

Irish Court of Appeal Rejects Partisan Expert Evidence

In a significant decision¹, the Irish Court of Appeal (the "Court") has warned of a possible culture of 'partisan advocates' among experts involved in Irish litigation and strongly emphasised the requirement for expert witnesses to be fair, objective and non-partisan. The Court confirmed that if an expert strays materially from their duties of independence, impartiality and objectivity, their evidence may be excluded altogether. Moreover, the Court reminded legal practitioners of their duties when retaining an expert and then deciding to adduce an expert's evidence, as well as possible adverse legal costs consequences not only for the client, but also, potentially, for the lawyers involved.

The decision is a welcome reminder of the applicability of the *Ikarian Reefer*² principles to the use of expert evidence in Irish litigation, and a development on the more typical consequence of partisan expert evidence, from limiting the weight to be afforded to the evidence towards refusing to admit it at all.

Background

The case concerned personal injuries claims by a couple arising from their exposure to toxic chemicals in their home during and after the installation of spray foam insulation by the first Defendant, Mr McGee, an insulation contractor. The Plaintiffs' case was that the contractor was negligent in failing to comply with the

requirement that the Plaintiffs should have been out of the premises while spraying was in progress and for a period thereafter, and further that the Defendant failed to have in place the required level of mechanical ventilation of the premises for a requisite period of time. As a result of their exposure to and inhalation of the toxic chemicals, the Plaintiffs suffered serious and life-changing injuries.

Mr McGee countered that he was not negligent and that the chemicals used could not have caused the injuries suffered. In support of this defence, he relied heavily on the expert opinion of a US-based toxicologist.

The High Court judgment expressed serious misgivings as regards the independence, objectivity, and impartiality of the toxicologist's expert report and evidence, in particular that they:

- carried a tone of absolute certainty and an aggressively dismissive attitude to any alleged negligence by Mr McGee;
- relied on two industry-generated papers in support of the expert's contentions rather than any peer-reviewed publications;
- did not refer to or engage with key facts that were inconvenient to Mr McGee's defence;

¹ *Duffy v. McGee t/a McGee Insulation Services & Anor.* [2022] IECA 254

² *National Justice Compania Naviera SA v Prudential Assurance Company Ltd ('The Ikarian Reefer')* [1993] (No.1) 2

Lloyd's Rep 68 (Cresswell J), and refined in *Anglo Group plc v. Winther Brown & Co. Ltd.* [2000] All ER 294 (Toulmin J)

- appeared not to be open to a change of view when confronted with new or different facts;
- strayed into comments on legal and medical matters, areas outside the scope of his expertise; and
- persisted in unwarranted allegations of deception by the Plaintiffs.

The High Court excluded the toxicologist's evidence, and ultimately decided that Mr McGee was negligent, that the Plaintiffs had suffered severe personal injuries that were caused by the chemicals used in the spray foam insulation, and awarded the couple approximately €2 million. Mr McGee appealed the decision saying, among other things, that the High Court should not have excluded the toxicologist's evidence.

Court of Appeal Judgments

Both judgments of the Court affirmed the applicability of the Ikarian Reefer principles to Irish expert evidence, and referred to a number of local developments that implemented aspects of an expert's duties of impartiality, independence, and objectivity to the Court.

The Court referred to the Law Reform Commission's (the "LRC") 2008 consultation paper and 2017 recommendations regarding the reform of aspects of the law of evidence, which include the consolidation and expansion of these expert evidence duties. The LRC had proposed that the Irish legislature implement its recommendations in a draft Bill, but the Court noted that legislation had not been passed and suggested that many of the expert evidence recommendations were amenable to implementation by the swifter Court rules or practice directions instead.

The Court took the opportunity to comment more generally on the use of experts in Irish litigation practice, stating that it was evident that

many expert witnesses either fail to understand and / or fail to take seriously their duties and that they wrongly regard themselves as advocates for their cause. The Court said, to the extent that this failure was a culture, it needed to change, and that courts need to be forceful in policing the rules and take appropriate measures when there was a failure to comply with those rules.

The issue of the admissibility of an expert's evidence usually arises in advance of that evidence being tendered, and by reference to a perceived lack of relevance or even of an existing field of science or methodology at all. It can also arise by reference to the individual concerned, whether due to an alleged lack of skill, experience or qualification in the particular field. In contrast, the reliability of the evidence itself is typically addressed by the weight the Court gives to it in its consideration. However, the Court considered existing Irish, English and Canadian case law and accepted that a significant departure from an expert's duty could lead to the exclusion of their evidence altogether.

In addition, the Court summarised the legal practitioner's duties in this area as ensuring that:

- the expert evidence was relevant and likely to assist the Court;
- the expert had the necessary expertise;
- the expert evidence was confined to issues within the scope of the expertise; and
- the expert fully understands and can comply with their duties and, if they are unwilling or unable to so comply, to ensure that the expert's evidence is not proffered to the Court.

In discussing consequences of proffering the evidence of an expert who is unable or unwilling to comply with their duties, the Court referred to

the broad jurisdiction the courts have to make costs orders against non-parties and for making wasted costs orders against legal practitioners, too.

The Court confirmed the High Court's misgivings as to the toxicologist's evidence and the decision to exclude it. It also confirmed the High Court's findings on liability, causation, and the quantum of the awards.

Comment

In this particular case, the issues may be considered atypical and extreme. However, as the Court accepted, it is human nature that an expert may feel part of their instructing client's team, and the risk of a breach of duty by an expert is endemic to litigation. This decision is a helpful reminder of the high standards expected of expert witnesses, and the obligation on legal practitioners to carefully consider the selection, engagement and consideration of the output of an expert, including ensuring that the expert stays 'within the tramlines' of the Ikarian Reefer principles. It also warns of the potential adverse consequences for lawyers failing to do so.

We await additional developments in this area, particularly in relation to the Court's suggestion that the LRC's recommendations should be taken up, and a consolidated code established, so that there is certainty for all interested parties on the use of expert evidence.

Further Information

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