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Mr del Piombo, I presume? The increasingly contentious field of art authentication

[Collyer Bristow LLP](#)



United Kingdom

A prominent art historian recently claimed that a portrait of Michelangelo displayed at the National Gallery was a ‘modern fake’. The Gallery had exhibited the work as being ‘probably’ by Sebastiano del Piombo and dating from 1520, however, Charles Hope cited the portrait’s lack of provenance before the 1960’s and the non-contemporary dress of the subject as evidence of its lack of authenticity. The response of the National Gallery to Hope’s claims was striking. It acknowledged the piece’s doubtful provenance and stated that their exhibiting of the work was intended ‘to contribute to the ongoing discussion regarding its attribution’. This response could be regarded as an unusually frank acknowledgment of attribution, and particularly connoisseurship, as a highly subjective field. Alternatively, it may reflect what has been called the ‘chilling effect’ of drawn-out legal battles on expert opinion.

The increasingly litigious nature of the art world in recent years has seen the estates of Basquiat, Haring, Pollock-Krasner, Lichtenstein and Warhol announce their retreat from the field of authentication. The Lichtenstein Foundation dissolved its authentication arm on realising the size of its liability insurance premium might jeopardise the Foundation's *'health and wellbeing'*. The Warhol Foundation did so having spent \$10 million in legal costs defending claims against collectors whose works it refused to certify.

In one of the ten lawsuits brought in New York against the Knoedler Gallery and its former president and director Ann Freedman, the defendants had stated that a 'Rothko' purchased from the Knoedler Gallery for \$8.5 million had been viewed by eleven eminent scholars and specialists on the Abstract Expressionist movement, including Rothko's son. The claimants argued that this statement implied that the listed individuals had viewed the work and *'verified its authenticity'*. Nearly all the experts testified that not only had they not discussed the work's authenticity, but that they were not in the practice of authentication at all, one stating *'I never have and I never will'*. Christopher Rothko conceded that he had described the work as *'beautiful'* but did not go further because he *'didn't want to be sitting here today'*. In another of the Knoedler lawsuits, the claimant brought a claim this time directly against an expert at the Beyler Foundation in Basel. It was alleged that they had confirmed the authenticity of another forged 'Rothko'. The claim settled in April of this year on undisclosed terms.

Given the stakes, it is perhaps unsurprising that experts are increasingly reluctant to throw their hat in the ring and many academic institutions and museums now restrict their staff from authenticating artworks (this in itself enabling forgeries to circulate more freely within the market).

Attributions are generally considered to be expressions of opinion rather than a warranty of authenticity which can be pursued as a contractual claim. In the absence of fraud or an appropriate contractual matrix a claim for an incorrect expert attribution is most commonly pursued under the law of negligence. In spite, or perhaps as a result of the increasing litigation and resulting stagnation of expert opinion, there is yet to be a successful negligence claim against an art professional in the English Courts.

Thwaytes v Sothebys illustrates the risks of attribution for experts (in allegedly failing in this case to spot a 'sleeper' potentially by Caravaggio), and re-confirmed that, in theory, the Courts are prepared to find an attribution negligent in circumstances where an auction house or expert has fallen below the standard of care expected of an art professional. Following this case, establishing whether or not an expert has fallen below that standard will involve applying an objective test to the highly subjective field of attribution, making a judicial judgment and not one based on artistic merit (despite the judge's estimation that the task of not substituting her own assessment of quality for that of the experts was *'inescapable'* in the circumstances of the case). In making

such an assessment, expert evidence must therefore be heavily relied on by the Court. In *Thwaytes, Sotheby's* were ultimately held not to have been negligent and until there is a successful claim against an expert, the precise definition of a negligent attribution remains vague. In the meantime, forthcoming expert opinion may be increasingly difficult to find.

