

*Unapproved
No redactions required*



THE COURT OF APPEAL

Record Number: 2021/63

High Court Record Number: 2017/7648P

Noonan J.

Neutral Citation Number [2022] IECA 254

Collins J.

Binchy J.

BETWEEN

PATRICK DUFFY

Plaintiff/Respondent

AND

BRENDAN MCGEE T/A MCGEE INSULATION SERVICES

AND GMS INSULATIONS LIMITED

Defendants/Appellant

Record Number: 2021/64

High Court Record Number: 2017/649P

BETWEEN

ANITA DUFFY

Plaintiff/Respondent

AND

BRENDAN MCGEE T/A MCGEE INSULATION SERVICES

AND GMS INSULATIONS LIMITED

Defendants/Appellant

JUDGMENT of Mr. Justice Maurice Collins delivered on 7 November 2022

1. I have read the judgment of Noonan J and I agree with it and accordingly agree that the appeal of the First Defendant (“*Mr McGee*”) should be dismissed.
2. I wish to add some observations of my own on the issues arising from the extraordinary evidence that was given at trial by Dr Thompson on behalf of Mr McGee.

Expert Evidence in Civil Proceedings

3. As far back as 1959 the Supreme Court declared that this “*is the age of experts qualified to give opinions in every field of human knowledge – whether science, medical or other, in accountancy, finance, handwriting and technical matters in every aspect of manufacturing process and so on*” (*AG (Ruddy) v Kenny* (1960) 94 ILTR 185, per Lavery J at 189). While he did not wish to “*minimise the value of such evidence*”, Lavery J cautioned that “*a sense of proportion should not be lost*”.¹
4. Despite that note of caution, in the period since the decision in *AG (Ruddy) v Kenny* the domain of expert evidence has continued its inexorable expansion. Such evidence is, of course, often indispensable to the just resolution of civil proceedings (and criminal proceedings also). But experience demonstrates that it is far from being an unalloyed

¹ The issue in *AG (Ruddy) v Kenny* was whether a Garda could properly give evidence that the defendant had been drunk while driving a motor lorry on Morehampton Road, the defendant’s solicitor having objected that the witness, “*not being a doctor or like expert*”, was not competent to give such evidence. The Supreme Court (in agreement with Davitt P in the High Court) dismissed that objection on the basis that no special expertise was required to recognise drunkenness. As it was put by O’ Daly J “*drunkenness is not so exceptional or so much outside the experience of the ordinary individual as to require an expert to diagnose*” (at 192).

blessing. Expert testimony can add significantly to the duration and cost of litigation which, as well as being undesirable in itself, can also give rise to concerns regarding equality of arms and access to the courts. Multiple experts may be called to give evidence in relation to the same or adjacent areas of expertise. Expert evidence is often led unnecessarily, addressing issues that are matters of common knowledge or, at least, are within the knowledge or expertise of the trial court.²

5. Concern about excessive (and expensive) recourse to expert evidence prompted changes to the Rules of the Superior Courts to give courts significantly greater control over the calling of expert evidence in civil proceedings. Order 39, Rule 58(1) RSC³ provides that “*expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings*”. Rule 58(2) gives courts extensive power to give directions (including on its own motion) in relation to the giving of expert evidence, including directions “*determining the fields of expertise in which, or the proposed experts by whom, evidence may be given at trial*”. Rule 58(3) is also significant, providing as it does that a party may offer evidence from one expert only in a particular field of expertise on a particular issue unless the court “*is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties.*”

² See, by way of example the comments of Charleton J in *James Elliott Construction Limited v Irish Asphalt Limited* [2011] IEHC 269, at paras 10-14 and *Condrón v ACC Bank Plc* [2012] IHC 395, [2013] 1 ILRM 113 at 123. See also the discussion in McGrath, *Evidence* (3rd ed; 2020) (“*McGrath*”) at para 6-100 and following.

³ Inserted by the Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254 of 2016).

6. In *O’ Brien v Clerk of Dáil Eireann* [2016] IEHC 597, [2016] 3 IR 384, Kelly P said the following of Rule 58 :

“[36] This rule gives a measure of badly needed statutory control to the court in respect of expert evidence. The various decisions in recent years where judges both at trial and at appellate level have commented adversely on the number, extent and costs of experts demonstrates this need. Under this rule the court is entitled to restrict such evidence to that which is reasonably required to enable the court to determine the proceedings. No longer are parties free to call expert witnesses willy nilly. The court can determine what is needed and restrict expert testimony accordingly.”

7. Excessive recourse to expert evidence, and the negative consequences for the length and expense of trials, is far from the only issue of concern in this context. Assessing the reliability of expert evidence can present significant challenges. Particularly in the area of complex expert evidence based on novel scientific theories or methodologies, the risk that the court may inadvertently admit and rely on unreliable evidence is a real one.
8. Different jurisdictions have taken differing approaches to the issue of reliability. In some jurisdictions reliability is assessed as a threshold *admissibility* issue. That appears to be the position in the United States (at least at federal level) and in Canada: see

McGrath at 6-34 – 6-36. The US Supreme Court’s decision in *Daubert v Merrell Dow Pharmaceuticals* (1993) 509 US 579 has been influential in this context.⁴

9. In England and Wales, there has been significant recent reform, deriving from recommendations made by the Law Commission in its *Report in Expert Evidence in Criminal Proceedings in England and Wales* (Law Com No 325) (2011) intended to make the process of assessing the reliability of evidence for the purpose of determining its admissibility much more rigorous. The Law Commission’s recommendations have been implemented by practice direction (now CPD V Evidence 19A). These changes are discussed in detail in Hodgkinson & James, *Expert Evidence: Law and Practice* (5th ed; 2020), at para 3-010 and following. While the Practice Direction applies only to criminal proceedings, there have been parallel developments in the approach to expert evidence on the civil side: *R (on the application of BAT Ltd) v Secretary of State for Health* [2016] EWHC 1169 (Admin), at paras 280-291 (upheld on appeal, [2016] EWCA Civ 1182)

10. One of the factors which the Practice Direction directs courts to take into account in assessing reliability is the extent to which any material upon which the expert’s opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on such material. The importance of peer review was also emphasised in *R (on the application of BAT Ltd) v Secretary of State for Health*.

⁴ For a discussion of *Daubert*, see (inter alia) Foster et al, *Judging Science – Scientific Knowledge and the Federal Courts* (1999)

11. Here, the “*Irish courts have not propounded a test of admissibility which require expert evidence to achieve a specified threshold of reliability before it can be admitted*” *McGrath* at para 6-41. Even so, there are instances in which courts have refused to admit novel scientific evidence because its reliability had not been sufficiently established. Thus in *People (DPP) v Kelly* [2008] IECCA 7, [2008] 3 IR 697 the Court of Criminal Appeal rejected evidence based on CUSUM analysis of an inculpatory statement made by the accused because the court was not satisfied that the CUSUM technique had “*a properly established scientific provenance or that it has achieved the requisite degree of expert peer approval*” (at para 97). Again, the reference to “*expert peer approval*” is notable.

12. As *McGrath* notes, in 2008 the Law Reform Commission provisionally recommended the introduction of a *Daubert*-style test for the admissibility of all expert evidence, based on empirical validation: *Consultation Paper on Expert Evidence* (LRC CP 52-2008) at para 2.380-2.400. However, in its *Report on Consolidation and Reform of Aspects of the Law of Evidence* (LRC 117 – 2016), the Commission drew back from that recommendation: para 7.140 - 7.151. Instead, it recommended that experts should be required by statute to state the facts and assumptions (and, where relevant, any underlying scientific methodology) on which their evidence is based. Such a requirement was, in the Commission’s view, essential so that the trier of fact could come to their own independent conclusion. If an expert is unable to lay out a cogent scientific basis for their opinion, the court should be empowered to exclude their evidence: paras 8.80-8.85.

13. Unfortunately, that recommendation - and the other valuable recommendations made by the LRC in relation to expert evidence – have not been implemented. While the LRC’s recommendations were framed in terms of the enactment of proposed primary legislation (in the form of the Draft Evidence (Consolidation and Reform) Bill appended to its Report), there appears to be no reason why many, at least, of its recommendations relating to expert evidence (which address the duties of expert witnesses as well as issues around reliability) could not be implemented by further amendments to the Rules and/or by the issuing of appropriate Practice Directions.

14. Even in the absence of a *Daubert*-style threshold reliability test, the reliability of expert evidence is obviously a crucially important matter. In *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 WLR 597, the (UK) Supreme Court identified four considerations governing the admissibility of “*skilled evidence*”, including “*whether there is a reliable body of knowledge or experience to underpin the expert’s evidence*” (at para 44, per Lord Reed and Lord Hodge). The Justices noted that what amounts to a reliable body of knowledge or experience depends on the subject-matter of the proposed evidence and observed that in “*many cases where the subject matter of the proposed expert evidence is within a recognised scientific discipline, it will be easy for the courts to be satisfied about the reliability of the relevant body of knowledge*” (at para 55). Conversely, where the science or body of knowledge concerned is not widely recognised, a party seeking to lead evidence in that area would be required to set up not only the qualifications and expertise of the individual skilled witness but also the

methodology and validity of that field of knowledge or science (also at para 55, citing *Mearns v Smedvig Ltd* 1999 SC 243).

15. While *Kennedy v Cordia (Services) LLP* was a Scottish appeal, the joint judgment of Lord Reed and Lord Hodge does not suggest that their views on the issue of reliability were specific to Scotland. To the contrary, the judgment refers to and applies precedents from England and Wales and from elsewhere in the common-law world (including the influential decision from South Australia, *R v Bonython* (1984) 38 SASR 45). *R v Bonython* and *Kennedy v Cordia (Services) LLP* were cited with evident approval by this Court in *CDG v JB* [2018] IECA 323, per Whelan J (Birmingham P and Edwards J agreeing) at paras 96-106.

16. The decision of this Court in *People (DPP) v Cumberton* [2020] IECA 136 is also worthy of note in this context. One of the grounds of the appeal there arose from the disputed admission of DNA evidence which was based on the application of a specific software program known as “*STRmix*”. On appeal, the appellant argued for the application of a *Daubert* test. The Court did not uphold that submission, noting that the *Daubert* test had not been universally accepted and that a more liberal approach to the admission of expert evidence had been adopted in England and Wales, citing in that regard a number of decisions of the Court of Appeal (Criminal Division) (per Edwards J (McCarthy and Kennedy JJ agreeing) at para 111. The Court went on to approve the view of the Special Criminal Court “*that while expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury, there is nonetheless no enhanced test for the*

admissibility of such evidence.” The SCC went on to observe that the question of an enhanced admissibility test often arose in the context of novel techniques or those that might be regarded as “*being at the frontiers of scientific knowledge in the discipline in question*” whereas it was satisfied that the DNA evidence at issue was “*firmly established*” (quoted at para 112).

17. The position in this jurisdiction as regards the issue of reliability would therefore appear to be as follows. There is no general requirement that expert evidence must meet any specific threshold of reliability as a condition of admissibility nor do the Irish courts have the “*gatekeeping*” function contemplated by *Daubert*. However, in any given case the admissibility of expert evidence may be challenged on the basis that it lacks a reliable scientific or methodological foundation. At what stage of the proceedings, and in what manner, such a challenge should be determined is a matter for case-by-case assessment. Finally, even where *admissible*, issues of reliability may properly affect the *weight* to be given to expert evidence.

18. The point made by the Law Reform Commission about the importance of the trier of fact reaching (and being in a position to reach) their own independent conclusion on the weight, if any, to be given to expert evidence highlights another significant issue. In civil proceedings, the weight to be given to evidence, including expert evidence, is always a matter for the court. Even if uncontradicted, a court is not obliged to accept the evidence of an expert witness, any more than it is obliged to accept the uncontradicted evidence of a witness of fact: see, *DPP v Burke* [2014] IEHC 483, [2014] 2 IR 651, approved by the Supreme Court in *McDonagh v Sunday Newspapers*

Limited [2017] IESC 46, [2018] 2 IR 1 (witness of fact) and *Davie v Magistrates of Edinburgh* [1953] SC 34, approved by the Supreme Court in *Donegal Investment Group Ltd v Danbywiske* [2017] IESC 14, [2019] 1 IR 150, [2017] 2 ILRM 1 (expert witness). There is no principle that greater weight is to be given to expert evidence than to ordinary evidence of fact. Ultimately it is always a matter for the court to resolve disputed issues of fact and, while that process may be assisted by expert evidence, the court must not surrender its judgment to experts, however well-qualified they may appear to be.

19. To properly perform its function, the court must be able to understand and engage with the evidence, which in turn requires that experts should sufficiently explain their opinions and the basis for them. Their entitlement to express such opinions “*is predicated upon also informing the court of the factors which make up their opinion and supplying to the court the elements of knowledge which their long study and experience has furnished to them whereby they have formed that opinion so that, in those circumstances, the court may be enabled to take a different view*”: *Flynn v Bus Eireann* [2012] IEHC 398, per Charleton J at para 9. It follows that the expert witness must “*provide material on which a court can form its own conclusions on relevant issues*” (*Pora v The Queen* [2016] 1 Cr App R 3, at para 24). Mere assertion or “*bare ipse dixit*” on the part of the expert witness is, accordingly, “*worthless*”: *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 WLR 597, at para 48.
20. However, arguably the most significant concern about expert evidence relates to issues of objectivity, impartiality (lack of bias) and independence. Concerns of that kind

prompted Cresswell J to formulate a detailed statement of the duties and responsibilities of expert witnesses in civil proceedings in *The Ikarian Reefer* [1993] 2 Lloyds Rep 68. That statement is set out in Noonan J’s judgment and I need not repeat it here. It, and variants of it, have been cited with evident approval in this jurisdiction (see e.g. *Kenneally v DePuy International Limited* [2016] IEHC 728, [2017] 2 IR 487 and *O’ Leary v Mercy University Hospital Cork Limited* [2019] IESC 48, [2019] 2 IR 478) and the Law Reform Commission has drawn on it in formulating its recommendations for legislation enshrining the general duties of expert witness: *Report on Consolidation and Reform of Aspects of the Law of Evidence*, para 8.69 and following.

21. For present purposes, it is sufficient to set out what the authors of Hodgkinson & James, *Expert Evidence: Law and Practice* (5th ed; 2020) suggest is “clear law” in both civil and criminal cases, as follows:

“(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.”⁵

⁵ As this Court emphasised in *Donegal Investment Group plc v Danbywiske* [2016] IECA 193, [2019] 1 IR 150, the duty of independence does not preclude *any* contact between an expert and the party by whom they have been retained and/or their legal representatives: per Finlay Geoghegan J (Hogan and Cregan JJ agreeing) at para 53. However, where such contact had inappropriately influenced the evidence of the expert, the court would be entitled to reject it in its entirety as inadmissible or to attach less weight to it: para 54. The same point was made by MacMenamin J in *O’ Leary v Mercy University Hospital Cork Ltd*, at para 46, though again subject to the caveat that witnesses must never allow a situation to arise “*where they put themselves, or are put in, the position of being seen as advocates rather than independent witnesses.*”

(2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise. An expert witness should never assume the role of advocate.” (para 6-002, footnotes omitted)”

22. In my opinion, these principles are “*clear law*” in this jurisdiction also. Their essence is reflected in Order 39, Rule 57(1) RSC, providing as it does that:

“It is the duty of an expert 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.”

Experts are required to acknowledge that duty in any report prepared by them and are also obliged to disclose any financial or economic interest in any business or economic activity of the party retaining them: Order 39, Rule 57(2). Order 39, Rule 57 is of general application, as is Order 39, Rule 58.

23. The legal practitioners acting for a party seeking to adduce expert evidence bear an important responsibility for ensuring that the evidence is relevant and likely to assist the court and that witness has the necessary expertise to give it. They must also ensure that such evidence is confined to issues properly within the scope of the expert’s relevant expertise. They also have a duty to ensure – and this is critical – that the witness fully understands, and is in a position to comply with, the duties of an expert witness, as articulated in the jurisprudence and encapsulated now in Order 39, Rule 57(1). If not, the witness should not be proffered.

24. Unfortunately, as Noonan J observes in his judgment, it is evident that many expert witnesses either fail to understand and/or fail to take seriously their duties as such. Far too frequently, expert witnesses appear to fundamentally misunderstand their role and wrongly regard themselves as advocates for the cause of the party by whom they have been retained. It may be said that this is an established part of litigation culture in this jurisdiction. If so, the culture is unacceptable and it needs to change. To that end, courts need to be forceful in policing the rules and in taking appropriate measures where those rules are not complied with.

25. Any significant departure from the essential requirements of objectivity, impartiality and independence must be taken very seriously. There was considerable debate here as to whether such matters went only to weight or whether a want of objectivity, impartiality or independence might reach the point where the evidence of an expert should be excluded altogether. I have no hesitation in concluding – in agreement with Noonan J – that, as a matter of principle, (lack of) objectivity, impartiality and independence may (and in an appropriate case will) go to the *admissibility* of expert evidence, not merely to the *weight* to be given to such evidence.

26. Where it appears that an expert is unable and/or unwilling to comply with his or her duty to give objective, impartial and independent evidence – as was the position here with Dr Thompson – then in my view their evidence should ordinarily be excluded as inadmissible.

27. I take that formulation from the judgment of the Supreme Court of Canada in *WBLI v Abbott and Haliburton* 2015 SCC 23, [2015] 2 SCR 182. The judgment of the Court in *WBLI v Abbott and Haliburton* was given by Cromwell J. It sets out the concerns that had arisen in Canada regarding the impartiality and independence of expert witnesses and the judicial response to such concerns, in terms which have an obvious resonance in this jurisdiction. After a survey of the authorities, Cromwell J concluded that “*the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence*” (para 40). As to the threshold for admissibility, he considered that it flowed from the duty to be fair, objective and non-partisan. If a witness is unable or unwilling to fulfil that duty “*they do not qualify to perform the role of an expert and should be excluded*” (para 46). An expert who assumed the role of advocate “*is clearly unwilling and/or unable to carry out the primary duty to the court*” (para 49). The essence of the Court’s approach is captured in the introductory section of the judgment, as follows

“[2] *Expert witnesses have a special duty to the court to provide fair, objective and non-partisan assistance. A proposed expert witness who is unable or unwilling to comply with this duty is not qualified to give expert opinion evidence and should not be permitted to do so. Less fundamental concerns about an expert’s independence and impartiality should be taken into account in the broader, overall weighing of the costs and benefits of receiving the evidence.*”

28. The issue in *WBLI v Abbott and Haliburton* involved an alleged conflict of interest. The plaintiffs sued the former auditors of a company in which they were shareholders. The

former auditors brought a motion to have the action dismissed. In response, the shareholders retained a partner from the firm that had subsequently been appointed as auditors to the company who provided an affidavit supporting the action. The former auditors then sought to have that affidavit excluded on the basis that the witness was not an impartial witness. The motion judge upheld the application and struck out the affidavit. The shareholders' appeal succeeded by a majority. The Supreme Court unanimously dismissed the former auditors' appeal from that decision, holding that there was no basis on which to find that the witness was in fact biased or not impartial or that she was acting as an advocate for the shareholders or that she was able and willing to provide fair, objective and non-partisan evidence.

29. The respective courts in *WBLI v Abbott and Haliburton* were clearly exercising a gatekeeping function, in which the issue of admissibility was considered as a threshold issue. In my view, however, that does not in any way affect the weight to be given to the statements of principle in Cromwell J's judgment set out above, which I wholeheartedly endorse.

30. In *Kennedy v Cordia (Services) LLP*, the UK Supreme Court identified the question of whether the witness "*is impartial in his or her presentation and assessment of the evidence*" as one of the four considerations governing the admissibility of skilled evidence (at para 44). Consistently with that analysis, the Court went on to observe that "[i]f a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible." In its view, "*the requirement of independence*

and impartiality is in our view one of admissibility rather than merely the weight of the evidence". I agree.

31. *WBLI v Abbott and Haliburton* was considered by the High Court (Barton J) in *Kenneally v DePuy International Ltd*. *Kenneally* was a defective products action, involving a claim that artificial hips fitted to the plaintiff, which had been manufactured by the defendant, were defective. In the course of the trial of the action, the defendant sought to exclude the evidence of an expert witness proffered by the plaintiff on the basis that the witness had a conflict of interest. The application was made in advance of the witness giving evidence and relied on the fact that the witness was suing DePuy in the United States in *qui tam* litigation arising from the same or related circumstances that, if successful, would result in him obtaining significant monetary compensation (the precise nature of *qui tam* litigation is explained in detail by Barton J in his judgment).

32. After a detailed survey of the authorities (including both *WBLI v Abbott and Haliburton* and *Kennedy v Cordia (Services) LLP*), Barton J rejected the application to exclude the evidence: paras 63 – 71. In his view, the preponderance of the authorities leant in favour of admitting, rather than excluding, expert evidence “*on an application such as that now before the court.*” That was, in his view, entirely understandable given that the admission of such evidence “*has the obvious benefit of enabling that evidence to be fully tested, the demeanour of the witness to be fully observed and the probative value of the evidence to be assessed*” (at para 70). In his view, the power to exclude expert evidence which on the face of it will enable and assist the court to determine the issues

in dispute “*should be exercised with circumspection, and where it is clear on the evidence and the materials before the court that such evidence ought not to be admitted*” (at para 72).

33. It is difficult to disagree with those observations but they must be understood in the context in which they were made, which differs very significantly from the position presented here. In *Kenneally v DePuy International Ltd* the witness had not given evidence and the objection to his evidence was effectively made on a *quia timet* basis. There was no evidence that the witness was unaware of his duties as expert – on the contrary Barton J expressly held that he was aware of those duties: at para 63. He also rejected the suggestion that, on the materials before him, the witness had “*adopted the role of an advocate in the cause*”: at para 67. Most significantly, perhaps, the judge’s ruling that the witness should be permitted to be called did not preclude the defendant from renewing its application to have the evidence excluded in the event that the witness gave evidence in a manner inconsistent with his duties as expert.

34. Nothing in the careful judgment of Barton J in *Kenneally v DePuy International Ltd* is inconsistent with the proposition that 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.

The Evidence of Dr Thompson Here

36. It is unnecessary to discuss Dr Thompson's evidence in detail. Its many difficulties have been identified by Noonan J in his judgment and I gratefully adopt his account. I make some observations simply by way of emphasis:

- Dr Thompson's written report, while not evidence in itself, contained numerous "*red-flags*" indicating the approach he was likely to take in his evidence. These red-flags included (i) Dr Thompson – who is a toxicologist, not a lawyer, expressing views about the doctrine of *res ipsa loquitur* (at page 6); (ii) Dr Thompson purporting to make categorical statements about disputed issues of fact about which he had no independent knowledge (see, by way of example only, Table 7 on page 31; there are numerous other instances in the report, including those highlighted by Noonan J); (iii) Dr Thompson accusing the plaintiffs of "*misrepresentations*" of the installation process (Table 8 on page 32 and the text on the following page); (iv) Dr Thompson purporting to identify "*contradictions*" in the plaintiffs' accounts of the SPF installation timetable (Table 9, at page 33); (v) Dr Thompson – who, again, is a toxicologist, not a respiratory physician doctor - suggesting that the plaintiffs had not told their treating doctors, including Professor Burke, "*the full truth about their*

injuries or illnesses”, suggesting that Professor Burke had been misled by the information provided to him into making “*false exposure assumptions*”, purporting to comment generally on the opinions expressed by Professor Burke in his reports and purporting to express a view (in trenchant terms) as to the cause of the plaintiffs’ respiratory inflammation which contradicted the views of Professor Burke (at pages 36-39); (vi) Dr Thompson – who, again, is a toxicologist and not a psychiatrist – purporting to comment on the views expressed in the psychiatric reports which had been exchanged by the parties (at pages 39-40) and (vii) Dr Thompson purporting to express his views on the contents of medical reports prepared by the plaintiffs’ family doctor addressing local skin irritations which the plaintiffs had presented with and going to present an “*alternative exposure and causation assessment*” (pages 40-45). More generally, the tone of absolute certainty that is evident throughout the report, and the aggressively dismissive attitude taken by Dr Thompson to any information that might suggest that the plaintiffs had indeed been negligently exposed as claimed, should perhaps have given rise to concern.

- In light of the features briefly identified above, it is rather surprising that it was considered appropriate to serve Dr Thompson’s report in the form it was served. It is equally surprising that the report did not provoke any objection from the Plaintiffs to Dr Thompson being called.

- When called, Dr Thompson seriously abused his position as expert witness to repeatedly accuse the plaintiffs of outright dishonesty and deception,

in circumstances where – as already observed – he had no independent knowledge of the facts and no role whatever in resolving any conflicts of fact as between the parties (and where his allegations were, in any event, contradicted by the factual evidence). In my view, this aspect of Dr Thompson’s evidence, even if it stood alone, was more than sufficient to disqualify him as an expert.

- Of course, it did not stand alone. Numerous other factors are identified by Noonan J in his judgment and I agree entirely with his observation, at para 103 of his judgment, that any of those matters on its own would strongly suggest a lack of objectivity and impartiality on Dr Thompson’s part but that, taken together, they can only be described as “*a wholesale abdication*” by him of his duties as an expert witness.

- I agree in particular that Dr Thompson’s reliance on the two Wood papers, which were industry-generated and which had not been peer-reviewed (and which, in any event, as Noonan J notes, were primarily concerned with ventilation, whereas Dr Thompson repeatedly asserted that the issue of ventilation was irrelevant) and his adamant refusal to engage appropriately with any of the documentary material that was inconsistent with his thesis that it was scientifically *impossible* that the plaintiffs had been exposed to isocyanate on the basis (so he said) that there was no risk of exposure after a period as short as 30 minutes (material including the Icynene Inc safety data sheets, the EPA and other regulatory documents put to him in cross-examination, as well as the two documents cited in the bibliography to his report which were discussed at

length in cross-examination) clearly indicated that Dr Thompson was acting as partisan advocate, clinging at all costs to an evidential thesis that, however implausible, would exonerate his client if only the court might be persuaded to accept it.

- Similarly, Dr Thompson's insistence that any respiratory injury suffered by the plaintiffs was caused by exposure to fibreglass, in the teeth of the very clear evidence to the contrary given by Professor Burke significantly undermined his objectivity, impartiality and independence.

- I also agree that issues arise as to the reliability of the Wood papers, given their provenance, the limited nature of the experimental data involved and the fact that they appear not to have been subject to either pre- or post-publication peer review. Peer review "*is an important but fallible filter, which tries to exclude from publication material that is trivial or uses flawed methods or draws conclusions unjustified by the tests used*".⁶ In truth, however, much the larger problem here was Dr Thompson's misuse of the Wood papers, rather than the actual content of those papers.

37. In these circumstances, the Judge was perfectly entitled to make the findings that he did about Dr Thompson's evidence. The manner in which Dr Thompson had given his evidence clearly demonstrated that he was unable or unwilling to comply with his duties

⁶ Ogden, "Lawyers Beware! The Scientific Process, Peer Review and the Use of Papers in Evidence", (2011) 55 *Ann Occup Hyg* 689

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: *Byrne v O' Connor* [2006] IESC 39, [2006] 3 IR 379 and *Moorview Development Ltd v First Active* [2011] IEHC 117, [2011] 3 IR 615; [2018] IESC 33, [2019] 1 IR 417. In addition, the Order 99, Rule 9 RSC provides for the making of wasted costs orders in certain circumstances: *Ward v Tower Trade Finance (Ireland) Ltd* [2022] IECA 70.

39. I agree fully with Noonan J's analysis of the other issues in this appeal and agree with him that the appeal both in respect of liability and *quantum* must be dismissed.

Binchy J has authorised me to record his agreement with this judgment.