

Errant Experts with Professor Dominic Regan Seminar Notes



1.	It was on 26th April 1999 that the Civil Procedure Rules were implemented. Part 35 was intended by Lord Woolf to see off 'experts' who were nothing more than hired guns. Who, if the price was right, would tell a party that they were in the right.
2.	Despite those reforms and a beefed up statement of truth, a depressing series of recent cases demonstrate that bad conduct continues.
3.	In LIVERPOOL VICTORIA INSURANCE COMPANY LIMITED V ZAFAR (2019) EWCA Civ 392 the MR gave guidance where a false statement was verified by a statement of truth. This was a dodgy doctor churning out 5,000 medico - legal reports per year generating fees of £350,000. A para-legal inadvertently disclosed the original report which indicated that the injury had lasted a week. The instructing Solicitor directed that this be upped to 6-8 months and the doctor obliged without question. The Solicitor was imprisoned for 15 months. A 9 month suspended sentence was imposed upon the expert at first instance. Henceforth, the sentence should be immediate, declared the Appeal Court.
4.	In March 2022 Clyde & Co reported what had happened in PATRICIA ANDREWS AND OTHERS V KROSNOSPAN LIMITED (2022) EWHC 1915 (TCC). Permission to use an expert who had already run up a bill of £225,000 was revoked. It emerged that he had become an advocate for the claimants and had sought substantial guidance from his instructing solicitors as to what he should say in his report.
5.	In PICKETT V BALKIND (2022) EWHC 2226 the unintentional disclosure of a letter from an expert revealed that Counsel had been involved in the production of a joint statement by experts. The Court refused to grant an injunction to prevent use of the letter. It was a cause for serious concern that an outsider had played a part in drafting what should have been the opinion of experts whose primary duty is always to assist the court.
6.	Too many practitioners appear to be unaware of CPR 35 PD 8. Any order which requires an act to be done by an expert, or otherwise affects the expert, must be served upon them.
7.	The third judgment of Pepperall J in ESSEX COUNTY COUNCIL V UBB WASTE (2020) EWHC 2387 (TCC) is one where indemnity costs were awarded on account of the conduct of the defendant. In particular, a blatantly compromised expert was instructed. That should not have happened and he in turn ought to have declined to act. Given that the damages came in at £9m this was an expensive error for the defendant to have made .
8.	In an £11.2m action Mrs Justice Joanna Smith excluded all 3 experts for the defendant. The reports were utterly inept. Each statement of truth was wrongly worded and the mandatory statement of awareness as to the duties of an expert did not appear either. The claimant won. See DANA UK AXLE LIMITED V FREUDENBERG (2021) EWHC 1751 (TCC).
9.	The blockbuster judgment of Cotter J in MUYEPA V MOD (2022) EWHC 2648 KB) is to be the subject of my February Frenkel Topping update. Suffice to say that the 5 experts for the claimant, who was found fundamentally dishonest, had a torrid time. Individuals were found to be partisan and so neglected their duties to the court (paragraph 280 and beyond). One expert had only ever written reports for claimants over a 9 year period and was considered in thrall to that camp (para 304) whilst her opponent, whose spilt was 65% claimant and 35 % defendant was " balanced and helpful " (para 310).
10.	Charles Hollander KC at page 607 of his sublime 'Documentary Evidence' gives a very clear steer about avoiding trouble. Never treat an expert as part of your team. Never discuss with them the overall strengths and weaknesses of your case. Do not involve them in any tactical discussions.
11.	A confused expert has the right to seek Court guidance.
12.	The misery of an expert out of their depth is sadly captured in VAN OORD V ALLSEAS LIMITED (2015) EWHC 3074 (TCC).



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