SENIOR PRESIDING JUDGE
FOR ENGLAND AND WALES

THE RIGHT HONOURABLE LORD JUSTICE LEVESON
SENIOR PRESIDING JUDGE

SPEECH TO
BOND SOLON ANNUAL EXPERT WITNESS CONFERENCE

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I would like to start by thanking Bond Solon for the invitation to this important conference and for the opportunity to bring to you a judicial perspective – I do not say the judicial perspective because I cannot speak for all of my colleagues. I must admit, however, that it is somewhat daunting to be in front of you. After all, you, expert witnesses all, are used to appearing before a judge. No judge will be used to appearing before expert witnesses, perhaps to be questioned about his or her own expertise.

I would like to focus on defining the role of an expert witness, looking at what makes a good expert witness, making a full contribution to the resolution of disputes. That requires me to define, at least from my perspective, the boundaries of what an expert witness can and should do.

This is an important issue, because once you define something, you also limit it. And it is important – as it is for all participants in the civil and criminal justice systems – to know their limits. This is not to emphasise a negative, but rather to underline what should be a positive: once the boundaries of the role of an expert witness are defined, it allows all to focus, in the true sense of the word, on the role and the duties of that expert.

Before launching into proffering an opinion on some issue, it is common to provide a health warning that "I'm not an expert on this…". My opinion is my opinion; it is not necessarily better or worse than yours. It is formed, however, after 40 years discussion of all manner of issues – in fields covering the most general including all types of medical expertise, pharmacology, chemistry, biology, engineering, statistical, botanical, to esoteric expertise which the experts would never have thought would be ventilated in court including marine architecture: I could not start to list them all. The themes are, I believe, common. I know that you are experts in what is, I imagine, an equally broad range of subjects but may not have discussed these issues across different types of expertise: I hope, therefore, that my views are of some value.

Before I start, let me say something about the use of experts. They abound in every field of litigation. Whereas once, going to an expert was rare. Now, it is commonplace. One problem with this increased use of expert evidence, however, is that it can be tempting to think experts are a panacea, a fix all, a universal solution to the evidence – or lack of evidence – in the case.

Am I being farfetched if I wonder whether this view is attributable more to television programmes like CSI than to everyday life in the courts? If you have watched that programme, each tends to be solved forensically: an expert, doctor or scientist, provides the links and the proof. Yet I am sure it is beyond the wildest dreams of all of you here for your expert evidence to be the single silver bullet that would solve all issues in the case. It is simply not true. But there can be a temptation, certainly in the eyes of the public, to think that there can be expert evidence to prove the essential point in a case, to the extent that you don't need regular, old fashioned normal witnesses any more: I fear that it has an impact on willingness to help the police. This is what I shall call "the CSI problem".

Having said all that, I wonder if there is a hint of truth in the CSI problem: we'll all be familiar with experts who have gone too far, I'm sure we can recall in our minds examples of experts whose testimony strayed beyond their expertise or whose evidence took on an irrefutable significance that it did not merit. There are certainly well known examples. I shall return to that problem shortly.

The question is, however, how many experts are experts at being experts?

Put another way, what makes a good expert witness?

It's a difficult question to answer. Simply because someone has a great level of expertise in a particular subject, they don't necessarily have expertise in the art of being an expert witness. They won't necessarily know what their lay and professional clients expect of them, or more to the point, what their lay and professional clients *should* expect of them. And most importantly, they won't necessarily know what the court expects of them.

There are, in fact, a variety of things you will need to know in order to be an *expert* expert. I want to split them into two broad headings – the first is case management, and the second relates to more general principles of being an expert witness.

Firstly, case management. Being an *expert* expert needs you to understand rules of procedure; the overriding objectives; directions hearings, time limits, complying with time limits…

The temptation – which I am sure lawyers and dare I say it judges also suffer from – is to switch off at any mention of case management. I hope that is not the case here today, because what happens before the trial is of great importance and can affect the sensible resolution of the issues between the parties, the time that the litigation takes and, most important, the cost to all involved – and let me make it clear that we ignore the cost of litigation at our peril. At present, it is truly unsustainable and, as you will be aware, my colleague Lord Justice Jackson is in the process of completing a fundamental review of costs in civil litigation which may affect everyone working in that field.

Case management should be the foundation of modern litigation, and as experts, you should be alive to the impact that a sensible approach can have on the overall conduct of the case. Easy to say, but what does that mean to you, not conducting the action, not interacting with the court, not attending the Case Management Conferences that courts hold. If good case management is the bedrock for all, including the expert, what does that mean for you?

First, everyone needs to know what the court expects of them – and that includes professional witnesses such as experts. The Court will expect you to comply with its directions, and, in doing so, will expect you to consider your primary duty as being owed to the court, and not your clients: that requires careful handling of those who instruct you. But that primary duty to the Court should help you view and pursue the underlying philosophy of

case management as an integral part of your duty. This is in stark contrast to a previous age, perhaps not so long ago, when some experts had no objection to joining in with the obstructive tactics of many litigators and were well known for the way in which they always took the same side: I remember talk of an orthopaedic surgeon with the actual initials NWA – never work again – who always appeared against another surgeon with the initials BTW – back to work – and that was always there evidence.

Even when there is no attempt to engage in obstructive tactics, bringing an expert into the proceedings often does cause delay. It might not be until some time into the progress of the case, as the issues are being narrowed down – or even, determined for the first time – that it is apparent that an expert is required at all. Coming to the proceedings late makes it all the more important that the expert in those circumstances engages with case management constructively. By that stage, the proceedings will, by definition, be experiencing unexpected delay: it is the duty of the expert to make sure there is no further delay.

And so you are brought in – that is, after your clients have finally decided they need you. Before you actually arrived on the scene, your instructing solicitors needed time, several weeks they said, to find you, to instruct you, and to await your report. The other side then decide that they, too, need an expert – but not before they had digested the contents of your report – and then they, too, embark on the same process of locating your opponent, instructing them, and awaiting the eventual report. They can't instruct their expert until they have your report. You can't produce your report until they have disclosed certain documents in their possession, whether medical records, or whatever.

Eventually, they respond to your report, at which point you decide that you need to produce a supplementary report in response to their report, new disclosure requests are made and so it continues… And all of this is before the co-defendant decides he needs an expert also! Does this sound familiar? Suddenly the trial that was 6 weeks away is now 6 months away, and any notion of active case management and proportionate use of resources has gone out of the window!

There are remedies, however, to exchanges such as these. There is, of course, a judicial responsibility to engage in active case management, but even the most robust of judges will be greatly assisted by cooperative parties – and experts.

For example, as an expert, you are best placed to foresee the impact your evidence may have on the proceedings. Don't wait to be asked by your instructing solicitors about your revised timetable constraints: take the initiative and tell them. Certainly in civil cases, where there are very real costs sanctions, there has been a degree of success with such a proactive approach. In crime, however, certainly in the more standard cases, case management directions are routinely ignored, or unrealistically set.

I wish to emphasise one particular rule of criminal procedure, buried away in Part 3 of the Criminal Procedure Rules 2005, which deals with case management. Amongst other things, rule 3.8 says that at every hearing the court must "*set, follow or revise a timetable for the progress of the case, which may include a timetable for any hearing including the trial…*" That means that at every pre-trial mention, PCMH or preliminary hearing prior to a criminal trial, the court will need to know the impact your report will have on the timetable of the proceedings. There is nothing groundbreaking in that requirement: it is mirrored in civil proceedings, and surely is so obvious as to not need stating. But it is stated. It is in the rules for a reason. The real question is this: just how alert to this requirement are you as expert witnesses? Are you aware of – or have you asked about – the schedule of hearings for the case? Can you revise your own timetable in the light of that? Certainly as a judge, I would welcome and applaud an expert who is able to demonstrate such initiative.

Moving on, both the Criminal Procedure Rules and the Civil Procedure Rules provide for single joint experts. The Criminal Procedure Rules only permit single joint experts for co-defendants and not for the prosecution and defence – but under the civil procedure rules, it is, of course, possible for both sides to have a single joint expert in relation to a particular issue.

I've been asked to say a little about the recent changes to the Civil Procedure Rules. Some of those changes are in this very area – Practice Direction 35 paragraph 7 now includes criteria for the court to take into account when considering whether to direct that a single joint expert be used in relation to a particular issue.

This strikes me as not so much a change in the law, but rather a codification of the factors courts were already taking into account and existing best practice.

Those factors include consideration of whether it is proportionate to have separate experts for each party in relation to the particular issue. What is proportionate will depend on the amount in dispute, the importance to the parties and the complexity of the issue.

The Court also has to consider whether appointing a single joint expert will speed up proceedings. In my experience, there are many cases whose timetable would have benefited from having a single joint expert.

In one sense, it could be argued that being a single joint expert increases the burden on you as the expert. Still, your overriding duty remains to the Court; but as a single joint expert you are also responsible to not one but at least two opposing clients. That, I am sure, will direct the mind. The content and extent of your expertise may be under a much greater level of scrutiny prior to the trial where the parties will seek to derive advantage, whether by questions or otherwise, and turn your evidence to their advantage. And you have an incentive, possibly a fresh incentive, to cooperate with both sides.

From my perspective, a greater sense of scrutiny and improved cooperation with the other parties can only benefit expert evidence. That will benefit the management and ultimate disposal of the case in question. As your case is managed efficiently and swiftly, aiding the parties to resolve issues which would otherwise be fought out, so the burden on the court system as a whole is lightened, and as a member of the senior judiciary, that is something that I am very interested in.

Single joint experts are not for all cases – neither the Criminal or Civil procedure rules advocate that – but for those cases where they are appropriate, their impact can be positive indeed.

We've covered the ground work, or laid the foundations, as it were, of good expert testimony. Now we can move on to the expert testimony itself.

General Principles of Expert Evidence

As a judge, I will expect you to have a proper appreciation of the scope of your expertise – and I will expect you to have the confidence and integrity to point out weaknesses in your evidence not so much by denigrating yourself but by ensuring that you have shaded your opinion and provided appropriate caveats and details of the significant facts the accuracy of which you have assumed but the judge may have to find. Further, of course, when you simply don't know the answer to something or are being pressed to speculate or make assumptions which fly in the face of your appreciation of the facts or the basis on which you have proceeded, say so. By knowing the limits of your expertise, you will know the limits of what your evidence can be.

Let me take a fictional example. You might be the world's leading authority on Forensic Botany in the mythical central European state of Ruritania, but that does not mean for one moment that you will be the world's leading expert on Ruritanian forensic botany. Expertise in any specialism does not mean you will automatically know how to engage with the court and it does not mean that you will know how to engage with your clients, and it does not mean that you will understand the overriding objective of the litigation you are involved with.

Your lay and professional clients will expect much of you. They will take it as a given that you are a competent Ruritanian Forensic Botanist. Your expert knowledge is only the starting point as far as your clients are concerned.

What **they** are concerned about is the process by which you compile your findings, the liaison you have with the other parties in the case. They will expect you to present your evidence in a coherent and logical manner, in a way which will have added clear benefit to the conduct of the litigation, during the phase up to the hearing and will continue to do so.

To say you must be prepared is to insult you but I am afraid that none of us need look far in the law reports to read of experts who said one thing in their written report, and said another in the witness box. It does happen. It shouldn't although your credibility but not perhaps the value of your evidence will be enhanced if you admit error when it is appropriate to do so, rather than sticking to an untenable line because that is what you said in the report.

So I am sure you'll agree, therefore, that there is a great deal more to being an expert witness than simply being an expert.

In the remainder of this address I want to outline briefly some of the problems that have arisen in relation to the use of expert evidence, and then look at how those problems might be tackled.

Just over a month ago, the Court of Appeal (Criminal Division) gave judgment in the case of *R v Atkins and Atkins* [2009] EWCA Crim 1876. The Court had to consider whether it was acceptable for a facial mapping expert to express his opinion in relation to CCTV footage using a sliding scale of certainty. The scale ranged from "lends no support" at one end of the spectrum to "lends powerful support" at the other. There was a crescendo of strengths of support between each end of the scale.

The Court of Appeal held that it was acceptable for an expert to express conclusions in this way; it noted[1] that many experts follow such an approach: you may do the same. It's perfectly acceptable to do that.

Atkins is a useful case to examine. The appellants' convictions for murder, aggravated burglary, wounding with intent and firearms offences were upheld. In the process of examining their convictions, the Court of Appeal considered some of the circumstances when expert evidence has been incorrectly used, or too much significance was ascribed to it.

I wish to examine some of those circumstances.

Firstly, the Court of Appeal noted that expert opinion is just that: an opinion. Such opinion is often fundamentally different from an issue of fact where there is a right and a wrong answer. The Court quoted the 2004 case of *R v Gardner* [2004] EWCA Crim 1639, in which the trial judge had warned the jury in the following terms:

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[1] At paragraph 26

> *Now has he* [– the expert –] *gone too far in the material available to him?* ***You cannot test his results in the way in which an examiner can test a student's examination paper in mathematics****, and so you will want to approach his evidence with caution. No-one suggests* [the expert] *is lying,* ***but an honest witness who is mistaken can be very persuasive or can appear to be very persuasive****.* [my emphasis]

There are two issues here.

First, experts should be wary of presenting their evidence as if they are the sole arbiters of fact, when the reality is that there is no clear answer. This is part of the CSI problem I outlined a moment ago. The maths test example is a useful example; although this particular direction to the jury related to facial mapping, the principle applies more widely. Of course, there will be areas of expertise where the issues are clear cut, but in my experience, and probably yours too, where there is a clear cut, black and white issue, expert evidence is not required. The issue can be agreed. The reason experts are brought in is precisely because there is ambiguity. To continue the teaching analogy, a court examining expert evidence is more like an English tutor considering an essay, rather than the maths tutor looking for the right numbers. So you need to be clear as to the limits of your expertise and opinion.

Secondly, Courts should be aware of the risk of the persuasive, but mistaken, expert witness. Experts are impressive people and all will be impressed by the solemnity with which they explain their expertise and their conclusions. Juries will need to be warned – as the judge was doing in this case. As it happens, the Court of Appeal upheld the safety of Gardner's conviction and attributed the safety of his conviction, in part, to this and other warnings that were given to the jury[2]. But this issue is why it is important to have the confidence and integrity to know the limits of your expertise, and to have the confidence and integrity to inform the Court of those limits, where it is appropriate to do so.

Let me return to *Atkins*.

Next, the CACD considered the extension of expert evidence, examining the 2006 Australian case of *Tang* [2006] NSWCCA[3] 167. Highlighting the importance of defining the limits of your expertise as experts, the Court considered an example where an expert in one field – again, facial comparison – sought to give evidence in relation to another field, body posture.

The expert went as far as to say that the body posture alone of the defendant was, and I quote, "a unique identifier", which "leant support" to her conclusion that the defendant and the person responsible for the crime were, and I quote again, "one and the same".

There was no body of knowledge that the expert was able to identify to establish that proposition. When pressed, she stated that she had indeed established her own "protocol" for the comparison of different body postures. She refused, however, to reveal any details of the "protocol" on the grounds that it was unique to herself and she wished to patent it.

Needless to say, the New South Wales Court of Criminal Appeal ordered a retrial of the defendants.

That is not say that domestic Courts are unwilling ever to accept a new area of expertise. The issue here was that the expert had self-certified a novel area of expertise, and refused to

[2] *R v Gardner*, paragraph 53, per Waller LJ
[3] New South Wales Court of Criminal Appeal

demonstrate the methodology behind it. Clearly Tang is an extreme example. But equally clearly, there are lessons to be learnt from it, and for that reason I cite it.

The third lesson from *Atkins* is the importance of robust testing of expert evidence. The remedy when faced with a new area of expertise is not to prevent all experts, whether good or bad, from testifying; on the contrary, the remedy is to examine the evidence robustly, with the assistance of another expert if necessary. So what happens if there is no other expert? The answer is to examine what the expert says from a general scientific perspective, to examine the rigour of the approach and whether it complies with accepted scientific methodology; whether there is a use or misuse of statistics; whether there is some other expertise that will be able to review the approach and its general validity

In that way, even esoteric expert evidence can be tested thoroughly in the witness box, and the judge will, I have no doubt, ensure that there is careful exegesis to the jury of the difference between, for example, factual examination and comparison on the one hand, and, on the other, a subjective, but informed, judgment of the significance of the findings.

So, to recap, three lessons from the Court of Appeal: first, remember that opinion is opinion, secondly, don't stray beyond your expertise, and thirdly, make sure you submit expert evidence to robust testing; if you don't the other side might well do it to you, in public and I am reliably informed that the witness box can be very lonely in those circumstances. So, you are an expert but are you experts at being experts?

To be an expert expert is a challenge; but it is a challenge that I am sure, by virtue of the very fact you are here today, you will want to live up to. And finally, if, on the off chance, you are a Forensic Botanist specialising in Ruritanian flora and fauna, I am sure you are indeed an expert expert.

Thank you for listening.

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