

# EXPERTISE AND EXPERT WITNESS SERVICES COURSE

6<sup>th</sup>, 13<sup>th</sup> and 20<sup>th</sup> May 2022, 9.00am – 4.00pm



# EXPERT'S DUTIES AND RISKS

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# FAILURE TO COMPLY WITH EXPERT WITNESS DUTIES

## Penalties suffered by the client:

- A ruling that expert witness evidence is inadmissible.
- Less weight is given to the evidence, thus prejudicing the outcome of the case.
- A 'costs order' is made against the client for wasting time.
- Aggravated damages arising from misconduct.

## Penalties suffered by the expert witness:

- Prosecution for contempt of court, or perjury.
- Action taken for professional negligence.
- Exposure to professional disciplinary proceedings.
- Public criticism by the court.
- A 'costs order' is made against the witness for wasting time.



**There are a range of penalties for a client and expert witness for non-compliance**



## IMMUNITY FROM SUIT

- Traditionally lawyers and witnesses have enjoyed immunity in relation to their conduct in proceedings.
- This immunity was to placate the then fear of potential multiple actions arising from a losing party to compensate for its loss.
- However, courts in many countries have ruled that the continuance of immunity is not in the public interest.
- The watershed for immunity was reached in *Jones v Kaney* [2011] UKSC13 which decided that immunity from suit such as a professional negligence action for an expert witness, previously available for over 400 years, would be no longer available.
- The case concerned a negligent statement given by Kaney, as an expert witness in an earlier action, where as a result Jones had to settle for a lesser sum. Jones then took a professional negligence action against Kaney, which continued to the Supreme Court in reflecting the public interest, to recover his loss where the case was upheld.



**Never assume you have no liability for your actions as an expert witness**

## IMMUNITY FROM SUIT

- Witness immunity is still upheld in Ireland. In *WJ Prendergast and Others v Redver Skelton* [2007] IEHC 192 an expert fire consultant was hired in a malicious injury claim where the expert failed to deal fully with the issues.
- The defendant argued that the proceedings should be struck out because as a witness he was immune from suit, where the court upheld that he was entitled to avail of expert immunity.
- In *Waliszewski v McArthur and Co. Ltd* [2015] IEHC 264 the expert witness failed to disclose certain material matters.
- Barton J commented on the omissions stating *“His failure to do so was reprehensible and is to be deprecated. I reject his explanation that this was due to his desire not to cause confusion. No question of confusing the court, in particular, would arise by a full and frank disclosure of the road traffic accident.”* Barton J directed his judgment to be forwarded to the Medical Council of Ireland.



**The Irish courts are becoming increasingly vocal about expert witness shortcomings**

## IMMUNITY FROM SUIT

- In *McKillen v Tynan* [2020] IEHC 189, O'Moore J commented:  
*“Neither [of the experts] state that they had ever valued a shareholding in any company, let alone a bank. They attest to no qualifications which would suggest that they have the capacity to advise on the valuation of the shareholding of Anglo Irish Bank. They have authored no papers relating to the valuation of a shareholding in any form of company let alone a financial institution. During the course of their evidence they refer to no guideline, academic work, or practical paper relating to the valuation of shareholding in a bank. At its height, their evidence suggests what these individuals believe should be available to Mr McKillen but they do not even begin to suggest why they as individuals are required to provide this evidence.”*



**O'Moore J summarised “the expert witness evidence was of no real value”**

## IMMUNITY FROM SUIT

- In its 2017 report the Law Reform Commission (LRC) recommended that immunity should be abolished and replaced with civil liability of an expert witness. The liability was to be limited to circumstances in which it is established that the expert has acted with gross negligence in giving evidence, that is, falling far short of the standard of care expected of such an expert.
- The Commission also recommended that provision should also be made for the Minister for Justice and Equality to draft, in consultation with a Working Group of suitable experts, a Code of Conduct for expert witnesses. The LRC further recommended that a trial judge should be empowered to exclude the evidence of an expert witness who fails to satisfy any of the proposed statutory duties.



**The LRC has consistently promoted answerability for expert witnesses, do not assume immunity**



## ADVERSE COSTS ORDERS FOR POOR CONDUCT

- In *Phillips v Symes (No.2)* [2004] EWHC 2330, Smith J indicated that it may be appropriate to make a costs order in circumstances against an expert witness who, by his/her evidence, caused significant expense to be incurred, and did so in flagrant and reckless disregard of his duties to the court
- In *Kennedy v Killeen Corrugated Products Ltd* [2007] 2 IR 561 it was suggested that an order for 'wasted costs' may be made against a solicitor where he has acted vexatiously. This would mean that the solicitor would be personally liable for the costs of the hearing.



**It is possible that this line of law could be extended to an expert witness in Ireland**

## PERJURY AND BIAS

**Perjury:** To tell the truth, the whole truth and nothing but the truth.

- Where an expert witness knowingly misleads the court having made such a declaration they can face criminal prosecution for the offence of perjury.
- Beware of placing ‘gloss’ on evidence to assist your side, do not be tempted to overstate your sides claim.
- Never assume that a prepared report will not be subject to a forensic court examination – not all cases settle.



**Bias:** Can be revealed in a number of different forms

- The Law Reform Commission in 2008 stated *“Bias or partisanship...can take place in a number of ways in the giving of expert testimony and a number of sources of adversarial bias have been identified. “Conscious bias”, “unconscious bias” or “selection bias” may all occur in the giving of testimony.*

## PERJURY AND BIAS

### Conscious bias:

- Will occur where there is a personal interest or financial interest, which can include moral belief, a close relationship and over involvement or over allegiance to a profession.

### Unconscious bias:

- Can take many forms including affinity bias, appearance bias, attribution bias, gender bias, age bias and authority bias as examples.

### Selection bias:

- Occurs when a study is not representative of the subject base, such that the conclusions do not accurately represent the subject base to which the conclusions are being extended, and would include sampling bias and exclusion bias as examples.



**Always ensure that your evidence is subjected to an objective bias check**



## CONTEMPT OF COURT

- In *Liverpool Victoria Insurance Co v Zafar* [2019] EWCA 392 a doctor in a personal injuries case rewrote a report on being prompted by the clients solicitor, without consulting with the injured client.
- The re-written report came to light when the original report was mistakenly included in the trial bundle, where both the original and re-written reports were verified with a statement of truth.
- The doctor was prosecuted for contempt of court and given a suspended sentence.
- However in a later Court of Appeal judgment it was ruled that a term of between nine and twelve months imprisonment would have been more appropriate.



**Vigilance in adopting suggestions of others is paramount, always adopt a critical eye**

## CRIMINAL PROCEEDINGS

- In *Autofocus Ltd v Accident Exchange Ltd* [2010] EWCA 788, seven experts perjured themselves when they gave evidence on oath when the disputes were heard in court.
- Supperstone J commented that the experts had become caught up in “*perjury on an industrial scale*” and involved themselves “*in a very serious perversion of the course of justice.*”
- Supperstone J declared that “*The evidence that [Autofocus] was involved in the systematic, endemic fabrication of evidence in which the defendants and each of them knowingly and actively participated throughout the material time is overwhelming.*”
- There is presently in Ireland, no systematic punishment of experts who fail to comply with the expected standards of an expert witness, but it is likely that the courts will be increasingly more vigilant in monitoring such evidence in the future.



**The Irish courts could in time adopt a similar robust approach if deemed necessary**

## PROFESSIONAL DISCIPLINARY PROCEEDINGS

- If experts bring their profession into disrepute it is reasonable to expect professional colleagues to take appropriate action.
- In the UK case of *General Medical Council v Meadows* [2006] EWCA 1390 it was held that an expert witness has no immunity from professional disciplinary or 'fitness to practice (FTP)' proceedings.
- The earlier case of *Eastern Health Board v FTP Committee* [1998] 3 IR 399 similarly suggests that there is no immunity in Ireland.
- In *Waliszewski v McArthur and Co. Ltd* [2015] IEHC 264 Barton J used the sanction of sending a copy of his judgment to the Medical Council of Ireland presumably in the knowledge that disciplinary proceedings would then be considered.



**Always remember that you have both legal and professional obligations**



# CODE OF ETHICS

Always be aware of and apply the code of ethics of your profession.

## RIAI – General obligations

- *Architects shall at all times act with honesty and integrity and avoid any actions or situations that are inconsistent with their professional obligations.*
- *Architects shall not make, support, or acquiesce in any statement written or otherwise, that is contrary to their professional opinion or that is misleading or unfair to others.*

## Engineers Ireland

- *Members shall not engage in conduct which is dishonest or illegal or which may bring Engineers Ireland or the profession into disrepute or which may prejudice Engineers Ireland or the profession.*



**Do not contemplate anything that is unethical in prejudicing you or your profession**

## PUBLIC CRITICISM

- Public criticism of experts can seriously impact reputation, judges will use acerbic language where considered appropriate.
- In *Van Oord UK Ltd and SICIM Roadbridge v Allseas UK Ltd* [2015] EWHC 3074 (TCC) Coulson J stated of the expert witness that his *“abrupt departure from the witness box at a short break for the transcribers, never to return, was an indication of the stress he was under. But I regret to say that I came to the conclusion that his evidence was entirely worthless”*.
- Fraser J in *Riva Properties Ltd & Others v Foster + Partners Ltd* [2017] EWHC 2574 (TCC) stated with regard to the evidence of a named expert that *“This approach has no intellectual justification whatsoever and as an approach by an expert witness is wholly flawed. If taken to its logical conclusion, it would mean that no outline design that had not been fully designed could ever be costed, which is verging on nonsense in my judgment.”*



**Be always vigilant to ensure that you do not compromise your professional standing**

## CONCLUDING REMARKS

- Acting as an Expert Witness requires more than just particular knowledge in your specialised field. It requires full knowledge of your role and duty to the court, understanding what this is; what burden it places on you; how to discharge this duty; and what the court expects and needs from you.
- If you feel disinclined to act as an expert witness, comfort can be taken from Law Reform Commission who have said *“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.”*



**Expert witness work can be rewarding, but ensure you know your duties and risks**



# THANK YOU

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The Royal Institute of the Architects of Ireland