Neutral Citation [2016] IEHC 728

THE HIGH COURT

[2012 No. 13047 P]

BETWEEN

KIARA KENNEALLY

PLAINTIFF

AND

DE PUY INTERNATIONAL LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 13th day of December, 2016.

1. This is the judgment of the Court in relation to an applicaion made by the Defendant to have ruled inadmissible the evidence of Mr. David John Langton PhD, an expert witness proffered on behalf of the Plaintiff.

Background.
2. The Plaintiff was born on 5th January, 1989. She developed a constitutional medical condition known as bilateral acetabular dysplasia as a result of which she underwent left hip surgery on 17th August, 2005; the surgery involved the fitting of Articular Surface Replacement (ASR) total acetabular and femoral implants designed, manufactured and supplied by the Defendant.

3. Initial results post operatively were very promising. The Plaintiff required and underwent right hip surgery on 25th May, 2006 at which she was also fitted with ASR implants. Within a relatively short time frame following the first but after the second surgery, the Plaintiff began to develop painful symptoms in her left hip which were attributable to a progressive failure of the ASR implants as a result of which she had to undergo left hip revision surgery in October, 2010.

4. By that time in 2010, failure rate volumes for the ASR implants had become know and were such that the Defendant voluntarily recalled its ASR XL implants in the United States before the Food and Drugs Administration (FDA) in the U. S. took action. On the recall form filed by the Defendant with the FDA, a box was ticked to indicate that the recall was the result of a "*…defective product that would affect product performance and/or could cause health problems*".

5. The Plaintiff brings these proceedings against the Defendant in contract and in negligence, as well as for breach of statutory duty pursuant to the provisions of the Liability for Defective Products Act 1991. The Defendants have delivered a full defence; accordingly, the Plaintiff is put on proof in respect of liability, causation and damage.

Objection to admissibility of expert evidence
6. The first consideration of any court on the admissibility of expert evidence is to ascertain whether such evidence is required at all; is such evidence necessary to assist the Court in the task of determining the issues in respect of which it is proposed to be adduced. That question does not arise for consideration in this case; the issues raised on the pleadings are such that the assistance of expert testimony will be necessary to assist the Court in reaching a decision on those issues.

7. The Plaintiff and Professor Dennis Bobyn, PhD, an expert in biomaterials and biomechanics, have already given evidence to the Court. At the conclusion of Professor Bobyn's evidence the Plaintiff sought to call Mr. Langton as an expert witness. He holds a number of qualifications including that of a medical surgeon and holds a PhD in metal on metal hip replacements.

8. The Defendant objects to Mr Langton's evidence being received by the Court on a number of grounds the essence of which is a challenge to his independence and objectivity and hence to his impartiality as an expert.

9. The central but by no means only contention of the Defendant is that his personal involvement as a party in litigation against the Defendant in the U.S. in respect of which, if successful, he stands to benefit financially and his involvement as an expert in numerous other cases against the Defendant hopelessly compromises his objectivity and independence; in short he is 'a gun for hire' who has become an advocate for a cause.

10. While accepting that Mr. Langton and Mr. Nargol, another expert whom the Plaintiff intends to call as a witness, have undoubtedly been a 'thorn' in the side of the Defendant, this application is, not surprisingly, strenuously resisted by the Plaintiff.

Submissions and the Law.
11. Apart from the differentiation and consequential significance which the Defendant has invited the Court to draw between the decision of this court *in O'Sullivan v. De Puy International Limited* [2016] IEHC 684 delivered by Cross J. on the 29th November last and these proceedings insofar as that judgment relates to the same issue, there was general agreement between the parties as to the law.

12. Written and oral submissions have been made and have been considered by the Court. I do not intend to summarise these here; suffice it to say that given the measure of agreement on the law concerning the matter in issue it seems appropriate and convenient to commence with the following summary.

13. The Court has been given to understand that almost all of the expert reports intended to be relied upon by the parties in these proceedings were prepared prior to the coming into force on 1st October 2016 of the Rules of the Superior Courts (Conduct of Trials), S.I. No. 254 of 2016. (The new rules). The significance of the change brought about by these new rules has already been the subject of judicial comment. See *O'Brien v. The Clerk of Dáil Éireann and Ors* [2016] IEHC 597 where the President observed that the new rules give "*…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 cost of experts, demonstrates this need. Under this rule (O. 36, r. 58) 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*."

14. A perusal of the new rules shows that many of these are expressly restricted to certain types of litigation; some of the rules are of general application but expressly exclude certain types of proceedings. By way of example the amendment of O. 20 by the inclusion

of a number of new rules including rules 12 and 23 which require the plaintiff or defendant in proceedings proposing to offer expert evidence on any matter at trial to disclose that intention in the statement of claim or the defence, as the case may, exclude the application of those rules to "personal injury actions". Other rules contain no such restriction.

15. The new rules amend O. 36 of the Rules of the Superior Courts 1986 in a number of significant respects including those provisions which are concerned with expert evidence comprised in rules 56 to 61.Of these Rules 59 to 61 are restricted to cases listed for trial or hearing in the Commercial and Competition lists and to proceedings in which an order may be made under O. 63 C, r. 4. (S.I. No. 255 of 2016). That S.I. applies to Chancery and Non Jury actions and to certain personal injury and jury actions which have been designated by the President in accordance with sub rule (2) as proceedings to which the Order is to apply. So far as the Court is aware these proceedings have not been so designated.

Disclosure; duties and obligations of experts under the new rules
16. The duties and obligations of experts to make disclosure are set out in Rule 57 (1) and (2) which expressly provide for: (i) the duty which an expert owes to the Court, (ii) the primacy of that duty over any obligation to the party paying the fee of the expert, (iii) the necessity to include an acknowledgment of that duty by the expert in the report submitted, and (iv) the disclosure of certain specified financial interests. This rule has some significance in the context of the grounds advanced by the Defendant in support of its application and to which I now turn.

17. Whilst not by any means the only ground relied upon by the Defendant, it is I think fair to categorise the main thrust of the Defendant's submission as being centred on the Plaintiff's involvement with Mr. Nargol as litigators in American proceedings, known as "*qui tam*" litigation, on foot of which, if they are successful, both stand to obtain monetary compensation likely be quantified in millions of dollars, a potential outcome openly and freely accepted by Mr. Langton.

18. Insofar as the Court has been made aware of the current status of those proceedings, it appears from the orders of the American courts concerned that the proceedings have been dismissed but that appeals from those orders are now pending. Of some significance to the grounds for and the outcome of this application, it also appears from the materials produced to the Court that while the Defendant's ASR featured in that litigation and that reference continues to be made to evidence relating to that product, the proceedings, if the appeals are successful, will be confined to another of the Defendant's medical products known as "Pinnacle".

'*Qui Tam*' proceedings
19. The Court has been given to understand that the American proceedings are a form of public interest litigation made possible by virtue of both Federal and States legislation dating back to 1863 during the American Civil War the purpose of which is, in essence, to encourage citizens, sometimes colourfully referred to here as "whistleblowers", to initiate proceedings which expose fraudulent activities of a commercial nature which have resulted in loss to the Government or the States or their agencies.

20. Whereas this litigation is usually commenced by private litigators, the Federal Government or State or State agency may seek to join in the proceedings at any stage; this has not occurred so far in proceedings being brought by Mr Langton and Mr Nargol but the right to do so gives its name to the type of litigation, '*qui tam*' which derives from the Latin "*qui tam pro domino rege quam pro se ipso in hac parte sequitur* ("he who sues in this matter for the King as well as for himself").

21. Success in the proceedings for the Government or State creates an entitlement to damages in respect of any losses arising from the activities with which the proceedings are concerned, such as from the manufacture and supply of defective goods; success also has a benefit for the initiating litigators (such as Mr. Langton and Mr. Nargol in their '*qui tam*' proceedings) since they are entitled to a percentage or proportion of the damages recovered.

22. As mentioned earlier, certain materials relating to that litigation, including various motions and the American court orders dismissing the proceedings, have been produced and admitted for the assistance of this Court on this matter.

23. It is the very significant financial interest which may flow from the '*qui tam*' litigation which the Defendant submits robs Mr. Langton of any independence or objectivity as an expert in these proceedings. Critically, the Defendant contends that there is a clear nexus between that litigation and this suit. Accordingly, it was argued that Mr. Langton has no option but to give the same evidence in both cases whereas a truly independent and objective expert should be free, on due consideration, to accept the evidence or opinion, when put, of an expert intended to be called by an opposing party.

24. Having nailed his colours to the mast in the *qui tam* litigation, the Defendant contends that Mr Langton has deprived himself of the freedom to agree with an expert view contrary to his own, moreover, because the outcome of these proceedings may directly impact upon the *qui tam* litigation with the potential for significant financial reward should that be successful, he has to give evidence in these proceedings consistent with the cause he advocates in the '*qui tam*' litigation.

25. The Plaintiff submits that no nexus exists between the two sets of proceedings nor could the outcome of one have a material bearing on the outcome of the other even if the appeals were successful; the distinction which the Defendant seeks to draw between the *O'Sullivan* decision and these proceedings is entirely artificial and in any event groundless. Mr. Langton formed opinions and expressed views within his expertise from his own study and research concerning the Defendants products before he ever became involved with any litigation against the Defendant, views and opinions which he continues to maintain and express. This aspect of matters shall be examined in more detail later.

26. Returning to the new rules in the context of this application, Order 36 r. 57 (1) provides:

> *"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.*
>
> *(2) Every report of an expert delivered pursuant to these Rules or to any order or direction of the Court shall:*
>
> *(a) contain a statement acknowledging the duty mentioned in sub-rule (1);*
>
> *(b) disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert, including any sponsorship of or contribution to any research of the expert or of any University, institution or other body with which the expert was, is or will be connected, other than any fee agreed for the preparation by the expert of the report provided or to be provided in the proceedings concerned and any fee and expenses due in connection with the participation of the expert in the proceedings concerned."*

27. I pause here to observe that Mr. Langton was asked and gave evidence under cross examination about when he first became involved in advising American lawyers in connection with potential litigation against the Defendant as well as about his own involvement in the *qui tam* litigation; his understanding of his duty to make disclosure was also explored in some detail and included the apparent non disclosure of his interests in connection with a number of papers which he co-authored subsequent to his involvement in litigation against the Defendant.

28. Mr. Langton's evidence was that he was aware of his duty and had always made disclosure of his interests; he produced documentary evidence of disclosure to show that this was so and offered an explanation as to why he thought that that information didn't appear in the article or paper ultimately published, namely, that he had no control over editorial interpretation or decision making as to what should or should not appear in the paper when published; he could do no more than make the disclosure to the editor.

29. For present purposes and having regard to the evidence which has been given I consider his to be a reasonable explanation. The significance of all of this is that Mr. Langton is and was generally familiar with policies directed towards the disclosure of conflicts of interest and of his duty to make such disclosure. The Defendant asks why then were his reports unsigned and why did they not contain the disclosures which have been mandatory in the UK for years.

30. He gave an explanation arising from these questions which the Court also accepts; I am satisfied that there was nothing sinister or unusual in the production by him of unsigned reports or the absence of disclosure of interests in reports which he prepared for the purposes of the proceedings almost all of which were prepared and furnished prior to the coming into force of the new rules of which he was unaware.

31. I pause once more to observe, particularly as in this case where new rules come into force during the litigation, that it is the responsibility of the retaining solicitor to draw the attention of the expert to the provisions of new rules relating to their role such as rules relating to expert evidence and reports; this is especially so in cases where an expert is unfamiliar in general with giving expert evidence in the State or where the lack of knowledge or appreciation of the requirements arises because the expert comes from outside the Jurisdiction.

32. The question which has been raised in relation to the duty to make disclosure cannot to be determined *in vacuo* or in isolation from the circumstances pertaining to the case; which in this instance means without having regard to Mr. Langton's background in giving expert evidence in proceedings such as these against the Defendant both here and in several countries around the world with apparently varying experiences and degrees of success. His qualifications, opinions, knowledge, experience, expertise and his involvement in such litigation against the Defendant and in the *'qui tam'* litigation is well known to the Defendant and to the Court.

33. The circumstances which present themselves in this case underscore the views expressed by the Court of Appeal with regard to the position of the trial judge and to the consideration of the particular evidence before the Court on an application relating to the admissibility of expert evidence in *Donegal Investment Group Plc v. Danbywiske and others* [2016] IECA 193.

Economic or financial interest under the new rules
34. Turning to the provisions of s. 57 (2) (b) it is clear that the disclosure of any financial or economical interest of the expert, including any sponsorship of or contribution to any research of the expert or of any university, institution or other body with which the expert was, is or will be connected other than any fee agreed for the preparation by the expert of the report or for the participation of the expert in the proceedings, is concerned with "*…any business or economic activity of the party retaining that expert,*".

35. There is no evidence that the Plaintiff is engaged in any business or economic activity with which her proposed expert, Mr. Langton, has any connection whatsoever. It is clear from the rule that if he had such an interest then there is a duty on him to disclose such under this rule.

Meaning of 'expert' and implications of connection with the retaining party .
36. Expert in the new rules is defined as meaning "an expert witness" which is not particularly informative, however, the legal meaning of "expert" was succinctly addressed by Murphy J. in *Galvin v. Murray and Ors* [2001] 1 I.R. 331 at p. 336 where he stated that "*…in general terms, 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 the area of his expertise.*"

37. As to the consequences of an established connection between an expert and the party by whom the expert is retained it is clear from authority that the mere fact of an established connection is not a ground upon which the court is entitled or should exclude the proposed evidence as being inadmissible though it may go to the question of independence and therefore the weight to be given to that evidence. Referring to the decision in *Shell Pensions Trust Ltd v. Pell Frischmann* [1986] 2 All ER 911 Murphy J. in *Galvin* when considering the status of an engineer employed by one of the parties and the consequences of such a connection 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*."

Admissibility of opinion and use of experts.
38. With certain exceptions, a witness as to fact may not express an opinion with regard to those facts which are in issue between the parties but rather may give evidence as to the existence of facts of which the witness has actual knowledge or experience through the senses such as by sight and sound. The function of the judge and/or the jury is to find and draw inferences of fact from the evidence adduced. The object underlying the general rule that a witness as to fact may not give an opinion as to fact is to exclude from the decision making process those well know human frailties and weaknesses identified by Kingsmill-Moore in *A.G. (Ruddy) v. Kenny* (1960) 94 ILTR 185 at p. 190 as those "*…of prejudice, faulty reasoning and inadequate knowledge, which would be introduced if a witness were allowed to give his opinion, and the tribunal of fact were allowed to act upon it.*"

39. Expert evidence, including opinion, is admissible as an exception to the general rules on admissibility for the purposes of assisting the Court in the finding and the drawing of inferences of fact in relation to matters which are not and cannot be expected to be in the experience of the fact finder whether that be a judge or a jury as to which Davitt P. at p. 186 in A. G. *(Ruddy)*, *supra*. (upheld and followed on appeal) observed were those 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. In regard to such matters, witnesses of whose expertise the court is satisfied are allowed to give evidence of their opinion*".

Purpose of an expert; not the function to be an advocate
40. The purpose of an expert witness was considered by Charlton J. in *Flynn v. Bus Átha Cliath* [2012] IEHC 398 at para. 8 of his

judgment:

> *"…. is to enable the court to be instructed on arcane disciplines which are outside the experience of a judge or jury. These disciplines might include, for instance, how childbirth is properly managed or how a horse can be predicted to react in a particular situation…. It should be born in mind that experts have a particular privilege before the courts. They are entitled to express an opinion. In doing so, their entitlement 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 to theirs. Experts are also privileged by being able to express a view on the ultimate issue before the court. This is because the unusual nature of the issue that requires their expertise enables a view to be expressed, sometimes but not in every case, on an issue upon which the case may turn."*

The learned judge went on to observe that it was not the function of nor was an expert entitled to take the place of counsel and act as an advocate for the party by whom the expert is retained. The Defendant submits that this is precisely the role being played by Mr. Langton.

Basis of opinion
41. The entitlement of an expert to offer an opinion on matters which the Court is called upon to determine is founded upon the expertise possessed by the expert on the matter being considered as well as upon a duty which the expert owes to the Court to provide an independent assessment based upon the knowledge and experience which the expert is qualified to profess. See *Emerald Meats Ltd v. The Minister for Agriculture & Ors* [2012] IESC 48.

Duties and responsibilities of expert witnesses in general.
42. This subject fell to be considered and commented upon against the background of a lengthy litigation in which a myriad of experts were called by the parties in an action known as the "*Ikarian Reefer*" reported at [1993] Vol. 2 68 Lloyds Law Reports. The duties and responsibilities as summarised by Cresswell J. at p. 81 of the report have been approved and followed in many subsequent decisions in the U.K. and in other common law jurisdictions. These were restated for England and Wales in *Anglo Group Plc v. Winther Brown and Co Ltd & Ors* [2000] EWHC 127 to take into account the reforms of Lord Woolf which resulted in amendments to the Civil Proceedure Rules (C.P.R) and which may usefully be recited here:

> *" 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.*
>
> *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."*

43. The Defendant contended that Mr. Langton fails to meet a number of these requirements. As already observed earlier, it was argued that the nexus between these proceedings and the *qui tam* litigation is in essence to place him in the same position as an expert who is retained and has agreed to provide a report and give evidence on a contingency fee basis. In short, by that fact alone a witness has a significant financial interest in the outcome of the case the result of which is to compromise the quality of independence and objectivity which the expert is required to possess. In this regard, the Defendant relied on the decision of the Court of Appeal for England and Wales in *R (Factordame Ltd and Ors) v. Transport Secretary (No. 8)* (2003) QB 381 in which the Master of the Roles at p. 410, para. 70 stated:

> *"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 shall 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 a 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".*

The Master of the Roles went on to state at para. 73:

> *"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 arrangement 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 a court will be permitted to consent to an expert being instructed under a contingency fee agreement."

Conflict of interest, consequences.
44. The fact that there may be a conflict of interest does not necessarily disqualify an expert from giving evidence rather the question which has to be addressed is whether the expert opinion is independent; that is to say the product of the expert uninfluenced as to form or content by the exigencies of the litigation. It is from the duty to assist the court in relation to matters in respect of which the expert is called to give evidence and which fall within the expertise possessed that the expert is required to give an independent opinion.

45. Whilst it seems clear from the decisions in *R (Factortame Ltd & Ors) and Rowley v. Dunlop & Ors* [2014] EWHC 1995 (Ch) that where an expert has a financial interest in the outcome of the litigation only rarely will the courts in England and Wales admit such evidence it also appears that any disqualification from giving evidence on the grounds of a conflict of interest must depend on the circumstances of each case. See *Toth v. Jarman* [2006] 4 All ER 1276.

46. In other common law jurisdictions further afield, the approaches taken by the courts differ as to how to deal with the admissibility expert evidence when a challenge is mounted on the grounds of objectivity and impartiality. An analysis of the different approaches was carried out in *WBLI v. Abbott and Haliborton* [2015] 2 S.C.R. 182 where Cromwell J., delivering the judgment of the Supreme Court of Canada, held that the dominant view in Canadian case law was that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence, if admitted, however, the Court noted that in the Unites States and Australia the predominant view on the case authorities was that objectivity and impartiality of an expert was something which would generally go to weight rather than admissibility. For reasons which will be given later, the view of this Court is that in general this approach is to be preferred.

Summary of the principles.
47. Having regard to the authorities to which the Court has been referred there appear to be no significant or fundamental differences in the law on the admissibility of expert evidence between the courts in this jurisdiction and those in the United Kingdom, the Court adopts and is greatly assisted by the analysis and summary of the current state of the law comprised at paras. 33-29 and 33-30 of the most recent addition of Phipson on Evidence which was cited with approval by Parker J. in *EXP v. Dr. Charles Simon Barker* [2015] EWHC 1289 (QB), an authority relied upon by the Defendant in this case and in *O'Sullivan*. The summary of the law which commends itself to the Court and found at para 33-30 is merits reciting:

(1) It is always desirable that an expert should have no actual or apparent interest in the outcome of the proceedings.

(2) The existence of such an interest, whether as an employee of one of the parties or otherwise, does not automatically render the evidence of the proposed expert inadmissible. It is the nature and extent of the interest or connection which matters, not the mere fact of the interest or connection.

(3) Where the expert has an interest of one kind or another in the outcome of the case, the question of whether he should be permitted to give evidence should be determined as soon as possible in the course of case management.

(4) The decision as to whether an expert should be permitted to give evidence in such circumstances is a matter of fact and degree. The test of apparent bias is not relevant to the question of whether an expert witness should be permitted to give evidence.

(5) The questions which have to be determined are whether:

(a) the person has relevant experience; and

(b) he is aware of his primary duty to the Court if they give expert evidence, and are willing and able, despite the interest or connection with the litigation or a party thereto, to carry out that duty.

(6) 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 (which read Rules of the Superior Courts (Conduct of Trials) 2015).

(7) If the expert has an interest which is not sufficient to preclude him from giving evidence the interest may nevertheless affect the weight of his evidence.

Even where the court decides to permit an expert to be called where his independence has been put in issue, the expert may still be cross-examined as to his independence and objectivity."

48. The Court was also assisted by the judgment of the Supreme Court of the United Kingdom in *Kennedy v. Cordia* [2016] UKSC 6 particularly with regard to the questions which the court is required to consider on the admissibility of expert evidence. It is also noted from the judgment that the Scottish courts have also adopted the views of Cresswell J. on the duties and responsibilities of expert witnesses expressed in the "*Ikarian Reefer*".

Objection to admissibility of expert evidence; notice of intention.
49. Given the introduction of the new rules and the circumstances in which this application arose I consider it pertinent to make some observations on procedure. The Court first became aware that the Defendant intended to object to the admissibility of Mr. Langton's evidence when counsel for the Plaintiff sought to call him as a witness; the Plaintiff and Professor Bobyn having by then given evidence, moreover, it appears that no prior notice of the intention to mount the objection was given to the Plaintiff.

50. While acknowledging that the Defendant was not obliged in law to give prior notice of intention to object and is entitled to object at any time during a trial, it seemed to me, for reasons which I expressed at the time, that where an objection is intended to be taken in circumstances where the facts upon which the decision to object were known to the party objecting before the commencement of the trial, it is highly desirable that notification of intention to make such an application should be given as soon as

is reasonably practicable after the decision is made, particularly in lengthy and complex litigation where enormous expense is inevitably involved.

51. While recognising that there will be circumstances in a case where that will not be possible or appropriate for any number of reasons, nevertheless it is a legitimate and desirable objective in furtherance of the efficient and effective administration of justice that litigation should be conducted in a manner which seeks to avoid, where possible, the chaos, waste of court time and costs involved in an adjourned or aborted trial which might likely ensue from a successful challenge to the admissibility of expert evidence and particularly so where that results in disqualification .

52. It was in light of these comments that counsel for the Defendant took instructions with regard to the attitude which was intended to be taken to Mr. Nargol, another expert which the Plaintiff intends to call, and informed the Plaintiff and the Court that the Defendant intends to object to the admissibility of his evidence, a course also taken by the Defendant in *O'Sullivan*.

53. Having had an opportunity to read and consider the judgment in that case I am quite satisfied that the facts and basis upon which the Defendant intends to object to the admissibility of Mr. Nargol's evidence in this case was well known before the trial commenced. I find it hardly credible that no decision was made or that a decision to object, if made, was deferred in circumstances where liability as well as causation and quantum were in issue in this case. Notice of intention to object should have been given to the Plaintiff when the decision was made and at latest to the Court at the commencement of the trial.

54. Returning to the distinction which the Defendant invites the Court to draw between *O'Sullivan* and this case, the Plaintiff submits that there is no material distinction to be drawn arising from the fact that liability was not in issue in *O'Sullivan*. Mr. Nargol was challenged in those proceedings on the grounds that he was neither objective nor independent rather he was biased because he, like Mr. Langton, were parties to the *qui tam* litigation in which they had a significant financial interest. The Plaintiff argued that the distinction which the Defendant sought to draw was artificial. It was incorrect to represent *O'Sullivan* as being a decision confined to an assessment of damages on foot of a letter dated the 18th October, 2016 sent by solicitors for the Defendant to the Plaintiff's solicitors.

55. It was further argued that apart altogether from the quantification of damages the Court had been concerned with a significant causation issue on which the parties took what amounted to polar opposite positions.

56. That such was the case is evident from the remarks made by Cross J. at para. 6.6 of his judgment in which he observed "*…it is fair to say that notwithstanding the letter of the 18th October, 2016, virtually every other matter in this case was in issue and indeed a hotly contested issue.*" The Defendant seeks to persuade me that the reason why only one case, *EXP v. Barker*, was opened in *O'Sullivan* was because that case was an assessment and matters of liability were not in issue.

57. While I am conscious that, unlike *O' Sullivan*, liability is fully in issue in these proceedings and that therefore the Plaintiff must, literally, prove everything to obtain an award, it seems to me that the distinction which the Defendant seeks to draw between the two cases, where both Plaintiffs suffered from the same congenital condition and were fitted with the same product, is unsustainable.

58. The differences between the two cases have been considered by the Court and are not in my such as to require the Court to disregard or distinguish the findings of Cross J, in relation this application in so far as those findings and the conclusions reached were concerned with the exclusion of Mr. Nargol's evidence, particularly in relation to the question of financial interest and bias arising from his involvement in the *Qui Tam* litigation as a co plaintiff with Mr. Langton.

59. As to that litigation Cross J. stated:

> *"7.24 If one examines the supposed 'interest' of Mr. N., it is clear that it would indeed have been preferable had Mr. N. not got himself involved in the Qui Tam litigation in the United States from the point of view of the smooth running of proceedings in this jurisdiction.*
>
> *7.25 However, it is also apparent that nothing that could happen in this case, or I suspect in any other litigation against these defendants in this State will be relevant to Mr. N.'s undoubted financial interest in the qui tam litigation in the United States of America. The issue in this case is that of causation and it is entirely independent of whether or not in the United States of America, the defendants have engaged in what is alleged to be mala fides to the detriment of the Federal Government or to any State or City Governments in the United States."*

60. I adopt that observation insofar as it can be said to be applicable to Mr. Langton's involvement in the same litigation. The proposition that the existence of an expectant financial interest on the successful conclusion of the American litigation, if such were the result, is coterminous with the position of an expert who has agreed with his client to act in the litigation on the contingency that he will be paid his fees in the event of a successful outcome of that litigation does not withstand scrutiny.

61. On my view of the evidence, the materials before the court, and bearing in mind that the Plaintiff is on full proof of her claim, there is no basis upon which I could properly come to the conclusion that a successful outcome to the proceedings in this case would materially affect the outcome of the *qui tam* litigation in relation to the Defendants 'pinnacle' product should the appeals against the orders dismissing those proceedings prove successful. In these circumstances it would be wholly wrong to hold that Mr. Langton's involvement in that litigation constitutes or is to be considered a financial interest in the outcome of these proceedings.

62. The considerations which govern the admissibility of expert evidence were stated by the Supreme Court of the United Kingdom in *Kennedy v. Cordia*, to be:

> "(i) whether the proposed skilled (expert) evidence will assist the court in its task;
>
> (ii) whether the witness has the necessary knowledge and experience;
>
> (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
>
> (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence."

In essence the second and fourth of these considerations are concerned with the relevant expertise of the witness and whether or not the expert evidence arising from that expertise satisfies the first requirement. The third requirement is concerned with the awareness by the expert of the primary duty to the court to give evidence which is impartial, and if so, whether, in the event of some

interest in or connection with the litigation or party by whom the expert is retained and despite that connection, the expert is willing and able to discharge the primary duty owed to the court.

Decision
61. Applying those principles to the evidence and the materials received during the qualification hearing, I am satisfied that Mr. Langton is an appropriately qualified witness possessing relevant expertise based on his own knowledge and experience as well as on a general knowledge and understanding of the relevant expertise in relation to the issues in respect of which it is proposed to call his evidence.

62. The Court is also satisfied that Mr. Langton is aware of his primary duty to the Court to be impartial by giving independent and objective evidence including, where appropriate, his opinions on matters within his expertise.

63. For reasons already stated the Court is also satisfied that Mr. Langton does not have any financial or other apparent interest in the litigation or connection with the Plaintiff other than as an independent expert for an agreed fee.

64. The Court has considered the learned papers co-authored by Mr. Langton in which he has expressed his opinions and views on the results of studies and examinations undertaken by him and by others before he became involved as an expert on behalf of any litigant against the Defendant or in the *qui tam* litigation and which are now relevant to the issues in these proceedings.

65. Insofar as it is possible to do so on the evidence currently before the Court it appears that those views and opinions, informed by further research, experience and knowledge, continue to be held and expressed by him; his continued persistence in expressing his views and opinions in and out of court is not to be confused with advocacy nor does it warrant the Court finding that he has adopted the role of an advocate in the cause.

66. For all these reasons and upon the conclusions reached the Court will make an order refusing the application and will permit the evidence of Mr. Langton to be adduced, however, this is not the end of the question which has been raised concerning the impartiality of this witness and the weight which should be given to his evidence in due course.

68. In reaching the conclusion that the application should be refused, the Court is conscious that the independence and objectivity of Mr. Langton has been put in issue by the Defendant; the Order to be made does not operate to prejudge the outcome of or prevent any cross examination of Mr Langton on those matters if pursued in the course of the trial. The Court is invariably concerned in every case with assessing the weight to be given to all of the evidence adduced at trial particularly where in the case of witness evidence credibility or, in the case of expert evidence independence of the witness is called into question.

69. It comes as no surprise to the Court to discover that the preponderance of authorities to which it has been referred lean in favour of admissibility rather than exclusion of expert evidence on an application such as that now before the Court. Unless the position is relatively clear-cut such as it was in *O'Brien v. The Clerk of the Dáil and others*, that preponderance towards admission is, in my view, entirely understandable. The admission of such evidence to be given in the ordinary way at trial 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 fully assessed.

70. The survival of a challenge to the admissibility of expert evidence on an application to exclude it is no predictor of the weight which is likely to be given to the evidence ultimately adduced at the trial.

72. Having considered the authorities, it is the view of the Court that the power to exclude expert evidence, whether on an application made before trial, such as at the case management stage or at trial, which on the face of it will enable and assist the Court to determine the issues in respect of which it is sought to be adduced, 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.