part 35 of the Civil Procedure Rules was innovative in that the underlying premise of admissibility of expert evidence is altered. There is no general provision stating that parties are entitled to call expert witnesses, rather, expert evidence is "restricted to that which is reasonably required to resolve the proceedings."<sup>98</sup> This provision aimed to reflect the overriding function of the rules namely dealing with cases justly and thus expeditiously.

5.204 Another significant provision in this vein is CPR r.35.5 which explains that the expert report, and not an expert witness, is the principal means by

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<sup>98</sup> Civil Procedure Rule 35.1

which expert evidence is to be brought before the court. CPR r35.5(1) provides that expert evidence is to be given in a written report unless the court provides otherwise.<sup>99</sup>

5.205 More significantly, CPR r35.5(2) provides that for claims on the fast track,<sup>100</sup> an expert will not be required to attend a hearing unless the court considers this is necessary in the interests of justice.

5.206 At common law, such a report would have been excluded as evidence unless the expert himself was called in court. However, this provision has been facilitated by the introduction of the *Civil Evidence Act 1995* which states that no evidence shall be excluded on grounds that it is hearsay.<sup>101</sup>

5.207 CPR r.35.5 has greatly reduced the costs and delayed associated with the giving of expert testimony in certain categories of cases. According to a *UK Register of Expert Witnesses* survey, one of the main noted changes in the expert witness marketplace has been the reduction in the number of cases in which experts are required to give oral evidence in court, it being now considered “exceptional” for experts in ‘fast track’ cases to be required to appear in court. The average frequency of court appearances recorded by this annual survey now stands at 3.1 times a year.<sup>102</sup>

**(b) Ireland**

5.208 No mirror provision to CPR r35.5 exists in this jurisdiction. Furthermore, because of the application of the rule against hearsay,<sup>103</sup> expert witnesses may be required to testify orally about the contents of the expert report in court in every case where expert evidence is sought to be adduced.

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<sup>99</sup> Civil Procedure Rule 35.5(1)

<sup>100</sup> The Civil Procedure Rules divides cases into a number of different categories. The ‘small claims track’ deals with cases involving a financial value of £5000 or less (CPR 27). Cases with a value between £5000 and £15000 are usually allocated to the ‘fast track.’ (CPR 28) Claims above £15000 are usually allocated to the ‘multi-track.’ (CPR 29)

<sup>101</sup> Section 1(1)

<sup>102</sup> UK Register of Expert Witnesses “Your Witness Newsletter” (No 49 Sept 2007, JS Publications) at 2

<sup>103</sup> In 1988 the Commission recommended that the rule against hearsay should be abolished in civil cases: *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988). The Commission is currently (December 2008) involved in a new project on the hearsay rule as part of the *Third Programme of Law Reform 2008-2014*, project 8.

5.209 If this was not the case, in less serious cases in the civil courts at least, it might lead to significantly reduced costs for parties to litigation. It would ultimately remain open to both parties to call any author of an expert report to be cross examined if the parties so wish.

5.210 Permitting expert reports, without the need to call experts, where the subject matter of the expertise is peripheral to the issues in the case, and where the parties are not in disagreement about the issues, may prove very beneficial both in terms of cost and terms of delays so it is certainly an issue that should be considered.

5.211 However, as a result of the lack of reform of the hearsay rule, such a reform would involve either creating a new statutory exception to the rule, or a complete overhaul of the rule, perhaps in civil cases only, such as has occurred in the *Civil Evidence Act 1995* in England, unless expert reports were considered records compiled in the ordinary course of the business, as allowed under the *Criminal Evidence Act 1992*.

5.212 In criminal cases, the *Criminal Justice Act 2006* has made some reforms which touch on hearsay. Section 188 inserts a new section (Sec 5(4)(b)(iia) into Section 5 of *Criminal Evidence Act 1992* which provides for an exception to the hearsay rule for certain types of documentation in criminal proceedings (business records). However section 5(3) provides that this exception does not apply to documentation created in the context of a criminal investigation (e.g. forensic records). The 2006 Act now provides that pursuant to S5(4)(b)(iia) the section 3 exclusion will not apply in the case of the forensic science laboratory.

5.213 There are, however, recent indications of tentative reform in this area. The *Rules of the Superior Courts (Commercial Proceedings) 2004* provide that a judge may, in exceptional circumstances and after hearing all of the parties, make an order that the written statement of an expert witness or a witness of fact sought to be relied on by one of the parties shall be treated as the evidence in chief of the witness or expert, provided the statement has been verified on oath by the witness or expert.

5.214 This would appear to allow the judge to order, in exceptional cases, that once an expert has verified the written statement on oath, he is no longer required to give viva voce testimony and the written statement will suffice as the evidence in chief.

5.215 However, the ability of this provision to reduce litigation costs is undermined by the fact that first, the provision expressly refers to "exceptional circumstances" which infers it will not be often used, and second, the expert is still required to come to court to verify the statement on oath, and so will still charge court attendance fees, albeit for a reduced time.

**(c) Conclusion**

5.216 The Commission has concluded that, while reform in this area might produce significant beneficial effect in terms of costs and delays, any reform in the context of expert witnesses should be considered by the Commission in the wider context of its consideration of the hearsay rule generally.<sup>104</sup>

**F Alternative Structures to Party Appointed Experts**

5.217 None of the above suggested reforms would necessitate a radical departure from the current system of giving expert testimony. All of the provisions recommended could be included in a single draft code of guidance for experts and their instructing parties. This would require little effort to put in place but could lead to significant improvements in the standard and quality of expert testimony.

5.218 However, many have argued that such procedural amendments are not sufficient in themselves. Several commentators have expressed the view that the only way of combating the recognised problems with the existing system of giving expert evidence is a complete modification of the current adversarial structure of the giving of expert testimony and its replacement by another system that is considered more conducive to independent and impartial expert evidence.

5.219 As a result, it may be worthwhile considering some of these suggested alternatives, as well as examining the systems used in other jurisdictions to import specialist knowledge into the court besides the party appointed experts used in this jurisdiction.

**(1) Single and Court Appointed Experts**

5.220 Many jurisdictions, including Ireland, have introduced provisions to the effect that in certain categories of cases, only one single expert will be appointed for the purposes of importing expert knowledge into the case.

5.221 In some cases, the court will be given the power to determine the expert to be appointed. In other cases, the court will direct a single expert to be appointed by joint agreement between the parties.

5.222 The theory behind the appointment of a single expert is that such an expert is more likely to present the issue in an objective and impartial light,

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<sup>104</sup> As already mentioned, in 1988 the Commission recommended that the rule against hearsay should be abolished in civil cases: *Report on the Rule Against Hearsay in Civil Cases* (LRC 25-1988). The Commission is currently (December 2008) involved in a new project on the hearsay rule as part of the *Third Programme of Law Reform 2008-2014*.

rather than two experts, both of which may seek to present the issues in the light most favourable to their instructing party.

5.223 However, it is apparent that not all categories of cases will be conducive to the appointment of a single expert. Furthermore, the use of single experts continues to be the subject of considerable debate, and has formed the subject matter of the majority of literature on the subject of expert evidence. As explained by Auld J:

“The same dilemma, most acutely present in an adversarial and jury system, and at its sharpest in criminal trials, has remained the subject of debate...and is still unresolved.”<sup>105</sup>

5.224 It is useful to consider the extent that various jurisdictions have introduced provisions providing for the use of single experts, in an attempt to consider if reforms should be introduced in this jurisdiction.

**(a) Ireland**

5.225 Although there is no general, all-encompassing provision for the appointment of single experts in this jurisdiction, legislative amendment has provided that in certain categories of cases the court has the authority to appoint single experts.

**(i) Personal Injuries Cases**

5.226 Section 20 of the *Civil Liability and Courts Act 2004* permits the court to appoint an independent ‘approved’ expert witness in personal injuries cases, which could be seen as an attempt to follow English reform.<sup>106</sup> Although it remains to be seen more clearly how this will operate in practice, Heffernan discusses some of the potential obstacles that may occur in the operation of s.20, and concludes that the provision is a half-hearted attempt at reform and its lack of clarity indicates that it may have a limited practical effect.<sup>107</sup>

5.227 Similarly, Holland argues that the imposition of ‘neutral’ experts carries the danger that the evidence from such experts will be given excessive weight leading to greater usurpation of the role of the fact finder. He also cites additional expense, practical difficulties in appointing such experts, their remuneration, and what documents they would be entitled to as part of their

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<sup>105</sup> Auld “A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld” (September 2001) at Para 138

<sup>106</sup> For a critical discussion of this provision see D. Holland “Civil Liability & Courts Act 2004: Some Thoughts on Practicalities” [2006] 6 Judicial Studies Institute Journal 43

<sup>107</sup> L. Heffernan “Gauging the Reliability of Expert Witnesses” (2006) 6 JSIJ 140

investigation as being serious difficulties which will hamper the practical working of s.20.<sup>108</sup>

**(ii) Family Law Cases**

5.228 Court appointed experts are also provided for in family law legislation. Section 47 of the *Family Law Act 1995* provides that the court may procure a report (commonly referred to as a “section 47 report”) from such person as it may nominate on any question affecting the family law proceedings in question.

5.229 Similarly, in nullity cases, Order 70 Rule 32 of the *Rules of the Superior Courts 1986* provides for the appointment of a medical inspector or two medical inspectors, normally a psychologist or psychiatrist, to carry out an independent examination of the parties so that the Court might have the benefit of such a professional assessment before determining the issues.

**(iii) Competition Law Cases**

Part IV of Order 63B of the *Rules of the Superior Courts 1986* (inserted by the *Rules of the Superior Courts (Competition Proceedings) 2004*) which governs competition proceedings also provides for the use of court appointed experts in competition cases. Rule 23 provides:

**“IV. Assessors<sup>109</sup>**

23.(1) The Court may, on the application of a party or of its own motion and having heard the parties, appoint a person to assist the court in understanding or clarifying a matter, or evidence in relation to a matter, in respect of which that person (in this rule hereinafter called an “expert”) has skill and experience.

(2) The Court may appoint an expert on the nomination of the parties or that of the court, and on such terms as to the payment of his fees and otherwise as the Court may direct.

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<sup>108</sup> Holland “Civil Liability & Courts Act 2004: Some Thoughts on Practicalities” [2006] 6 JSIJ 43; William Binchy also outlines a number of criticisms of the Section in Binchy & Craven *Civil Liability & Courts Act 2004: Implications for Personal Injury Litigation* (Firstlaw 2005)

<sup>109</sup> The heading for this part of the Rules uses the word ‘assessors,’ although as previously discussed in this Consultation Paper this has been considered to convey a different meaning to expert witnesses. However, the Rules go on to call persons subject to the rule ‘experts’ which indicates the intention that they be expert witnesses as opposed to assessors.

(3) The expert shall attend so much of the hearing and be available thereafter to assist the Court as aforesaid, as the Court shall direct.

(4) Where the expert provides advice or other information to the Court, the Court shall, where it considers it appropriate in the interests of justice, inform the parties of such advice or information and afford each of them an opportunity to make submissions in respect of it."

**(iv) Conclusion**

5.230 Although the use of court appointed experts has been common in the context of family law cases and cases involving the welfare of the child, the provisions in the *Civil Liability and Courts Act 2004* allowing for such experts to be used in personal injuries cases have, it appears, been rarely invoked in practice.

5.231 In England, provisions allowing for the use of court-appointed experts are being used more and more frequently in litigation, and the Commission now turns to examine these provisions.

**(b) England and Wales**

5.232 In recent years, the English civil law system has embraced wide use of single experts in litigation. Furthermore, all available studies show that the use of single experts, in English civil law at least, continues to grow.

**(i) Civil Cases**

5.233 Prior to the introduction of the Civil Procedure Rules, Order 40 of the Rules of the Supreme Court empowered the judge to appoint an expert "on the application of any party." However, in practice this provision was rarely invoked.<sup>110</sup>

**(I) Development of Use of Single Experts**

5.234 In his 1995 Interim Report *Access to Justice* Lord Woolf recommended the introduction of a single expert witness under the control of the court.<sup>111</sup> However, Lord Woolf's recommendation was widely criticised as being anathema to the adversarial system in the submissions made subsequent to this report.

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<sup>110</sup> Dwyer "The Effective Management of Bias in Civil Expert Evidence" (2007) 26 CJQ 57 at 59; Woolf "Access to Justice" (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995)

<sup>111</sup> Woolf "Access to Justice" (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995)

5.235 Nevertheless, in the final report he endorsed this recommendation, but emphasised that under his vision for the use of single experts, it would be the parties as distinct from the court itself who would decide on the expert to be appointed, leaving only residual powers of appointment with the court in the case where the parties cannot reach agreement.<sup>112</sup>

“It needs to be understood that a neutral expert, under the system I am proposing, would still function within a broadly adversarial framework. Wherever possible, the expert would be chosen by agreement between the parties, not imposed by the court. Whether appointed by the parties or by the court, he or she would act on instructions from the parties. The appointment of a neutral expert would not necessarily deprive the parties of the right to cross-examine, or even to call their own experts in addition to the neutral expert if that were justified by the scale of the case. Anyone who gives expert evidence must know that he or she is at risk of being subjected to adversarial procedures, including vigorous cross-examination. This is an essential safeguard to ensure the quality and reliability of evidence.”<sup>113</sup>

(II) *The Civil Procedure Rules*

5.236 The reformed Civil Procedural Rules in England, introduced in the wake of this report, gives the court the power under CPR 35.7 to direct that a single expert give evidence in a particular case in lieu of testifying experts, where two or more parties wish to give evidence on a particular issue.

5.237 Where the parties fail to come to an agreement on a particular expert to be appointed, the court is given the power under CPR r. 35.7.3 to decide how such experts are to be appointed, either from a list prepared by the parties, or in such other manner as the court specifies.

5.238 CPR r. 35.7 provides:

“35.7 Court’s power to direct that evidence is to be given by a single joint expert

(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.

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<sup>112</sup> This aim is reflected in the title of this section, which refers to single ‘joint’ experts, which reiterates that such experts should be, where possible, jointly appointed by the parties.

<sup>113</sup> Woolf, MR Lord (1996) Access to Justice, Final Report, HMSO at [17]

(2) The parties wishing to submit the expert evidence are called ‘the instructing parties’.

(3) Where the instructing parties cannot agree who should be the expert, the court may –

(a) select the expert from a list prepared or identified by the instructing parties; or

(b) direct that the expert be selected in such other manner as the court may direct.”<sup>114</sup>

5.239 CPR r. 35.8 sets out the instructions that can be given by the court prior to the appointment of a single joint expert. It provides:

#### 35.8 Instructions to a single joint expert

(1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, each instructing party may give instructions to the expert.

(2) When an instructing party gives instructions to the expert he must, at the same time, send a copy of the instructions to the other instructing parties.

(3) The court may give directions about –

(a) the payment of the expert’s fees and expenses; and

(b) any inspection, examination or experiments which the expert wishes to carry out.

(4) The court may, before an expert is instructed –

(a) limit the amount that can be paid by way of fees and expenses to the expert; and

(b) direct that the instructing parties pay that amount into court.

(5) Unless the court otherwise directs, the instructing parties are jointly and severally liable (GL) for the payment of the expert’s fees and expenses”<sup>115</sup>

5.240 Part 6 of the Practice Direction accompanying CPR Part 35 is interesting as it states that where the court holds that a single joint expert is to give evidence on a particular issue, but there are several disciplines involved, that such expert should be a leading expert in the dominant discipline and he or

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<sup>114</sup> Civil Procedure Rules r. 35.7

<sup>115</sup> Civil Procedure Rules r. 35.8

she should prepare a general report but is also responsible for incorporating contents of reports from experts in other disciplines relevant to the issue.

(III) *Use of Single Experts*

5.241 In the Auld Review of the English criminal justice system Auld LJ reported that a survey in 2001 indicated that single joint experts were in use 40% of the time.<sup>116</sup> More recently, the UK Register of Expert Witnesses 2007 survey on the practise of expert witnesses found that 73% of experts surveyed had been instructed as single joint experts, a statistic that remains unchanged in the annual survey since 2003.<sup>117</sup>

5.242 Such surveys reveal consistently high use of CPR r.35.7 and are a considerable achievement in the context of reducing costs which was the main goal of the reform.

(IV) *Judicial Commentary on Single Experts*

5.243 There has also been significant judicial commentary in England on the use of single joint experts under the CPR rules. The operation of CPR r.35.7 was discussed in detail in *Daniels v Walker*.<sup>118</sup> Here, a single expert had been appointed to make a medical report which the defendant was not satisfied with. This appeal sought to determine if the defendant was entitled to have his own expert examine the plaintiff in these circumstances.

5.244 The defendant claimed that preventing him from adducing expert evidence on a point in which he disagreed with the opinion of the joint appointed expert came into conflict with Article 6 of the European Convention of Human Rights because it amounted either to barring the whole claim of the defendant or barring an essential or fundamental part of that claim. Lord Woolf vociferously rejected this argument stating:

“Article 6 could not possibly have anything to add to the issue on this appeal. The provisions of the CPR, to which I have referred, make it clear that the obligation on the court is to deal with cases justly. If, having agreed to a joint expert's report a party subsequently wishes to call evidence, and it would be unjust having regard to the overriding objective of the CPR not to allow that party to call that evidence, they must be allowed to call it....It would be unfortunate if case management decisions in this jurisdiction involved the need to

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<sup>116</sup> Auld “A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld” (September 2001) at Para 139

<sup>117</sup> UK Register of Expert Witnesses “Your Witness Newsletter” (No 49 Sept 2007, JS Publications) at 2

<sup>118</sup> [2000] EWCA Civ 508 (3 May 2000)

refer to the learning of the European Court on Human Rights in order for them to be resolved. In my judgment, cases such as this, do not require any consideration of human rights issues, certainly issues under article 6. It would be highly undesirable if the consideration of those issues was made more complex by the injection into them of article 6 style arguments.”<sup>119</sup>

5.245 However, Lord Woolf went on to find that the trial judge had been wrong to prevent the defendant from adducing his own expert evidence on the contentious point. He outlined the correct approach to be taken in situations such as this:

“In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.”

5.246 The interpretation given by Lord Woolf to CPR r.35.7 in this case ensures that the single expert system will not be subjected to the accusation that it denies a party the right to put forward a contrary argument in circumstances where they do not agree with the opinion of the single expert.

5.247 This implies that there are sufficient safeguards in place to allow for each party to give their own opinion, where necessary, but also allowing for an opinion to be given by one expert, where this is possible thus promoting expediency and better case management.

5.248 In *Quarmby Electrical v Trant t/a Trant Construction*<sup>120</sup> Jackson J also praised the use of single experts:

“I fully accept that in the larger construction cases the device of a single joint expert is generally reserved for subordinate issues or relatively uncontroversial matters. However, in the smaller cases, such as this one, if expert assistance is required, it is difficult to see any alternative to the use of a single joint expert in respect of the technical issues. If adversarial experts had been instructed to

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<sup>119</sup> [2000] EWCA Civ 508 (3 May 2000) at [24] and [26]

<sup>120</sup> [2005] EWHC 608 (TCC)

prepare reports and then give oral evidence in the present case, I do not see how there could have been a trial at all. The respective experts' fees and the trial costs would have become prohibitive. In lower value cases such as this one, I commend the use of single joint experts. The judge, of course, remains the decider of the case. He is not bound by everything which the single joint expert may say. However, the judge is able to perform his functions within more sensible costs parameters."

**(ii) Criminal Law**

5.249 In his review of the English Criminal Justice System Auld LJ considered the merits of introducing a system of single experts in criminal cases. He argued that such a measure may go against the right to a fair trial as guaranteed in Article 6 of the European Convention of Human Rights, and would also conflict with the right to lodge a defence.

5.250 He explained that if a court expert gave evidence on an issue that was highly controversial and central to the case at hand, the accused would be required to instruct their own expert to advise them on the advice given by the court expert, but this expert would not be entitled to cross examine the court expert or outline a contrary view in court.

5.251 Furthermore, he argued, where the appointment of a single expert is left to the discretion of the court, judges are more likely to continue to allow the defence or prosecution call their own experts to avoid the danger that the expert ultimately decide the issue, or in some instances, the case itself. This would thus make the provision a "dead letter."<sup>121</sup>

5.252 However, he did acknowledge that where expertise was needed on a matter that was not in issue, or on an issue where the parties were content to have it resolved by a single expert, there is no grounds for not using single experts in these circumstances. Auld LJ therefore recommended that;

"where there is an issue on a matter of importance on which expert evidence is required, the court should not have a power to appoint or select an expert, whether or not it excludes either party from calling its own expert evidence; and

where there is no issue, there is or one in which the parties are content that the matter should be resolved by a single expert, they

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<sup>121</sup> Auld "A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld" (September 2001) at Para 140

should be encouraged to deal with it in that way, agreeing his report or a summary of it as part of the evidence in the case.”<sup>122</sup>

5.253 Therefore, the use of single experts is not as viable in the criminal context, as this is likely to be seen as an infringement of the right of the accused to present his or her own evidence.

5.254 However, Criminal Procedure Rule 33.7 provides that where more than one co-defendant wishes to adduce expert evidence on the same issue, the court may order such evidence to be given by a single expert to be appointed jointly by the co-defendants, or by the court or in a manner directed by the court where the co-defendants fail to agree.

### **(iii) Conclusion**

5.255 Surveys on the use of single experts under the civil procedure rules reveal that the rule is operating very satisfactorily in practice. Furthermore, judicial comment appears to be very much in favour of the use of such a structure.

5.256 The seemingly successful use of single experts in England, in the civil context at least, is very significant in terms of our jurisdiction considering one of the main arguments made against the use of single experts is that it is not consistent with an adversarial system.

5.257 As the English and Irish legal systems are founded on the adversarial model, it is interesting that the English system embraced so easily the use of single experts while in Ireland we appear to be reluctant to do the same.

### **(c) Australia**

5.258 In the wake of considerable commentary on this issue, several Australian jurisdictions have implemented provisions allowing for the use of single or court appointed experts.<sup>123</sup>

5.259 However, it has been acknowledged that as of yet, appointments of single or court appointed experts in general in Australia remain the exception rather than the rule.<sup>124</sup>

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<sup>122</sup> Auld “A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld” (September 2001) at Para 141

<sup>123</sup> See for example Federal Court Rules (Cth) *Statutory Rules 1979 No. 140 as amended* made under the Federal Court of Australia Act 1976 Order 34A r 2; Uniform Civil Procedure Rules 2005(NSW) r. 31.37, r. 31.46; Uniform Civil Procedure Rules 1999 (Qld) r. 425(1); Family Law Rules 2004 (Cth) r. 15.44

5.260 A recent survey of Australian judicial perceptions of expert evidence found a high level of support for single or court appointed experts. Although few respondents had used such measures, most respondents stated that they had not used court-appointed experts either because they had not been asked to do so by the advocates appearing before them or because they had determined such a course not to be necessary.

5.261 However, others stated a reluctance to use them "because of the inroads it was perceived that they would make upon the role of the judge as a "ring-keeper" within the adversarial model."<sup>125</sup>

**(i) New South Wales**

5.262 New South Wales has had provisions allowing for the use of court appointed experts for many years, albeit limited to the context of civil proceedings. There are no existing rules providing for the use of single experts in criminal proceedings.

5.263 Following on from the recommendations of the Law Reform Commission in its Report on Expert Witnesses,<sup>126</sup> the Uniform Civil Procedure Rules 2005 now make a clear distinction is made between single experts jointly appointed by the parties, and single experts appointed by the courts, and different rules govern the two.<sup>127</sup>

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<sup>124</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 3.34; Sperling "Expert Evidence: The Problem of Bias and Other Things" (2000) 4 JR 347

<sup>125</sup> Freckleton, Reddy & Selby "Australian Judicial Perspectives on Expert Evidence; an Empirical Study" (Australian Institute of Judicial Administration, 1999) at 9.13

<sup>126</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) recommendation 8.1

<sup>127</sup> These provisions were inserted by; Uniform Civil Procedure Rules (Amendment No 12) 2006. GG No 175 of 8.12.2006, p 10468 Date of commencement, on gazettal.

(I) *Parties' Single Expert*<sup>128</sup>

5.264 Part 31, Division 2, Subdivision 4 UCPR provides that at any stage of the proceedings, the court may order that an expert be engaged jointly by the parties, where an issue for an expert arises.<sup>129</sup> Where, the parties fail to agree on an expert, the expert will be appointed in accordance with the directions of the court.<sup>130</sup>

5.265 This part also contains rules allowing instructions to be given to a single expert jointly by the parties; allowing the single expert to apply to the court for directions; requiring the single expert to send a copy of his or her report to the parties; allowing the parties to seek clarification of the report; permitting either party to cross examine the expert in court; prohibiting either party from adducing the evidence of any other expert where a single expert has been appointed, and; providing for the remuneration of single experts.

5.266 The Law Reform Commission of New South Wales, who recommended the introduction of a provision allowing for the use of parties' single experts, explained that the primary objective of such a provision is to "assist the court in reaching just decisions by promoting unbiased and representative expert opinion." An additional objective is to minimise costs and delay to the parties to litigation by limiting the amount of expert evidence presented to the court.<sup>131</sup>

(II) *Court Appointed Experts*

5.267 Part 31, Division 2, Subdivision 5 UCPR provides that, at any stage of the proceedings, where an issue for an expert arises, the court may appoint an expert to inquire into and report on the issue and give any instructions as the court sees fit.

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<sup>128</sup> The Law Reform Commission of New South Wales recommended the terminology used for the type of experts envisaged here be "joint expert witnesses." They point out that various jurisdictions use different terminology, for example "single joint expert" in the English CPR rules (where the idea originated), "single expert" in the Queensland Supreme Court, and "agreed expert" in the ACT Supreme Court, however, all of these terms provide for the same type of structure, namely, the appointment of an expert witness, by joint agreement of the parties, to give expert testimony in a case. (New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 7.4-7.7)

<sup>129</sup> Uniform Civil Procedure Rules 2005(NSW) r 31.37(1)

<sup>130</sup> Uniform Civil Procedure Rules 2005(NSW) r 31.37(2)

<sup>131</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 7.7

5.268 This part, like the above part governing parties' single experts, also contains provisions; governing the instructions that can be given to court appointed experts; allowing the expert to apply to the court for instructions; requiring the expert to send a copy of their report to the registrar; allowing the parties to seek clarification on an aspect of the expert's report and to cross examine the expert; prohibiting either party from adducing the evidence of any other expert where a court appointed expert has been appointed, and; providing for the remuneration of single experts.

(III) *Single v Court Appointed Expert*

5.269 In its Report on Expert Witnesses in the 2005, the Law Reform Commission of New South Wales recommended that provisions be incorporated into the UCPR rules allowing for the appointment of 'joint expert witnesses,' a recommendation that led to the insertion of Subdivision 4 UCPR on Parties' Single Experts.<sup>132</sup>

5.270 In the report, the Law Reform Commission explained why such a reform was needed by outlining why the work they envisaged would be done by a single joint expert could not be carried out by a court appointed expert.

5.271 The Commission acknowledged that both concepts are similar as neither has been engaged by only one of the instructing parties. However, they argue that there are fundamental differences between the two, not least in the degrees of control the court and the parties have over both types of experts.

5.272 With a parties' single expert, it is the parties who have responsibility for selecting the expert and managing the process of their appointment including the instructions given to the expert and deciding whether or not to adduce the report of the expert in evidence.

5.273 With a court appointed expert, the court has sole responsibility for choosing the expert (although it can delegate the powers of selection to the parties) and for the instructions to be given to an expert. Furthermore, unless the court orders otherwise, the report of a court appointed expert will be in evidence in any hearing concerning a matter to which it relates, and the parties have no say in this matter.

5.274 The reforms suggested by the Law Reform Commission of New South Wales were adopted almost in their entirety in the UCPR Rules. There is but one notable difference between the Commission's recommendations and the reformed UCPR rules. The Commission had recommended that, in the context of court appointed experts, the rule should be amended so that instead

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<sup>132</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 7.34

of providing that additional expert evidence cannot be adduced except by leave, it would provide that an order can be made prohibiting other expert evidence if there is a special reason for doing so.<sup>133</sup>

5.275 The Commission had argued that such a reform was appropriate because the appointment of an expert by the court would not ordinarily be inconsistent with the parties calling expert evidence of their own. Nevertheless, UCPR r. 31.52 provides;

“Except by leave of the court, a party to proceedings may not adduce evidence of any expert on any issue arising in proceedings if a court-appointed expert has been appointed under this Division in relation to that issue.”<sup>134</sup>

(IV) *Land and Environment Court of New South Wales*

5.276 In contrast with the limited use of single and court appointed experts in other jurisdictions, in recent times, the Land and Environment Court of New South Wales has made extensive use of court appointed experts in environmental planning and protection appeals cases.<sup>135</sup>

5.277 Interestingly, in practice in this court, rather than court discretion in favour of single experts, there is a presumption operating since 2004 that in relation to any issue requiring expert evidence, a court expert is to be appointed.<sup>136</sup>

5.278 Although each case will be decided on its merits, the court will appoint an expert once satisfied that there may be cost savings to the parties or where the issue involved is such that the integrity of the ultimate decision will benefit from the appointment of an expert by the Court.<sup>137</sup>

5.279 Between March 2004 and April 2005, 474 court experts were appointed, all but 10 appointed by mutual agreement between the parties. This

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<sup>133</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 8.37

<sup>134</sup> Uniform Civil Procedure Rules 2005(NSW) r 31.52

<sup>135</sup> New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 3.37

<sup>136</sup> McClellan “Expert Witnesses: Recent Developments in NSW” Paper delivered at the Australasian Conference of Planning and Environmental Courts and Tribunals 2006 (16 September 2006)

<sup>137</sup> McClellan “Expert Evidence – Aces up Your Sleeve?” Paper presented at the Industrial Relations Commission of New South Wales Annual Conference 2006 (20 October 2006)

development has led to a significant reduction in hearing times within the court. Furthermore, feedback on the structure from judges, legal practitioners and experts themselves about their opinion of the quality of the evidence given by court appointed experts consistently found that evidence from persons appointed as court experts “reflects a more thorough and balanced consideration of the issues than was previously the case.”<sup>138</sup>

**(ii) Family Law Court**

5.280 Rule 15.44(1) of the Family Law Rules 2004 (Cth) which govern proceedings in the Family Court of Australia provides for the use of a single expert jointly appointed by the parties, where the parties agree that expert evidence may help to resolve a substantial issue in the case.

5.281 Interestingly, Rule 15.44(2) states that the permission of the court is not needed in order for a party to adduce evidence or tender a report of a single expert.

5.282 The parties must jointly decide on the expert to be appointed. However, where the parties cannot agree, the court has the power to order that the parties confer for the purposes of agreeing, and failing this the court can appoint an expert from a list drawn up by the parties.<sup>139</sup>

5.283 However, Rule 15.45 provides that the court does have the power to order evidence to be given by a single expert, on application or on its own initiative, where it considers this necessary and appropriate.

5.284 Rule 15.54(3) provides that the instructions to be given to single experts must be agreed jointly by the parties and, if an independent children’s lawyer has been appointed in the case, by the independent children’s lawyer. The court can order the parties to confer for the purposes of agreeing on instructions to be given to the single expert.<sup>140</sup>

5.285 These rules reveal that the court has very little input into the use of single experts in the Family Court of Australia. While the court does have the power to order evidence to be given by a single expert and can make orders requiring the parties to confer on conditions governing their appointment,<sup>141</sup> for the most part it is the parties who decide on the use of a single expert, on who

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<sup>138</sup> McClellan “Expert Witnesses – The Experience of the Land and Environment Court of New South Wales” Speech given at the *XIX Biennial Lawasi Conference* (20-24 March 2005 Gold Coast) at 14

<sup>139</sup> Rule 15.46(a)-(c)

<sup>140</sup> Rule 15.46 (e)

<sup>141</sup> For the range of orders the court can make see Rule 15.46

to appoint, the instructions to be given, and whether or not to adduce the evidence of such expert.

**(iii) Queensland**

5.286 The Uniform Civil Procedure Rules 1999 (Qld) also provide for the use of Court Appointed Experts in civil proceedings in the Queensland courts.

5.287 Section 425(1) gives the court the power to appoint a court expert, from a list of experts kept by the court or otherwise, for the purposes of court proceedings. Section 425(3) further gives the court the power to require the parties to provide a list of experts for the purposes of appointment as a court expert.

5.288 Section 428 provides that where expert evidence has been given by a court expert, a party may not adduce further expert evidence on the same matter without the leave of the court.

5.289 These rules give considerable power to the court to control the expert evidence of the court expert, and in this way, provide a sharp contrast with the Family Law Rules where the expert retains most control.

**(iv) Conclusion**

5.290 An examination of the various Australian jurisdictions shows a very clear distinction between two types of single experts; those jointly appointed by the parties, and court appointed experts.

5.291 While some jurisdictions for example New South Wales, have provisions allowing for both these type of experts, other jurisdictions only provide for party appointed single experts, with the court retaining a residual discretion to appoint an expert where the parties cannot agree on a single expert.

5.292 This is significant because, it is submitted; allowing a single expert to be appointed by the parties retains the adversarial nature of proceedings and removes one of the main criticisms of the system of single experts, but also reduces costs and delays in litigation by preventing expert evidence on the same issue being repeated by experts for both sides.

**(d) The Use of Single and Court Appointed Experts: Conclusion**

5.293 The successful use of single experts in other jurisdictions implies that it is a practice that should possibly be adopted here, albeit in certain categories of cases only.

5.294 It is clear that it may be virtually impossible to recommend the use of single experts in criminal cases, as the constitutional right to a fair trial would likely be interpreted as necessitating the ability of each party to present their

own evidence and the right to present evidence contrary to that put forward by the single expert.

5.295 However, less criticism may attach to the suggestion that single experts be appointed in cases involving non contentious issues for which expert testimony is needed.

5.296 However, it must also be noted that a system whereby the parties jointly agree on a single expert, as opposed to a single expert chosen and appointed by the court, is to be preferred. Furthermore, it is clear that both parties must retain the ability to cross examine the expert if the adversarial character of the system is to be retained.

5.297 As already mentioned, there is a plethora of literature both advocating and opposing the use of single or court appointed experts.<sup>142</sup> The main arguments made will now be summarised.

#### **(i) Advantages**

- The use of single or court appointed experts is the best possible way of removing the problem of adversarial bias in the giving of expert testimony. Having one expert appointed by the court and not by the parties would remove any perception of bias on the part of the expert that would be generated by his desire to do right by the instructing party. The evidence given by a single expert will be more likely to be considered as an objective, reasonable, representation of professional opinion on the issue than that of a party appointed expert, whose views may have been coloured by his affiliation with the instructing party.
- It would also have the effect of reducing the excess costs and delays generated by experts who have different opinions battling it out in court. Time and money will be saved by the reduction in the number of experts, the removal of time spent by party experts exchanging reports,

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<sup>142</sup> See *inter alia* Australian Law Reform Commission “Adversarial Background Paper 6 Experts” (1999); McClellan “Expert Witnesses – The Experience of the Land and Environment Court of New South Wales” Speech given at the XIX Biennial Lawasi Conference (20-24 March 2005 Gold Coast) at 14; Woolf “Access to Justice” (Interim Report to the Lord Chancellor on the civil justice system in England and Wales, HMSO, London, 1995) and Woolf, MR Lord (1996) Access to Justice, Final Report, HMSO; Sperling “Expert Evidence: The Problem of Bias and Other Things” (2000) 4 JR 347; Family Court of Australia “The Changing Face of the Expert Witness” (2002) at 14 Cited in New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 3.35; Howard “The Neutral Expert: A Plausible Threat to Justice” (1991) Crim. L.R. 98; New South Wales Law Reform Commission *Expert Witnesses* (Report 109, 2005) at 7.14-7.33

the reduction in time spent giving expert evidence and the fact that the court has some control over experts' fees.

- Where two parties agree on the appointment of a joint expert, this expert is likely to recommend settlement, which may limit court times and reduce costs for both parties.
- It would reduce the possibility of the situation occurring as has in the US where both parties 'shop' for expert witnesses who may be more favourable to their claim and may help prevent potential conflicts of interest.
- If the expert reports to the court early in the proceedings, this may result in an early resolution of the dispute.
- The expert is not being paid by any one party and therefore is more likely to be impartial.
- Expert witnesses will not be placed in an adversarial role and the court will not be forced to choose between the opinions of two opposing experts.
- Another significant advantage of a court expert in merit appeals is that the parties have an opportunity to discuss with an expert, who has no brief for both sides, and who both sides have confidence in, the merits and problems of the particular proposal.
- Although there are issues and instances where the appointment of a single or court appointed expert will not be appropriate, this should be a matter for the court to consider when to allow such appointments, and should not be used as an argument against introducing such provisions at all.

#### **(ii) Disadvantages**

- The appointment by the court of its own expert witness is contrary to the fundamental premise of the adversarial system. Such a system does not facilitate the fact that, under the adversarial model, the contesting parties have the right to gather evidence and present their own case and to call witnesses of their own choice to support that case, in order to improve the likelihood of the court finding in their favour. As pointed out by *JF v DPP*,<sup>143</sup>

“...the mere presence, actual or anticipated, of an expert on the other side provides a wholesome discipline.”<sup>144</sup>

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<sup>143</sup> [2005] IESC 24 (26 April 2005)

<sup>144</sup> [2005] IESC 24 (26 April 2005)

- With such a system, there is a danger that the court might place undue reliance on the evidence of the court expert, with the result that it will be the court expert and not the judge who will in practice decide the case thus usurping the role of the judge.
- If the parties are permitted to call their own ‘shadow’ experts in order to reduce that concern, the appointment of a court expert in addition to the parties own experts may cause delay and an increase in costs without any countervailing benefit;
- Even if parties are precluded from calling their own experts, they would still have to incur the cost of retaining experts to advise them on the likely outcome of the proceedings and to assist in preparation for cross-examination of the court expert, so that the saving in costs might be less than anticipated.
- A court expert may be unable to deal with the situation where there are different schools of thought, that is, where more than one acceptable view on a particular issue is held in the professional community.
- Where the issue is novel it may be the subject of intense debate and contention within the professional community, with a single expert, there is a risk that such expert may only present one side of this debate, depending on their viewpoint.
- The advantages in terms of cost and delays that may be gained by the use of a single expert may be offset in other ways. Where the issue which is to be the subject matter of the evidence of a single expert is particularly contentious, technical or specialised, the parties may have trouble agreeing on a single expert to be appointed which may lead to delays created by the negotiations on this issue. Further costs may be accrued where each party enlist the aid of additional experts to advise them on the merits and appropriateness of the single expert suggested by the other party to be appointed.
- There is a lack of certainty that a court-appointed expert will be any more objective than a party appointed one. As already discussed, the causes of bias are complex, and not all are generated by allegiance to the instructing party. Howard expressed doubt at the assertion that single or court appointed experts are likely to reduce the possibility of bias;<sup>145</sup>

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<sup>145</sup> Howard “The Neutral Expert: A Plausible Threat to Justice” (1991) Crim. L.R. 98 at 101

“...it is slightly mysterious that it should be thought that experts are venal mountebanks when engaged by the parties but transformed into paragons of objectivity when employed by the courts.”

- In his view, the adversarial system is more suited to dealing with the bias problem than the inquisitorial as it requires both parties to conduct a thorough analysis of the other's evidence in the hopes of showing it to be misleading.

“Expert evidence produced under the dual pressures of expectation and the threat of attack by the opposition is likely to be superior to that produced by one of a corps of supposedly disinterested individuals drawn from a list approved by the bureaucracy.”<sup>146</sup>

- There is a danger that the selection criteria for court appointed experts will result in the situation whereby only those with safe or popular views would be appointed as neutral experts to assist the court.
- The right to a fair trial is jeopardised in circumstances where the expert's report is kept from the parties thus preventing them from challenging or testing its contents. Therefore, to prevent this it would be necessary to allow each party to introduce their own expert in order to rebut the court expert's evidence – this leads to increase costs, delay and inefficiency.
- It is also arguable that, in such a system, the court expert would be immune from direct challenge, regardless of his arguments, and the party's own expert would effectively be 'gagged.' As Howard argues;

“The public debate of the parties' respective cases would be supplanted by a decision, reached in secret, on the basis of unidentified information, by a person whose authority had been established in advance, and whose views and competence could not be challenged by the parties.”<sup>147</sup>

### **(iii) Conclusion**

5.298 In light of the above, it is clear that the introduction of a provision allowing for the appointment of a single expert would involve a significant change in current law and practice. It may be that some tangible change to the current law could be made to facilitate parties to decide jointly on the

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<sup>146</sup> Howard “The Neutral Expert: A Plausible Threat to Justice” (1991) Crim. L.R. 98 at 101

<sup>147</sup> Howard “The Neutral Expert: A Plausible Threat to Justice” (1991) Crim. L.R. 98 at 105

appropriate expert to be appointed, rather than being imposed by the court. The Commission would welcome submissions on this matter.

5.299 *The Commission invites submissions on whether parties could be facilitated to decide jointly on an appropriate expert to be appointed, rather than having a single expert being imposed by the court.*

**(2) Panels of Experts or Mixed Panels**

5.300 Along with encouraging the use of single or court appointed experts, many proponents of change also propose different structures based on the idea of having an assembly of experts, to use their collective wisdom to give an expert opinion. There are various forms this could take;

**(a) Panel of Experts**

5.301 There has been considerable support for the adoption, in some cases at least, of the Australian Competition Tribunal model which consists of a panel, or ‘hot tub’ of opposing experts who debate the issue amongst themselves without initial intervention from lawyers.<sup>148</sup>

5.302 Under this structure, the opposing experts meet, without initial intervention from legal counsel, and debate the issues amongst themselves.<sup>149</sup> The procedure is best summarised by Heerey J:

“This procedure involves the parties’ experts giving evidence at the same time. Written statements will have been filed prior to trial. After all the lay evidence on both sides has been given, the experts are sworn in and sit in the witness box – or at a suitably large table which is treated notionally as the witness box. They do not literally sit in a hot tub. Constraints of propriety and court design dictate a less exciting solution. A day or so previously, each expert will have filed a brief summary of his or her position in the light of all the evidence so far. In the box the plaintiff’s expert will give a brief oral exposition, typically for 10 minutes or so. Then the defendant’s expert will ask the plaintiff’s expert questions, that is to say directly, without the intervention of counsel. Then the process is reversed. In effect, a brief colloquium takes place. Finally, each expert gives a brief

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<sup>148</sup> See Heerey “Expert Evidence: The Australian Experience” (2001) 7 (3) BR 166; O’Sullivan “A Hot Tub for Expert Witnesses” (2004) 4 JSIJ 1; McInnis “Expert Evidence and the Federal Courts – Current Developments” Paper presented at *Experts and Lawyers: Surviving the Brave New World Conference* (October 2005, Broome, Western Australia)

<sup>149</sup> O’Sullivan “A Hot Tub for Expert Witnesses” (2004) 4 JSIJ 1

summary. When all this is completed, counsel cross-examine and re-examine in the conventional way.”<sup>150</sup>

5.303 In *Quantas Airways Ltd*<sup>151</sup> the Tribunal attempted to explain the way in which it was envisaged the panel would operate, and the role of expert evidence within the Competition Tribunal;

“The role of expert witnesses appearing before the Tribunal is to instruct on areas of specialist knowledge in a manner that is ultimately designed to inform rather than to advocate a particular view. Obviously, parties will call upon experts whose opinions support their view of the case. However, it is not appropriate for an expert witness to act as an advocate for the instructing party at all costs, and professional witnesses should be willing to concede points which, whilst not advancing the case of the party engaging them, they believe to be open as a fair and reasonable assessment on the material before them. The Tribunal will be assisted by expert witnesses who can clearly explain the relevant issues and concepts and can pinpoint the differences between opinions in the profession and the reasons for such differences so that an informed decision can be made as to which opinion should be accepted on the available evidence. The Tribunal will not be assisted by experts who uncritically push a party line, avoid challenging questions, and seek to obscure the real issues in contention.”<sup>152</sup>

5.304 However, the panel of experts procedure has been criticised by some commentators, and despite its proponents, has been largely confined to the Competition Tribunal.<sup>153</sup> Davies LJ attempted to explain why the ‘hot tub’ concept has not been adopted by other courts within Australia, or indeed, internationally<sup>154</sup>

“Heerey J’s view that an expert’s adversarial bias is often exposed in the forensic process shows, in my respectful opinion, a naïve but unfounded faith in the adversarial system. One of two possible

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<sup>150</sup> Heerey “Expert Evidence: The Australian Experience” (2002) 7 (3) BR 166

<sup>151</sup> [2004] ACompT 9 (12 October 2004)

<sup>152</sup> [2004] ACompT 9 (12 October 2004) at [216]

<sup>153</sup> McInnis “Expert Evidence and the Federal Courts – Current Developments” Paper presented at *Experts and Lawyers: Surviving the Brave New World* Conference (October 2005, Broome, Western Australia)

<sup>154</sup> Davies “Recent Australian Developments: A Response to Peter Heerey” [2003] 23 CJQ 396

consequences is much more likely at the end of that process. The first is that the judge will be left with two opposed but apparently convincing opinions by equally well-qualified experts, neither of them has been shaken in the process. The second and, unfortunately more likely, consequence is that the judge will be unwittingly convinced by the more articulate and apparently authoritative personality. The likelihood of this latter consequence increases as the complexity of the question in issue increases.

So, in hindsight, after the introduction of the reforms I have outlined, the Hot Tub method seemed, to many, to be too cumbersome, too expensive and too adversarial. Hence, the failure to adopt it in other courts.”<sup>155</sup>

5.305 McInnis has suggested that despite its shortcomings, the procedure has its advantages. He argues that it could be an appropriate system to introduce at a pre-trial stage; as a preliminary step prior to mediation or at the least to narrow contentious issues at trial.<sup>156</sup>

**(b) Mixed Panel**

5.306 Another alternative which could be introduced in certain categories of cases could be a procedure whereby the issues in a case would be decided by a mixed panel composed of both a number of experts in the particular area and members of the judiciary, thus combining both inquisitorial and adversarial elements into a new structure.

5.307 This is the approach taken in Australia in the South Australia Environment, Resources and Development Court in cases involving land use, environmental protection and management.<sup>157</sup> Here, hearings are conducted by a court which is made up of both judges and experts in areas relevant to the court's jurisdiction, such as planner, engineers, architects and scientists, who are referred to as Commissioners.<sup>158</sup>

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<sup>155</sup> Davies “Recent Australian Developments: A Response to Peter Heerey” [2003] 23 CJQ 400

<sup>156</sup> McInnis “Expert Evidence and the Federal Courts – Current Developments” Paper presented at *Experts and Lawyers: Surviving the Brave New World* Conference (October 2005, Broome, Western Australia)

<sup>157</sup> This court was established in 1993 under the *Environment, Resources and Development Court Act 1993*

<sup>158</sup> Hodgson “The Role of the Expert Witness – A Court Perspective” Paper delivered to the *Planning Education Foundation Seminar “Evidence, Experts and Experience”* (15 October 2004, Adelaide)

5.308 The court is composed of three full time Commissioners who are not lawyers but who have specialist knowledge in town planning, and a number of part time Commissioners with expertise in other relevant areas who can be called where needed. The Court also sits with two full time judges.<sup>159</sup>

**(c) Conclusion**

5.309 As in the case of the single expert, the Commission would welcome submissions on whether panels of experts or mixed panels should be used in certain types of cases.

5.310 *The Commission welcomes submissions on whether panels of experts or mixed panels should be used in certain types of cases.*

**(3) Special Jury**

5.311 The concept of the special jury as it has been used throughout history was discussed in Chapter One. Here it was explained that although various types of special juries were used over the centuries, the use of a jury composed of members specially chosen because of their specialised knowledge about the issues involved in the case ceased in Ireland in the 20<sup>th</sup> century, principally due to concerns it represented “survival of class legislation,” due to the property qualification.<sup>160</sup>

5.312 However, it has been recommended by many academics that the reintroduction of a special jury in cases of a particularly complex or specialised nature, has considerable merit.<sup>161</sup>

**(i) Advantages**

5.313 The specialist knowledge of the jury would ensure that the experts are best placed to consider the issues in the case, particularly in cases involving particularly esoteric concepts and issues.

5.314 Such a system would lessen the likelihood of jury confusion or misunderstanding in relation to the central issues involved in the case, and increase the likelihood of the jury reaching a well reasoned and principled decision.

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<sup>159</sup> See “Courts Administration Authority” Available at:  
<http://www.courts.sa.gov.au/courts/environment/index.html>.

<sup>160</sup> 18 Dáil Debates, (15 February 1927), Orders of the Day. Juries Bill 1927 – Second Stage (Cited in Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19 at 41)

<sup>161</sup> See *inter alia* Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19; Jones “The Case for Special Juries in Complex Civil Litigation” (1980) 89 Yale LJ 1155;

5.315 Furthermore, the advantages of trial by jury as opposed to trial by judge alone would be preserved ensuring that the verdict reached represents the views of a body of reasoned individuals and protects against “the professional or perhaps overconditioned or biased response of a judge.”<sup>162</sup>

**(ii) Disadvantages**

5.316 The disadvantage of this is that, particularly in a jurisdiction as small as Ireland, where the subject matter in question is so technical as to warrant the use of a special jury, there is likely to be a limited number of candidates who could sit on the jury.

5.317 The relative sparsity of the pool of potential experts means that those who are qualified to sit on a particular jury, are likely to have some acquaintance with the parties to the litigation, and as jury room deliberations are not accessible, the potential for bias within the judgment of the special jury would be undetectable.

5.318 Furthermore, seeking twelve experts in a particular area who are willing to take several weeks out of their professional careers to sit on a jury is likely to prove impossible.

5.319 Furthermore, such a jury would be unlikely to be considered as complying with the Constitutional right under Article 38 to trial by jury by one’s peers as a panel of experts might not be considered as trial by a fair cross section of one’s peers. In *deBurca and Anderson v Attorney General*<sup>163</sup> Henchy J interpreted the constitutional meaning of “jury” and concluded:

“...the jury must be drawn from a pool broadly representative of the community so that its verdict will be stamped with the fairness and acceptability of a genuinely diffused community decision.”<sup>164</sup>

5.320 Therefore, it is probable that a Constitutional amendment would necessary in order to introduce any system of special juries.<sup>165</sup>

5.321 In its report on a Fiscal Prosecutor and a Revenue Court the Law Reform Commission considered the reform option of the introduction of a

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<sup>162</sup> Taylor v Louisiana 419 US 522, 530 (1975) Cited in: Jones “The Case for Special Juries in Complex Civil Litigation” (1980) 89 Yale LJ 1155 at 1159

<sup>163</sup> [1976] IR 38

<sup>164</sup> [1976] IR 38 at 57

<sup>165</sup> Howlin “Special Juries: A Solution to the Expert Witness?” (2004) 12 ISLR 19 at 46

special Revenue Court composed of experts in an area other than law, for example in tax or accounting.<sup>166</sup>

5.322 The Commission concluded that it may be considered unconstitutional if the adjudicator in a trial did not have a legal qualification. Furthermore, individuals not legally qualified would not satisfy the qualifications for appointment as a judge as set down by statute, and so their relevant experience would be doubtful.

**(iii) Conclusion**

5.323 *The Commission would not recommend the introduction of a system whereby special juries are to be used in any category of cases.*

**(4) Court Assessors or Advisors**

5.324 As already discussed in Chapter One, there is legislation currently in force in this jurisdiction providing for the use of assessors, as opposed to expert witnesses, in certain categories of cases.

5.325 Nevertheless, the use of assessors is rare in practice, and they are predominantly confined to admiralty proceedings.

5.326 However, a number of academics have suggested that increased use of assessors, who would act not as witnesses giving evidence in court, but as advisors to the judge, assisting him or her to understand technical concepts, is a viable replacement of the current system of party appointed expert witnesses.<sup>167</sup>

5.327 An assessor would differ from a court appointed expert in a number of ways. The assessor would be appointed by the court for the purposes of assisting the court by giving it specialist knowledge on the issues involved in the case. In this regard, the assessor would not be considered a witness so would not be required to swear an oath to the court.

5.328 Furthermore, the information given to the court would not be available to the parties and the parties would not be able to cross examine the expert assessor on the information given. The parties therefore have no way of assessing the independence or potential for bias on the part of the assessor.

5.329 It is also arguable that the use of assessors is unlikely to lead to reduced costs as both parties are likely to continue to recruit their own experts

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<sup>166</sup> Law Reform Commission "Report on a Fiscal Prosecutor and the Revenue Court" (LRC 72-2004) at 8.31

<sup>167</sup> See for example Heerey "Expert Evidence: The Australian Experience" (2001) 7 (3) BR 166

or advisors if they are not entitled to have regard to the information given by the assessor in court.

5.330 Based on these factors, increasing the use of assessors in either criminal or civil litigation is unlikely to be considered beneficial.

5.331 It is submitted that a better way to increase the knowledge of the judiciary in technical or scientific matters is to encourage members of the judiciary to attend continuing professional development courses in such areas, rather than the use of specialist advisors in individual cases who remain unaccountable to either party or to the court.

5.332 As mentioned in Chapter 1, in the patent infringement case *Kirin-Amgen Inc and ors v. Hoechst Marion Roussel Ltd and Ors*<sup>168</sup> the House of Lords were, with the consent of the parties, given a series of seminars *in camera* prior to the case by a Professor of Biochemistry at Oxford University to explain the relevant aspects of recombinant DNA technology.

5.333 This it, is submitted, is a preferable approach to the use of assessors, as the information given in a series of seminars is likely to be generalised information on the subject and not specifically applied to the facts of the case at hand so will thus avoid the taint of bias of the person providing the expert information.

5.334 Furthermore, members of the judiciary are likely to gain more from attending such seminars as the knowledge gained will stand to them in future cases, rather than the arbitrary knowledge gained by an assessor from a specific set of facts of an individual case.

5.335 *The Commission does not recommend that the use of court assessors should be encouraged in a wide variety of cases.*

5.336 *The Commission does recommend that members of the judiciary should be encouraged to attend formal training in complex subjects that commonly arise in cases before them, such as forensic science, accounting and engineering.*

## **G Conclusion**

5.337 This chapter has discussed a range of procedural reforms that could have significant beneficial effects on the current expert testimony structure.

5.338 Although some of these suggested reforms are quite radical and far reaching, others would involve little effort to implement but their effects could be

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<sup>168</sup> [2004] UKHL 46

significant. The Commission therefore recommends that procedural reforms similar to those outlined above be introduced where possible.

5.339 The following chapter will discuss a range of reforms which aim at improving the quality of expert testimony through education and regulation of those who give such evidence.

## **CHAPTER 6      SANCTIONS, ACCOUNTABILITY AND GOVERNANCE OF EXPERT WITNESSES**

### **A            Introduction**

6.01       As demonstrated in the previous chapters, there are many cases where the expert's failure to carry out their duties, or the expert's negligence in the giving of expert evidence, have had onerous implications for one of the parties. As a result, it is clearly necessary to consider ways to prevent undesirable behaviour on the part of experts and to decide on the consequences where an expert has been found to have been acting negligently or inappropriately.

6.02       Reducing the prevalence of bias, and promoting high standards amongst expert witnesses, is clearly best achieved by a two pronged approach; clear instruction for experts on the standards expected of them in their capacity as expert witnesses, coupled with the imposition of sanctions on experts for negligence or breach of duty.

6.03       However, it must be borne in mind that the introduction of a range of sanctions could also have negative consequences, for example, the creation of additional delays or expenses, which could go against the interest of doing justice between the parties. Any suggested reforms must therefore not impose excessive burdens on parties to litigation which may negate the benefits of their introduction.

6.04       Such reforms will not however address all problems that have been identified with the system of expert testimony. Indeed the warning of Hallett J must be borne in mind;

"However good the training, however good the system of accreditation, however vigilant the professional associations, miscarriages of justice have undoubtedly occurred and will continue to occur unless expert evidence is put into its proper context; namely,

it is an opinion based hopefully on fact and science but nevertheless an opinion.”<sup>1</sup>

6.05 Part B of this chapter discusses the merits of introducing a system of formalised training and accreditation of experts and consider what would be the most appropriate forum for introducing such a system. Part C goes on to consider whether or not an expert witness regulatory body or disciplinary body is needed and if so what form should this take. Part D considers the extent of the existence of an immunity from suit for expert witnesses and questions whether expert witnesses should be entitled to avail of such an immunity. Part E looks at the range of alternative existing remedies that can be used where an expert has acted negligently or wrongfully.

## **B Training & Accreditation of Experts**

6.06 One of the principal concerns caused by the absence of set requirements or standards in terms of qualifications or experience to be considered an ‘expert’ for the purposes of giving expert testimony is that the current process for determining expertise; questioning during examination-in-chief and cross-examination; may not be sufficient to prevent persons purporting to be an expert from giving expert testimony on a subject matter on which they are not suitable to testify.

6.07 Although it has been acknowledged earlier that the formal qualifications of the expert will greatly assist the trial judge in determining expertise, assessing someone’s standard of specialisation in an area governed by no formal accreditation, study or training and where the person has gained their expertise through experience alone, may prove difficult.

6.08 The potential difficulties become clear when it is considered that the judge is ultimately given the task of evaluating the skill and ability of the witness to give evidence on a subject, where the reason such evidence is being admitted is because the subject is outside the range of knowledge of the judge.

### **(1) *Fraudulent ‘Expertise’***

6.09 The most serious potential consequence of the lack of formal regulation of persons purporting to be an expert is demonstrated by the English case in 2005 of one Barian Baluchi.<sup>2</sup> Here, a taxi driver who fraudulently

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<sup>1</sup> Hallett J “Expert Witnesses in the Courts of England and Wales” (2005) ALJ 288 at 295

<sup>2</sup> See: “Bogus Doctor Jailed for 10 Years” BBC News 26 January 2005 Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/4209509.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/4209509.stm).

claimed to be a consultant psychiatrist was convicted on more than 30 charges of misrepresenting himself as a medical expert.

6.10 A similar incident occurred in 2007 in England where one Gene Morrison was found guilty of perjury and obtaining money by false pretences where he fabricated a fake degree certificate from a fictitious university and posed as a forensic psychologist without proper qualifications to appear in court giving expert advice in payment from solicitors.<sup>3</sup>

6.11 Although such instances are undoubtedly rare, these cases do expose the possibility that if the giving of expert witness testimony is viewed as an increasingly lucrative career, it could prove enticing to individuals to claim they are an expert in a particular subject area in order to be hired by a party to litigation where in reality they have no such expertise.

6.12 Where an individual testifies as an expert witness in a trial and is later exposed as a fraud, this will necessarily have serious implications for the parties to the action. In the wake of the conviction of Morrison, the police were required to conduct a thorough review of the 700 or more cases in which he had given evidence. The potential for retrials, leading to additional delay and expense, not to mention miscarriages of justice, is considerable.

6.13 There is a certain merit therefore to the suggestion that some form of professional regulation of expert witnesses would be beneficial in guaranteeing a high level of expertise and in screening potential charlatans set on abuse of the expert witness system for profit.

## **(2) Existing Examples of Training & Accreditation**

6.14 Many commentators have spoken about the merits of introducing a system whereby any person wishing to give expert evidence would be required to undergo mandatory training with a dedicated training body for expert witnesses.

6.15 Any person who undergoes such training would be formally accredited with having passed the necessary level of training and this training

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<sup>3</sup> See; "Fraudulent Forensic Expert Jailed" *BBC News* 22 February 2007 Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/manchester/6386069.stm](http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm); "Bogus' Psychologist Admits Lying to Police" *Manchester Evening News* 7 February 2007 Available at; [http://www.manchestereveningnews.co.uk/news/s/235/235509\\_bogus\\_psychologist\\_admits\\_lying\\_to\\_police.html](http://www.manchestereveningnews.co.uk/news/s/235/235509_bogus_psychologist_admits_lying_to_police.html); Wilson "The Trouble with Experts" *The Guardian* 25 February 2007 Available at: [http://commentisfree.guardian.co.uk/david\\_wilson/2007/02/bea\\_campbell\\_in\\_these.html](http://commentisfree.guardian.co.uk/david_wilson/2007/02/bea_campbell_in_these.html).

and accreditation would be a necessary requirement in order to be permitted to give expert evidence in court. This would, in theory, reduce delays in the trial process as the expert would not be required to prove their expertise in court; the formal accreditation would be sufficient proof.

6.16 Such a system could also permit special considerations to apply in certain instances, where the expert is seeking to give evidence on a one-off basis. For example, experts could be permitted to act in a set number of cases before evidence of formal training and accreditation becomes necessary.

**(a) Ireland**

6.17 In this jurisdiction there is no mandatory requirement for persons wishing to act as expert witnesses to undergo any formalised training course. However, there are a number of ways in which expert witnesses can be educated about the requirements of their role in Ireland.

6.18 For example, a range of training courses are commercially available in courses such as Courtroom Skills, Advanced Cross Examination Skills and Excellence in Report Writing to professionals who hold themselves out as experts in their profession.<sup>4</sup> In the civil context, it would appear that medical experts make up the bulk of those who give expert evidence in court, notably physiotherapists, occupational therapists, psychologists. In addition, in recent years accountants and computer analysts have been required as forensic witnesses. In the criminal context, forensic scientists, officials from the State laboratories and public analysts are common expert witnesses who require training.

6.19 Furthermore, various professional bodies governing different industry sectors often provide their own training courses for professionals within the particular discipline who may be called upon to give expert evidence in a legal forum. Such courses educate professionals in courtroom skills and excellence in report writing, and help to educate the professionals in how best to convey their expert knowledge in easily understood terms.

6.20 Finally, many courses provided by Universities and Institutes of Technology in subject areas which are likely to be the subject matter of expert testimony are beginning to include a module on the role of expert witnesses as part of the course. For example, the B.Sc in Forensic Science and Investigation provided by the Institute of Technology, Sligo, places a strong emphasis on scientific communication and the role of the expert witness.<sup>5</sup>

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<sup>4</sup> See: [www.witnessstraining.ie](http://www.witnessstraining.ie) (La Touche Bond).

<sup>5</sup> See [www.itsligo.ie](http://www.itsligo.ie).

6.21 These courses are a valuable source for experts as they are normally provided by solicitors or barristers or other persons well acquainted with the legal system and the structure of the expert testimony system. However no formal qualification is earned by attendance at these courses and completion of a training course does not at present lead to any professional certification or accreditation that denotes that a certain standard of understanding has been gained by the expert witness.

6.22 The closest structures akin to a professionally accredited body for expert witnesses currently in place are the publishers who compile a directory of experts such as the Expert Witness Directory of Ireland.<sup>6</sup> All of the expert witnesses listed in this directory have provided two professional references from practising solicitors or barristers who have instructed them within the preceding 3 years. The reference form asks the referee to rate the expert from very good to very poor on aspects of an expert report such as accuracy, understanding and analysis of the expert's subject area, presentation and adherence to time scale.

6.23 Any expert witness who provides satisfactory references under the process outlined above is able to use the 'Expert Witness Directory of Ireland Irish Checked' logo on their stationery, which will be valid for one year from the date of publication. Use of the logo refers to individuals who have passed the checking procedure and those who fail to meet the requirements are not entitled to use the logo.

6.24 Experts who fail to meet any of the requirements set out in the Code of Practice of the Expert Witness Directory will not be issued with the updated logo until they satisfy the publishers that they have complied with these requirements. Where any of the ratings from solicitors or barristers fall below 'good', the references are carefully scrutinised. Other than in very exceptional cases, low ratings lead to the expert's exclusion from the listing of checked experts.

**(b) England**

6.25 There is considerably more training and accreditation available for expert witnesses in the United Kingdom than currently available here. There are a number of major accreditation bodies, however, as these all operate privately and without cooperation or harmonisation of the training provided, setting common standards for expert witness training remains unaccomplished.<sup>7</sup>

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<sup>6</sup> See: *The Expert Witness Directory of Ireland* (Thomson Roundhall Reuters, published annually). Another directory to source expert witnesses is available on <http://www.expertwitness.ie>.

<sup>7</sup> Bawdon "A Crowded Thoroughfare" (1996) New Law Journal 1742

6.26 Many English law schools,<sup>8</sup> as well as a large number of private professional bodies, for example the Expert Witness Institute,<sup>9</sup> The Society of Expert Witnesses,<sup>10</sup> The UK Register of Expert Witnesses,<sup>11</sup> and the Academy of Experts<sup>12</sup> cater for the needs of experts by providing such resources as help-lines, mentoring schemes and training courses about the basic relevant laws, the role and duty of an expert witness and courtroom skills. Most of this training is provided by lawyers, who are proficient in instructing an expert about such issues as dealing with disclosure and privilege rules, and witness familiarisation with report writing and cross examination.<sup>13</sup>

6.27 Membership of these expert witness bodies requires the individual to prove their expertise, normally by producing an up-to-date curriculum vitae which shows relevant professional qualifications along with satisfactory references from a set number of solicitors or barristers. Listing on the UK Register of Expert Witnesses has identical vetting procedures to the Irish register.<sup>14</sup>

6.28 Stricter membership criteria is imposed by the recently established, non-profit, 'Council for Registration of Forensic Practitioners' (CRFP) set up by the Home Office which assesses and accredits the competence of individuals in most forensic science disciplines to give expert evidence in court. The registration process is extremely thorough and involves an assessment of recent case work by assessors experienced in the field of forensic science.

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<sup>8</sup> For example Cardiff University in conjunction with Bond Solon Witness Training provides an 'expert witness certificate' which requires experts to be independently assessed by Cardiff University. It is interesting to note that in the first year of this course, 20% of experts failed, a worrying statistic as many of them had been giving expert testimony for many years. (Solon "Experts: Amateurs or Accredited?" (2004) New Law Journal 7117)

<sup>9</sup> See: "The Expert Witness Institute" Available at: <http://www.ewi.org.uk/>.

<sup>10</sup> See "The Society of Expert Witnesses" Available at: [http://www.sew.org.uk/noidxbar/wel\\_fs.htm](http://www.sew.org.uk/noidxbar/wel_fs.htm).

<sup>11</sup> See: The UK Register of Expert Witnesses" Available at: <http://www.jspubs.com/index.cfm>.

<sup>12</sup> See "The Academy of Experts" Available at: <http://www.academy-experts.org/>.

<sup>13</sup> Cooper "More to Learn" (2007) New Law Journal 459

<sup>14</sup> See: "The UK Register of Expert Witnesses" Available at: <http://www.jspubs.com/>.

Furthermore, registered members are subject to periodic reassessment to ensure fitness to practice.<sup>15</sup>

6.29 Support for the introduction of standardised training and improvement of the quality of expert witnesses is burgeoning in England and Wales among both practitioners and academic commentators.<sup>16</sup> In his report on improving the civil justice system Lord Woolf recommended that;

“Training courses and published material should provide expert witnesses with a basic understanding of the legal system and their role within it, focusing on the expert's duty to the court, and enable them to present written and oral evidence effectively.”<sup>17</sup>

6.30 However, Lord Woolf recommended that such training should not be compulsory, and advised against the introduction of an exclusive system of accreditation, as he believed this might exclude potentially competent experts who do not undergo the training and accreditation process, thus narrowing the pool of available experts.

6.31 Similarly in the criminal context, Auld LJ recommended in his Review of the Criminal Justice System that one standard professional body should be created in England and Wales for the purposes of setting standards for and monitoring the conduct of forensic scientists, as well as maintaining and monitoring the regulation of a register of accreditation. In order to carry out this recommendation, he advised that all of the existing expert witness professional organisations should be amalgamated into the existing Council for the Registration of Forensic Practitioners.<sup>18</sup>

6.32 The English Legal Services Commission also considered the issue of training and accreditation in their research paper on the use of experts in publicly funded cases. In this paper they did not recommend the creation of a dedicated expert witness accreditation body;

“...we do not regard the compulsory registration of all expert witnesses as practicable. Our proposals are intended to facilitate and

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<sup>15</sup> See “Council for the Registration of Forensic Practitioners” Available at; <http://www.crfp.org.uk/>.

<sup>16</sup> Cooper “More to Learn” (2007) New Law Journal 459; McConnell “Strange Bedfellows in the Witness Box” (1996) New Law Journal 1746

<sup>17</sup> Woolf, MR Lord (1996) Access to Justice, Final Report, HMSO at ch 13 para 60

<sup>18</sup> Auld J “A Review of the Criminal Courts of England and Wales by The Right Honourable Lord Justice Auld” (September 2001) at para 131

encourage the use of accredited experts, not to confine solicitors to instructing only accredited experts.”<sup>19</sup>

6.33 However, the Legal Services Commission did encourage the development by professional bodies of training and competency assessments within the individual disciplines, along the lines of those provided by the Council for the Registration of Forensic Practitioners for those engaged in forensic science. They expressed a belief that accreditation, whilst not capable of completely removing the risk of deficient expert evidence, that this would “reduce the likelihood, and this will benefit the food administration of justice.”<sup>20</sup>

6.34 There have also been a number of English cases that have considered witness training courses. In these cases it is recognised that some training has the potential to amount to coaching the experts on how best to orchestrate the evidence in favour of their instructing party, in the words of the trial judge in *R v Salisbury*,<sup>21</sup> “capable of converting a lying but incompetent witness into a lying but impressive witness.”

6.35 It has therefore been repeatedly emphasised in the English courts that professional witness familiarisation training should only be for the purpose of instructing experts on their role and duty. For example, in *R v Momodou and Limani*,<sup>22</sup> Judge LJ explained that there is a distinction to be made between witness training or coaching and witness familiarisation.

6.36 He acknowledged that training or coaching of a number of people together who are witness to the same event carries the inherent risk that the accuracy of the witness will be adversely affected as whether “deliberately or inadvertently, the evidence may no longer be their own.”<sup>23</sup> However, he found that the possibility of adverse effects caused by coaching of witnesses should

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<sup>19</sup> Legal Services Commission “The Use of Experts Consultation Paper: Quality, Price and Procedures in Publicly Funded Cases” (2004) Available at: [http://www.legalservices.gov.uk/docs/criminal\\_consultations/use\\_of\\_experts\\_consultation\\_paper.pdf](http://www.legalservices.gov.uk/docs/criminal_consultations/use_of_experts_consultation_paper.pdf), at 6.14

<sup>20</sup> Legal Services Commission “The Use of Experts Consultation Paper: Quality, Price and Procedures in Publicly Funded Cases” (2004) Available at: [http://www.legalservices.gov.uk/docs/criminal\\_consultations/use\\_of\\_experts\\_consultation\\_paper.pdf](http://www.legalservices.gov.uk/docs/criminal_consultations/use_of_experts_consultation_paper.pdf), at 6.14

<sup>21</sup> [2005] EWCA Crim 3107 (30 November 2005)

<sup>22</sup> [2005] EWCA Crim 177

<sup>23</sup> [2005] EWCA Crim 177 at [48]

not act to preclude pre-trial arrangements to familiarise the witness with the layout and structure of the court.<sup>24</sup>

6.37 This reasoning was used as the basis for Phillip LJ's dismissal of the appeal in *R v Salisbury*.<sup>25</sup> Here the appellant argued that the case should be appealed on the basis of the crown's failure to disclose that its expert witnesses had undergone a training course prior to the trial.

6.38 Phillip rejected the contention that such training gave them an unfair advantage over other witnesses or that it added a specious quality to their evidence. He approved the comments of the trial judge about the effect of the training;

"What they would have received was knowledge of the process involved. It was lack of knowledge and understanding which created demand for support in the first place. Acquisition of knowledge and understanding has probably prepared them better for the experience of giving evidence. They will be better able to give a sequential and coherent account. None of this gives them an unfair advantage over any other witness."<sup>26</sup>

6.39 These decisions infer that the courts appear to be in favour of witness training where this training is limited to familiarising the witnesses with the courtroom set up and structure. They are, however, wary of any training that amounts to coaching of a witness, or that would result in the witness altering their evidence.

#### **(c) Australia**

6.40 In Australia, similar to the United Kingdom, there are a number of dedicated private professional bodies that provide training for expert witness. Furthermore, many of the professional bodies governing various disciplines also offer training sessions to professionals for those who wish to act as expert witnesses.<sup>27</sup>

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<sup>24</sup> [2005] EWCA Crim 177 at [49]

<sup>25</sup> [2005] EWCA 3107

<sup>26</sup> [2005] EWCA 3107 at [60]

<sup>27</sup> See for example The Australian College of Legal Medicine, the Medical-Legal Special Interest Group of the Royal Australian College of Surgeons, the Australian and New Zealand Forensic Science Society and The National Institute of Forensic Science. (As outlined in; Wood J "Expert Witnesses – The New Era" Paper delivered at the 8<sup>th</sup> Greek Australian International Legal & Medical Conference (Corfu, June 2001)

6.41 Also similar to the United Kingdom and Ireland, some expert witness training courses are offered in academic institutions.<sup>28</sup> Furthermore, there are a number of service providers dedicated to provision of expert witness services along the lines of the Irish Expert Witness Directory which permit experts to register with the body subject to appropriate proof of qualifications and adequate peer review.<sup>29</sup>

6.42 As yet however, there is no formal requirement in any Australian jurisdiction for expert witnesses to undertake standardised training leading to formal credentials. However, there are similar indications to those expressed in England and Ireland that support for this idea is growing.

6.43 For example, Freckleton, Reddy & Selby's comprehensive study of Australian judicial perceptions of expert evidence in 1999 found overwhelming support for "training for expert witnesses to communicate their views better and to fulfil their role as forensic witnesses more professionally."<sup>30</sup>

6.44 More recently, the Honourable Justice Peter McClellan, who was responsible for considerable reforms relating to the giving of expert testimony in the Land and Environment Court of New South Wales, also expressed keen support for the imposition of professional standards through accreditation of experts. However he hinted that the responsibility for this should lie with professional bodies governing the various disciplines rather than the court. He stated;

"...I have not infrequently been asked whether courts should be responsible for accrediting experts who may give evidence before them. The commonly expressed expectation is that courts would thereby be able to exclude witnesses that are neither appropriately qualified, or had failed to give evidence which reflected relevant levels of professional competence or objectivity. There are many difficulties with such a proposal. However, given the frequency with which experts give evidence in courts and the reliance placed on their learning and professional integrity, an increasing interest by

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<sup>28</sup> See for example; <http://www.ewia.org.au/>;  
[http://www.mit.com.au/professional\\_development/course/expert\\_witness\\_preparation\\_1067.htm](http://www.mit.com.au/professional_development/course/expert_witness_preparation_1067.htm) ; <http://www.expertopinion.com.au/info/training.html>.

<sup>29</sup> See for example, <http://www.expertwitnesses.com.au/>;  
<http://www.expertopinion.com.au/>.

<sup>30</sup> Freckleton, Reddy & Selby Australian Judicial Perspectives on Expert Evidence; an Empirical Study (Australian Institute of Judicial Administration, 1999) Question 4.1

professional bodies in maintaining appropriate standards from those who give evidence should be encouraged."<sup>31</sup>

### **(3) *Difficulties caused by Lack of Mandatory Training***

6.45 As already mentioned, in this jurisdiction there is no mandatory requirement for a person seeking to act as an expert witness to undertake any form of education about their role and applicable duties. As a result, even some experienced witnesses do not have a full understanding of what the role of the expert witness entails.

6.46 Recent research carried out in England on expert witnesses in practice concluded that the training of expert witnesses to give evidence is still patchy and unregulated, creating a continuing risk of miscarriages of justice.<sup>32</sup> The research found that approximately one in ten experts had no training at all and did not intend to undertake any. Penny Cooper, a barrister and a governor of the Expert Witnesses Institute, who conducted the research explained that high profile miscarriages of justice such as the Sally Clark case are inextricably linked with lack of training. She argues that court rules should be amended to impose a duty on judges and lawyers to consider the training an expert has had before allowing them to give evidence.<sup>33</sup>

### **(4) *Should Mandatory Training & Accreditation be introduced?***

6.47 It can be argued that the above difficulties could be alleviated by requiring experts to undergo some sort of formalised training for their role. Such training should educate individuals about the role and duties applicable to expert witnesses. It should also enable them to improve their oratory skills, to ensure that they recognise the boundaries of their area of expertise, and to successfully convey technical information to the court, in order to cope with cross examination and examination in chief. The training should also teach experts how to create structured, informative expert reports.

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<sup>31</sup> McClellan "Contemporary Challenges for the Justice System – Expert Evidence" Paper given at the *Australian Lawyer's Alliance Medical Law Conference 2007* (20 July 2007)

<sup>32</sup> See "Most Lawyers Fail to Check on their Expert Witnesses" *Times on Line* 12 November 2007 Available at:  
<http://business.timesonline.co.uk/tol/business/law/article2852661>.

<sup>33</sup> See "Most Lawyers Fail to Check on their Expert Witnesses" *Times on Line* 12 November 2007 Available at:  
<http://business.timesonline.co.uk/tol/business/law/article2852661.ece>.

6.48 Set up in 1985, the Irish National Accreditation Board (INAB) provides accreditation for calibration and testing laboratories.<sup>34</sup> INAB is responsible for carrying out quality checks on the Forensic Science Laboratory. In the 2005 *Report on the Establishment of the DNA Database*, the Commission recommended that INAB should give periodic reviews of the independent statutory body that the Commission recommended be set up to monitor the profiling and storing of the DNA database.

**(a) Disadvantages**

6.49 It must be acknowledged that the practical administration of accreditation on a standardised basis may prove very difficult for one body alone given the unlimited scope of the areas on which expert evidence may be given. As a result, a separate accreditation board in each particular discipline may be required in order to conduct sufficiently thorough monitoring of expert witnesses.

6.50 For example, take the option of giving the INAB the responsibility for the accreditation of all expert witnesses. The current function of INAB is to monitor laboratories, which would imply it would be capable of reviewing forensic and medical experts. However, it may not have the necessary experience or knowledge to carry out effective quality assurance on experts in other unrelated areas, such as non-science related disciplines.

6.51 There are also certain areas that may form the subject matter of expert testimony which might not lend themselves easily to formal accreditation processes, particularly where the area is not governed by any professional body or is a new or emerging form of expertise.

6.52 Furthermore, mandatory accreditation also has its drawbacks, principally the danger that it could lead to a monopoly of professional expert witnesses who make repeated court appearances but who become out of touch with the profession or subject matter on which they are giving expertise.<sup>35</sup>

6.53 Another potential disadvantage of the introduction of such a scheme is that requiring all experts wishing to give expert testimony in court proceedings to undertake formal training would impose a significantly onerous resource, administrative and temporal burden.

6.54 The argument has also been made that the credibility of a court-required training and accreditation scheme would be undermined each time an

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<sup>34</sup> See: <http://www.inab.ie>

<sup>35</sup> Walton “Deployed Bias” (2006) 156 NLJ 1084

accredited expert was criticised in court or where the evidence of a non-accredited expert was preferred.<sup>36</sup>

6.55 It can also be argued the introduction of mandatory training and accreditation would not have prevented criminals from impersonating expert witnesses, as in the cases of *Barian Baluchi* and *Gene Morrisson* as the forged credentials used by these individuals would have probably fooled any expert witness regulatory body just as easily as the court was convinced. Training may therefore regulate expert witnesses who fall below a certain level of quality, but will not prevent individuals from misrepresenting themselves as qualified experts in a particular area.<sup>37</sup>

6.56 The argument was made in Chapter 5 that the system already in place, whereby the expert is subject to scrutiny from both the judge and the opposition party, is sufficiently adequate to ensure the quality and authenticity of any expert witness giving evidence in court. In light of this argument, and in view of the disadvantages listed above, the desirability of introducing the reform of mandatory training and accreditation is unclear.

**(b) Advantages**

6.57 On the other hand however, there may be tangible benefits accruing from training of expert witnesses. This is particularly so if the training goes beyond witness familiarisation with the courtroom set up, but also encompasses informing the experts about the applicable laws governing the admissibility of expert evidence in court, and also clearly elucidates the role, duties and function of experts.

6.58 Such training, if provided at the time the expert is first enlisted, would help to ensure that any person purporting to give expert evidence clearly understands the responsibilities attached to the task, and ensure high quality, reliability and impartiality of the expert evidence from the outset; from the initial examination of the issues, to the preparation of the expert report and to the eventual expert testimony in court.

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<sup>36</sup> The Institute of Chartered Accountants in Australia “Chartered Accountants Showcase Leadership in Expert Witness Arena” (Press Release, 29 September 2005) Available at:  
[http://www.charteredaccountants.com.au/news\\_releases\\_2005/september\\_2005/A117398811](http://www.charteredaccountants.com.au/news_releases_2005/september_2005/A117398811).

<sup>37</sup> For more on this see Pamplin “Bearing False Witness: The Regulatory Effect” (2005) 155 New Law Journal 1756

**(5) *Training for Judiciary and Other Members of the Legal Profession***

6.59 The point has also been made on numerous occasions that judicial training in the field of science and other technical areas may have two-fold benefits; first, it would reduce the necessity for expert evidence in some cases, and second, it would better equip judges to determine the reliability of expert evidence before them and to detect when an expert is giving partisan or fraudulent expertise.

**(6) *Training & Accreditation: Conclusion***

6.60 In light of the above, the Commission is inclined towards retaining the current arrangements, in which relevant training for expert witnesses is given - and received - on a voluntary basis, rather than on the basis of a mandatory system. The Commission is concerned that a mandatory system may fail to distinguish between quite appropriate familiarisation of witnesses with courts (which appears to the Commission to be the basis of current voluntary arrangements in Ireland of which it is aware) and inappropriate coaching of experts.

6.61 *The Commission provisionally recommends that current voluntary arrangements for training of expert witnesses, in which appropriate familiarisation training for experts is given, should continue, and that a mandatory system should not be introduced.*

**C *Professional Expert Witness Regulatory & Disciplinary Bodies***

6.62 A number of significant disadvantages have been identified as attaching to the introduction of mandatory training and accreditation of experts. An alternative and, it is submitted, less onerous, reform would be the creation of regulatory and disciplinary bodies for expert witnesses which would provide a dual purpose of both imposing binding obligations on expert witnesses and also monitor their enforcement.

**(1) *Dedicated Regulatory Body for Expert Witnesses***

6.63 One option for reform that has received considerable support is the creation of a dedicated regulatory body for expert witnesses. In accordance with the principles set out in the government 2004 White Paper *Regulating Better*,<sup>38</sup> such a body need not necessarily be created on a statutory basis.

6.64 All persons engaged in expert witness work would be given the option of registration with this body, subject to proof of expertise based on

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<sup>38</sup> *Regulating Better: A Government White Paper Setting Out Six Principles of Better Regulation* (Department of An Taoiseach, The Stationery Office, 2004)

relevant qualifications, experience and/or references from solicitors or barristers. A register of members would thus be available that would act as a directory of registered available experts for the use of solicitors, barristers and parties to litigation.

6.65 The body would be responsible for continuing review of experts and the expert witness system to decide on what training is needed and updating and informing experts about continuing developments in the case law. Such a regulatory body would also be the appropriate organisation in which to provide training and accreditation processes as discussed in the last section.

6.66 The expert witness regulatory body should be responsible for the creation of a Code of Ethics, or Guidance Code for expert witnesses and registration would require the expert to agree to be bound by this Code. The body would be responsible for monitoring experts to ensure compliance with the Code and where necessary, for example, where a failure to conform to the Code has been identified, to refer the expert witness to a disciplinary body to allow them to impose professional disciplinary measures or sanctions.

6.67 One issue for consideration is whether registration with such a body would be a mandatory requirement to be permitted to give expert testimony. If mandatory training is considered necessary, this would necessarily make affiliation with this body compulsory. As already noted, the Commission is currently of the view that such training should not be mandatory.

6.68 Moreover, it might also be considered that compulsory registration may disproportionately limit the pool of available experts and impose an undue burden on individuals who are enlisted to give expert testimony on a one-off basis. It would therefore seem necessary to ensure that registration is not compulsory and to ensure that the court retains an overriding jurisdiction to hear evidence from non members, albeit that evidence of being a registered member would help to establish integrity.

**(a)      *Support for this Reform***

6.69 Registration with this body would provide the expert with added evidence of their expertise which would assist in proving expertise before the court. This body could also provide a valuable source of information and support for experts about their role and function, setting out guidance notes and protocols on the various aspects of the work of an expert.

6.70 A comprehensive AGIS report which surveyed expert practice in a number of EU member states revealed that one of the main common denominators for judicial experts surveyed was the felt need for a regulatory body to provide initial and continuing education on their role and duty and the legal profession, and also to act as an interlocutor with judicial institutions. The report noted that in many jurisdictions the regulatory bodies are consulted on

issues such potential legislative and procedural amendments to the system of giving expert evidence.<sup>39</sup>

6.71 In the section on the AGIS report that outlined the position in Ireland, it was explained that a meeting had taken place for the purposes of providing information for the report which was attended by members of the legal profession, representatives from a commercial training company that provides training for expert witnesses, representatives from professional bodies which often form the subject matter of expert evidence, and other interested parties that are knowledgeable about the Irish system of expert testimony.<sup>40</sup>

6.72 The AGIS report revealed that representatives at the Irish meeting recommended the creation of one central body to establish a register of experts with a system to ensure the experts meet certain standards. It was further suggested that if some professional body for expert witnesses was introduced then it should include members the Bar Council and the Law Society, as well as representatives from professional bodies governing different disciplines which form the subject matter of expert evidence, so that the key areas, both legal and professional, are covered.<sup>41</sup>

**(b) Disadvantages of this Reform**

6.73 The main differentiating factor between any body set up to regulate expert witnesses and other regulatory bodies operating in Ireland at present would be that other bodies govern conduct or professions carried out on a full time basis whereas the giving of expert testimony encompasses only an element of the work of a professional. It has been stressed that, in the interests of ensuring the expert remains au fait with the subject matter of their expertise; this should take up the bulk of their work, and not in-court testimony.

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<sup>39</sup> Conseil Nationale des Compagnies d'Experts de Justice "Report: Access to Judicial Expertise in Criminal Matters Implying More Than One Member State, Especially in Serious Cases and Organised Crime" (AGIS, June 2007) Available at: <http://www.euroexpert.de/sixcms/media.php/61/Report-En-Anglais.pdf>, at 75

<sup>40</sup> Conseil Nationale des Compagnies d'Experts de Justice "Report: Access to Judicial Expertise in Criminal Matters Implying More Than One Member State, Especially in Serious Cases and Organised Crime" (AGIS, June 2007) Available at: <http://www.euroexpert.de/sixcms/media.php/61/Report-En-Anglais.pdf>.

<sup>41</sup> Conseil Nationale des Compagnies d'Experts de Justice "Report: Access to Judicial Expertise in Criminal Matters Implying More Than One Member State, Especially in Serious Cases and Organised Crime" (AGIS, June 2007) Available at: <http://www.euroexpert.de/sixcms/media.php/61/Report-En-Anglais.pdf>

6.74 Requiring registration may therefore impose an onerous obligation on those persons wishing to act as an expert witness, particularly those who are only to give evidence on a one-off basis. Even though registration should be optional in theory, in reality the situation would probably occur whereby extra weight would be given in court to the evidence of registered experts so that all expert witnesses would feel pressurised into registration, which may be a costly burden where the expert only wishes to give evidence on a one-off basis.

6.75 If registration with such a body is optional, this leaves the possibility open that alternative expert witness regulatory bodies may be set up in competition, as has occurred in England, where a plethora of such bodies have been created in recent years for example the Expert Witness Institute, the Academy of Experts, the Society of Expert Witnesses

6.76 Although this in itself is not a disadvantage as competition between such bodies may lead to higher standards of expert evidence all round, some commentators have suggested that in England the situation has emerged where none of the major professional bodies for experts work in harmony, which has led to major problems. Bawdon has suggested:

"There appears to be no love lost between the three groups despite, or perhaps because, of the fact that they all claim to cover much the same ground. Each insists it is independent, democratic, non-profit making, and aimed at raising standards and acting as a voice for experts. Whatever impact their existence may ultimately have on standards within the litigation process, so far there is not much sign of improved behaviour among experts outside the legal sphere. Quite the opposite, in fact."<sup>42</sup>

### **(c) Alternatives**

6.77 The introduction of a distinct body for the regulation and registration of expert witnesses can be seen as having considerable merit. However, the possibility that it would lead to an anti-competitive monopoly of control over all expert witnesses in one organisation, and impose an undue burden on individuals engaged in the giving of expert testimony on a one-off basis is also strong. A number of different or alternative suggestions for reform must therefore also be highlighted;

#### **(i) *Introduce a Tiered System of Registration and Membership of the Regulatory Body***

6.78 One way of preventing registration from being an excessive financial burden would be to introduce a system whereby there would be various

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<sup>42</sup> Bawdon "A Crowded Thoroughfare" (1996) New Law Journal 1742

categories of membership of the society based on the amount a times an expert is likely to be enlisted to give expert testimony, something akin to the membership structure of the Society of Actuaries in Ireland,<sup>43</sup> or the Society of Expert Witnesses in England.<sup>44</sup>

6.79 Those who only give expert evidence on a one-off basis could apply for the lowest and least expensive form of membership, for example an ‘association’ which would merely require an acknowledgment of the Code of Ethics or Guidance Code governing expert witnesses and an agreement to abide by this, as well as undergoing some basic training about the role and duty of an expert witness.

**(ii) *No Regulatory Body and Vesting Regulatory Role of Experts with Professional Bodies governing Various Disciplines***

6.80 An alternative recommendation to the creation of a dedicated regulatory body for expert witnesses would be for the Commission to recommend and encourage the professional bodies governing various professions that are often the subject matter of expert testimony to increase their powers of inspection to include a specific mandate for the supervision of professionals within the discipline engaged in acting as expert witnesses.

6.81 Such bodies would be encouraged to set out a Code of Ethics for their members to abide by when acting as an expert witness. Having the Code of Guidance aimed at a particular discipline would enable it to be more specific than a general code aimed at all expert witnesses. This would allow it to be more detailed in its provisions, giving greater guidance about the parameters of permitted expert evidence in the context of the particular discipline.

6.82 The accusation could however be levelled that it is unfair that some experts would be compulsorily required to conform to a certain standard of behaviour as a result of their membership – which may in itself be mandatory for the particular profession – of a professional organisation. This could be seen as imposing an additional burden on experts who are part of some professional body than those not affiliated with any such body.

6.83 In the alternative, it could be considered that it is at the discretion of each professional body to decide on necessary principles and standards of behaviour within the discipline, and where this discipline is commonly the

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<sup>43</sup> See; The Society of Actuaries in Ireland – Categories of Membership Available at: [http://www.actuaries.ie/About\\_the\\_Society/Membership/Categories/Categories\\_Listing.htm](http://www.actuaries.ie/About_the_Society/Membership/Categories/Categories_Listing.htm).

<sup>44</sup> See: “The Society of Expert Witnesses – How To Join” Available at: [http://www.sew.org.uk/welcome/join\\_fs.htm](http://www.sew.org.uk/welcome/join_fs.htm).

subject matter of expert testimony, it cannot be considered too radical a requirement to conform to a certain standard in the giving of expert testimony.

**(iii) *No Regulatory Body but Creation of a Separate Disciplinary Body Responsible for all Expert Witnesses***

6.84 It was stressed above that in the event that a regulatory body for expert witnesses is introduced, registration or membership of this should be not be made mandatory as this would have the undesirable effect of limiting the pool of available experts. However, non-registration with an expert witness regulatory body should not be a defence to taking action where an expert witness has acted negligently or engaged in professional misconduct.

6.85 The benefits of having some form of control over the expert witness process cannot be denied. Therefore, regardless of the introduction or not of a regulatory body for expert witnesses, there should be a separate disciplinary body responsible for the disciplining of expert witnesses. The functioning of this will now be discussed.

**(d) *Dedicated Regulatory Body: Conclusion***

6.86 Based on this discussion, and consistent with its provisional recommendation that mandatory training should not be introduced, the Commission provisionally recommends that a mandatory regulatory body for expert witnesses should not be introduced.

*6.87 The Commission provisionally recommends that a mandatory regulatory body for expert witnesses should not be introduced.*

**(2) *Dedicated Disciplinary Body for Expert Witnesses***

6.88 As mentioned above, one of the consequences of registering with a regulatory body for experts would be that the expert automatically agrees to be bound by the Code of Ethics of the regulatory body. This body would be responsible for monitoring experts to ensure compliance with the Code and, where necessary, for deciding that disciplinary measures should be taken against the expert.

6.89 Alternatively, it has been suggested that existing professional bodies governing particular areas of expertise should be given increased powers of regulation and should be encouraged to create a binding Code of Conduct for their members to abide by in the giving of expert testimony, and that these bodies would be entitled to take disciplinary measures in the event of a breach of this code by their members.

6.90 The decision to take disciplinary action would occur where the body in question has received complaints from members of the public, the legal profession, other experts or the court, due to a perceived failure by a particular expert to comply with the code. The body should undertake a complete

investigation of such claims and there should be a fully functioning appeals procedure to enable an expert to address criticisms.

6.91 However, it is submitted that a strong perception of bias or unfair procedures could be created where the body that trains and regulates expert witnesses is also responsible for the discipline of its members. The introduction of a separate, independent disciplinary body to carry out the task of imposing sanctions on expert witnesses who are considered to have breached their role and duties has therefore considerable merit.

6.92 Such a disciplinary body should not be required to rely on references from the regulatory body for expert witnesses or the regulatory committees of the various professional bodies governing different professions, but could act on its own accord wherever they form the opinion that an expert witness has engaged in misconduct or negligent behaviour.

**(a) Example: The Solicitors Disciplinary Tribunal**

6.93 This is an independent statutory body, composed of both solicitors and lay members who are appointed by the President of the High Court to investigate complaints of misconduct or negligence on the part of solicitors. It is independent from the professional body governing the profession of solicitor, the Law Society of Ireland, which also has its own disciplinary structure in place.<sup>45</sup>

6.94 Where the Tribunal decides that a complaint discloses a *prima facie* case of misconduct by a solicitor, the Tribunal will carry out an inquiry, conducted in public and with oral evidence.<sup>46</sup>

6.95 Where an application has been made to the Tribunal concerning a solicitor, and a *prima facie* case made out in a subsequent inquiry, this may result in the Tribunal or the President of the High Court imposing such sanctions as requiring the solicitor to pay a fine, being suspended from practice for a set period of time, or having his or her name struck off the Role of Solicitors.

6.96 The fact that it is independent from the regulatory body for solicitors means that the Tribunal provides a feasible model on which to base any regulatory body for expert witnesses as it is submitted that any such body

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<sup>45</sup> See: Law Society of Ireland Complaints & Client Relations Committee Available at:  
[http://www.lawsociety.ie/displayCDACContent.aspx?node=192&groupID=192&code=society\\_committees](http://www.lawsociety.ie/displayCDACContent.aspx?node=192&groupID=192&code=society_committees).

<sup>46</sup> The procedures of the Tribunal are regulated by the *Solicitors Acts 1954 to 2002* and by the *Solicitors Disciplinary Tribunal Rules 2003*. See The Solicitors Disciplinary Tribunal Available at; <http://www.distrib.ie/default.htm>.

should necessarily be, and be seen to be, independent from any professional body that provides training and guidance for expert witnesses

**(b)      *Alternative: Encouraging Professional Bodies to Introduce their Own Disciplinary and Investigative Procedures***

6.97      As above, if it is considered that an investigative and disciplinary body dedicated to monitoring expert witnesses should not be introduced as it would impose an excessive financial and administrative burden, encouraging professional bodies to increase their investigative and disciplinarian powers, or to create their own disciplinary committee within the organisation, is a viable alternative.

6.98      This may in fact prove a preferable option for reform as it can be argued that the various professional bodies will have the necessary expertise and knowledge in the particular area to enable them to determine whether or not the evidence given by the expert has fallen below the necessary standard, or whether or not the expert has engaged in misconduct.

6.99      On the other hand, the criticism could be levelled that vesting disciplinary power with professional bodies governing various subject areas might prevent novel theories emerging from that area of expertise as the committee might require their member experts to 'toe the party line' and must not be willing to allow them explore new theories which had not been fully accepted by the professional body.

**(c)      *England***

6.100     In England, as already mentioned, there are a number of expert witness regulatory bodies which provide training for expert witnesses, and allow experts to register with the bodies. Although these bodies impose strict vetting procedures for their members, and some impose codes of practice on their members backed up by disciplinary procedures,<sup>47</sup> here is no formal disciplinary body dedicated to investigating and monitoring all expert witnesses.

6.101     However, a number of areas of expertise are governed by regulatory bodies which also contain disciplinary committees to monitor their members, or are governed by separate disciplinary boards which provide a disciplinary scheme for professionals in the particular area of expertise.<sup>48</sup>

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<sup>47</sup> See for example the Academy of Experts Available at: <http://www.academy-experts.org/default.htm>.

<sup>48</sup> See for example the "General Medical Council" Available at: <http://www.gmc-uk.org/>; "Actuarial Profession – Disciplinary Board" Available at: [http://www.actuaries.org.uk/Display\\_Page.cgi?url=/professional\\_affairs/discipline/board.html](http://www.actuaries.org.uk/Display_Page.cgi?url=/professional_affairs/discipline/board.html); the "Taxation Disciplinary Board" Available at: <http://www.tax>-

6.102 Interestingly, there have been some English cases where the courts have referred an expert who has been found to have breached his duty to such professional bodies for discipline purposes.

6.103 In *Pearce v Ove Arup Partnership Ltd and Others*<sup>49</sup> Jacob LJ held the claimant's expert witness to be in breach of his duties by giving evidence that was "biased and irrational" and significantly lacking in objectivity. He rejected the claimant's case and further held that the expert witness was heavily responsible for the case coming to trial in the first place "with its attendant cost, expense and waste of time."

6.104 Jacob LJ went on to acknowledge that there is no rule providing for specific sanctions in such cases, nor does a specific accrediting body exist to whom an expert could be referred. However, he appeared to be of the opinion that despite the lack of such a body or statutory sanctions for breach, experts should nevertheless be made accountable in situations where their breach of duty has led to considerable unnecessary expense and delay.

6.105 The appropriate body to take such measures, in Jacob LJ's view, was the relevant professional body with which the expert witness is associated, if such exists:

"I see no reason why a judge who has formed the opinion that an expert had seriously broken his Part 35 duty should not, in an appropriate case, refer the matter to the expert's professional body if he or she has one. Whether there is a breach of the expert's professional rules and if so what sanction is appropriate would be a matter for the body concerned."<sup>50</sup>

6.106 Jacob LJ went on to hold that in his view the expert in this case should be referred to his professional body, however, he accepted that before this step was to be taken, the expert should have an opportunity of being heard. He therefore allowed 21 days prior to referral to the professional body, in order to allow representations to be made on behalf of the expert.

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board.org.uk/; Royal Institute of Chartered Surveyors" "Disciplinary Sentencing Policy" Available at:

[http://www.rics.org/AboutRICS/RICSProfessionalRegulationandConsumerProtection/RICSDisciplinaryprocedures/sentencing\\_policy.htm](http://www.rics.org/AboutRICS/RICSProfessionalRegulationandConsumerProtection/RICSDisciplinaryprocedures/sentencing_policy.htm); The "Accountancy and Investigation Disciplinary Board" Available at:

<http://www.frc.org.uk/aadb/index.cfm>.

<sup>49</sup> [2001] EWHC Ch 455 (2 November 2001) at [60]

<sup>50</sup> [2001] EWHC Ch 455 (2 November, 2001) at [61]

6.107 Similarly, in *Hussein v William Hill*<sup>51</sup> Hallett J criticised the expert psychiatrist advanced on behalf of the plaintiff for failing to disclose his close relationship with the claimant, and for failing to disclose the fact that he was, at the time of giving evidence, suspended from practice and being brought before a Mental Health Review Tribunal. Hallett J refused to place any weight in the expert's evidence and held that the judgment should be referred to the General Medical Council to examine the conduct of the expert in question.<sup>52</sup>

**(d) Dedicated Disciplinary Body for Experts: Conclusion**

6.108 Based on this discussion, and consistent with its provisional recommendations that mandatory training should not be introduced and that a mandatory regulatory body for expert witnesses should not be introduced, the Commission provisionally recommends that the relevant professional bodies should be encouraged to introduce their own regulatory and disciplinary processes for professionals who wish to act as expert witnesses.

*6.109 The Commission provisionally recommends that the relevant professional bodies should be encouraged to introduce their own regulatory and disciplinary processes for professionals who wish to act as expert witnesses.*

**(3) Immunity from Disciplinary Action from Professional Regulators**

6.110 There have been a number of cases in this jurisdiction, and more recently in England, which considered whether or not immunity exists for expert witnesses from disciplinary, regulatory or fitness to practice proceedings (commonly known as FTP proceedings), in relation to statements made or evidence given by him in or for the purpose of legal proceedings.

**(a) Ireland: MP v AP: John Connolly Applicant (Practice: In Camera)<sup>53</sup>**

6.111 This case involved a complaint made by one of the parties to the Psychological Society of Ireland in respect of the applicant who was a potential witness in family law case involving the parties. The applicant claimed that the complaint could not be considered by the disciplinary body as section 34 of *Judicial Separation and Family Law Reform Act 1989* provides that family law cases be held *in camera*.

6.112 Laffoy J held that section 34 was contravened by the making of complaints to the Psychological Society of Ireland and that the complaint could not be prosecuted without further infringement of the section as it concerned the

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<sup>51</sup> [2004] EWHC 208 (QB) (18 February 2004)

<sup>52</sup> [2004] EWHC 208 (QB) (18 February 2004) at [34]

<sup>53</sup> [1996] 1 IR 144

contents of a letter which commented upon the defendant's evidence on affidavit in support of a motion in family law proceedings.

6.113 Laffoy J went on to recognise the existence of an immunity for witnesses from civil proceedings in respect of evidence given in court and statements made in preparation for giving evidence. She continued:

"While no authority has been cited which supports the proposition that an expert witness is immune from disciplinary proceedings or investigation by a voluntary professional organisation to which he is affiliated in respect of evidence he has given while statements he has made with a view to their contents being adduced in evidence, having regard to the public policy considerations which underlie the immunity from civil proceedings — that witnesses should give their evidence fearlessly and that a multiplicity of actions in which the value or truth of their evidence would be tried over again should be avoided — in my view, such a witness or potential witness must be immune from such disciplinary proceedings or investigation. However, I consider that it is not necessary to make a declaration that the society cannot conduct any inquiry in relation to evidence given by the applicant or any statements made by the applicant in preparation for oral testimony or evidence on affidavit in these proceedings because such inquiry is precluded by s. 34 of the Act of 1989."<sup>54</sup>

6.114 In this case, Laffoy J seemed to support the recognition of immunity for expert witnesses from disciplinary proceedings taken pursuant to evidence given during the course of litigation. However, the latter part of this statement implies that her comments were limited to considering this issue in the context of family law proceedings, and not more generally.

6.115 A number of other Irish cases have considered the extent to which witnesses, including expert witnesses, are immune from civil suit in the course of giving evidence. These will be discussed later on. However, there has been greater consideration given to the extension of witness immunity to disciplinary proceedings recently in England, which may influence the Irish direction in future cases.

**(b)      *England: General Medical Council v Meadow*<sup>55</sup>**

6.116 In *General Medical Council v Meadow*<sup>56</sup> Professor Meadow, a medical expert witness, had given expert evidence in an earlier murder case

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<sup>54</sup> [1996] 1 IR 144 at 155

<sup>55</sup> [2006] EWHC 146 (Admin) (17 February 2006); [2006] EWCA Civ 1390 (26 October 2006)

that was later proved to be inaccurate. As a result of this, the Fitness to Practice Panel (FPP) of the General Medical Council (GMC), the professional body governing the conduct of medical professionals in the UK, concluded that Professor Meadow was guilty of serious professional misconduct and ordered that his name be struck off the GMC register. Professor Meadow appealed both the finding and the sanction of erasure.

**(i) High Court**

6.117 In the High Court, Collins J acknowledged the established existence of common law immunity from suit of witnesses, including expert witnesses, in respect of statements made in the course of giving evidence.<sup>57</sup> He went on to find that in some instances, in the interests of justice, this immunity should be extended to cover FTP disciplinary proceedings, and as a result, he allowed the appeal against the FTP's finding of serious professional misconduct.<sup>58</sup>

6.118 However, he also referred to *Pearce v Ove Arup Partnership Ltd & Ors*<sup>59</sup> and *Hussein v William Hill*<sup>60</sup> and held that there is nothing preventing a professional body from examining an expert witness whose conduct has fallen so far below what is expected of him as to merit disciplinary action, but that it is the job of the judge to decide if this is the case.

6.119 He went on to outline the circumstances under which such a referral could be made by a judge;

Such a referral would not be justified unless the witness's shortcomings were sufficiently serious for the judge to believe that he might need to be removed from practice or at least to be subjected to conditions regulating his practice such as a prohibition on acting as an expert witness. Normally, evidence given honestly and in good faith would not merit a referral.<sup>61</sup>

6.120 Collins J also allowed the appeal against the finding of the GMC of serious professional misconduct on the part of Professor Meadow. He pointed out that the appellant had acted in good faith, and honestly believed in the

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<sup>56</sup> [2006] EWHC 146 (Admin) (17 February 2006); [2006] EWCA Civ 1390 (26 October 2006)

<sup>57</sup> The extent of this immunity and whether or not it should be abolished will be discussed further on.

<sup>58</sup> [2006] EWHC 146 (Admin) (17 February 2006) at [21]-[25]

<sup>59</sup> [2001] EWHC Ch 455 (2 November 2001)

<sup>60</sup> [2004] EWHC 208 (QB) (18 February 2004)

<sup>61</sup> [2006] EWHC 146 (Admin) (17 February 2006) at [23]

veracity of the statistics he cited in evidence. Collins J concluded that an honestly held albeit mistaken evidence should not lead to a finding of serious professional misconduct giving rise to disciplinary sanctions.

**(ii) Court of Appeal**

6.121 The General Medical Council appealed the findings of Collins J in the High Court. Clarke MR gave extensive consideration to the question of whether witness immunity should be extended to cover FTP proceedings. He acknowledged that the courts have shown a marked reluctance to extend the witness immunity beyond that absolutely necessary and also expressed a belief that the threat of FTP proceedings is in the public interest as it acts as a deterrent to the giving of partisan evidence.<sup>62</sup>

6.122 Clarke MR also reasoned that even a partial extension, in the form of the judicial filtering mechanism suggested by Collins J, should not be introduced as it would cut across or limit the powers of such professional bodies to set and maintain standards and that it should be Parliament that decides what charges are to be made. As reasoned by Auld LJ:

"It goes to the very root of the core principle of immunity that it must be certain in its extent and it must be absolute. And that must be equally so where the boundary line is between – in the case of medical practitioners – serious professional misconduct or no, or between serious professional misconduct and serious professional conduct so bad ("super serious professional misconduct") that a judge in a particular case considers it necessary to refer the matter to a disciplinary body. As the Master of the Rolls has put it, in paragraph 53 of his judgment, that would make the trial court or this Court the sole arbiter, on a case by case basis, as to who should be immune and who should not."<sup>63</sup>

6.123 As a result, all three appeal court judges unanimously rejected an extension to the witness immunity to cover FTP proceedings and that the FPP of the GMC had the requisite jurisdiction to entertain the allegations against Professor Meadow.

6.124 This appeal court decision is a lengthy, well reasoned judgment that took into account submissions from expert witnesses and the Attorney General on issues involved. It provides a summary of the relevant case law and expresses firm authority in support of the decision not to extend the witness immunity. Furthermore, those commentators that have criticised the decision

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<sup>62</sup> [2006] EWCA Civ 1390 (26 October 2006) at [45]

<sup>63</sup> [2006] EWCA Civ 1390 (26 October 2006) at [115]

have done so because the courts did not go so far as to rule out immunity for expert witnesses from civil proceedings for professional negligence.<sup>64</sup>

6.125 This decision, therefore, provides strong support for the suggested reform of the creation of a dedicated disciplinary body for expert witnesses, or the encouragement of professional bodies to create their own disciplinary panels.

#### **(4) *What Circumstances Should Disciplinary Action Be Taken In?***

6.126 The *General Medical Council v Meadow*<sup>65</sup> litigation also gave considerable consideration to the range of circumstances under which a referral to a disciplinary body should be made and when disciplinary action would be taken.

6.127 In the High Court decision, Collins J held that an expert witness should only be referred to a professional regulatory body where the judge in the case in which he was giving evidence was of the opinion that he manifested shortcomings that were sufficiently serious to require disciplinary action. An honestly held belief, even though mistaken, would not be sufficient to give rise to a finding of serious professional misconduct leading to disciplinary action.

6.128 Giving the judiciary the authority to determine when to refer an expert witness to his professional body was subsequently rejected by the Court of Appeal. However, by a majority, the Court of Appeal upheld Collins J's decision that Professor Meadow was not guilty of serious professional misconduct and so should not have been made the subject of professional disciplinary action.

6.129 This would imply that a considerably serious breach or lapse in standards, a "calculated or wilful failure,"<sup>66</sup> is necessary to justify initiating disciplinary action. Although Professor Meadow's mistake had significantly onerous consequences, his opinion was honestly held and he had acted in good faith at all times.

#### **(5) *Types of Professional Disciplinary Sanctions***

6.130 Disciplinary measures would be imposed where the regulatory body has received complaints from members of the public, the legal profession, other experts, or the court, due to a perceived failure by a particular expert to comply with the code. The Body should undertake a complete investigation of such

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<sup>64</sup> See Blom-Cooper "Fault Lines Remain After Meadow" (2006) 156 NLJ 1697

<sup>65</sup> [2006] EWHC 146 (Admin) (17 February 2006); [2006] EWCA Civ 1390 (26 October 2006)

<sup>66</sup> As per Collins J *General Medical Council v Meadow* [2006] EWHC 146 (Admin) (17 February 2006 at [55]

claims and there should be a fully functioning appeals procedure to enable an expert to address criticisms.

**(a)      *Admonish or Censure the Expert***

6.131     If a dedicated disciplinary body or regulatory body was created for expert witnesses, this body would be expected to continually review and monitor the conduct of all individuals engaged in giving expert testimony, and not just those that have had complaints made against them by clients, solicitors or barristers.

6.132     Therefore, even where the breach or misconduct by the expert witness is not of a serious nature, for example incorrect format of an expert report or mild judicial criticism of the expert as manifesting slight bias, at times it may be necessary for the disciplinary body to intervene and impose a formal warning on the expert. This would act as a censure against more serious breaches by the expert, and ensure that they are reminded of their duties and obligations.

**(b)      *Require Formal Apology***

6.133     In some instances, the conduct of the expert witness, although wrong, may not have resulted in any serious implications for the parties or the legal professionals involved. For instance, the expert may have been criticised by the trial judge as giving partisan evidence, but the judge may also consider that his evidence is still to be preferred as it appears to best reflect what was likely to happen. In such instances, although the expert's party was successful, the opposite result may have also been achieved based on the expert's misconduct.

6.134     Where such a case is brought to the attention to an expert witness regulatory or professional body, requiring the expert witness to give a formal apology to his instructing party and counsel may be all that is necessary to remedy the situation. As mentioned above, this would also have the effect of acting as a censure for the expert against more serious breaches and also remind the expert of the extent of their role and function.

**(c)      *Require Payment of Compensation/Fine to Aggrieved Party/Disciplinary Body***

6.135     If the professional misconduct has resulted in monetary loss to the parties or counsel, or where the misconduct is significant but not so serious as to warrant striking off of the expert, a monetary award may be sufficient compensation.

6.136     Alternatively, the professional expert body may require the expert witness to pay a monetary fine to the disciplinary body.

**(d) Striking Off**

6.137 In *General Medical Council v Meadow*<sup>67</sup> the disciplinary action taken by the GMC was the striking of his name from the medical register of the GMC. Registration with the GMC is a mandatory prerequisite to acting as a GP in the United Kingdom so the sanction of erasure effectively prevented him from practising medicine. This is an extremely severe sanction; this may have influenced the court's ultimate decision to reverse the penalty.

6.138 However, if an expert witness were struck off the register of a dedicated regulatory body for expert witnesses, this would not have such severe consequences. Erasure or suspension from an expert witness register for misconduct in the giving of expert evidence would only prevent the person from acting as an expert witness for as long as the sanction is in place. It would still be open to the individual to practise within their particular profession.

6.139 Although if the misconduct was of a very serious nature, likely to influence their fitness to practise the profession generally, the imposition by an expert witness body of professional sanctions may lead the individual's governing professional body to consider initiating their own investigation of the matter.

**(6) Immunity Issues: Conclusion**

6.140 Having reviewed this area, the Commission is persuaded by the approach taken by the English Court of Appeal in the *Meadow* case. In that respect, the Commission considers that, where a court finds that an expert has acted in a manner inconsistent with their paramount duty to the court, they may refer such expert to the disciplinary committee of the appropriate professional body to deal with that witness. This does not, of course, preclude the professional body itself from taking action independently of the court. While there may be some cases in which, in principle, an expert witness may not be a member of an existing professional body, the Commission considers this is unlikely in this jurisdiction. Consistent with this approach, the Commission provisionally recommends that the immunity from suit for expert witnesses should not be extended to cover disciplinary proceedings from professional bodies.

6.141 *The Commission provisionally recommends that the immunity from suit for expert witnesses should not be extended to cover disciplinary proceedings from professional bodies.*

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<sup>67</sup> [2006] EWHC 146 (Admin) (17 February 2006); [2006] EWCA Civ 1390 (26 October 2006)

## D        Expert Witness Immunity from Civil or Criminal Suit

6.142 As mentioned above, the main reason why the English courts have shown a readiness on certain occasions to refer an expert witness to his or her governing professional body for professional sanctions is that the court itself was restrained from disciplining the expert due to the well established existence of an immunity of witnesses from civil or criminal proceedings.

6.143 Several cases in this and other jurisdictions have considered the immunity and given justifications for its retention. The immunity exists for the benefit of the public, as it is considered that the proper administration of justice requires assurance that witnesses are not discouraged from giving full and complete evidence due to the fear of liability. As summarised by Murphy J in *Looney v Bank of Ireland & Morey*,<sup>68</sup> the immunity stems from “the necessity of affording to witnesses the opportunity of giving their evidence freely and fearlessly.”<sup>69</sup>

6.144 The purpose of the immunity was explained by Pigot CB in *Kennedy v Hilliard*<sup>70</sup> in the context of a defamation charge;

“[The] purpose is, to give him the courage to resort as a party to the legal tribunals for justice, or, as a witness, to give his evidence before these tribunals, undeterred by the fear of a prosecution or an action. It is impossible that he can be free from that fear, if his immunity must depend on his not mistaking what is not material for what is, and upon his rightly distinguishing what is from what is not libel or actionable slander.”<sup>71</sup>

6.145 This reasoning has particular relevance in the context of expert evidence in Ireland based on the size of the jurisdiction and the related small size of the pool of potential experts in any one field. Any reform that may affect the numbers of experts willing to give expert evidence is to be avoided. However, there have been increasing calls from commentators on this topic to abolish the immunity. Furthermore, there have been some tentative indications from the case law that this may occur in the near future.

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<sup>68</sup> [1996] 1 IR 157

<sup>69</sup> [1996] 1 IR 157 at 161

<sup>70</sup> (1859) 10 Ir. Com. Law Rep. 195; (1859) 4 Ir. Jur. N.S. 286

<sup>71</sup> (1859) 10 Ir. Com. Law Rep. 195; (1859) 4 Ir. Jur. N.S. 286

**(1) Ireland**

**(a) Common Law Immunity**

6.146 The law on general witness immunity in Ireland is largely reflective of that in other jurisdictions, and much of the Irish case law recognising the immunity makes reference to cases from England and Wales, and Australia and endorse the existence of a general witness immunity which, in more recent cases, has been held to cover expert witnesses.

**(i) Recognition of Witness Immunity**

6.147 The existence of immunity for witnesses has been recognised in this jurisdiction on numerous occasions. In *Re Haughey*<sup>72</sup> O Dalaigh CJ expressly acknowledged the immunity and explained the reasons for this;

“The immunity of witnesses in the High Court does not exist for the benefit of witnesses, but for that of the public and the advancement of the administration of justice and to prevent witnesses from being deterred, by fear of having actions brought against them, from coming forward and testifying to the truth. The interest of the individual is subordinated by the law to the higher interest, namely, that of public justice, for the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences.”

6.148 The immunity was also at issue in *Looney v Bank of Ireland & Morey*.<sup>73</sup> Here, the plaintiff sought to pursue a libel and defamation claim against the second-named defendant for evidence she had given against him, as a lay witness, in an earlier mortgage suit. In the High Court Murphy J cited the comments of Pigot CB in *Kennedy v Hilliard*,<sup>74</sup>

“...for what is stated by a party on his own behalf, or a witness in giving evidence in the ordinary course of a judicial proceeding, there is absolute immunity from liability to an action for libel or slander.”<sup>75</sup>

6.149 Murphy J accepted the defendant’s argument that the case should be struck out due to the existence of an absolute privilege in relation to matters said in the course of judicial proceedings, which precludes legal action from being taken against any witness giving evidence in such proceedings.

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<sup>72</sup> [1971] IR 217

<sup>73</sup> [1996] 1 IR 157

<sup>74</sup> (1859) 10 Ir. Com. Law Rep. 195; (1859) 4 Ir. Jur. N.S. 286

<sup>75</sup> (1859) 10 Ir. Com. Law Rep. 195 at 200

6.150 He rejected the plaintiff's contention that such a privilege derived from the Royal Prerogative and thus did not survive the enactment of the Constitution. Alternatively, he found that such a privilege "derives from the very nature of the judicial process and the independent judiciary created by our Constitution."<sup>76</sup>

6.151 Murphy J also acknowledged the plaintiff's argument that the witness' comments had damaged his good name, and recognised the Constitutional right to vindicate one's good name. However he held that the Constitutional right of access to the courts and to appropriate legal process, which necessarily requires calling witnesses to give evidence concerning the matters in issue, must be reconciled with "the rights of others to be protected against any abuse of their rights which might be involved or occur by reason of the evidence given on behalf of the parties."<sup>77</sup>

**(ii) Extent of Witness Immunity**

6.152 However, Murphy J also acknowledged that the courts also have a duty to ensure that legal proceedings are not abused to the detriment of persons not an action to the case. Therefore, the privilege or immunity will not apply where it can be shown that the witness was invoking it to abuse the legal process. As stated by Murphy J;

"If a witness was to take advantage of his position and of the absolute privilege which he enjoyed, to digress from the proceedings in hand and make a wholly irrelevant and completely unwarranted attack on the good name or reputation of another citizen who did not have a chance of defending himself....In my view such an abuse of the legal process would constitute contempt of court and be punishable accordingly."<sup>78</sup>

6.153 The decision of Murphy J was upheld in the Supreme Court where the existence of immunity for witnesses was confirmed but where it was also recognised that this immunity has its limits and it remains open to the court to suspend it where it appears that the witness acted maliciously and where the testimony was held to be irrelevant to the issue in court. O'Flaherty J confirmed the dictum of O Dalaigh CJ in *Re Haughey*<sup>79</sup> where he stated:

"It is salutary to hear in mind that even in the High Court, if a witness were to take advantage of his position to utter something defamatory

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<sup>76</sup> [1996] 1 IR 157 at 161

<sup>77</sup> [1996] 1 IR 157 at 160

<sup>78</sup> [1996] 1 IR 157 at 161

<sup>79</sup> [1971] I.R. 217

having no reference to the cause or matter of enquiry but introduced maliciously for his own purpose, no privilege or immunity would attach and he might find himself sued for an action for defamation.”<sup>80</sup>

### **(iii) Continued Judicial Endorsement of Witness Immunity**

6.154 The decision in *Looney*<sup>81</sup> involved a defamation action taken against the witness for statements made whilst giving evidence in court proceedings. Subsequent to this decision, the question arose whether the immunity was limited to defamation actions or whether a witness is immune from all civil or criminal suits arising out of evidence given in court.

6.155 In *Fagan v Burgess*<sup>82</sup> the decision in *Looney*<sup>83</sup> was approved to support a finding that a witness in a civil action is immune from being sued for perjury. O’Higgins J rejected the plaintiff’s arguments that the immunity should not extend to perjury claims because perjury is a graver matter than defamation and unlike defamation is always intentional.

6.156 O’Higgins also rejected the argument that the public policy considerations for granting privilege do not stand up to scrutiny, and that if an action for perjury were to be allowed, it would be likely to aid, rather than hinder, the administration of justice by being a disincentive to people to commit perjury. O’Higgins held that the proceeding should be struck out finding that no different principles apply with respect to privilege where perjury is involved than where defamation is involved.<sup>84</sup>

6.157 Witness immunity was also applied to strike out an action for negligence in *McMullen v Clancy*.<sup>85</sup> Here, the plaintiff’s property purchase had resulted in a dispute with the vendors concerning access routes to the property which had been settled on terms unfavourable to the plaintiff. He then took legal action against his solicitors arising from this but his claim failed largely because of the evidence given by senior counsel instructed by those solicitors. In this further case, the plaintiff sought damages from this senior counsel alleging negligence and breach of duty arising from the fact that he had given evidence against him.

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<sup>80</sup> [1971] I.R. 217

<sup>81</sup> [1996] 1 IR 157

<sup>82</sup> [1998] IEHC 52

<sup>83</sup> [1996] 1 IR 157

<sup>84</sup> [1998] IEHC 52 at [9]

<sup>85</sup> [1999] IEHC 252

6.158 The defendant argued that this case should be dismissed as the existence of common law immunity from suit for witnesses in regard to the giving of evidence in court is well established, and cited several English cases, including, *Marrinan v Vibart*,<sup>86</sup> *Hargreaves v Bretherton*<sup>87</sup> and *Watson v McEwan*<sup>88</sup> in support of this. These arguments were unreservedly endorsed by McGuiness J:

"I accept on the authority of the cases opened to me that there is an overwhelming public policy argument for maintaining the common law rule that a witness is immune from suit in regard to the evidence which he gives in Court."<sup>89</sup>

**(iv) Witness Immunity & Application to Expert Witnesses**

6.159 The above cases firmly established the existence for immunity for witnesses from civil or criminal proceedings arising out of evidence given in court proceedings. More recently, the question arose as to whether this immunity equally covers expert witnesses or whether different considerations apply.

6.160 In *O'Keeffe v Kilcullen & Ors*<sup>90</sup> the plaintiff sought damages for negligence against the medical expert witness appointed by the court to carry out a psychiatric assessment for the purposes of nullity proceedings. The plaintiff claimed the defendant expert had failed in the duty owed to the plaintiff to exercise reasonable care and skill in the making of the psychiatric report and its contents.

6.161 In response, the defendant expert argued that the proceedings should be dismissed because *inter alia* an expert witness enjoys immunity from suit in negligence relating to the evidence given by him in court, and also in relation to the work principally and proximately relating thereto. In support of this argument, the defendant referred to English case law confirming the existence of the immunity, for example, *Marrinan v Vibart*,<sup>91</sup> *Evans v London Hospital Medical Hospital College*<sup>92</sup> and *Palmer v Durnford Ford*.<sup>93</sup> The defendant further

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<sup>86</sup> [1962] 3 All ER 3

<sup>87</sup> [1958] 3 All ER 122

<sup>88</sup> [1905] AC 480

<sup>89</sup> [1999] IEHC 252; The existence of witness privilege was endorsed without question on appeal: *McMullen v McGinley* [2005] IESC 10

<sup>90</sup> [2001] IEHC 17

<sup>91</sup> (1962) 1 All ER 869

<sup>92</sup> [1981] 1 All ER 715

raised two important public policy considerations which support the retention immunity for expert witnesses. These are;

"(A) Witnesses (including expert witnesses) should be encouraged to present to Court all the evidence that it is desirable that the Court should hear without the worry that afterwards their time, energy and possibly their own money might be devoted to defending post evidential suits (a proportion of which might well be *bona fide* and otherwise justifiable); and

(B) The Court lists should not be cluttered up with post evidential litigation which would inevitably involve retrying some issues or some aspects of issues which have already been dealt with in Court."<sup>94</sup>

6.162 O'Sullivan J rejected the plaintiff's argument that *Looney*<sup>95</sup> did not have binding effect on this case because it involved lay and not expert witnesses and was thus distinguishable. He also rejected the plaintiff's argument that English case law such as *Hall v Simons*<sup>96</sup> demonstrates a shift in jurisprudence in this area which necessitates considering the application of immunity from suit afresh to ensure that it is clearly justifiable.

6.163 On the contrary, O'Sullivan J found that he considered himself expressly bound by *Looney*<sup>97</sup> and *Fagan*<sup>98</sup> and decided the case on the basis of the precedent set therein;

"From the foregoing it is clear that the witness in *Looney* gave evidence at the behest of the Court and the evidence was relevant to an issue in the action. In those circumstances the decision of the Supreme Court is that absolute immunity privilege attached to such evidence. There is no hint that an exception should or could be made in the case of an expert and whilst there are some passages in the more recent jurisprudence of the United Kingdom which might give grounds for distinguishing the evidence of expert witnesses from the evidence of witnesses generally and in particular in the Judgment of Chadwick L.J. in *Stanton v Callaghan* [1998] 4 All ER 961 at page 974, this passage, which is clearly obiter, must be seen in the context

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<sup>93</sup> [1992] 2 All ER 122

<sup>94</sup> [2001] IEHC 17 at 22-23

<sup>95</sup> [1996] 1 IR 157

<sup>96</sup> [2000] 3 All ER 673

<sup>97</sup> [1996] 1 IR 157

<sup>98</sup> [1998] IEHC 52

of the evolved jurisprudence in that country on this general topic and in my view that development in the United Kingdom in no way disturbs the binding nature on me of the decision in Looney of the Supreme Court.”

6.164 However, he further held that, as stated in *Looney*,<sup>99</sup> a limitation can be placed on the immunity where the evidence given is seen to be malicious and irrelevant to the issues before the Court.

6.165 The plaintiff appealed to the Supreme Court where O’Sullivan J’s dictum was approved and the court held that no claims could be brought against the defendant expert witness. Here, Murphy J described the well-established immunity of witnesses as “the by-product of conflicting constitutional rights and the impact of public policy on the administration of justice.”<sup>100</sup>

6.166 Murphy J cited with approval earlier Irish case law confirming the existence of witness immunity. He then went on to acknowledge the fact that the English decision of *Hall v Simons*<sup>101</sup> has had the effect of significantly restricting the range of persons to whom the immunity will apply in the United Kingdom but found that even if this decision were followed in this jurisdiction it would not affect witness immunity as that case was concerned with the liability of lawyers. It did not, he argued, “purport to strip witnesses of the immunity which had been conferred on them in the public interest.”

6.167 The established parameters of the immunity were also confirmed where Murphy J held that even if negligence on behalf of the expert witness in this case were established, the court would still be right in concluding that the witness was entitled to avail of the immunity. The immunity will only be departed from, he reiterated, where a witness “so departed from the duties which he or she was purporting to perform as to abuse his position that he would forfeit the immunity which he was abusing.”

6.168 Expert witness immunity was considered most recently in *WJ Prendergast & Ors v Redver Skelton*.<sup>102</sup> Here, an expert Fire Consultant was hired by the respondents in a malicious injury claim pursuant to a fire in the plaintiff’s factory, and in these proceedings the plaintiff alleged that the applicant had given false and misleading evidence in the proceedings and that he interfered with the analysis of samples for a wrongful purpose. The applicant argued that the proceedings should be struck out as *inter alia* as a witness he

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<sup>99</sup> [1996] 1 IR 157

<sup>100</sup> [2001] IESC 84

<sup>101</sup> [2000] 3 All ER 673

<sup>102</sup> [2007] IEHC 192

was immune from suit as the proceedings were based on evidence he had given in court.

6.169 In the High Court, McGovern J considered when the immunity from suit would be removed and again endorsed the decisions in *Re Haughey*<sup>103</sup> and *Looney*.<sup>104</sup> Based on these, the court dismissed the suit against the plaintiff expert finding that he was entitled to avail of the immunity from suit of witnesses.

**(b) Statutory Immunity**

6.170 Although witness immunity has been well established at common law, its precise application can be uncertain. This was acknowledged by Murphy J in *O'Keeffe v Kilcullen & Ors*<sup>105</sup> where he stated that witness immunity "is a matter with a long and, at times, confused, history.

6.171 Due to this uncertainty, in certain cases, the common law immunity has been bolstered by statutory provisions. For example, Section 102 of the *Children Act 2001*, which deals with probation officers reports, provides for immunity from liability for any probation officer who, acting in good faith, prepares a report requested under this section of the Act.

6.172 Similarly, the *Arbitration (International Commercial) Act 1998* provides for the appointment of expert witnesses in an arbitral tribunal to report to it on specific issues. It expressly provides that such experts are not liable for anything done or said in the discharge of their statutory duties unless they acted in bad faith.

**(c) Conclusion**

6.173 The above discussion demonstrates that expert witness immunity from civil or criminal suits in respect of evidence given in court proceedings has been unequivocally endorsed in this jurisdiction on numerous occasions. Furthermore, there is no evidence to suggest the development of a body of support for removing this immunity.

6.174 It therefore appears unlikely, particularly bearing in mind Constitutional considerations, that the Irish courts are likely to alter this view and consider imposing liability on witnesses. However, it can be argued that, as mentioned in some of the Irish case law discussed above, recent English case law has taken some tentative steps in this direction.

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<sup>103</sup> [1971] I.R. 217

<sup>104</sup> [1996] 1 IR 157; Unreported, Supreme Court 9 May 1997

<sup>105</sup> [2001] IESC 84

## (2) ***England and Wales***

6.175 The existence of common law witness immunity has been firmly established and justified in several English cases dating back to the 19<sup>th</sup> century. Although the case law continues to endorse the necessity for the immunity, the precise scope of application has come under scrutiny in recent years, and the courts can be seen to be rowing back from blanket immunity to limiting it to that absolutely necessary.

### (i) ***Recognition of Witness Immunity***

6.176 As far back as 1585 the need to protect witnesses from liability resulting from their comments or actions whilst giving evidence has been recognised. In *Cutler v Dixon*<sup>106</sup> the King's Bench stated;

"It was adjudged, that if one exhibits articles to justices of peace against a certain person, containing divers great abuses and misdemeanours, not only concerning the petitioners themselves, but many others, and all this to the intent that he should be bound to his good behaviour; in this case the party accused shall not have for any matter contained in such articles any action upon the case, for they have pursued the ordinary course of justice in such case; and if actions should be permitted in such cases, those who have just cause for complaint would not dare to complain for fear of infinite vexation."

6.177 The immunity was confirmed in clearer terms by Kelly CB in the 1873 decision *Dawkins v Lord Rokeby*;<sup>107</sup>

"No action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceedings in a court of justice."<sup>108</sup>

6.178 Two public policy rationales have been repeatedly identified as underling the immunity of witnesses.<sup>109</sup> The first of these was referred to in

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<sup>106</sup> (1585) 4 Co. Rep. 14b, 76 E.R. 886 Cited in *Darker & Ors v Chief Constable of The Mid-Westland Police* [2000] UKHL 44; [2000] 3 WLR 747 (27th July, 2000)

<sup>107</sup> (1873) LR 8 QB 255

<sup>108</sup> (1873) LR 8 QB 255 at 264 This statement was cited with approval by the House of Lords in *Darker & Ors v Chief Constable of The Mid-Westland Police* [2000] UKHL 44; [2000] 3 WLR 747 (27th July, 2000)

<sup>109</sup> See Simon-Brown LJ's summary of the public policy purposes underlying the immunity in *Silcott v Commissioner of Police for the Metropolis* [1996] 8 Admin L.R. 633 at 637

*Munster v Lamb*<sup>110</sup> where Frye LJ confirmed that witnesses are immune from action for statements made in the course of giving evidence, even where it can be shown that the witness acted with malice;

"The rule of law exists not because the conduct of those persons ought not of itself to be actionable but because if their conduct were actionable, action would be brought against judges and witnesses in cases in which they had not spoken with malice, in cases in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law: but it is the fear that if the rule were otherwise numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide who under a different rule would be liable, not perhaps to verdicts and judgments against them but to the vexation of defending actions."

6.179 Therefore, the first objective of the immunity is to ensure that witnesses give their evidence freely without fear of liability.<sup>111</sup> This was reiterated by Salmon J in *Marrinan v Vibart*<sup>112</sup> where he stated that witness immunity is necessary because;

"....the administration of justice would be greatly impeded if a witness were to be in fear that any disgruntled or possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation."

6.180 The second objective of the immunity is to avoid successive actions and ensure finality in court proceedings. This was referred to by Lord Wilberforce in *Roy v Prior*<sup>113</sup> where he stated the immunity is designed "to avoid

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<sup>110</sup> (1883) 11 QBD 588

<sup>111</sup> See also Hoffman LJ's comments in *Taylor v Serious Fraud Office* [1999] 2 AC 177 where he explained that the immunity rule "is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say."

<sup>112</sup> (1962) 1 All ER 869

<sup>113</sup> [1971] A. C. 470

multiplicity of actions in which the value or truth of their evidence would be tried over again.”<sup>114</sup>

6.181 These justifications can be seen to have shaped the decision in *Re N.*<sup>115</sup> Here, the plaintiff sought damages for psychological trauma which she alleged she suffered due to the defendant expert’s failure to show up in court to give evidence in a rape case, in which she was the complainant, and where as a result of the non arrival of the expert, it was held the defendant had no case to answer.

6.182 The plaintiff acknowledged the existence on an immunity for experts which prevented the allegation that a duty to give evidence was owed, but went on to argue that on fundamental tort principles on the duty of care, that it was reasonably foreseeable that the plaintiff would have suffered exacerbation of psychiatric trauma where the accused in the rape case was not convicted, therefore the defendant owed a duty of care to take all reasonable steps to provide evidence and attend the trial as a prosecution witness.

6.183 The existence of such duty was rejected by the court. It was considered that if any duty were to exist it would be a duty to take reasonable care to prevent the plaintiff suffering psychiatric injury, but that this would be bound to fail also had it been claimed due to the lack of proximity between the parties. The plaintiff’s claim was also bound to fail as a result of the well established existence of the witness’ immunity. Chadwick LJ explained that “an attempt to assert and establish that the law recognises that, absent contract, any duty of care is assumed by a potential witness, in that role, towards anyone who may be affected by the evidence which he or she gives in court is doomed to failure” in the light of those decisions expressly recognising witness immunity. He went on to justify this:

“The reason, as the courts have stressed over many years, is that the public interest in the proper administration of justice requires that witnesses and potential witnesses should not be discouraged from coming forward and giving such evidence as they properly can by a concern that their participation may expose them to proceedings - however vexatious or ill-conceived - by those who perceive themselves to be adversely affected by that evidence.”<sup>116</sup>

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<sup>114</sup> [1971] A. C. 470 at 480

<sup>115</sup> [1999] EWCA Civ 1452 (20 May 1999)

<sup>116</sup> [1999] EWCA Civ 1452 (20 May 1999) at [8]

**(ii) Extent of Immunity from Suit**

6.184 More recent case law has given greater consideration to the parameters of the immunity and it has been observed that the courts have shown a marked reluctance to extend the immunity.<sup>117</sup>

6.185 In *Darker & Ors v Chief Constable of the Mid-Westland Police*<sup>118</sup> the plaintiffs sought damages for conspiracy to injure and the tort of misfeasance in public office against police officers in respect of their breach of disclosure process prior to the plaintiff's trial. As the actions concerned occurred prior to the trial process, no challenge was made to what is referred to as the 'core immunity,' namely the immunity covering things said or done while in the witness box.

6.186 However, it was considered that the plaintiff's claim necessitated a determination of the exact extent of the immunity outside of its application in court. As a result, all the Lords of Appeal all gave significant consideration to the boundaries of the immunity, which provides a good summary of the current English position regarding witness immunity.

6.187 The above mentioned public policy reasons for the immunity were acknowledged and approved, but it was explained that these must be balanced against the principle that a wrong ought not to be without a remedy. "The immunity," Hope LJ reasoned, "is a derogation from a person's right of access to the court which requires to be justified." However, he also recognised that if the public policy objective underlining the immunity, namely the protection of witnesses for the proper administration of justice, the immunity cannot be limited to things done or said in court and the Lord Justices went on to approve a number of recognised extensions of the immunity.

6.188 In *Watson v McEwan*<sup>119</sup> it was held that the immunity must extend to the preliminary examination of witnesses to determine what information they can provide. Similarly, in *Evans v London Medical College (University of London)*<sup>120</sup> it was held that it must also cover evidence from potential witnesses when court proceedings are in contemplation but not yet commenced.

6.189 In *X (Minors) v Bedfordshire County Council*<sup>121</sup> an expert report prepared in order to be relied on in child abuse proceedings, even where the

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<sup>117</sup> Per Clarke MR in *Meadow v GMC* [2006] EWCA Civ 1390 at [17]

<sup>118</sup> [2000] UKHL 44; [2000] 3 WLR 747 (27th July, 2000)

<sup>119</sup> [1905] A.C. 480

<sup>120</sup> [1981] 1 WLR 184

<sup>121</sup> [1995] 2 AC 633

expert did not give evidence in the proceedings, was held to be covered by the immunity.

6.190 In *Taylor v Director of the Serious Fraud Office*,<sup>122</sup> out of court statements that would be considered part of the process of investigating crime with a view to prosecution were seen as covered.

6.191 However, Lord Hoffman's decision was approved in *Taylor v Director of the Serious Fraud Office*,<sup>123</sup> where it was stressed that immunity cannot be claimed over a charge of malicious prosecution.<sup>124</sup>

6.192 The House of Lords recognised that the exact boundaries of the immunity can be difficult to determine where the statements are made prior to the trial. They held that the line is to be drawn at the time where court proceedings come under consideration and thus where the statements related to the giving of evidence; anything before this will not be covered. As described by Scott VC in *Bennett v Commissioner of Police for the Metropolis*,<sup>125</sup> it applies only to out of court statements "if these were clearly and directly made in relation to the proceedings in court."

6.193 The Lords all expressed reluctance at the imposition of blanket immunity and all reiterated the need to ensure that the immunity is limited to that which is necessary for the administration of justice. The judgment of the Australian High Court in *Mann v O'Neill*<sup>126</sup> was approved:

"The general rule is that the extension of absolute privilege is 'viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated'."<sup>127</sup>

6.194 The House of Lords here held that the work of police officers that cannot fairly be said to form part of their participation in the judicial process as witnesses should not be covered by the immunity. As the actions of the officers

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<sup>122</sup> [1999] 2 AC 177

<sup>123</sup> [1999] 2 AC 177

<sup>124</sup> Four elements are necessary to establish this tort; 1. The claimant is prosecuted in the criminal courts 2. The prosecution is resolved in the claimant's favour 3. The prosecution was brought without reasonable and probable cause 4. The prosecution was malicious. (*Hodgkinson & James Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 13-001 fn. 2

<sup>125</sup> (1997) 10 Admin. L.R. 245

<sup>126</sup> (1997) 71 A.L.J.R. 903

<sup>127</sup> Per Brennan CJ, Dawson J, Toohey J and Gaudron J (1997) 71 A.L.J.R. 903 at 907

here occurred in the investigatory stage and not at the stage where they were considering the giving of evidence at trial, the reasons justifying the immunity did not apply. The appeal was thus unanimously allowed.

**(iii) Immunity from Suit and its Application to Expert Witnesses**

6.195 In *Palmer v Durnford Ford*<sup>128</sup> the expert engineer engaged by the plaintiff's produced a written report advising them that they had a justified claim. However, at trial, and having seen the reports of the expert for the other side, it became apparent that no claim was justifiable and the case was abandoned. The expert claimed immunity from suit as he was acting at all times in the course of preparing evidence for a possible claim.

6.196 The Court acknowledged earlier case law recognising immunity for witnesses in preparing statements with a view to giving evidence. However, he emphasised that this immunity should only be conferred where absolutely necessary, and where it would inhibit the expert witness from giving truthful and fair evidence. However, he went on to state that there is no good reason why the imposition of liability for failure to give proper advice to clients should inhibit the ability of expert witnesses to give such truthful and fair evidence. The plaintiff was therefore entitled to sue for negligence. He stated:

"I can see no good reason where an expert should not be liable for the advice which he gives to his clients as to the merits of the claim, particularly if proceedings have not been started and *a fortiori* as to whether he is qualified to advise at all."<sup>129</sup>

6.197 The Court went on to make some general comments about the exact circumstances where an expert could or could not rely on the immunity. He cited the decision in *Saif Ali v Sidney Mitchell & Co*<sup>130</sup> which considered the correct test to apply to determine when advocates are entitled to avail of the immunity. The Court here opined that a similar approach to that taken in *Saif*<sup>131</sup> could apply in the context of experts, and thus the immunity would only apply to that which could fairly be said to be preliminary to his giving evidence in court, judged perhaps by the principal purpose for which the work was done.

6.198 The test in *Palmer* was subsequently applied in *Landall v Faulkner & Ors*<sup>132</sup> and a claim for negligence struck out against an expert consultant as it

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<sup>128</sup> [1992] QB 483

<sup>129</sup> This decision was approved in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633

<sup>130</sup> [1980] AC 198

<sup>131</sup> [1980] AC 198

<sup>132</sup> [1994] 5 Med LR 268

was held that his advice constituted “pre-trial work...so intimately connected with the conduct of the case in court that it could fairly be said to be a preliminary decision affecting the way that the case was to be conducted when it came to a hearing.”

6.199 In *Stanton v Callaghan*<sup>133</sup> the plaintiffs alleged negligence and breach of retainer against an expert arising out of the expert’s conduct in preparing and creating, in conjunction with the expert for the other party, a joint statement for the plaintiff for the purposes of court proceeding, which they alleged resulted in a significant and erroneous reduction in the award granted to them at trial. The question for determination here was whether or not the expert’s actions fell within the principles governing witness immunity from suit, where the expert did not give evidence as the trial did not take place.

6.200 Chadwick LJ reasoned that the duty of expert witnesses, in the interests of justice, to make all possible efforts to reduce contentious issues at trial by engaging in full and frank pre-trial discussions necessitates an assurance that the experts are free to make concessions without fear that departing from any previous advice given to the retaining party could lead to a negligence action. He approved the test set out in *Palmer*<sup>134</sup> as applied in *Landall*.<sup>135</sup>

6.201 For these reasons, and by applying the *Palmer* test, he found that the expert here was entitled to avail of the immunity, even where the trial does not take place. Otton LJ and Nourse LJ concurred with this decision and both agreed that the ‘principle purpose test’ was the appropriate one to apply when considering the immunity of pre-trial work.

6.202 However, Otton LJ did express one note of caution. While he agreed with the general points made by Chadwick J, he emphasised that such considerations may not be present in every case. He explained that a greater degree of protection may need to be given to some classes of experts than to others, for example family law cases or those concerning the welfare of the child. He was therefore reluctant to draw rigid categories determining the cases where immunity would be granted preferring to leave determination on a case by case basis. The test, he felt, should be is it in the best interests of the administration of justice to grant immunity.

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<sup>133</sup> [1998] EWCA Civ 1176 (8 July 1998)

<sup>134</sup> [1992] QB 483

<sup>135</sup> [1994] 5 Med LR 268

6.203 In the Scottish decision *Karling v Purdue*<sup>136</sup> the pursuer sought damages for loss and damages resulting from breach of contract and negligence of the defender, a medical expert retained by the pursuer to carry out a post-mortem and give conclusions on likely cause of death in the context of a murder charge of which the pursuer was subsequently convicted.

6.204 In his report, the defender had concluded that the deceased was most likely to have died from suffocation, as did the Crown's report. However, on appeal additional scientific evidence was adduced and it was found that the conclusion of suffocation was without scientific basis, and the pursuer's conviction was subsequently quashed.

6.205 The defender claimed that as he had prepared a post mortem report and opinion in his capacity as an expert witness, and as these were prepared with a view to forming part of the evidence to be given at the trial, absolute immunity attaches to the defender both in terms of what is contained in that report and opinion, and alleged to have been negligently omitted.

6.206 The pursuer argued that a functional test, requiring the statement to have been prepared for the purposes of giving evidence, is discernible from *Darker*.<sup>137</sup> If the test is applied to the case at hand, it was argued, the defender's function was not to prepare a document which set out the evidence which he would give in Court because he was preparing his report at a time when the precise basis of the Crown's case was unclear and he did not know whether he was likely to give evidence on behalf of the accused. The immunity should not therefore have applied.

6.207 The Court gave an extensive summary of the case law to date dealing with the extent of the immunity for witnesses, including expert witnesses. From the conclusions that can be drawn from these cases, he found that the defender came clearly within the scope of witness immunity. He rejected the pursuer's argument that at the time the expert had prepared the report it was not clear if he would give evidence and held that in fact it was difficult to conclude otherwise than that the principal purpose the defender was engaged was to give evidence on his behalf in criminal proceedings.

#### **(iv) *Curtailment of the Immunity in the Context of Advocates***

6.208 In *Rondel v Worsley*<sup>138</sup> the necessity for immunity from suit in the specific context of the conduct of barristers in court was unequivocally recognised. Three public policy reasons were advanced in support of this

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<sup>136</sup> [2004] ScotCS 221

<sup>137</sup> [2000] UKHL 44; [2000] 3 WLR 747 (27 July 2000)

<sup>138</sup> [1969] 1 AC 191.

blanket immunity. First, the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently. Second, allowing such actions would necessitate retrying the original actions and thus prolong litigation. Third, a barrister was obliged to accept any client, however difficult, who sought his services.

6.209 The blanket immunity propounded in *Rondel*<sup>139</sup> was restricted somewhat by *Saif Ali v Sidney Mitchell & Co.*<sup>140</sup> Here the question to be considered was whether or not the immunity extended to cover the negligence of a barrister in failing to join a party in court proceedings. Lord Wilberforce acknowledged the public policy arguments in *Rondel* but also pointed out that that “account must be taken of the counter policy that a wrong ought not to be without a remedy.”<sup>141</sup> The House of Lords concluded that a barrister’s immunity from suit should extend only to such pre-trial work as was intimately connected with the conduct of the case in Court as distinct from other work such as giving the client legal advice.

6.210 Since these decisions, the position of the immunity of barristers and solicitors has been dramatically altered by the House of Lords decision in *Hall v Simons*<sup>142</sup> where it was considered that societal changes necessitated a rethinking of the immunity that should be granted to advocates. As Lord Hoffman explained;

“I have now considered all the arguments relied upon in *Rondel v Worsley*. In the conditions of today, they no longer carry the degree of conviction which would in my opinion be necessary to sustain the immunity. The empirical evidence to support the divided loyalty and cab rank arguments is lacking; the witness analogy is based upon mistaken reasoning and the collateral attack argument deals with a real problem in the wrong way. I do not say that *Rondel v Worsley* was wrongly decided at the time. The world was different then. But, as Lord Reid said then, public policy is not immutable and your Lordship must consider the arguments afresh.”<sup>143</sup>

6.211 The House of Lords went on to unanimously hold that advocates no longer enjoyed immunity from suit in respect of their conduct of civil

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<sup>139</sup> [1969] 1 AC 191.

<sup>140</sup> [1980] AC 198.

<sup>141</sup> [1980] AC 198 at 214

<sup>142</sup> [2000] 3 All ER 673

<sup>143</sup> [2000] 3 All ER 673 at 701

proceedings, and, with some dissenting opinions, to hold that advocates should no longer enjoy immunity from criminal proceedings.

6.212 However, in its recent decision in *Moy v Pettman Smith (a firm)*<sup>144</sup> the House of Lords has indicated that it will be difficult indeed for plaintiffs to make out a negligence claim against barristers. Lord Hope referred to his judgment in *Hall v Simons*<sup>145</sup> and reiterated that;

“....the measure of the advocate's duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged, and that it could not be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence.”

6.213 The shift in jurisprudence that has occurred in the context of immunity of advocates has been raised in many cases in support of a similar change in the context of immunity of expert witnesses. The advantages and disadvantages of such a reform will now be discussed.

### **(3)      *Expert Witness Immunity from Suit: Abolition or Retention?***

6.214 Two alternative arguments can be made from the above analysis. On the one hand that the argument in favour of the abolition, or at least curtailment, of the immunity from suit as it applies to expert witnesses, has its strengths. On the other, there are strong justifications operating in favour of its retention. The appropriate course of action continues to be the focus of debate, and it can be seen that there has been extensive judicial commentary arguing both approaches.

#### **(a)      *Abolition or Curtailment of the Immunity***

6.215 In the wake of the abolition of immunity from suit for advocates, and in the light of high profile cases of deception and negligence on the part of expert witnesses leading to gross miscarriages of justice, there has been increasing judicial and academic calls for similar reforms to take place in the context of expert witnesses.<sup>146</sup> It is argued that although the public policy arguments underlying the immunity still remain important, more emphasis is nowadays placed on a competing public policy argument, namely that every wrong should have a remedy.

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<sup>144</sup> [2005] UKHL 7; [2005] 1 WLR 581,

<sup>145</sup> [2000] 3 All ER 673

<sup>146</sup> For a comprehensive summary of the major arguments supporting the abolition of the immunity see Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 13-010

6.216 At the outset, it must be acknowledged that even in the above mentioned decisions where immunity of expert witnesses was endorsed, the judgments have all cautioned against extending the immunity and all emphasised the need to ensure that it is limited to that which is necessary for the effective administration of justice and the need to ensure that there is appropriate justifications for its application.<sup>147</sup>

6.217 One of the main public policy arguments supporting the immunity is to ensure that witnesses are not deterred from coming forward to give evidence out of a fear of litigation. However, it has been questioned if expert witnesses are more likely to be deterred from giving evidence as lay witnesses, considering they are professionals who are well reimbursed for their services in giving evidence.

6.218 Other distinctions can also be made between experts and lay witnesses which support the argument that they should be governed by different principles and liabilities, such as the fact that experts have the ability to pick and choose their cases and lay witnesses normally do not, and the fact that experts are likely to be in a contractual arrangement with their instructing party.

6.219 Furthermore, experts are only likely to be dissuaded from acting as expert witnesses if there were a flood of claims made against such expert witnesses. As the definition of an expert requires them to be highly skilled and knowledgeable in their area of expertise, it is unlikely – one would hope – that there would be a large volume of cases where this skill and knowledge would be found to be wanting. It could be further considered that the only ‘experts’ likely to be dissuaded from acting are those who are charlatans or whose expertise is questionable and thus imposing liability may have the positive effect of improving the standard and calibre of expert evidence given across the board.

6.220 However, given the wide range of subject areas in which expert evidence can be given, it may be appropriate to impose different liability on expert witnesses in different areas. For example, it may not be considered appropriate to impose liability on court appointed experts appointed in family law cases or cases involving the welfare of the child in order to ensure that such experts are not deterred from giving full and frank evidence.

6.221 This was recognised in *Stanton v Callaghan*<sup>148</sup> where Chadwick J made the following comments;

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<sup>147</sup> See Clarke MR’s judgment in *General Medical Council v Meadow* [2006] EWCA Civ 1390 at [17] for a summary of judicial statements exemplifying the reluctance to extend the immunity.

<sup>148</sup> [1998] EWCA Civ 1176 (8 July 1998)

"There is, if I may say so, no difficulty in recognising the need for immunity in relation to the investigation and preparation of evidence in criminal proceedings - or in child abuse cases - in order to ensure that potential witnesses are not deterred from coming forward. For my part, however, I find it much more difficult to recognise an immunity founded on the need to ensure that witnesses are not deterred from giving evidence by the possibility of vexatious suits in a case where the witness is a professional man who has agreed, for reward, to give evidence in support of his opinion on matters within his own expertise - a *fortiori*, where the immunity is relied upon to protect the witness from suit by his own client, towards whom, *prima facie*, he owes contractual duties to be careful in relation to the advice which he gives."<sup>149</sup>

6.222 Chadwick J also cited with approval the comments of Tuckey QC in *Palmer v Durnford Ford*<sup>150</sup> where he argued that;

"... I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court."<sup>151</sup>

6.223 Chadwick J went on to point out that in the context of negligence claims, expert witnesses, as professionals, will be covered by an additional safeguard than lay witnesses in that they will not be considered liable for negligence unless it can be shown that their actions were those actions that no reasonable professional acting in the field would have taken. He expressed the view that the imposition of liability is unlikely to have a negative impact on the numbers of experts willing to offer their services as expert witnesses;

"I find it difficult to believe that the pool of those who hold themselves out as ready to act as expert witnesses in civil cases, on terms as to remuneration which they must find acceptable, would dry up if expert witnesses could be held liable to those by whom they are instructed for failing to take proper care in reaching the opinions which they advance. Indeed, I would find it a matter of some surprise if expert witnesses offer their services at present on the basis that they cannot be held liable if their advice is negligent."

6.224 Similar comments were made by Reid J in *Karling v Purdue*.<sup>152</sup> Here, although the defender was considered on the facts to be covered by the

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<sup>149</sup> [1998] EWCA Civ 1176 (8 July 1998)

<sup>150</sup> [1992] 1 QB 483

<sup>151</sup> [1992] 1 QB 483 at 488

immunity, Reid J went on to argue that there is a strong case to be made for the abolition of the immunity, in civil cases at least, for all actions with the exception of defamation. He reasoned:

"It seems to me that it will generally be easier to reach a conclusion that a forensic expert is immune from suit where he is engaged in the course of ongoing criminal proceedings; there is a relatively short space of time between engagement and trial, the fact finding role will usually mean that the expert and his client will have in view that the expert will give evidence if his findings are favourable. In civil proceedings, as the English authorities illustrate, the position will often not be clear cut. Experts may be engaged before actions are raised; their role may initially be restricted, and subsequently broadened e.g. as to topic to report on, and as to function. Some experts are particularly good at providing detailed background information which can be used in cross examination, but are not themselves skilled at giving evidence and explaining their position simply and persuasively to the court. In civil proceedings many permutations are possible where fine distinctions may have to be made. These considerations support the argument that, in relation to civil proceedings, the expert witness should no longer enjoy immunity from suit, except in relation to defamation."

6.225 In the European Court of Human Rights decision *Osman v United Kingdom*<sup>153</sup> the court expressed serious dissatisfaction with the imposition of blanket immunity.

6.226 In the wake of the incorporation into Irish law of the European Convention of Human Rights,<sup>154</sup> the possibility remains that the continued operation of immunity in favour of expert witnesses could be considered to breach the Right to a Fair Trial as guaranteed under Article 6 of the Convention.

**(b)      Retention of the Immunity**

6.227 The above mentioned cases where the immunity has been recognised all go into considerable detail about the public policy reasons that have continuously led to a finding that the immunity is necessary.

6.228 Many cases have rejected the contention that the abolition of the advocates' immunity provides support for the abolition of witness immunity

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<sup>152</sup> [2004] ScotCS 221

<sup>153</sup> No. 23452/94 [1998] ECHR 101

<sup>154</sup> Pursuant to the *European Convention on Human Rights Act 2003* (No. 20 of 2003)

because an analogy can be made between the two groups. In *Hall v Simons* Lord Hoffman explained this ‘witness analogy’.

“No one can be sued in defamation for anything said in court. The rule confers an absolute immunity which protects witnesses, lawyers and the judge. The administration of justice requires that participants in court proceedings should be able to speak freely without being inhibited by the fear of being sued, even unsuccessfully, for what they say. The immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court. So it is said that a similar immunity against proceedings for negligence is necessary to enable advocates to conduct the litigation properly.”

6.229 However he went on to reject this analogy outright;

“My Lords, with all respect to Lord Diplock, it seems to me that to generalise the witness immunity in this way is illegitimate and dangerous..... A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth. There seems to me no analogy with the position of a lawyer who owes a duty of care to his client.”

6.230 Murphy J argues in *O’Keeffe v Kilcullen & Ors*,<sup>155</sup> that rather than reaffirming the abolition argument, this decision can be interpreted as rejecting the argument as Lord Hoffman clearly explains why the two groups should be considered under separate headings.

**(c) Conclusions**

6.231 Having considered the extensive case law in this area, the Commission is inclined to the view that the present position should be retained and that the traditional immunity from civil or criminal suit for expert witnesses should be retained. In view of the differing views that are evident on this, the Commission would welcome views on this matter.

6.232 *The Commission invites submissions on whether the traditional immunity from civil or criminal suit for expert witnesses should be retained.*

**E Alternative Remedies to Civil Suit**

6.233 In the absence of any tortious liability being ascribed to experts for their conduct whilst performing the role of expert witness, alternative ways to sanction experts for wrongful conduct must be considered.

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<sup>155</sup> [2001] IEHC 17

6.234 However, it has been recognised that such alternatives are limited and that expert witnesses appear to have a highly protected position within the legal system. Immunity from suit for expert witnesses has been upheld,<sup>156</sup> and it has been considered impermissible to allow complaints to be made to the professional body of the expert in question.<sup>157</sup> Furthermore, it has been acknowledged above that no approved expert witness body exists in Ireland to which disgruntled solicitors, barristers and clients can have recourse.

6.235 However, there are a number of existing common law and statutory remedies which may provide a disappointed litigant with a limited method of redress against an expert who he believes has behaved wrongfully.

**(1)      *Criminal Sanctions***

**(a)      *Perjury***

6.236 The offence of perjury is a common law offence that provides that in where a person makes a statement in court and under oath or affirmation that is untrue and which they know to be untrue they can be convicted of the criminal offence of perjury and given a fine or a penal sanction.

6.237 The crime is committed by any person lawfully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement, material in that proceedings, which he knows to be false or does not believe to be true.<sup>158</sup> It is an indictable offence but, in certain circumstances, it may be tried summarily under the *Criminal Justice Act 1951*, as amended by the *Criminal Procedure Act 1967*.

6.238 In the context of expert witnesses this means that in, where an expert gives an opinion in court which he does not truly believe, or where he makes false claims which he supports by reference to his expertise, and is subsequently revealed to have lied to the court, he can be convicted of the offence of perjury. Furthermore, it has been held that where a person claims to be an expert witness and gives evidence supported by this alleged expertise, and their expertise later emerges to be fabricated, they will have lied under oath thus perjuring themselves and this will give rise to a charge of perjury.<sup>159</sup>

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<sup>156</sup> *O'Keeffe v Kilcullen & Ors* [2001] IEHC 17

<sup>157</sup> *MP v AP: John Connolly Applicant (Practice: In Camera)* [1996] 1 IR 144

<sup>158</sup> Law Reform Commission *Report on Oaths and Affirmations* LRC 34-1990 at 2.28

<sup>159</sup> See; “Fraudulent Forensic Expert Jailed” *BBC News* 22 February 2007 Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/manchester/6386069.stm](http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm); See: “Bogus Doctor Jailed for 10 Years” *BBC News* 26 January 2005 Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/4209509.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/4209509.stm).

6.239 However, it is undeniable that, the very nature of the evidence that is given by an expert – it being an ‘opinion’ - makes proving the dishonesty of the opinion almost impossible. False claims based on alleged expertise may be easier to identify, however, where very difficult or technical issues are involved, the lay judge and jury will inevitably struggle with detecting falsities and it may depend on the testimony of an expert for the other party to challenge the veracity of the evidence given.

6.240 Furthermore, it has already been acknowledged that in *Fagan v Burgess*<sup>160</sup> it was held that a witness in a civil action cannot be sued for perjury as the witness immunity from suit extends to cover civil claims based on perjury.

6.241 As a result of these limitations, the prosecution of an expert witness for the criminal offence of perjury is not likely to occur often. Indeed it has been recognised that in reality, prosecutions of expert witnesses for perjury are virtually unknown.<sup>161</sup>

6.242 In the context of civil proceedings, section 25 of the *Civil Liability and Courts Act 2004*<sup>162</sup> provides for a new offence of dishonestly giving false evidence in personal injuries claims which is wider than the offence of perjury. Section 25(2) specifically makes it an offence to give false evidence to a solicitor or an expert. This implies that subsection (1) which makes it an offence for ‘a person’ to give false evidence should have wide application and thus it can be implied that this would apply to experts who are considered to have dishonestly given false evidence.

**(b) Contempt of Court**

6.243 Contempt of court is also a common law offence, that can be both criminal and civil, and which can be tried summarily or on indictment.<sup>163</sup>

6.244 As can be seen in *Re N*,<sup>164</sup> where an expert witness fails to attend court to answer questions and give evidence they can also be considered to be in contempt of court *in facie curiae*.<sup>165</sup>

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<sup>160</sup> [1998] IEHC 52

<sup>161</sup> Dwyer “The Effective Management of Bias in Civil Expert Evidence” (2007) 26 CJQ 57 at 73

<sup>162</sup> No 31 of 2004

<sup>163</sup> Law Reform Commission *Report on Contempt of Court* LRC 47-1994 at 3.7

<sup>164</sup> [1999] EWCA Civ 1452 (20 May 1999)

<sup>165</sup> Contempt in *facie curiae* consists of conduct which is so direct and immediate as to be deemed to be “in the personal knowledge of the court.” (Law Reform Commission *Consultation Paper on Contempt of Court* LRC 47-1994 at 4

6.245 It has been held that impersonating an advocate can lead to a charge of contempt *in facie curiae*,<sup>166</sup> therefore by analogy; this could be used to argue that falsely representing oneself as an expert in a particular area could lead to similar charges.

6.246 In England, the Civil Procedure Rules Part 35.10 provides that the expert report must comply with the provisions of the Practice Direction (PD35) to Part 35. This provides that all expert reports must be verified by a statement of truth. Part 2.5 of the Practice Direction further makes it clear that proceedings for contempt of court can be brought where a person makes a false statement in a document verified by a statement of truth without an honest belief in its truth.<sup>167</sup>

**(c) *Perverting the Course of Justice***

6.247 This is a common law offence which, in the case of expert witnesses, would probably require that the expert had agreed with the instructing party or counsel for the party, to make false or misleading statements, or suppress, fabricate or destroy evidence.<sup>168</sup>

6.248 In February of this year, a man who falsely misrepresented himself as a forensic psychologist in over 700 cases was convicted of 20 charges including perverting the course of justice and perjury.<sup>169</sup>

**(2) *Civil Sanctions***

**(a) *Wasted Costs Orders***

6.249 It has been held that it is permissible for a party to bring an action against an expert whose breach of duty and misconduct has resulted in wasted

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<sup>166</sup> See *In the Marriage of Slender (Mr. H and DM)* 29 FLR 267 (Cited in Law Reform Commission Consultation Paper on Contempt of Court LRC 47-1994 at 13)

<sup>167</sup> This is provided in CPR r. 32.14

<sup>168</sup> Dwyer “The Effective Management of Bias in Civil Expert Evidence” (2007) 26 CJQ 57 at 73

<sup>169</sup> See; “Fraudulent Forensic Expert Jailed” BBC News 22 February 2007 Available at: [http://news.bbc.co.uk/2/hi/uk\\_news/england/manchester/6386069.stm](http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm); “Bogus’ Psychologist Admits Lying to Police” Manchester Evening News 7 February 2007 Available at; [http://www.manchestereveningnews.co.uk/news/s/235/235509\\_bogus\\_psychologist\\_admits\\_lying\\_to\\_police.html](http://www.manchestereveningnews.co.uk/news/s/235/235509_bogus_psychologist_admits_lying_to_police.html); Wilson “The Trouble with Experts” The Guardian 25 February 2007 Available at: [http://commentisfree.guardian.co.uk/david\\_wilson/2007/02/bea\\_campbell\\_in\\_these.html](http://commentisfree.guardian.co.uk/david_wilson/2007/02/bea_campbell_in_these.html).

time and cost.<sup>170</sup> In the English case *Phillips v Symes & Zamar*<sup>171</sup> the second defendant was an expert witness whose evidence was rejected by the court who found in favour of the plaintiff. The first defendant was declared bankrupt which meant that the plaintiffs had little chance of recovering costs against him. The court held that the plaintiffs were entitled to have the expert witness joined in the costs proceedings.<sup>172</sup>

6.250 In the High Court, it was held that a third party costs order could be made against an expert because, as a result of the way in which he gave his evidence, which was in blatant disregard of his duties owed to the court, significant costs were incurred. Smith J referred to the recognised immunity from suit for witnesses but rejected that it should be applied to cover wasted costs orders;

"It seems to me that I should approach the matter along the principles (for example) set out in the Stanton case. Do expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice? Alternatively, is it against the administration of justice principles not to allow a costs application of the type envisaged by the Administrators to be brought against Dr Zamar?

In my judgment, that question should be looked at in the light of modern developments of the law in relation to litigation. Thus, wasted costs applications against advocates have been decoupled from the immunity. The immunity has been destroyed as regards advocates. In neither of those cases did the Courts accept submissions that the immunity inhibited advocates fearlessly representing their clients. Indeed they rejected them. As regards experts in Stanton the Court of Appeal equally was dismissive of the belief that Experts would be deterred from giving proper reports because of a potential action against them.

It seems to me that in the administration of justice, especially, in spite of the clearly defined duties now enshrined in CPR 35 and PD 35, it would be quite wrong of the Court to remove from itself the power to make a costs order in appropriate against an Expert who, by his

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<sup>170</sup> This is expressly acknowledged in Part 4.7 of the Civil Justice Council's Guidance Protocol on Part 35 of the Civil Procedure Rules (Civil Justice Council "Protocol for the Instruction of Experts to Give Evidence in Civil Claims" (June 2005))

<sup>171</sup> [2004] EWHC 2330 (Ch) (20 October 2004)

<sup>172</sup> [2004] EWHC 1887 (Ch) (30 July 2004)

evidence, causes significant expense to be incurred, and does so in flagrant reckless disregard of his duties to the Court.”<sup>173</sup>

**(b) Withhold Payment**

6.251 There is some authority for the proposition that evidence of misconduct of an expert witness, such as professional negligence, could be allowed as shield for a claim by the expert witness for unpaid fees.<sup>174</sup>

6.252 Another possibility in this regard would be for the judge hearing a case to have the power to limit or disallow the expert's fees if there were costs wasted attributable to the expert. The CPR may already contain this power in CPR 35.4 (4), although on the wording it is not clear that this power contained in the CPR can be used retrospectively.

**(c) Contempt of Court**

6.253 Civil contempt arises where a person fails to follow a court order. Therefore it may occur that where an expert witness has failed to carry out an order of the court for example to make full disclosure of expert reports as required under Statutory Instrument No. 391 of 1998 to the expert for the other side, the expert may be convicted of civil contempt of court.

**F Conclusion**

6.254 The above shows the range of existing ways in which an expert witness may be punished for failing to meet the required standard whilst giving expert evidence. Some alternative or additional ways in which liability may be imposed on an expert are also debated.

6.255 The Commission believes that reducing the likelihood of biased or negligent experts and increasing the overall standard and quality of expert evidence going before the courts is best achieved by the availability of sufficient guidance and education for expert witnesses about their role and duties, and the existence of appropriate punitive measures for dealing with experts that fail in these duties.

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<sup>173</sup> [2004] EWHC 2330 (Ch) (20 October 2004) at [93]-[95]

<sup>174</sup> Hodgkinson & James *Expert Evidence: Law and Practice* (2<sup>nd</sup> ed Sweet & Maxwell 2007) at 13-011

## **CHAPTER 7      SUMMARY OF PROVISIONAL RECOMMENDATIONS**

7.01      The Commission's provisional recommendations in this Consultation Paper may be summarised as follows.

7.02      The Commission provisionally recommends that further research be conducted into the functioning of translators in our court system in order to ascertain if reforms need to be taken to improve access to justice. [Paragraph 2.47]

7.03      The Commission provisionally recommends that the common knowledge rule should not be abolished and that matters of common knowledge should remain outside of the scope of matters on which expert testimony can be given. [Paragraph 2.192]

7.04      The Commission provisionally recommends that the Ultimate Issue rule should not be abolished and should have continued application as it does not impose any excessive difficulties in practise. [Paragraph 2.242]

7.05      The Commission provisionally recommends that the Court should continue to be entitled to allow expert evidence to inform and educate the judge and or jury about the background to the ultimate issue where necessary, whilst emphasising that the ultimate decision on such issues is for the court and not the expert. [Paragraph 2.243]

7.06      The Commission provisionally recommends that experts should be required, as far as possible, to distinguish clearly between matters of fact and matters of opinion when giving their expert evidence both orally and in the expert report. [Paragraph 2.252]

7.07      The Commission provisionally recommends that a reliability test should be introduced as an additional requirement for admissibility of all expert testimony. [Paragraph 2.383]

7.08      The Commission provisionally recommends the introduction of a judicial guidance note outlining the factors that can be taken into account by the trial judge when assessing whether the expert evidence in question meets the requisite reliability threshold. [Paragraph 2.390]

7.09 The Commission provisionally recommends that the general acceptance test, by focusing on the number of experts in the area that recognise the theory, rather than assessing the subjective merits of the theory itself, imposes too onerous a burden in terms of its provenance as opposed to its content to be considered an appropriate test to determine the reliability of the evidence. [Paragraph 2.394]

7.10 The Commission provisionally recommends the introduction of a judicial guidance note outlining a non-exhaustive and non-binding list of factors, based on empirical validation, which can be used to help the court assess the reliability of tendered expert evidence. [Paragraph 2.400]

7.11 The Commission provisionally recommends that the court should have the discretion to determine whether or not evidence that fails to satisfy the reliability test should be excluded. The Commission also provisionally recommends that where the extent of the reliability is uncertain, or where the trial judge feels it appropriate or necessary, he or she can argue that the evidence be admitted subject to a warning to the jury about its uncertain reliability. [Paragraph 2.406]

7.12 The Commission invites submissions as to whether experience-only based knowledge should suffice to be entitled to give expert evidence or whether formal, professional qualifications, study or training is necessary. [Paragraph 3.48]

7.13 The Commission provisionally recommends the adoption of a definition of the term “expert” for the purposes of giving expert testimony and invites submissions on the form of wording that would be appropriate for such a definition. [Paragraph 3.58]

7.14 The Commission invites submissions as to whether experience-only based knowledge should suffice for a witness to be entitled to give expert evidence or whether formal, professional qualifications, study or training is necessary. [Paragraph 3.59]

7.15 The Commission provisionally recommends that a person seeking to act as an expert witness need not be actively involved in the field of expertise at the time of the giving of expert evidence. [Paragraph 3.60]

7.16 The Commission provisionally recommends that, when assessing the competency of an individual to be considered an expert, considerable account be taken of the length of time they have spent studying or practising in the particular area, as well as, in the case of retired people and others no longer practising, the length of time they have spent away from the field. [Paragraph 3.61]

7.17 The Commission provisionally recommends that a formal guidance code for expert witnesses, based on the principles set down in the English case *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikerian Reefer)*<sup>1</sup> should be developed which would outline the duties owed by expert witnesses and which would be made available to all persons seeking to act as expert witnesses. The Commission invites submissions on the form, statutory or non-statutory, this guidance should take and whether all the specific duties identified in The Ikerian Reefer should be adopted. [Paragraph 3.246]

7.18 The Commission provisionally recommends that there should not be a prohibition on treating therapists acting as expert witnesses. [Paragraph 4.28]

7.19 The Commission provisionally recommends that there should not be a prohibition on the giving of evidence by experts who have a pre-existing relationship with one of the parties to an action. [Paragraph 4.132]

7.20 The Commission provisionally recommends that an expert witness should be obliged to disclose the existence of any pre-existing relationship with a party to a case or any other potential conflict of interest. [Paragraph 4.133]

7.21 The Commission also provisionally recommends that the court should be encouraged as far as possible to limit the amount of time spent by an expert witness in court to that which is reasonably necessary to give their expert evidence. [Paragraph 4.134]

7.22 The Commission provisionally recommends that there should be no change to the overriding duty owed by the expert witness to the court. The Commission also provisionally recommends that the expert witness should continue to owe a duty to the court which supersedes any duty owed to the instructing party. [Paragraph 4.136]

7.23 The Commission invites submissions on whether there should be a general requirement that court permission is expressly required before a party can adduce expert evidence. [Paragraph 5.41]

7.24 The Commission provisionally recommends that determination of the admissibility of expert evidence and expert witnesses should continue to take place during the trial process but that the court should have discretion to order pre-trial determination where this is likely to have a significant impact on the length and costs of a trial. [Paragraph 5.52]

7.25 The Commission provisionally recommends that parties to litigation should formally agree terms of engagement in writing from the outset with expert witnesses instructed by them, and that this requirement could be included as part of a draft code of guidance for expert witnesses and their

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<sup>1</sup> [1993] 2 Lloyd's Rep 68.

instructing parties. The Commission also provisionally recommends that any such guide should set out the specific issues which should be agreed, that this should be a non-exhaustive list. The Commission invites submissions on what should be included in such guide, particularly in the context of individuals not accustomed to the giving of expert testimony. [Paragraph 5.62]

7.26 The Commission provisionally recommends the inclusion in any guidance of a provision recommending that full information be given by the instructing party to expert witnesses throughout the extent of their appointment by the party, in particular concerning procedural requirements, which should not prejudice the manner in which the expert witness prepares his or her evidence for court. [Paragraph 5.73]

7.27 The Commission provisionally recommends that there should be an express provision prohibiting fee arrangements with expert witnesses which are conditional on the outcome of a case, as such arrangements are likely to impede the independence of the expert witness. [Paragraph 5.95]

7.28 The Commission provisionally recommends that it would be appropriate for the court and the parties to be empowered to encourage pre-trial meetings between experts, and invites submissions on the form or forms this might take. [Paragraph 5.116]

7.29 The Commission provisionally recommends that both parties be required to answer questions about the contents of their expert reports prior to the trial when these are put by the other party. [Paragraph 5.120]

7.30 The Commission invites submissions on whether it would be appropriate for an expert witness to put a request to the court for information about issues relating to how he or she can satisfactorily fulfil their role and duties as an expert witness where they feel they have not received sufficient information from those instructing them. [Paragraph 5.125]

7.31 The Commission invites submissions as to whether the court should be empowered to order that a party disclose all necessary information to the other party where this is not forthcoming and where needed in order to create a comprehensive expert report. [Paragraph 5.138]

7.32 The Commission invites submissions on whether it would be appropriate to recommend the extension of a requirement to exchange expert reports, currently confined to personal injuries actions, to all categories of civil claims. [Paragraph 5.175]

7.33 The Commission provisionally recommends that there should be a set form and structure for expert reports, which might include the following elements:

- The report must be addressed to the court and not to the party or parties from whom instructions have been received.
- The expert's qualifications and experience should be outlined in detail and relevant certificates of proof attached.
- The terms and conditions of the appointment of the expert witness including the payment arrangements should be explained.
- All material instructions, oral and written, which were given to the expert, and on the basis of which the report was written must be outlined.
- If a potential conflict of interest arises, the facts relating to this should be stated.
- All relevant information relating to the issue, including that which is capable of detracting from the expert's opinion, should be outlined.
- All materials used by the expert in coming to the opinion, clearly distinguishing between matters of fact and matters of opinion.
- Where tests or experiments have been conducted in the course of creating the report all related information must be included such as methodologies, results and details about the individuals and qualifications of those involved in the carrying out of these tests.
- The expert should indicate if the opinion is provisional or conditional on certain factors, or if they believe they cannot give a formal opinion on the issue without further information, or where they believe they cannot make an opinion without qualification.
- A signed declaration that the contents of the report are true and that the expert understands the overriding duty owed to the court and that the report has been created in compliance with this.
- If, subsequent to the completion of a report, an expert changes his or opinion on any material issue in the report, the expert witness must state this in a supplementary report. [Paragraph 5.202]

7.34 The Commission invites submissions on whether parties could be facilitated to decide jointly on an appropriate expert to be appointed, rather than having a single expert being imposed by the court. [Paragraph 5.299]

7.35 The Commission welcomes submissions on whether panels of experts or mixed panels should be used in certain types of cases. [Paragraph 5.310]

7.36 The Commission provisionally recommends that current voluntary arrangements for training of expert witnesses, in which appropriate

familiarisation training for experts is given, should continue, and that a mandatory system should not be introduced. [Paragraph 6.62]

7.37 The Commission provisionally recommends that a mandatory regulatory body for expert witnesses should not be introduced. [Paragraph 6.88]

7.38 The Commission provisionally recommends that the relevant professional bodies should be encouraged to introduce their own regulatory and disciplinary processes for professionals who wish to act as expert witnesses. [Paragraph 6.110]

7.39 The Commission provisionally recommends that the immunity from suit for expert witnesses should not be extended to cover disciplinary proceedings from professional bodies. [Paragraph 6.142]

7.40 The Commission invites submissions on whether the traditional immunity from civil or criminal suit for expert witnesses should be retained. [Paragraph 6.232]





The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. Since 2006, the Commission's role also includes two other areas of activity, Statute Law Restatement and the Legislation Directory. Statute Law Restatement involves incorporating all amendments to an Act into a single text, making legislation more accessible. The Legislation Directory (previously called the Chronological Tables of the Statutes) is a searchable guide to all legislative changes.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975