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Expert evidence

What happens when an expert doesn't meet the necessary standards and is heavily criticised by a judge - and what are the consequences for other cases in which that expert is instructed?

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A Guide to Expert Witness Evidence

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A PROFESSIONAL HANDBOOK

The Reliable Expert Witness

Mark Tottenham

A guide to professional reports and expert evidence for courts, arbitrations and other tribunals.

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SCSI Chartered property, land and construction surveyors

The Chartered Surveyor as Expert Witness

A Guide to Best Practice

Preamble

This guide seeks to provide assistance to the Chartered Surveyor instructed as an Expert Witness. SCSI members are expected to follow the recommendations provided herein. This guide is effective from 1st October 2009.

It is drawn heavily from the RICS Practice Statement and Guidance Notes "Chartered Surveyors Acting as Expert Witnesses" and it is strongly recommended that members familiarise themselves with that document. Members should also be aware that the Law Reform Commission has published a consultation paper on Expert Evidence and should consult this also.

For the purposes of this document, the generic expression 'tribunal' means any body whose function it is to determine disputes. This therefore includes:

- Courts and tribunals (including the Valuation Tribunal);
- Arbitrations tribunals (including hearings before the Property Arbitrator); and
- Independent Experts.

Principal message

As a surveyor actively involved in a dispute that may come before a tribunal, you may find yourself carrying out one or more roles, including that of an expert witness. Your primary duty as an expert witness is not to a client but to the tribunal. Your primary duty to the tribunal is to ensure that the expert evidence provided by you:

Types of expert evidence

- Opinion from facts proven in evidence
- Explanation of complex subjects
- Analysis of the evidence eg delay, quantum
- Professional standards

Expertise

A witness who gives evidence as an expert must have sufficient expertise in relation to the matter upon which he or she is to give evidence to be considered an expert and the burden of establishing this rests on the party calling the witness. Such expertise may be acquired by reason of experience, training or knowledge.

McGrath on Evidence (2nd ed 2014), cited with approval by O'Moore J in *McKillen v Tynan* [2020] IEHC 189

Duties

It is the duty of an expert witness to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.

Rules of the Superior Courts, Order 39, rule 57(1)

A warning

The area of expertise in any case may be likened to a broad street with the plaintiff walking on one pavement and the defendant walking on the opposite one. Somehow the expert must be ever mindful of the need to walk straight down the middle of the road and to resist the temptation to join the party from whom his instructions come on the pavement. It seems to me that the expert's difficulty in resisting the temptation and the blandishments is much increased if he attends the trial for days on end as a member of the litigation team. Some sort of seduction into shared attitudes, assumptions and goals seems to me almost inevitable.

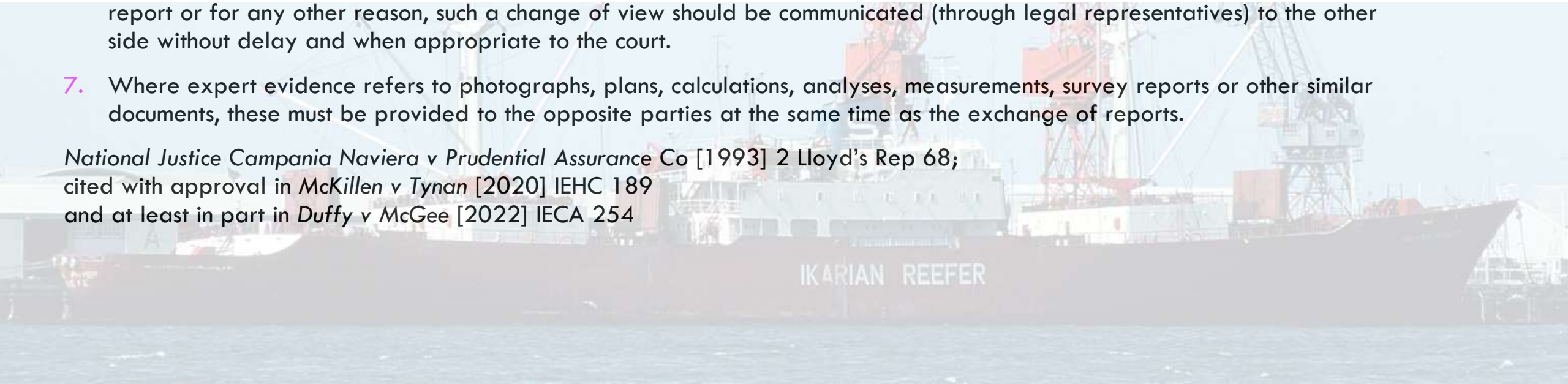
Thorpe LJ in *Vernon v Bosley* [1996] EWCA Civ 1310

Duties

- Tell the truth
- Be independent
- Disclose any financial or economic interest in any business or economic activity of the party retaining the expert (Ord 39, r 57 (2))
- Ascertain and investigate all relevant facts
- Apply expertise to the facts in a professional manner
- Reach a reasoned and honestly held conclusion
  - 'what carries weight is the reasoning, not the conclusion'
- Co-operate with the other parties and experts
- Comply with the court's directions

1. Expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness 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.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
6. If after exchange of reports, an expert witness changes his view on a material matter having read the other side's experts report or for any other reason, such a 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 parties at the same time as the exchange of reports.

National Justice Campania Naviera v Prudential Assurance Co [1993] 2 Lloyd's Rep 68;
cited with approval in *McKillen v Tynan* [2020] IEHC 189
and at least in part in *Duffy v McGee* [2022] IECA 254



Don’t stray

- Don’t stray into the role of advocate
- Don’t stray beyond your expertise
- Don’t usurp the role of the court or tribunal

Consequences

- Evidence rejected as inadmissible
- Short of inadmissible, evidence rejected as unpersuasive
  - even if not controverted *Duffy v McGee* [2022] IECA 2 (Collins J); *Tesco Ireland v Stateline Transport* [2024] IECA 46; *Griffiths v TUI* [2021] EWCA Civ 1442
- Perjury
- Contempt
- Civil liability (immunity?)
- Wasted costs order?
- Professional discipline (immunity?)
- Court criticism

Evidence rejected as unpersuasive in favour of another expert's evidence

98 As for the delay experts, Mr Robinson and Dr Aldridge, I preferred Mr Robinson in almost every respect. He, broadly, logically and conventionally, adopted the approach of establishing critical delay by reference to the 'logical sequence(s) of events which marked the longest path through the project'; Dr Aldridge accepted that this was generally the way to calculate delay... In the difficult circumstances facing both experts by reason of the absence of any usable contemporaneous programme from early 2007 onwards, Mr Robinson adopted a much more objective approach to his expert analysis whilst Dr Aldridge proceeded on a much more subjective approach (which he accepted at least in part)…

99 Dr Aldridge's report also in some respects almost reads simply as a suggestion to the Court that the Claimant has not proved its case; an example is the opening words: 'Walter Lilly's case does not stack up'; his report is littered with this type of remark that WLC has failed to prove or demonstrate this or that or to make out its case; it is not for an expert to suggest this type of thing. He proceeds on an obvious logical misapprehension that, if works are finished before Practical Completion, they cannot have delayed completion. His suggestion that plastering defects delays could realistically have contributed to the overall delay is simply unsustainable in circumstances in which there was ultimately a limited amount of remedial work actually done and the remedial work was substantially completed by April 2007. His adoption of an approach based on determining the most 'significant' matters preventing practical completion led to him adopting in many respects a subjective approach as to what his client thought was significant. This approach was one which Mr Robinson had never seen used. He frequently descended into the arena of disputed facts and liabilities in which he was not the relevant expert; an example was…when he felt able to criticise WLC's unwillingness to accept that the colour variation (and the very poor quality of staining which had made matters worse) was an unacceptable defect requiring rectification'. Some parts of his report were based on conversations and information which were not in evidence and on occasion he had to accept that he was given information by Mr Mackay and by Navigant which was not contained or referred to in his report. He produced as Appendix D a 'Weighted Significance Matrix' which was worthless and self-fulfilling when he on a largely subjective basis awarded weightings to the various possible causes of delay; this was taken through the project in 2007 and 2008 on a monthly basis and, unsurprisingly gave much higher weightings to the subjectively accepted factors (such as plastering defects) selected by him or his client as 'significant'.

100 As for the Architect Experts, I preferred the well researched, very open and pragmatic approach of Mr Zombory Moldovan, WLC's expert. He was clear and positive throughout. Mr Josey is an experienced expert and was open, as one would expect, with the Court. He has, perhaps somewhat unfairly, been criticised by WLC's Counsel for having been instrumental prior to the Defence and Counterclaim in drawing up detailed lists of defects; it was said that this was indiscriminate because it did not identify what defects were the fault of WLC. Whilst it is the case that initially very large quantities of defects and amounts were counterclaimed against in respect of defects (many of which were later dropped), I would not criticise Mr Josey for that; it would be up to those advising DMW, DMW and Mr Mackay himself to identify who had a contractual or legal responsibility for the defects. However, he did labour under the disadvantage that he had to accept that a large number of them could no longer be pursued against WLC, including some which he had himself supported. I would not criticise him but I found Mr Zombory Moldovan much more reliable.

101 In relation to the quantum experts, both are experienced quantity surveyors with experience of litigation. I much preferred the approach of Mr Hunter which was pragmatic and down to earth. I was disappointed with Mr Pontin who, although an experienced expert, I felt was trying too hard to reduce the delay and other quantum heads to an insignificant level. Whether he felt, subconsciously, pressurised by Mr Mackay or not I can not say. But his arguments were reduced to scraping the barrel in some respects such as suggesting that WLC had not demonstrated any loss and expense attributable to Plot C alone; this was absurd because it must follow that, if there was as here delay (almost 30 months delay), some time and resources must have been incurred in consequence and that obviously has a cost. He endorsed a totally artificial calculation to demonstrate that WLC had recovered all its preliminaries costs on the three Units.

Akenhead J in *Walter Lily & Co v Mackay* [2012] EWHC 1773 (TCC)

Inadmissible

102. It seems to me that there were a number of aspects of Dr. Thompson's evidence that give rise to serious cause for concern in the context of expert testimony. These include the following:

(i) Dr. Thompson, rather extraordinarily it must be said, purported to give an opinion on Irish law in the context of res ipsa loquitur. This was something that was entirely beyond his competence and entirely inappropriate for a supposedly independent expert.

(ii) The bedrock of Dr. Thompson's evidence, repeated on countless occasions by him, was the 30-minute proposition concerning the properties of isocyanate. For this fundamental proposition, he did not rely on his own researches or expertise but rather on two papers which were not independent peer reviewed scientific papers, but were commissioned by the SPF [spray polyurethane foam] industry and were, in any event, concerned with the question of ventilation.

(iii) Dr. Thompson's report is virtually devoid of any reference to ventilation, notwithstanding the fact that the manufacturer of Icynene makes clear in all its published documents, of which he was aware, that ventilation is critically important to the health and safety of those in the vicinity of SPF spraying operations. Yet, as the trial judge noted, in his evidence he repeatedly sought to downplay and effectively ignore the relevance of ventilation.

(iv) In preparing his written report and his oral evidence, despite the fact that Dr. Thompson was aware that ventilation was the cardinal issue in the case, he made no enquiries from Mr. McGee regarding how many ACH [air changes per hour] his men had achieved during the spraying works and thereafter.

(v) Dr. Thompson's report and evidence was exclusively predicated on Mr. McGee's instructions on crucial issues such as the presence or absence of Mrs. Duffy and Charlie Jo in the house during the spraying, despite the fact that Dr. Thompson was well aware that these issues were strongly disputed. He made no attempt to consider, and evidently avoided considering, any alternative scenario and in particular, that advanced by the plaintiffs, again of which he was fully aware.

(vi) Both in his report and his oral evidence, Dr. Thompson repeatedly accused the Duffys of lying, referring to their evidence as deception and misrepresentation. When confronted in cross-examination with clear evidence that there was no attempt by the Duffys to conceal the fact that there was another 'project' ongoing in the house on the day of the spraying, he steadfastly refused to withdraw his allegations of deception.

(vii) Dr. Thompson, as already indicated, purported to give a medical opinion on Mrs. Duffy's psychiatric and skin complaints, an area clearly outside his competence and advanced for no obvious purpose other than attempting, again improperly, to undermine the plaintiffs' case.

(viii) In his report, Dr. Thompson cited and relied upon documents from the EPA to buttress the conclusions he arrived at and when statements in those documents were put in cross-examination that were inconsistent with his evidence, he sought to disavow the documents, saying the EPA was wrong.

(ix) Dr. Thompson's evidence to the High Court about the curing time for SPF was contradicted by his own statements in the interviews he gave to Mr. Davidson.

103. Any one of these matters on its own would tend to strongly suggest an absence of objectivity and impartiality on the part of Dr. Thompson but taken in combination, can only be described as a wholesale abdication by Dr. Thompson of his duty as an expert witness. I share the trial judge's experience of never having encountered such an approach to giving evidence by an expert witness before our courts. Dr. Thompson impermissibly donned the mantle of a partisan advocate in his efforts to discredit the claim of the plaintiffs.

104. It is simply not possible to adopt some kind of curate's egg approach to this evidence, as counsel for Mr. McGee suggested, and I am satisfied that the trial judge was perfectly correct to exclude Dr. Thompson's evidence in its entirety. There was in this case such an abject failure to comply with the most basic obligation of an expert, namely, to be objective and impartial, as to render all of Dr. Thompson's evidence inadmissible.

Noonan J in *Duffy v McGee* [2022] IECA 254

Inadmissible

20. However, arguably the most significant concern about expert evidence relates to issues of objectivity, impartiality (lack of bias) and independence…

34…where it is evident that an expert witness is either unwilling or unable to comply with their duties as expert, their evidence can - and ordinarily should - be excluded as inadmissible. I am not referring here to minor transgressions, which may properly be seen as going only to weight. Rather, I am speaking of significant departures from the fundamental requirements of objectivity, impartiality and independence.

35. While it may be that it will sometimes be difficult to draw the dividing line, no such difficulty arises here in my view. Regrettably, Dr Thompson demonstrated a total lack of understanding of, or respect for, the duties of an expert witness in this jurisdiction.

37...The manner in which Dr Thompson had given his evidence clearly demonstrated that he was unable or unwilling to comply with his duties as an expert witness. Accordingly, he was not qualified to give expert opinion evidence and the evidence that he did give had to be disregarded in its entirety as inadmissible. The fundamental frailties of that evidence went far beyond anything that could properly be addressed merely by discounting the weight to be attached to it. The Judge would have been seriously in error had he adopted such an approach.

Conclusions

38. This is a disturbing case and it is certainly to be hoped that its like will not be seen again. As I have said, there needs to be a significant change of culture in this area. As well as the duties of expert witnesses themselves, I emphasise again the responsibilities of legal practitioners. The adverse consequences of calling an expert witness who is unable or unwilling to comply with their duties as such may not necessarily be limited to the exclusion of their evidence, serious as that may be for the party concerned. It may also have adverse consequences in costs. The Superior Courts have a broad jurisdiction to make costs orders against non-parties, if necessary by joining the non-party as a party for that purpose:

Collins J in *Duffy v McGee* [2022] IECA 254

Partisan behaviour

48...I have to record my clear conclusion that Mr Singleton walked on the pavement hand-in-hand with the husband…some might say that the forceful judicial demands for impartiality are tinged with unworldliness. It seems to me to be not unlikely that subconscious forces may well incline an expert, who is being handsomely paid by one of the parties, to give evidence favourable to that party. Solemn statements have been made for decades about the duty of experts to be impartial, but I have yet to see in a financial remedy case an expert, instructed and paid for by one party, give evidence adverse to that party's interests and strongly in favour of the other party's.

49. Even so, I agree with Mr Southgate QC that Mr Singleton did not deal with Ms Longworth in an open, impartial way but rather in a strategic defensive manner that has all the hallmarks of the mentality of an advocate. I agree that his attendance throughout the two-day private FDR [familt dispute resolution]is highly suggestive of *de facto* membership of the husband's team. He also wrote an email on 26 September 2021 to Mr Kerins about a possible comparable transaction stating 'it is a great comparable and we can argue that the contracts it has are longer term and more secure than those within Galldris' (my emphasis). This laid bare his perceived membership of the husband's team. His written evidence put forward figures for A and B which were as low as he could tenably go without falling off the spectrum altogether. They were not impartial figures.

50. The evidence of the experts was hot-tubbed and I allowed them politely to interrupt each other. Mr Singleton's interruptions were forthright, abrasive and adversarial, even degenerating on one occasion to him rebuking the court for allowing Ms Longworth to descend, in his opinion, to excessive detail.

51. I therefore do regard Mr Singleton as *parti pris*…

52. Even absent my conclusions about his partiality, I would not have accepted his figures for A and B. But I agree with Lord Hamblen that his partiality deals a fatal blow to his use of those figures.

Moystn J in *Gallagher v Gallagher* [2022] EWFC 53

Partisanship (in stages) (proudly) admitted

The defendants submitted as their expert Mr. Goodall. He is an eminent architect. He prepared a lengthy report which was served in this action.

In August 1990, Mr. Goodall wrote an article in the Journal of the Chartered Institute of Arbitrators. Its title is 'The Expert Witness: Partisan with a Conscience'. It sets out, among other things, what Mr. Goodall believes is the appropriate approach an expert should adopt when preparing a report for use in litigation. He confirmed in court that the principles set out there were applied to the drafting of the report on which the defendants relied in this action…In his article, Mr. Goodall said the following:

> How should the expert avoid becoming partisan in a process that makes no pretence of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?... the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game'.
>
> If by an analogous 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri' is, as the maxim has it, 'suggestio falsi', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them...
>
> Thus there are three phases in the expert's work. In the first he has to be the client's 'candid friend', telling him all the faults in his case. In the second he will, with appropriate subtlety, be almost what the Honorary Editor's American counsel called 'a hired gun', so that client and counsel, when considering the other side's argument can say, with Marcellus in Hamlet, 'Shall I strike at it with my partisan?'. The third phase, which happens more rarely than is acknowledged in much of the comment on expert witness work, is when the action comes to court or arbitration.
>
> Then, indeed, the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close upon on him.

…The whole basis of Mr. Goodall's approach to the drafting of an expert's report is wrong. The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, 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. An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill…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.

Cala Homes v Alfred McAlpine Homes [1995] EWHC 7 (Ch); also *Anglo Group v Winther Brown* [2000] EWHC Technology 127

Should judges criticise expert evidence? Yes, to explain their conclusions

13(1)(h) I am afraid that Morgan 1 and Morgan 2…were, in critical respects, disingenuous documents, written in a manner that seemed to me calculated, not to assist, but to mislead, the court. I am very conscious that this is the most serious criticism that one can make of an expert, and I do not make it lightly…I am not confident that I can rely on Professor Morgan's reports, save with a degree of caution and reserve that a judge would not normally attach to the report of an expert.

(f) As is normal practice, a draft of this judgment was circulated, on terms of strict confidentiality, to the parties and their legal advisors. Professor Morgan did not see the draft. Counsel for Mylan…questioned the appropriateness of my criticisms of Professor Morgan, and referred me to the decision of the Court of Appeal in Re W ([2016] EWCA Civ 1140), a case which considered (in rather different circumstances) the extent to which it was appropriate to make factual findings in relation to persons not directly before the court (i.e., witnesses not parties), but named as part of a fact-finding exercise conducted by a judge in the Family Court. Whilst I do not consider Re W to be precisely on point, I have re-visited the draft with Mylan's points regarding Professor Morgan specifically in mind…However, having considered the matter most carefully, I have not materially changed the terms of the draft, and I should explain why:

(i) An expert is responsible for his or her evidence, including the precise wording of any report submitted to the court under the name of that expert. In many cases, the expert will be in need of, and will receive, assistance from the solicitors (or other lawyers) who have retained that expert. That is entirely understandable, but only serves to enhance the importance of the expert being entirely satisfied that his or her opinion is properly reflected in the report(s) submitted in that expert's name. This is the duty of the expert, and it is not one that can be delegated.

(ii) An expert will be giving opinion evidence in relation to a subject-matter with which a lay person - specifically, in this case, the judge - will be unfamiliar. That is why the evidence is needed. It is incumbent on the expert not merely to present evidence that is technically correct, but that makes a fair presentation of the expert's opinion. If the expert does not do that, then criticism is liable to follow.

(iii) It must be emphasised that such criticism is not intended in any way to be personal or punitive. It is an intrinsic part of assessing the weight to be attached by the court to the expert evidence that is adduced before it. The criticisms that I have made of Professor Morgan must be seen in this light. They are made purely and simply because I need to explain to the reader of this judgment precisely why I have preferred - on critical points - the evidence of Professor Roth over that of Professor Morgan. That has involved a very close parsing of material parts of Professor Morgan's written evidence, together with the oral evidence he gave in relation to that written evidence.

(iv) To put the same point differently: it would be unacceptable for me to say simply that I preferred the evidence of Professor Roth over that of Professor Morgan, without saying why. Oftentimes, the "why" will turn on technical matters of legitimate dispute between the experts, and the judge will explain why the approach of one expert has been preferred over that of another, it being accepted that each expert was doing his or her best to assist the court. That is the ordinary case. This - for reasons that I have set out in this judgment - is not such a case.

Marcus Smith J in *Neurim Pharmaceuticals v Generics UK* [2020] EWHC 3270 (Pat)

What happens when an expert doesn't meet the necessary standards and is heavily criticised by a judge - and what are the consequences for other cases in which that expert is instructed?

Questions?

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