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KEYNOTE ADDRESS[1]

BOND SOLON 25th ANNUAL EXPERT WITNESS CONFERENCE

STANDARDS

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1. Good morning. It is a pleasure to be here today at the invitation of Bond Solon to give the keynote address. The theme of this Conference is "standards", the title I have adopted for my address. In doing so, it is noteworthy that this is the 25th Annual Bond Solon Conference, exemplifying a determination to raise standards in the sphere of expert evidence – so often an important component in all our jurisdictions (criminal, civil and family).

2. Expert witnesses have played an essential role within our justice system since at least the 16th century. At that time the courts formally recognised something that we all know too well: judges are not omniscient, however tempting it might be to think otherwise. As Mr Justice Saunders put it in *Buckley v Rice Thomas* in 1554,

> '*if matters arise in our law which concern other sciences or faculties we commonly apply for the aid of that science or faculty which it concerns. this is a commendable thing in our law. for thereby it appears we do not dismiss all their sciences but our own, but we approve of them and encourage them as things worthy of consideration.*'[2]

[1] I am most grateful to Dr John Sorabji, Principal Legal Adviser to the Lord Chief Justice and the Master of the Rolls, for his considerable assistance with the preparation of this Address.
[2] (1554) 1 Plowden 118 at 124. Also see *Folkes v Chadd* (1782) 3 Doug 157, *R v Turner* [1975] 1 QB 834.

3. We do this because it is simply neither realistic nor possible to expect judges, if I can borrow from Professor Anthony Jolowicz, to '*have knowledge of every branch of science, of every art and of the mysteries of every profession*'. [3] There may be exceptions. No doubt Lord Sumption could well have brought to bear his expert knowledge of the 100 years' war should it have been relevant to a case before the Supreme Court. And it is well-known that the great American Judge, Billings Learned Hand would call on his own knowledge of scientific matters in determining cases,[4] perhaps foreshadowing Judge John Deed in that most entertaining TV series.

4. Exceptions (real and fictional) to one side, in the vast majority of cases just as judges cannot determine questions of fact in the absence of lay witness evidence, they are generally unable to determine questions that call for scientific or other specialised knowledge without the assistance of an expert witness. That puts the expert in a privileged position. That privilege places a great deal of responsibility upon an expert, whether or not his/her evidence is determinative of any issue[5]. Nor, as has been repeatedly stressed, can experts properly take the role of tribunal of fact. As not infrequently noted by the Courts, we do not have trial by expert in this country; we have trial by Judge. As juries are routinely directed in criminal cases, they are to decide the case on the whole of the evidence; the expert is there to assist them on a part only of the case, where particular expertise is required.

5. Privilege of course comes with responsibility – a responsibility to maintain certain standards. Today, I wish to explore the standards required of experts under four broad headings:

[3] J. A. Jolowicz, *On Civil Procedure*, at 225.
[4] *Elyria Iron Steel Co v Mohegan Tube Co Inc* (1925) 7 f (2d) 827
[5] Thus, for example, the uncontradicted evidence of an expert on foreign law is, in practice, likely to be decisive on the particular point in issue and the Court should be reluctant to reject it - but the Court is not slavishly bound by it, albeit that good reason will be needed for not accepting it: *Bank Mellat v HMT* [2019] EWCA Civ 449 at [53]

(I) Expertise;

(II) Non-partisan;

(III) Need;

(IV) The discipline of case management.

6. Before proceeding further, it is worth recapping the well-established duties of experts, which are (or ought to be) well-known to every expert. They exist to promote the proper administration of justice, to enable the expert to assist the court in reaching accurate decisions, and to enable the court to place confidence in the evidence the expert will give. Such confidence does not, of course, mean the evidence will necessarily be accepted. That depends on all the circumstances of the case. What it does mean is that the court can properly consider it.

7. The common law duties were famously summarised by Cresswell J in *The Ikarian Reefer*[6]. Paraphrasing, they require experts to be: independent; impartial; and, unbiased. They also require each expert to remain firmly within their area of expertise when giving evidence. These duties are reinforced in the Civil, Criminal and Family Procedure Rules,[7] which place an overriding duty on experts to assist the court on matters within their expertise. That duty, as the Civil Justice Council's Guidance on the Instruction of Experts quite rightly emphasises, '*overrides any obligation to the person instructing or paying them*'.[8] This requirement is further underpinned by the wording of the statement of truth by which experts must verify their reports.[9]

[6] [1993] 2 Lloyd's Rep. 68, at pp. 81-2.
[7] CPR r.35.3(1); Crim.PR r.19.2(1)(a)(ii); FPR r.25.3(1) and see FPR PD25B.
[8] White Book 2019 Vol.1 para.35EG.3.
[9] CPR PD35 para.3.3; CRIM PD V, para.19B; FPR PD25B para.9.1

(I) Expertise

8. To my mind, the very first requirement of someone purporting to give expert evidence is that they must have relevant expertise. Disconcertingly, this turned out to be a problem in *R v Pabon*[10], before a constitution of the CACD of which I was a member[11]. Giving the judgment of the Court, I expressed the matter this way[12]:

"The essence of the matter is straightforward. ….expert evidence is adduced to assist with matters likely to be outside….[the jury's]…experience and knowledge. A partisan expert is quite incapable of furnishing such assistance, quite apart from the breach of the ethical and legal duties thus entailed. So too, to state the obvious, expert evidence must be expert; it can only be such if it is within the expert's area/s of expertise; if the so-called expert witness gives evidence outside of his area/s of expertise it is both of no use to the jury and corrosive of the trust placed in such witnesses."

9. Simply put the facts were as follows. Mr Pabon was charged with conspiracy to defraud. The alleged conspiracy concerned what was said to be dishonest rigging of the London Inter-bank Offered Rate (LIBOR). He was convicted. An initial application for permission to appeal the conviction was refused. Subsequently, there was a retrial of two other individuals who were prosecuted for a similar offence; on the retrial, they were acquitted. The retrial brought to light fresh evidence, said to be relevant to Mr Pabon's conviction. In the light of that evidence he renewed his application for permission to appeal. The application was granted. The fresh evidence concerned expert evidence given by the same expert who had given evidence at Mr Pabon's trial. In essence it called into question the expert's understanding of, and compliance with, the various expert duties.

[10] [2018] EWCA Crim 420.
[11] For obvious reasons, I say no more of this decision here than is apparent from the judgment.
[12] At [54]

10. The starting point for any expert is to ensure that they are fully aware of, understand, and comply with the expert's duties. The expert in this case failed to do so. He signed the declaration at the end of his expert's report having only "glanced" at the necessary guidance on his duties. He had made no proper attempt to ascertain what they were or how they were to be applied and complied with. As the Court of Appeal put it:[13]

'. . .*[He] signally failed to comply with his basic duties . . . he signed declarations of truth and of understanding his disclosure duties, knowing that he had failed to comply with these obligations alternatively, at best, recklessly.*'

11. A variety of consequences flowed from this failure, including the expert asking others for answers to questions, despite being warned by the trial Judge not to discuss his evidence with anyone, during breaks in the trial and while in the course of giving evidence. He went well-beyond permissible research into an area in which an expert has the requisite expertise but (properly) seeks to enhance his opinion. An expert cognisant of their duties would not have done so.

12. These were criminal proceedings. A man's liberty was at stake. In the event, for extraneous reasons, the conviction remained safe and was upheld. But the conduct of this expert was such that, on the one hand, the defendant's liberty could have been unjustly imperilled, and, on the other hand, the trial could have been derailed. He was not an expert, properly so-called, at all; he was no more than (as recorded in the judgment) an enthusiastic amateur. The same approach taken in family or civil proceedings could be equally devastating to the parties involved, and to the credibility of the judicial process.

[13] At [58]

13. Still more disconcertingly, *Pabon* may well not stand alone. Thus, there are reports[14] of a trial of eight men accused of a £7 million carbon credit fraud which had to be halted when it appeared that the expert witness (so-called) had no relevant qualifications. He was not an expert of suitable calibre; he had little or no understanding of the duties of an expert; he had received no training and had no academic qualifications.

14. I add three further matters on expertise. First, English law is characteristically pragmatic as to how expertise is acquired[15]. It is not prescriptive as to how an expert has acquired his expertise – but it does insist that he must have the relevant expertise.

15. Secondly, there are logically distinct questions as to the competence of an individual to give expert evidence and the weight to be given to the evidence of an expert who has the relevant expertise[16]. Not least, in a criminal trial, the first question is a matter for the Judge, whereas the second is one for the jury. Pragmatically, the questions are sometimes permitted to overlap – as where (especially in a civil case) a Judge or arbitrator faces a dispute whether a part of an expert's report strays outside his area of expertise. There is a temptation to hear the evidence (*de bene esse*) and take a view later of both its admissibility and weight. In the interests of avoiding disproportionate satellite litigation, there can on occasions be something to be said for that course – but it must be recognised that the questions are separate and that in a criminal trial one is for the Judge, the other for the jury.

16. Thirdly[17], there is a degree of tension between insisting that the proposed expert evidence forms part of a body of knowledge or experience sufficiently organised or recognised to constitute an expert discipline on the one hand[18], and the Court or arbitration tribunal being

[14] See, Mark Solon, in *New Law Journal*, 14 June 2019, Law Stories/Expert Witness, "Imposters and confidence tricksters".
[15] See the authorities cited in *Pabon*, at [55] – [56]
[16] See *Archbold* (2019), at para. 10-48
[17] *Archbold*, at para. 10-50
[18] See the discussion in *Kennedy v Cordia* [2016] UKSC 6, at [54] and following.

ready to take advantage of new techniques and advances in science on the other. Consider, for example, recent developments in facial recognition technology. Such questions require a balance between rigour and receptiveness to new thinking; answers will turn on individual circumstances.

(II) Non-partisan

17. Assuming the proposed expert has relevant expertise, the next and fundamental requirement is that he should be non-partisan. It might have been thought that this duty was so well-known as not to require reiteration here – but I am not persuaded that complacency is warranted. A recent case serves as a reminder of the importance of this duty and the gravity of the sanction for a dishonest breach.

18. While (save exceptionally) we do not have court-appointed experts in England and Wales, each expert permitted to give evidence does so as a servant of justice and not as a 'hired-gun', for the party instructing them. They must act accordingly. The privilege experts are afforded is not a licence to act as an advocate for any party. Rather they must, as the Civil Justice Council's guidance stresses, resist any pressure, whether subtle and unstated or express, to join 'the team'. A useful rule of thumb is to self-check and ask the question: would I give this evidence if '*given the same instructions by another party*'.[19] If you cannot answer yes to that question you cannot properly say you are independent and impartial.

19. Examples can be multiplied. Perhaps the most egregious recent example of an expert failing to act in accordance with their duties was that detailed in *Liverpool Victoria Insurance*

[19] White Book 2019 Vol.1 para.35EG.3.

Company Ltd v Zafar [2019] EWCA Civ 392. The case concerned a medical expert who was held to be in contempt of court. The contempt arose from his completion of a false statement in his expert report - a document verified by a a statement of truth. In a nutshell, at the instigation of the instructing solicitor, the expert had altered an earlier opinion by producing a later opinion significantly more favourable to the claimant client. As the Court of Appeal expressed it[20]:

"The seriousness of the case lies…in the putting forward of the revised report as if it represented the….[expert's]…honest and independent opinion based upon his own examination of ….[the client]…".

20. Whatever the motivation that led the expert to act in this way, the approach taken could in no way be said to comply with an expert's duties. No serious attempt to consider the issues. No scrutiny and assessment of what his secretary had written; thus the report was neither all his own work nor did it identify who else – here a non-expert – had assisted. No independence, as it was prepared on instructions from the solicitor.

21. In short, the expert here was a mere mouthpiece for the party. Again, this approach undermines the judicial process. And it sells the parties short. Such a report was one that if admitted in evidence could bear little weight in terms of credibility. And if not accepted as evidence, then the party for whom the expert acts has no evidence on the issues before the court. An expert who fails to comply with their duties thus neither provides assistance to the court nor to the party instructing them.

22. The Court of Appeal set out its view of the seriousness of a contempt of this nature in robust terms:[21]

[20] At [62]
[21] At [59] – [60]

"59. …the deliberate or reckless making of a false statement in a document verified by a statement of truth will usually be so inherently serious that nothing other than an order for committal to prison will be sufficient. That is so whether the contemnor is a claimant seeking to support a spurious or exaggerated claim, a lay witness seeking to provide evidence in support of such a claim, or an expert witness putting forward an opinion without an honest belief in its truth. In the case of an expert witness, the fact that he or she is acting corruptly and makes the relevant false statement for reward, will make the case even more serious; but it will be a serious contempt of court even if the expert witness acts from an indirect financial motive (such as a desire to obtain more work from a particular solicitor or claims manager), or without any financial motivation at all, and even if the expert witness stands to gain little financial reward by it. That is so because of the reliance placed on expert witnesses by the court, and because of the corresponding importance of the overriding duty which experts owe to the court….

60. Because this form of contempt undermines the administration of justice, it is always serious…."

23. The *Liverpool Victoria* decision, the first to provide guidance on the approach to sentencing an expert for contempt of court, is one example of how the courts are taking a much more and properly robust approach to experts who fall short of the mark. An expert who falls short of the mark may find their evidence ruled inadmissible or of little or no weight. Quite apart from any claim in negligence which might be brought by the party instructing them, they may find themselves reported to a regulatory or disciplinary body or facing costs sanctions in the litigation. At the extreme end, contempt of court or referral to the DPP for perjury are also possibilities. No one likes to focus on sanctions. It is far better to focus on standards in a continuing drive to improve them, exemplified by this Conference.

(III) Need

24. As a previous Lord Chief Justice once said, if it was not necessary to cite an authority, it was necessary not to cite it. Much the same might be said of calling expert evidence, though

I do not think there can be any sensible suggestion of a test of "absolute necessity". The important point is that such evidence should never be called as a crutch, saving the parties and the Court or Tribunal the need to think their way through an issue on which no particular expertise is required. So, in *R v Turner* [1975] QB 834, Lawton LJ said this[22]:

"If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

25. So too, expert evidence should not be called to lend spurious support by way of generalisations when a fact specific issue arises for determination; by way of example, in some human trafficking cases, the CACD has taken a cautious view as to the admissibility of psychiatric or psychological evidence, dealing in no more than generalities as to likely responses to individual circumstances[23].

26. CPR Part 35.1 points the way: "*Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.*" If the Court would be unable to decide an issue without expert evidence, then plainly this criterion for admissibility would be satisfied; medical and statistical evidence come obviously to mind. If the issue is capable of resolution without expert evidence but such evidence would likely assist in the efficient determination of the case, then the evidence may well be admissible[24]; conversely, no witness (factual or expert) should be called unless likely to assist the efficient determination of the proceedings. In exercising its discretion as to the admissibility of expert evidence, the Court (at least in civil cases) will have the overriding objective well in mind – a matter to which I return under heading (IV) later.

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[22] At p.841
[23] See, for example, *R v GS* [2018] EWCA Crim 1824, at [72] and following
[24] Cf., *Kennedy v Cordia*, *supra*, at [47]; albeit a Scottish appeal, where the question related to the different rule in Scottish Law as to expert evidence of *fact*. With respect, the test appears apposite here. See too, the discussion in *Civil Procedure I* (2019), at 35.4.2

27. I add this. There has been some suggestion that the development of judicial primers on, for instance, forensic gait analysis or forensic DNA analysis,[25] will reduce the necessity for calling expert evidence. I am not convinced that this is correct. The aim of the primers is to educate, to provide judges with the tools to more readily understand areas of expert evidence, to improve their ability to probe and test the evidence. They are not a substitute for expertise. The primers will better equip judges to consider expert evidence. They are not a substitute for it, nor do they reduce the need for it where it is otherwise properly necessary.

(IV) The discipline of case management

28. Recent decades have seen what can properly be described as a case management revolution in all court jurisdictions. The Judge's role is no longer essentially passive, in a manner analogous to a cricket umpire, confined to responding to the question "how's that?"[26]. Instead, the Judge will take a grip on the proceedings, ideally from start to finish. The essence of case management is straightforward: the identification of common ground and, conversely, the issues in dispute at the earliest practicable stage. Once that is done, the course of the proceedings can be mapped out, delays can be eliminated, and evidential requirements assessed. Expert evidence has not been immune to this judicially led revolution, now part of legal professional best practice. In the present context, it is a wholly positive development, strongly reinforcing the standards and duties already discussed.

[25] See https://royalsociety.org/~/media/about-us/programmes/science-and-law/royal-society-forensic-gait-analysis-primer-for-courts.pdf; <https://royalsociety.org/~/media/about-us/programmes/science-and-law/royal-society-forensic-dna- analysis-primer-for-courts.pdf>.

[26] See F.Pollock and F.W. Maitland, *The History of English Law* (Vol. 2) (2nd ed.) (CUP), at pp. 670-671

29. Expert evidence can be costly and time consuming. Necessarily, therefore, the calling of expert evidence in civil proceedings engages the "overriding objective" and is covered by rules of court. The overriding objective of the Civil Procedure Rules ("CPR") is to enable the Court "to deal with cases justly and at proportionate cost". The parties are under a duty to help the Court to further the overriding objective and the Court is under a duty to further the overriding objective by "actively managing cases"[27].

30. Accordingly, as to expert evidence in civil proceedings:

    (i) Expert evidence may only be adduced with the court's permission. An application for permission must address the likely costs and the field in which expert evidence is required, together with the issues which the expert evidence will address.[28]

    (ii) Experts are (as already emphasised) under an overriding duty to help the Court on matters within their expertise, a duty taking precedence over any obligation to the person from whom experts receive instructions or by whom they are paid.[29]

    (iii) An expert's report must comply with Practice Direction 35[30], it must contain a statement that the expert understands and has complied with his duty to the Court and must state the substance of his instructions on the basis of which the report was written.[31]

    (iv) The Court may direct a discussion between experts, requiring the experts to identify and discuss the expert issues in the proceedings and, where possible, to reach agreement on those issues. Further, the Court may direct that, following such a discussion, the experts must prepare a joint statement for the Court, setting out (a) those issues on which they agree (b) those issues on which they disagree – with a summary of their reasons for disagreeing.[32]

[27] See, CPR, Parts 1.1, 1.3 and 1.4
[28] CPR, Part 35.4
[29] CPR, Part 35.3; see too the discussion which follows that rule, *Civil Procedure Vol. I* (2019), at 35.3.1 – 35.3.6
[30] A Practice Direction which repays careful study.
[31] CPR, Part 35.10
[32] CPR, Part 35.12

31. The aim is that expert evidence – which should not be called at all unless necessary or, at least, reasonably required – is also subject to the test of proportionality, going to both time and cost.

32. Case management is now an accepted part of criminal procedure and the Criminal Procedure Rules ("Crim PR") speak to very much the same effect as the CPR – as is clear from the "overriding objective" that "criminal cases be dealt with justly", acquitting the innocent and convicting the guilty and (*inter alia*) dealing with the case efficiently and expeditiously.[33]

33. So too, the provisions of the Crim PR, supplemented by the relevant Practice Direction[34], as to the introduction of expert evidence in criminal proceedings are similar to those found in the CPR[35]. The Practice Direction contains a concise summary on the question of admissibility of expert evidence at common law:

"*Expert opinion evidence is admissible in criminal proceedings at common law if, in summary, (i) it is relevant to a matter in issue in the proceedings; (ii) it is needed to provide the court with information likely to be outside the court's own knowledge and experience; and (iii) the witness is competent to give that opinion.*"[36]

34. In criminal proceedings, an expert is under an express, overriding, duty to help the Court achieve the overriding objective; his evidence must be objective, unbiased and within his area of expertise. Where more than one party wishes to adduce expert evidence, there are provisions as to a meeting of the experts and for the production of a joint statement, clarifying the areas of agreement and disagreement; the aim is to narrow the issues in

[33] Crim PR, Part 1.1
[34] Crim PR, Part 19 and CPD V
[35] Crim PR, Part 19
[36] CPD V, para. 19A.1

dispute. From experience I can safely say that these provisions are of the greatest assistance in rendering expert evidence intelligible and helpful in jury trials.

35. It is to be emphasised that these provisions are not to be applied in a mechanistic, box-ticking fashion. That achieves nothing. Successful case management – benefiting both the parties and the Court – requires a mindset focused on resolving the issues in dispute.

Conclusion:

36. I have focused on standards, not out of any wish to be sanctimonious. Nor does anyone take any pleasure in the sanctions for misconduct on the part of experts. My emphasis on standards is instead positive – aimed at promoting best practice. If experts, in compliance with their duties to the court, follow the requisite standards, then (and only then) can they fulfil the very important part they have to play in Court or arbitration proceedings. That is to the benefit of experts themselves, the parties, the Court or tribunal in question, and the justice system as a whole.

37. Thank you. I wish you a productive Conference.