Lady Justice Rafferty's Keynote Presentation
Bond Solon Annual Expert Witness Conference 2017

It's a particular pleasure for me to be here, for three reasons.

First, I was one of the earliest members of any professional body dedicated to advancing the standing and standards of expert witnesses, a governor of the Expert Witness Institute in 1997 when such a thing was quite a departure from the norm. So I'd like to think my credibility with you is off to a good start, in that at least I'm not a Johnny come lately. And in any event my heart is in it.

Second, I am here at the invitation of Mark Solon, who instructed me whilst I was at the Bar, to whom I remain grateful, and from whom I learned. Mark has known me since I was in my twenties and, as he pointedly reminded me, had no nonsense from me then and won't be having any now.

Third, because expert evidence is central to the good order of how we run our professional lives. With the deepening knowledge afforded us by scholarship across so many disciplines, coupled with the availability of technology, our chance of doing right to all men – a part of the judicial oath – is markedly improved if we can rely on you.

I know you are obliged to live in the real world. I know that post-Jackson it's not just timetables which are unforgiving, it's fees. I know perfectly well that you face daily tussles when your professionalism tells you that the permitted four hours should be ten. It's all very well to add that you can apply to the court for more allowance – and you should – but it's one more thing to do and one further erosion of your time and it is directed towards making the mechanics line up, not to what you were trained to do, explain the engineering, or the physics of the hip joint, or why intoxication was not on the facts a recognized medical condition.

I know each of you is well on top of Jones v Kaney. I suspect that all the above must, if only from time to time, trigger your asking yourself if it's worth getting out of bed.

Let me try to set out why you must, you really must.

First, consider the beneficial changes in how we now organize our litigious lives. Some of you, I can tell, will never have encountered what the more mature among us did, adversarial preparation and presentation to the exclusion of cooperation pre- and mid-trial. The majority of you will have known nothing other than pre-trial sharing of views, distillation of areas of agreement and of disagreement, with reasons for the second, and an analysis of where the court must concentrate.

One or two comments if I may about pre-trial meetings. Just as I realise the compendious strains on you which we've already considered, I acknowledge too the importance of these convergences and divergences being as good a use of time and resource as is possible. Your time, the other chap's time, the resources of the funding system, the imperative of adhering to a court-imposed timetable.

There is no need to have a face-to-face exchange every time. Don't be reticent about suggesting a telecon, a Skype or Facetime con, or if there are multiple parties a webinar. (When arranging to discuss this conference Mark was driven to distraction by the exigencies of the judicial diary such that at one stage I offered to FaceTime myself to him. It's extraordinary how much meaning Mark can get into one monosyllable. Trust me, I'm sympathetic to people holding you to attendance account).

When you go into a pre- or mid-trial joint consultation, try to leave your hackles at home, or at least down. If up, they predispose to a degree of acerbity best avoided, in most cases. Far better to adopt the good advocate's approach: *I want to give away as many points as I properly can*. Prepare with that as your central theme.

It has several advantages. It is a splendid focus tool. Making a primary task one of shedding is arguably more effective than a narrative, a chronology, or a distillation of the experience on which you rely to found your conclusions. If you go early on in the process to what can depart the exercise, the balance finds expression more easily for the brevity earned.

Another advantage is that you look informed, aware of your duty to the court. and **confident**. It's worth reflecting on why the best advocates do it. They have reasons additional to your own, but in common is what I've just set out. It conveys messages both overt and covert that you are at the helm, in control, driving the exercise, any number of descriptors of that type.

And you will be confident. You won't be acting.

The other major effect will be that when you haven't jettisoned, your words resonate with more power. One of the best examples of the lawyer achieving this was the then David Calvert Smith QC prosecuting a difficult murder, with lots going on in the evidence. In the usual pre-trial talk to his opponent, whom he knew well, he was asked to take out a list of six things. He said six versions of "Sure, why not?" and omitted them. All of them. His opponent, who'd expected negotiation followed by failure, realised too late what he was about. When he opened and then ran the case, the only three things that mattered shouted at the jury from day one. They never got lost, they remained stark, they brought the jury back to the essentials time and time again, and they got the Crown home. It took mastery of the case and confidence and an understanding of human nature. I was irritated at the time and as you can hear I've not forgotten. You will be just as successful. You need to know your stuff, take your principled stand, and let the rest go.

Unlike a jury trial, many – I'd guess the vast majority - of the contested cases in which your help will be sought are judge alone. And you represent a party highly likely to be financially interested in the outcome. The difference is that you know the finder of fact and decider of the issue is intelligent and trained and there's only one of him or her, whereas all you know of twelve jurors is that you don't know anything about the twelve of them.

The same rule applies. Shed all you can. The J has a lot to think about and the easier you make it the better served s/he will feel.

On the topic of the J sitting alone, please don't hang back from saying that the court might want to reflect upon (insert the error). You can phrase it to suit what you make

of the personality listening, some will welcome straight from the shoulder and find deference unwelcome, some will be the reverse and some on a scale between the two.

The point to remember is this: the first instance judge is vulnerable to an appeal. If you haven't put him/her right when you could have done, if the decision is later overturned, your reputation will not be burnished. The J will much prefer that you keep him/her safe from later criticism by pulling no punches when you're there as an expert.

Take care that your CV is completely accurate – on all fronts. Any deficiency will come back to bite you. The other side's solicitor will check it. Make sure the same check has been done on the expert for the other side.

Your presentation will affect the weight of the evidence. Have you been trained in how to give evidence? Tatty notes passed over counsel's shoulder is not a good look. Insist on a consultation with counsel in good time so you can if necessary make him face the knotty issues. It will also give the opportunity to discuss how having you adds value.

Don't let yourself be put off by cross-examination. You know your territory. Your expertise goes before you – it's why you're instructed in the first place – and you know xx is coming your way. It will go the other chap's way too when his turn comes. It is an opportunity for you to do several productive things.

One: see the next or next but one question coming.
Q "How many of these procedures have you done in the last five years?"
A "200"

Now, we need to recall that you'll have read the other chap's CV. You ought to be ready for the subtext, counsel laying the ground to make the point that his expert has done 2000. If you're the niche expert and he's five years your junior, the full answer may be that he's done 2000 because he sees volume, You've done 200 because you're at the top of the complexity tree so only the most challenging come to you. Perhaps he'd like to tell the court how many at your level he's done? Underlying your fuller answer is that you can do all he does, you did it for years, but he can't do the limited number you do.

Courts warm to the expert who is still practising, In medicine is s/he a clinician? Worth thinking through whether you are and he isn't, or each of you is, or you aren't but he is. If the last, expect questions designed to put it in the spotlight. You can't change your position but preparation for the approach is never wasted.

No matter whether you're in front of a jury or a judge alone, the decision maker/s want/s to understand your opinion (and to understand in general). Your opinion should be tracked and fortified. What are your workings, how did you reach the conclusions, what is the learning?

When you are setting out your expert opinion, what's needed are simple words, a way of expressing yourself which is not prolix, and the ability to identify and to distill

the main issues. Jurors do better if told the victim had a punctured lung, not a pneumothorax, and a bruised check not a haematoma to the zygomatic area. The J will find it easier to note the former. The car slid across the damp carriageway because the brakes had been applied about three car lengths too late for the conditions. The footings were doomed from the moment the wrong proportions of concrete were mixed.

Identify the main issues: does it matter that the concrete was laid with a slightly uneven surface? If it does, say so, but if the crunch comes over whether it wasn't allowed to cure for the right length of time was thus not strong enough, say just that.

All that said, beware of the "*Could you just*" question. Quite often well into xx and after you've dealt with either challenges or invitations to expand, or both, will come:

Could you just tell the court the answer to this simple point?

Be careful. It might be a simple point which you can answer simply. It might however, and it often is, be a simple point which you cannot answer simply. Stand your ground and get the subtlety into your answer.

"*It is not simply answered – by any expert*".

There'll be a follow up. Next answer:

"*The issues are stratified, interlinked, subtle and I cannot do my duty by reducing them*"

There comes a time when it is not you but the Judge who should be expected to take control of how experts are being treated. Seeing when that is comes with experience, for you, but it's an awareness you can work on developing from now on.

Your duty is to the court. You are an expert and your expertise permits you to advise whoever instructs you. There is one thing you are not and should never be and that's an advocate. There are likely to be instances when some genuflection to the interests of the party instructing you becomes obviously desired. If it requires you to bend the knee, don't. Stand up straight, literally and figuratively. Simple test: when preparing and when in court, notionally appear for other side. Your opinion and your evidence should be completely unchanged. I repeat: your duty is not to your clients but to the court.

That's enough on nuts and bolts underpinned by principle and philosophy. Two different points before I leave you to the rest of this splendid conference.

A well deserved recognition of the status and importance and complexity of some types of expert evidence is shortly to find expression in the publication of the first in a series of judicial primers. The patents court has long had them. The outgone LCJ, Lord Thomas, thought the system would profit by the creation of more of them for use by judge and counsel in areas of complex science. He secured collaboration between the Royal Society, the Royal Society of Edinburgh, and the senior judiciary, and the first of them, on DNA, will be published on 22nd November. The second will be on gait analysis and there will follow collision science and, we hope, plenty more. The object is to allow the J and counsel better to understand the basics, and if need be then drill down to more detail. I suggest that without more this excellent initiative brings us

back to where I began: given the developing scholarship across so many disciplines, we need you.

Penultimately, something just for you to think about. AI is entering into our lives. If we think about how you have to record and track input into your conclusions – who worked on the examination, and at what level, etc etc – will there be nervousness about how to set out the part played by AI? How is something by definition vast to be amenable to testing? I have in mind Watson, which can rattle through thousands of papers and give the expert information in minutes which would otherwise take researchers and age. I am not for a moment suggesting there should be anxiety, it's just that if let loose on a topic I tend to think round the corners. One for a coffee break perhaps.

And finally, in any address such as this, the old rules are the best. Leave them laughing, preferably at the speaker. You've all seen it. Counsel tries to chip away at the power or the certainty of the opinion from the other side. *You can't exclude can you? That is not a view set in stone is it? That conclusion must admit of a degree of uncertainty?* Many phrases of similar erosive potential. The last resort, if one has made little, or no, progress, is the final question in cross-examination. It is most classically expressed when medics are the experts.

Picture me, in Silk, cross-examining Prof X, a world class paediatric pathologist, called by the Crown in the alleged murder of an infant. He was giving no quarter. Having padded around, trying to take the odd brick out of his wall, then putting the alternative mechanism, and getting nowhere, I resorted to the last question, to which there is always only one answer, and I knew what it was.

"*But, Prof X, you would agree that you can't 100% exclude what I have put to you?"*

"I can't."

I began to sink gracefully to my seat, when he continued:

"*But in this case, I get as near 100% as someone like me ever will"*

Game, set, match – and championship.