

Expert Witness Institute Online Conference 2022

Keynote speech of Lord Hamblen of Kersey

Introduction

1. It is a pleasure to give the keynote address at the EWI's 2022 Online Conference, at the invitation of your President, Lord Hodge. This year's conference focuses on the Modern Expert. With that in mind, the title of my talk today is: "The modern expert: personal insights and current issues". During my talk I propose to address the following matters.
2. First, I will summarise my professional background and the various kinds of expert evidence which I have encountered both as a barrister and a judge. Secondly, I will explain how I used to work with experts as a barrister, what I would find particularly useful in terms of expert assistance and how I would seek best to deploy that assistance. Thirdly, I will discuss my experience as a judge and offer suggestions as to how you can best assist judges. Fourthly, I will identify some key 'do's' and 'don'ts' based on my general experience. Finally, I will address current issues relating to expert evidence highlighted in recent case law.

Professional background

3. I start then with my professional background. From 1982 to 2008 I practised at the Commercial Bar at one of the leading London commercial sets of chambers, 3, Essex Court or, as it later became, when it moved out of the Temple, 20 Essex.

4. My main areas of specialism were shipping, international trade, commodities, insurance and reinsurance. Shipping in particular involved dealing with a wide range of different areas of expertise, and most cases of any length would involve expert evidence.
5. There is a great deal that can go wrong with ships and their cargoes. If it was a main engine issue, then there would be engineering evidence. If it was a navigational issue or incident, then there would be evidence from expert mariners. Other disciplines that might be involved included chemists; physicists; fire experts; metallurgists; naval architects; cargo and ship surveyors; agronomists; oil industry experts; weather experts etc. In shipbuilding cases you would have the usual range of experts found in Technology and Construction Court (“TCC”) cases.
6. Some cases involved allegations of the ship being cast away or scuttled where forensic evidence would often be deployed. These cases would often involve particular specialisms, such as survival experts, explosives experts and terrorism experts. In relation to issues such as terrorism or war, leading academics with expertise in those areas would often be relied upon. Experts in War Studies would advise on issues such as the prospects of war breaking out and when an armed conflict becomes a war, topics of obvious relevance today.
7. In other cases, business related experts would be needed, such as accountants, expert underwriters, or experts in banking or particular aspects of banking business, such as derivatives trading. In such cases you often needed to be clear as to the boundaries in relation to what was and was not properly the subject of expert evidence.
8. When I joined the High Court Bench in 2008, I sat regularly in the Commercial Court where again much business related expert evidence would be heard. But I also sat in criminal cases, most often in murder cases, where one would have

various types of forensic evidence, for example, blood splatter, gunshot residue, DNA, and fingerprint evidence from pathologists, medical examiners, and other experts. I also sat in the Queen's Bench Division, which heard general civil cases, including personal injury and clinical negligence cases.

9. So, over my career I have encountered a great variety of different areas of expertise and experts – and I have learned, and forgotten, a great deal of expert knowledge.

Working with experts as a barrister

10. I shall now address how I would approach expert evidence as a barrister. As far as I was concerned the key issue was 'understanding'.
11. If I was going to cross examine an expert in his or her field, I had to be sure that I had as complete a comprehension of the relevant area of expertise as possible. In order to cross examine effectively you need to understand the expert area and to demonstrate that you seemingly have such an understanding to the expert who you are questioning. That is necessary not just for the proper preparation of lines of questioning but also to be able to respond to and revert on issues raised during cross examination. To be able to think on your feet when cross examining an expert you need to be able to think like an expert. So, my goal would always be, for the duration of a case, I must become an expert.
12. In practical terms this would mean going back to basics with the expert. Even if it involved an area in which I had previous experience I would aim to build up my knowledge and understanding of the relevant area of expertise from the ground up, starting from first principles. This could be laborious and might involve asking some basic questions, but it is important to be sure that you

understand the underlying principles before you delve into more specialist areas of expertise.

13. Barristers, like judges, live very much from case to case. You are completely absorbed in the case you are doing at any particular time, and you very quickly forget the case you were doing last month or last week. You clear your mind so that you can focus on the present case. And that means that you often need reminding of matters you may have covered before when you come back to deal with specialist areas of expertise.

14. So, when you are working with counsel on a case a key principle I would urge you to bear in mind is 'understanding'. Do what you can to ensure that the advocate really does understand the relevant area of expertise and help him or her to achieve that.

15. This is also a key principle when writing your report. Write it in a way which can be easily understood. Do not be afraid to set out matters which may seem basic to you. Imagine your audience to be a lay audience that does not have any grounding in your expert area. Set matters out simply and clearly.

Assisting judges

16. This leads on to how to present expert evidence to a judge. Again, I would suggest that a key issue is the conveyance of 'understanding'. As a judge you do not have the benefit of being able to go over the expert evidence in conference, to ask questions, and to build up your understanding of the subject. The evidence comes to the judge 'cold' in the form of a finalised report. Judges have to work everything out for themselves from the reports. They are on their own. While a judge can of course ask questions in open court, he or she is unlikely to do so on a general basis and will probably limit questioning to specific areas of

uncertainty or confusion. There is no chance to develop knowledge and understanding through detailed exchanges with the expert in the way that an advocate can.

17. As experts, you therefore have to ensure that your report does that job. So, included in your targeted lay audience is one very important person – the judge. You must do what you can to make it easy for the judge to understand your expertise and your expert views. This involves explanation. Do not assume prior knowledge and understanding. In simple and clear language try and make it easy for a judge to assimilate and to understand. Make clear what your underlying assumptions are and set out all the building blocks which lead to the conclusions that you reach. That may involve covering what seems like basic ground for you, and possibly for the judge, but it is far better to err on the side of cautious simplicity than diving straight in to the key disputed issues.

18. To do this effectively you need to ensure ‘clarity’. You should be aiming your report at a layman and so you need to express your views in terms understandable to a layman. Where technical terms are used you need to explain them. This is a problem which lawyers and indeed judges have. We are used to legal language and expressions as that is our common currency. This tends to lead to a stilted and rather formal prose style. If, for example, I am writing a letter I have consciously to try and make my writing more straightforward and less formal. And that is what you should be doing in your reports. Try and make it clear and understandable to everyone, not just to fellow experts. Make a conscious effort to simplify and to clarify.

19. In order to assist understanding an important element is ‘structure’. This is something which we have to grapple with when writing opinions or advices as a barrister or judgments as a judge. Before I commit finger to keyboard, I will always have thought very carefully about how I propose to structure my judgment. You can never spend too much time on this. To get your points across

effectively in your report it is very important that you structure your report in a logical and coherent way which hangs together as a whole. If you can do that then the individual points you wish to make within the body of a report will come across all the more forcefully. A conclusion which is reached by clear and logical steps is likely to be a compelling one.

20. Allied with 'structure' is the importance of 'reasoning'. All the opinions you express and the conclusions you draw must be supported by reasoning. Those reasons must be clearly set out and explained. Make sure, however, that the supporting reasons are cumulative rather than individually critical. You want to avoid the risk of your expert opinion being undermined if one building block is taken down. Try and build as effective defences as you can for any opinion you express. This means careful and convincing reasoning.
21. Next, you must do what you can to try and gain the judge's trust and confidence. This means demonstrating objectivity and an awareness of your duty to the court, not just your client. Be prepared to make concessions even if that appears to be against your client's interest in winning the case. Acknowledge errors or omissions, if made.
22. Finally, another point I would flag up from the judge's perspective is the importance of the joint memorandum of experts. For a judge coming to a case for the first time, his or her first port of call when considering the expert evidence is likely to be the joint memorandum. It makes obvious sense to find out first what have become the key points. You do not want to spend time working on matters that are no longer in issue. The time a judge has for pre-reading is invariably limited and so sensible short cuts will always be taken. So, bear that in mind when preparing your initial reports and in producing any memoranda, which could, for example, refer back to sections of your report of particular help or relevance.

Do's and Don'ts

23. I now come on to some key 'do's' and 'don'ts'.
24. In discussing my professional experience and some personal insights drawn from it I have already identified five key 'do's': first, 'understanding'; secondly, 'clarity', thirdly, 'structure', fourthly 'reasoning' and fifthly 'building trust and confidence'.
25. Whilst these recommendations are directed in the first instance to the preparation of reports, they also apply to the giving of oral evidence.
26. In relation to structure and reasoning, the structure of your oral evidence will be largely out of your control as that will be in the hands of your cross examiner. Whilst there might be some cross examinations which, as a barrister, I would structure in a logical way, building up, hopefully, to an inescapable conclusion, there would be others in which I would deliberately dart about between different topics and lines of questioning so as to make it difficult for the expert to see where I was heading. Nevertheless, whatever tactics the cross examiner employs, it should still be possible for you to ensure that your individual answers are structured and reasoned. Try and ensure that you give reasons for any view that you express and that you do so in a logical manner. Counsel will always be seeking to pin you down to 'yes' or 'no' answers. However, there is no reason why you cannot give a 'yes, but...' or 'no, but...' answer, setting out qualifications to your answer and the reasons for it. The more logically coherent your reasoning is, the more compelling it will be and structured reasoning aids that. Advocates and judges often, for example, make enumerated points and this can help – for example, 'yes, but firstly..., secondly... and thirdly...'.
27. As to understanding, you should make sure in your oral evidence that what you are saying is clearly comprehensible to the judge or, if there be a jury, to a jury.

If you are unsure about that, you should not hesitate to offer to explain the matter in more detail. Counsel may not want you to do so, but the judge may often be assisted and, if not, he or she will say so. Do not presume understanding and always be prepared to offer and to give some further explanation.

28. As to clarity, this may be easier said than done, but it is obvious that the clearer your oral evidence is, the better it will be understood and the greater its likely impact. Clarity in the giving of oral evidence involves keeping to the point and making your points in shortly expressed but plain language. Avoid speeches.

29. As for building trust and confidence, you must be realistic. If questioning demonstrates that an opinion is wrong or based on false assumptions do not blindly adhere to it. You must be prepared to give ground if good reason for doing so is demonstrated. Show that you have been even handed and are concerned to arrive at the right answer rather than simply the answer that may suit your client. As it is put in one of the cases to which I shall be referring, give the impression that your evidence would have been exactly the same if you had been instructed by the other side.

30. What then about the 'don'ts'? The absolute number one 'don't' is to ensure that you avoid doing anything which might compromise your independence and impartiality.

31. The expert's primary duty is to the court, and this must always guide you.

32. As counsel, one knows from experience how easy it is to get wrapped up in a case that you have been working on, to embrace your client's cause and to lose a degree of objectivity. Indeed, I have always thought that this is one of the great advantages of the split profession. It is very difficult for a solicitor who has been working on a case with his client from day one to retain complete objectivity. Going to counsel who has no previous association with the case or client provides

an opportunity for a clear-headed objective appraisal of the case, or at least it should do. Clear-headed objectivity is what an expert needs to retain at all times, from the time of initially being consulted, to preparation of the report, to discussions with the opposing expert and to the giving of oral evidence.

33. There is nothing more fatal to the acceptability of an expert's evidence than concerns about their independence and impartiality. Indeed, if a judge concludes that an expert has not been impartial it may well lead to all that expert's evidence being rejected or even excluded. It will taint all. It is therefore vital to avoid any hint of partiality. Just as judges must both be impartial and be seen to be impartial, so must experts. Appearances are critical and so you should always strive to demonstrate your impartiality. That will add both credibility and weight to your evidence.

34. A second and related 'don't' is to avoid being an advocate. It is counsel's job to argue the case. That is not the role of the expert. If you give your evidence in an argumentative manner that will inevitably undermine that evidence and risk allegations of partiality. Counsel may try to provoke you and to get a rise from you, but you must retain your clear-headed objectivity. Make points, explain points, but do not argue them. Never get into an argument with counsel, however provoked you may be. If you are not being treated fairly in cross examination then your counsel or the judge will usually intervene. Do not, however, take matters into your own hands.

35. Thirdly, and again relatedly, know the limits of your expertise. By that, I do not mean avoid straying into areas of expertise that are not your own, but rather do not stray into areas of non-expertise. You are being asked to give expert opinion evidence. That opinion evidence is only admissible because it is expert evidence. But keep to your expert opinions. Do not stray into judgments as to the facts. Ensure that the evidence you give is and remains the expression of your expertise and nothing else.

Issues raised by recent case law

36. The importance of all these ‘don’ts’ is illustrated by recent case law.
37. Despite the basic rules regarding expert evidence being well known, and the applicable principles changing little in recent times, there have been a number of recent cases regarding the proper approach to expert evidence. Indeed, there has been a notable recent uptick in cases expressing concerns about inadequate expert evidence. For example, in *Beattie Passive Norse Ltd and Another v Canham Consulting Ltd* [2021] Costs LR 737 the judge observed at [38]: “There is a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties”.
38. Any expert must be familiar with the applicable duties and responsibilities imposed on them at common law and under the applicable procedural rules. All experts owe an overriding duty to the court, irrespective of who instructed or called them. The basic principles are little changed from when they were set out in *The “Ikarian Reefer”* in the early 1990s. They are now summarised in Practice Direction 35 of the Civil Procedure Rules (“CPR”).
39. Recently, in *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No.2 Quantum)* [2018] EWHC 1577 (TCC); [2018] T.C.L.R. 6 at [237], Fraser J enjoined every expert to read Practice Direction 35. He also provided a list of points to be considered by experts and those instructing them, namely: (1) Experts of like discipline should have access to the same material. (2) It is not for an independent expert to indicate which version of the facts they prefer. (3) Experts should not take a partisan stance in relation to interim applications. (4) The process of experts meeting and producing an agreement (where possible) is governed by the CPR, including the Overriding Objective, and should be

constructive and cooperative. The parties and experts must save expense and approach the case proportionately. (5) Should material emerge close to trial such that an expert considers that further analysis, consideration, or testing is required, his or her opposite number should be notified as soon as possible. Only in exceptional circumstances rendering it unavoidable should an expert produce a further report during a trial that takes the other side by surprise. (6) The principles in *The Ikarian Reefer* should be adhered to.

40. Recent case law suggests that these principles are frequently not being adhered to. The principles are being duly recited but not then acted upon. I shall discuss that case law under four main headings: Partiality; Relevant Expertise; Conflicts of Interest and Consequences of a failure to comply with expert duties.

Partiality

41. Experts are not to act as advocates for the party instructing them, but recent cases suggest that this obligation is breached far too often by experts, to the detriment of the party instructing them.

42. For example, in *Bank of Ireland v Watts* [2017] EWHC 1667 (TCC), the claimant Bank sought damages for professional negligence against the defendant quantity surveyors in relation to an Initial Appraisal Report of a residential development in York which it was alleged had been negligently prepared.

43. In his judgment at [58]-[70], Coulson J strongly criticised Mr Vosser, the Bank's expert witness. Coulson J said at [59] and [60] that Mr Vosser was not a properly independent witness because:

“It was clear that the Bank was his principal client, providing the vast majority of his work (and fees), and that he had spent most of the last few years acting for the Bank as an expert witness in actions against monitoring quantity surveyors arising out of the 2008-2009 financial

crash...Mr Vosser's close relationship with the Bank was borne out by many things: his unrealistic approach to the allegations; his attempt to mislead the court; his application of the wrong test; his unreasonable intransigence which led to his refusal to make any concessions whatsoever; and the fact that many of his criticisms, which he did not withdraw, were so unpersuasive that the Bank, quite properly, declined even to plead them as allegations of professional negligence."

44. Coulson J added as follows at para 70:

"The duties of an independent expert are set out in the well-known passages of the judgment in *The Ikarian Reefer* [1993] 2 Lloyd's LR 68. For the reasons set out above, Mr Vosser did not comply with those duties and I was not confident that he was aware of them or had had them explained. For him, it might be said that *The Ikarian Reefer* was a ship that passed in the night."

45. In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd (No.2 Quantum)* [2018] EWHC 1577 (TCC), Fraser J referred to the *Bank of Ireland* case, observing as follows at [237]:

"It is to be hoped that expert evidence such as that called by ICI in this case, and also in *Bank of Ireland v Watts Group plc*, does not become part of a worrying trend in this respect. There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence."

46. Partiality was also an issue in *Gee v Depuy International Ltd* [2018] EWHC 1208 (QB); [2018] Med LR 347 (QBD), which concerned whether a "metal-on-metal" hip prosthesis for use in total hip arthroplasties was defective within the meaning of section 3 of the Consumer Protection Act 1987. Mrs Justice Andrews observed as follows in relation to the expert evidence in that case at [19]:

"The Court heard and read evidence from a wide range of experts in numerous different disciplines. Whilst most of the experts, irrespective of who called them, were mindful of their duties to the Court, I regret to say that a minority of the claimants' experts were not. Some gave the appearance of acting as advocates in the claimants' cause. Sometimes that was not entirely

the expert's fault, because of the approach he had been instructed to take, but others were plainly partisan, and their reports lacked the necessary balance and impartiality. That has meant that, unfortunately, I have found their evidence unreliable, and I have placed little or no weight upon it or preferred the evidence of DePuy's experts in matters that were contentious."

47. Most recently, in *Beattie Passive Norse Ltd v Canham Consulting* [2021] EWHC 1116 (TCC); [2021] PNLR 22, the claimants, a contractor and one of its major shareholders, brought a claim in breach of contract and professional negligence against the defendant consulting engineer in respect of the design of foundations at a construction site. Fraser J commented that Mr Hughes, the claimants' expert at para 79: "... constantly embellished his criticisms of [the respondent]; appeared to be seeking to bolster the claimants' case; in cross examination, relied on material that...had no relevance to the issues under consideration in this trial". By contrast, he said that the respondent's expert "gave me the impression that his evidence would have been exactly the same had he been instructed by the claimants... [the claimants' expert] regrettably, did not... he constantly sought to advance the claimants' case at the expense of expert objectivity".

48. The upshot, as in the *Gee v Deepuy* case, was that the judge preferred the evidence of the other side's expert in all respects where it differed.

Relevant expertise

49. A party seeking to adduce expert evidence on a particular issue must ensure that the proposed expert has the necessary experience to be properly regarded as an expert in the issues in question. Having experience of giving expert evidence does not make you an expert, as observed in *De Sena v Notaro* [2020] EWHC 1031 (Ch). In that case, the parties sought to adduce evidence from professionals put forward as experts in relation to demerger transactions. HH Judge Matthews (sitting as a judge of the High Court) held that the men lacked sufficient experience in carrying out demerger transactions to be regarded as experts, observing as follows at [156]-[157]:

“The document relating to Mr Mesher [the claimant’s expert] said frankly that he did not “claim to be an expert in ‘demergers’ per se”, but that during the period 1993 to 2010 he worked for KPMG and was “exposed to various M&A transactions”. From 2010 to 2012 he was a partner in Grant Thornton’s forensic accounting team, where he continued to deal with the drafting of sale and purchase agreements and the mechanics of post-transaction accounting. From 2012 he has been practising in his present firm of forensic accounting where he has dealt with many post-transaction disputes, and assisting clients with untangling their business arrangements sometimes calculating the value of shareholdings in section 994 claims. I am afraid that this simply does not demonstrate expertise in demerger transactions, even though I accept that he will have had the opportunity to see one or more such transactions, and may even have participated in them. But that does not make you an expert in demergers. And it is for the expert witness tendered to demonstrate the expertise, not for the court to assume it.

In these circumstances, I do not see how either Mr Mesher or Mr Playa [the respondent’s expert] has acquired sufficient experience in carrying out demerger transactions as to be able to claim an expertise in it. I emphasise that it is just not enough to be a ‘forensic accountant’. It is not the experience of giving ‘expert’ evidence in court that makes you an expert. Those firms that provide expert witness services really ought to have learned by now that expertise is acquired by doing the thing in question, usually over many years, and that merely being an accountant (or anything else) for a long time does not mean that you thereby become an expert in everything that accountants (or whatever it may be) commonly do.”

50. An especially egregious case of an expert lacking expertise was *Robinson v Mercier* [2021] 9 WLUK 400. The claimant had alleged negligence or breaches of duty by the Trust in relation to the failure by one of its maxillofacial surgeons to remove her upper left second molar whilst under general anaesthetic. The claimant's case at trial in respect of breach of duty and causation rested solely on the expert evidence of M, who was a general dental practitioner. At the conclusion of his evidence, the claimant withdrew her claim.

51. The judge held that it was plainly the case that M had no expertise in the examination of a patient prior to general anaesthesia in a hospital setting and could not speak to any errors in the treatment given. It should have been obvious to him that, as a general dental practitioner, he should not have been expressing

an expert opinion on the standard of care afforded to the claimant by an oral and maxillofacial surgeon. He had shown a flagrant and reckless disregard for his duties to the court and had done so from the outset in preparing a report on subject matter in which he had no expertise (see [38]-[49]). The consequence was that a third party costs order was made against him.

Conflicts of interest

52. An expert's overriding duty to the court means that they must disclose, both to the court and those instructing him or her, the existence of any conflict, or potential conflict, of interest.

53. In *EXP v Barker* [2017] EWCA Civ 63; [2017] Med LR 121, a consultant neuroradiologist appealed against a decision that he had negligently failed to identify and report an aneurysm in the course of his review of an MRI brain scan carried out on the respondent. His expert's evidence was rejected by the trial judge who found that the court's confidence in his independence and objectivity had been undermined by his failure to disclose that he had a close connection with the appellant, having previously worked with him and co-authored research papers.

54. The Court of Appeal upheld the judge's findings, holding at [23] that:

“As the judge set out between paragraphs 45 and 57 of his judgment, there was in fact a close connection between the Appellant and his principal expert witness. That was not declared by the Appellant or by Dr Molyneux. Indeed, the judge clearly concluded that some steps had been taken which might have had the effect of avoiding the emergence of the connection. This aspect of the case caused him real concern, led him seriously to consider excluding Dr Molyneux's evidence from the trial, and affected significantly the weight which the judge was prepared to attach to his evidence.”

And at [27]-[29]:

“The judge took the view that the failure to disclose this close connection was “a very substantial failure indeed”, the more so because there had been a specific direction in the case that: “Experts will, at the time of producing their reports, incorporate details of any employment or activity which raises a possible conflict of interest.”

55. In *Bux v General Medical Council* [2021] EWHC 762 (Admin); [2021] Med LR 350, an expert appealed against his erasure from the medical register on the ground that his fitness to practise was impaired by misconduct because he had acted dishonestly and for financial gain and had been subject to a conflict of interests.

56. The medical practitioners tribunal had found the doctor to have accepted instructions to prepare medico-legal reports in holiday sickness claims from a firm of solicitors in which his wife was a partner. It found, among other things, that he had produced superficial, unanalytical expert medical reports on an industrial scale which did not satisfy the requirements of CPR Part 35 and which were invariably supportive of the claim. The doctor paid the report fees into a service company of which he held 55% of the shares and his wife 45%. The Court of Appeal upheld the findings of the tribunal – see [81]-[84].

The consequences of a failure to comply with expert duties

57. An expert who does not comply with CPR Part 35, the Guidance for the Instruction of Experts in Civil Claims 2014, or his or her common law duties not only runs the risk of all of his or her expert evidence being rejected but also considerable reputational risk. In an extreme case, permission to rely on the evidence may be revoked, and, in even more extreme cases, costs orders may be made against the expert.

58. For example, *Dana UK Axle Ltd v Freudenberg FST GmbH* [2021] EWHC 1413 (TCC) was an £11.2 million claim for damages arising from the defendant's supply of defective automotive parts. The case involved very serious breaches of the rules by the defendant's three technical experts, which led to the judge refusing to allow the defendant to rely on their reports. The judge commented as follows at [93]-[94]:

“The establishment of a level playing field in cases involving experts requires careful oversight and control on the part of the lawyers instructing those experts; all the more so in cases involving experts from other jurisdictions who may not be familiar with the rules that apply in this jurisdiction. For reasons which have not been explained, there has been no such oversight or control over the Experts in this case.

The provision of expert evidence is a matter of permission from the Court, not an absolute right (see CPR 35.4(1)) and such permission presupposes compliance in all material respects with the rules. I agree with Mr Webb's submission that the use of experts only works when everyone plays by the same rules. If those rules are flouted, the level playing field abandoned and the need for transparency ignored, as has occurred in this case, then the fair administration of justice is put directly at risk.”

59. We have already seen an example of a case in which a wasted costs order was made against an expert in *Robinson v Mercier* [2021] 9 WLUK 400.

60. Another example is *Thimmaya v Lancashire NHS Foundation Trust* [2020] PNLR 12, an NHS Trust was awarded a wasted costs order against a consultant spinal surgeon (“J”) who had been engaged as an expert witness by the claimant in clinical negligence proceedings. At trial, the expert had been unable to articulate the test to be applied in determining breach of duty in clinical negligence cases, was found not fit to give evidence due to his mental health problems and to have comprehensively failed in his duties to the court.

61. The judge observed at [19]-[21] that J owed important and significant duties to the court. He failed comprehensively in those duties from November 2017

onwards. As a result, a public body had incurred significant unnecessary costs. Although it would not be right to use him as an example to send a message to experts, experts should all understand the importance of their duties to the court and the potential consequences if they failed in them. The consequence for the claimant was that she lost her entitlement to have her case tried on its merits. A considerable amount of court time had been wasted. There were also significant costs consequences to the NHS. J had clearly had a very difficult time, but the balance came down firmly in favour of the Trust. J would be ordered to pay the Trust's costs from November 2017 in the sum of £88,801.68.

62. A costs order against an expert is a salutary example of the importance of compliance with an expert's duties.

Conclusion

63. I hope that the personal insights which I have provided and the summary of recent case law which I have given will be a helpful basis for thought and discussion at your conference and that it will provide some guidance to you all in the important role that you perform as experts. More and more cases seem to involve experts of one kind or another and you play a very important part in dispute resolution, whether that be through settlement, mediation, arbitration, or litigation.

Lord Hamblen of Kersey

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