Should a professional assessor of technical evidence sit as a member of the court in complex legal cases?

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Charles has wide professional and financial interests. He told me that he was feeling particularly frustrated because of what appeared to him to be two perverse judgments. The first was a civil case which had gone all the way to the House of Lords.

'The other one,' he said, 'was a criminal case. Each matter was highly technical involving large frauds and in both cases I did not feel the judges on their own were competent to deal with the matter or advise the jury. I respect their knowledge of the law, but in my opinion both cases depended more on the technical interpretation of the facts than on the complexity of the law.'

'But aren't judges supposed to be trained or selected for their ability to sort out the facts?' I replied.

'Yes,' he said, 'I don't doubt that they're able to sort out evidence presented to them, including technical evidence of uniform quality. I'm sure they're good at ascertaining the veracity of factual evidence and whether it is believed to be true or false by the witness. However, it must require deep technical knowledge to weigh the value of the evidence from different experts. This must be done before any conflicts of evidence can be fairly resolved.'

'I see what you're getting at,' I said. 'It's like doing a jigsaw with pieces of varying elasticity. It's impossible to do it until you can compress the pieces to the right size, but once the scale is uniform, a solution is possible. This may be easy or difficult depending on the shape of the right sized pieces.'

'Quite,' he replied. 'It requires someone with special knowledge to knock the pieces into the right size. I am sure the same problem arises in medical cases as well. Have you come across any, Coe?'

'Yes, I can think of several. The first was a long time ago when my defence society's annual review described a man with a blood pressure of 160/100 which had apparently never been really satisfactorily controlled. His treatment was stopped and then he had a serious stroke. There were clearly other important factors. Probably the risk attributable to the relatively mild hypertension was no more than 15% over a five-year period or perhaps a doubling of the relative risk. Perfect treatment might have reduced this by one-third and the reduction actually achieved to about one-sixth. I couldn't see how the court could justify its conclusion that on balance of probabilities the stroke would not have occurred had the treatment continued. The report did not discuss this.'

'You're suggesting that insufficient weight was given to statistical evidence?'

'Yes, and to the valid point made by the defence that the concept of a single cause for a stroke is fundamentally flawed.'

'What about the others?' he asked.

'Well, there was another where the majority of experts in the field felt that if the judgment wasn't fundamentally flawed, the judge certainly got the balance of the causes of the condition wrong – his perception of the weight of the evidence of different witnesses seemed to be at fault. But perhaps the best example has gone all the way to the House of Lords.'

'Tell me more, Coe.'

'This was a case where the judge became convinced by the idea of a single cause, in particular whether a mesothelioma was attributable to a single asbestos fibre. If it was, as he accepted, then it would be necessary for the plaintiff to show which particular exposure, out of several potential ones, produced the guilty fibre. This took everyone in the field by surprise and so the case went to the Court of Appeal which upheld the decision, but the Lords overturned it. The original judgment meant that the usual approach of joint and several responsibility would no longer apply in mesothelioma cases, so the plaintiff who has had several employers is put at great disadvantage.'

'Weren't there any expert witnesses?'

'Yes,' I said, 'and they did their best to explain to the judge that whether or not a single asbestos fibre finally sets off a mesothelioma, there are several

other factors involved, including the possibility of some "softening up" process, even if the ultimate precipitator of the tumour is a particular fibre.'

'**If all the medical experts were agreed, why didn't the original judge agree with them?'**

'I don't know,' I replied, 'and nor did they, so much so that they wrote a joint letter to *Thorax* explaining their position.'

'An unusual event!' Charles continued, 'You feel that the experts should be the judges?'

'No,' I replied, 'I hope the reforms of court procedure with joint reports from experts commissioned by the opposing parties will get rid of these difficulties.'

'**That might improve matters but I doubt whether it will succeed entirely,' he said**.

'Why not?' I asked.

'Almost inevitably one party will have approached one of the experts and the other party another. Experts selected by one party will inevitably tend to defend the interests of that party, however hard they try not to, and so neither will be impartial.'

'There's nothing wrong in that,' I said.

'No, but it makes a just settlement more difficult to achieve. Like many compromises, it may bring out the worst of both systems. The case might be decided by the more persuasive expert, effectively without the intervention of the court.'

'Suggest another system,' I replied.

'OK,' he said, 'the judge should sit with a professional assessor who participates in the judicial process itself. This has the great advantage of reducing the potential for prejudice of the professional view, and the judge has the advantage of expert assessment of the weight of technical evidence to add to his skills in determining its veracity and the solution of the problem.'

'But there is no precedent for that.'

'As far as civil cases are concerned that's not quite true. Arbitrators appointed by the High Court with the agreement of parties often have professional competence. You yourself sit on appeals tribunals where you participate in the decision rather than merely advise the chairman.'

'But those are civil matters; what about criminal cases?'

'This is more difficult. The technical arguments are often simpler, but in the complex case to which I alluded, one could certainly argue for a judge, sitting with an assessor, and jury. Indeed I might go further. If in these complex cases you're more interested in justice actually being done rather than apparently being seen to be done, perhaps it should be judge and assessor only.'

Coemgenus