

Academy of Experts

Conference on The Immune Expert
Keynote Speech by Mr Justice Colman

30 June 2006

Recent months have seen the whole issue of the quality and reliability of expert evidence in court placed under a microscope.

The best-known case to receive publicity has been that of Sir Roy Meadows. I am sure that everybody will recall the essential criticism of the content of his evidence on cot deaths. The alleged defect in his testimony exemplifies a major problem with expert evidence. That is the temptation to which so many give way to venture outside their area of expertise. In the case of Sir Roy Meadows he is said to have departed from the field of paediatrics in which he was unquestionably an expert into the field of statistics in which he was not.

It is, I believe, worth pausing to investigate why this temptation arises, what makes an expert stray off course?

The answer, I suggest, is not hard to find. It lies in a failure on the part of an expert to separate in his or her mind the forensic object of the party who relies on this person's evidence and the location of the limits to the scope of the expert evidence. That forensic objective will clearly depend in part upon the expert's favourable opinion with regard to a particular issue but the expert has to keep absolutely clearly in mind that his contribution to the achievement of the forensic objective is to express an entirely independent and objective opinion, confined with the limits of the issue referred to him. Once the expert strays over those limits into the field of evidence aimed at achieving the forensic objective, he is giving evidence outside his remit to which no weight can be attached and he is doing the party calling him a profound disservice by appearing to fight the

wider forensic battle and thereby to suggest that he is biased in favour of one party and that less weight should therefore be given to the evidence which he does give within his expert field.

The danger of straying into a field outside the designated field of expertise is typically illustrated by experience in the area of claims for professional negligence. An expert is called on the profession of, for example, insurance broking. The issue is whether a broker has acted negligently. So often one reads experts' reports which conclude with an opinion as to whether there has been negligence. That, however, is not the function of such experts. That is the function of the judge or arbitrator. What the expert is required to do is to give evidence of the standard of conduct which brokers in the profession could be expected to demonstrate and to say what the tolerance of the standard is, that is for example, whether most brokers would have taken a particular course, whether different brokers could have taken different views or whether few if any brokers would have so acted.

The court or tribunal must then use the experts' opinion as a tool for evaluating the actual conduct to see whether it complied with the standard to be expected of a competent broker or fell below it.

The perils of falling to the temptation of straying into field outside one's own expertise are well illustrated by what happened in the course of the Formal Investigation into the Loss of the Derbyshire which I conducted in 2000. This you may remember was the bulk carrier sank without trace in the Pacific and which was and still is the biggest British ship ever to be lost at sea. In the course of the hearing it became essential to derive from tank tests on models of the tanker conducted by ship model experts in Holland the possible incidence of loading of the forepeak of the vessel by seas of a certain height when water had

already begun to enter the vessel. The model testing experts had, in addition to providing experimental information by way of results, sought to extrapolate from these results a series of values for the deterioration of the vessel's freeboard as loading on the forepeak increased in the face of monster waves. The results were challenged by various parties' experts who said that the extrapolation methodology was inappropriate. But those experts who made this point were not experts in the statistical discipline in question, namely extreme value statistics. As a result of some agile networking amongst my contacts in the academic world I was able to engage the services of one of the two world's leading experts in this field of statistics as an expert appointed by the Court. He was able to work out what would be the most effective methodology for the problem to be solved and with the help of some very sophisticated computer programmes he was able to produce a set of sea loading analyses based on the model test results which in turn gave me the cause of the loss of the ship which was the whole purpose of conducting the Investigation.

However, it is not only expert witnesses who need to recognise and keep within the limits of their own expertise.

Many here will, I am sure, have read reports in the Press of the strong criticisms of the rules of procedure of the Commercial Court made a few days ago by the Governor of the Bank of England. These criticisms arose out of the trial in Three Rivers DC v. Bank of England. This case eventually settled when the Liquidators of BCCI, the Bank for Credit and Commercial International, withdrew their claim against the Bank of England for misfeasance in public office. That was thirteen years after the claim had been brought. The trial itself lasted well over a year. The Governor made the following comments:

“I can presume only that they were allowed to play within the rules of the game. In which case, it is the rules of the game that should be questioned. A legal framework for enforcing contracts and resolving disputes is not just an arcane process which allows professionals to earn vast fees, but an integral part of the infrastructure of a successful market economy. It matters that there are simple, clear and timely ways of resolving disputes. What the BCCI case revealed was a legal system incapable of guaranteeing that.”

And

“A system that is powerless to prevent a case so hopelessly misconceived continuing for thirteen years requires examination. I very much hope that the Government will look carefully at this case, learn the lessons, and take steps to ensure that such an outcome can never occur again.”

These criticisms are not only serious, but, coming from a person holding that office, are extremely damaging not only to the Court but to the national economy. I say that because the Commercial Court is seen by international corporations throughout the world as just about the finest example of a judicial tribunal for the resolution of commercial disputes available anywhere. The late Lord Wilberforce described it as “the jewel in the crown of the English Legal System”. That is one of the reasons why so much of the work done by that court involves litigation between corporations from overseas and why every year our judges are called upon to spend a great deal of time assisting foreign judicial authorities from all over the world who wish to get ideas for setting up their own Commercial courts. That is why international litigation in London makes such an important contribution to invisible exports.

One might have thought that before voicing his criticisms of the Commercial Court, the Governor would have considered the following facts:

- (i) The Commercial Judges conduct trials in accordance with the Civil Procedure Rules and the special Commercial Court procedures to be found in the Commercial Court Guide.
- (ii) The contents of the Commercial Court Guide are approved by the Commercial Court Users' Committee, one member of which represents the Bank of England.
- (iii) The claim in *Three Rivers* involved the investigation of an unprecedentedly large volume of documents and a cause of action which was extremely unusual in any form of English civil litigation.
- (iv) On 2 October 1997 Mr Justice Clarke, as a Commercial Judge, now Master of the Rolls held on preliminary issues that the Liquidator's claim was hopeless and struck it out. On 4 December 1998 the Court of Appeal by a majority, including Hirst LJ., a former Commercial Judge, agreed that the claim as pleaded in the Statement of Claim was hopeless. On 22 March 2001 the House of Lords by a majority of 3 to 2 reversed the Court of Appeal decision and held that the claim was not so hopeless that it should be struck out. The minority included one former Commercial Judge, Lord Hobhouse. So, by that time four members of the Higher Judiciary had held that the claim was hopeless, of whom three were commercial or former commercial judges. It was against that background that it went to trial on the basis of the Commercial Court procedure.

Anybody who knows anything about the conduct of heavy commercial litigation would fully appreciate that the trial judge, who is exclusively responsible for managing the case, is almost inevitably in a less well-

informed position than counsel in the case to judge whether any particular evidence or cross-examination is irrelevant and should therefore be excluded. That is because the counsel have spent much longer in preparation of the case than the judge has and are therefore in a stronger position to judge what needs to be put before the court. For this reason, in the management of a really heavy trial such as this, the judge inevitably has to rely heavily on the responsible presentation of the case by counsel in the most efficient way consistent with the sufficient presentation of the client's case.

It is thus a very strong and indeed perilous course for a judge to intervene in a huge public trial of this kind to shut out cross-examination or presentation of a party's case with the objective of shortening the trial: perilous because if he shuts out too much, the losing party may appeal and the appeal may be allowed leading to a retrial because the Court of Appeal takes a more generous view. It is an even more difficult course for the trial judge to intervene in the middle of the trial by dismissing the claim, particularly where as in that case, the House of Lords has already ruled that it is not hopeless. Obviously, different judges might take a different view as to how hopeless a case ought to be before it was thrown out or to what extent there should be active intervention in the course of a trial in order, for example, to curtail cross-examination. That simply reflects the fact that rules of practice and procedure cannot legislate for everything. At the end of the day it is the individual judge's management of the trial session by session, week after week, that determines how rapidly it can be completed and that is a highly personal exercise which quite properly can vary from judge to judge.

Finally, the Bank of England recovered indemnity costs.

Had the Governor troubled to inform himself of these considerations and not pretended to be an expert in litigation procedure, he might have avoided making in public remarks which are at least to some extent contrary to the national interest.

Indeed, wearing my hat as Principal of the Faculty of Mediation of the Academy of Experts, I ought to add that, if the dispute had been referred to ADR in 1996, when the Commercial Court started making ADR orders, thousands of hours of executive time and millions of pounds in legal fees would probably have been saved.

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