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Members Information

All of The Academy's information is available for Members from the Member's website.

This includes:

- Guidance
- Publications
- Reports
- Member's Handbook
- Model Terms of Engagement

This and past editions of 'update' are available from:
members.academyofexperts.org

Further information about anything contained in this publication may be obtained from The Academy of Experts

3 Gray's Inn Square
London WC1R 5AH
DX: 283 London, Chancery Lane

t:020 7430 0333
f:020 7430 0666
e:admin@academy-experts.org
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From the Chairman



Phew....!

It was obviously tempting fate when, in writing the last 'From the Chairman', I took advantage of a lull in the normally hectic pace of developments in the expert world to reflect on times past and how little of anything fundamental seemed to have changed in twenty years.

How foolish could I be? The end of March has seen the production of at least three major government consultations affecting expert witnesses, and the long-awaited judgement from the Supreme Court on the question of experts' immunity from civil suit in *Jones v Kaney*. All of these will require careful analysis and response of experts at large, and add to the effort called for from our stalwart administration team.

Immunity

Almost certainly the most far-reaching of these questions is that of immunity from civil suit. As you will all, I hope, be aware, following the Chief Executive's e-mail, on 30th March the Supreme Court handed down its decision on *Jones v Kaney*. By a majority of five out of seven (Lord Hope and Lady Hale dissenting) it ruled that the 400-or-so-years-old immunity for experts from civil suit should be removed as no longer appropriate for modern circumstances. The result was, it is fair to say, not entirely unexpected.

To recap: until this judgement, expert witnesses, in common with other witnesses, enjoyed immunity from civil litigation in respect of anything said by way of evidence. This was generally assumed to include not only oral evidence but also an expert's report to the court (containing the expert's declaration and statement of truth) and possibly the signed memorandum of a meeting of experts – of which more in a moment.

This did not give experts unlimited licence to behave as cavalierly as the mood took them. An expert behaving inappropriately, or negligently, faced the possibility of (unanswerable) criticism by the judge, disciplinary proceedings by his primary professional body, or an adverse order for wasted costs under CPR Part 35. There was also the possibility of disciplinary proceedings by his professional body. The case of *Jones v Kaney* arose, originally, out of a meeting of experts (see inside).

Like all revolutionary reforms, the decision raises more questions than it settles. The judgement appears to assume that only an expert's 'client' will want to sue him in negligence.

continued inside...



The Supreme Court Justices

From the Chairman

...continued from page 1

This begs the question of precisely who is the 'client': instructing solicitor, party, both, solicitor as agent for the party? It does not address the questions of Single Joint Experts, and their specific difficulties and constraints, nor that of the (rare) court-appointed expert.

In my personal non-legally qualified opinion, I'm not so sure that the expert owes no duty at all in tort to the opposing party. I hazily remember some insurance exams thirty years ago on professional liability, and the case of *Hedley Byrne et al*, beloved of all students of liability to third parties... But I await legal guidance on that question!

There will obviously be implications for our guidance to experts, for our Model Terms of Engagement, and for Professional Indemnity insurance for experts. The Academy is already working on appropriate guidance for experts and those who instruct them. We will keep you posted.

In the meantime, our May Evening Meeting will be on this very subject. Colin Passmore of Simmons & Simmons, well known to Academy members and an acknowledged specialist in this field,

will be giving us an overview of the implications of the decision, from the solicitor's point of view.

I urge you to attend if at all possible – as I have already said, this decision has the most far-reaching effect on experts of any for a very long time – possibly 400 years! It will have implications, to some degree, for the way we all approach our duties - although, as one legal commentator has already said, "the non-negligent expert should have nothing to fear". A somewhat simplistic approach in my view.

And Finally

As for the Ministry of Justice's many consultation papers (*see page 3*) we are working hard on our responses and I will have plenty to write about in the next few issues of 'update'.

One sad bit of news which has recently reached us is of the passing away of HH Esyr Lewis, TAE Vice President and the last Senior Official Referee. He was a great friend to the Academy.

On a happier note, member number 3,000 has just applied to join TAE.

Enjoy the Easter break, and the Royal Wedding public holiday. I look forward,

Jones v Kaney

An expert was persuaded to change her mind as to her opinion after a telephone meeting of experts. She had not seen the other expert's report and despite the record of the meeting not reflecting her opinion or what was agreed she signed it.

As a direct result her client accepted a lower figure for damages than might have been the case, and then sought redress against the expert.

The High Court, reluctantly in the circumstances, applied the existing law as laid down by the Court of Appeal but gave the parties permission to "leapfrog" the Court of Appeal and refer the matter directly to the Supreme Court. They, in view of the importance of the subject, accepted the appeal and convened a seven-judge panel to hear the case.

optimistically as ever, to a fine warm summer and to meeting or hearing from as many of you as possible in the next few months.

Phillippa Rowe
Chairman
April 2011

ADR Corner

New Court Trial - Mediation Information Sessions

The NMPA (National Mediation Providers Association*) is, with the Ministry of Justice, running a trial Mediation Information scheme. Initially this will be in three courts (Birmingham, Manchester and one to be decided) although if successful may be rolled out further.

The scheme will be run along the basis of the recent Family Mediation trial. Essentially a mediator is available in the court building at set times so that judges can refer parties to them for information sessions.

These have proved very successful in the Family Courts and it is hoped that the Civil trial will prove just as successful.

TAE is looking for 'volunteers' to help man the TAE slots in the rota. If you would like to take part please contact Dominic Stanton at the TAE office.

*previously the NMH Providers Forum

CMC Conference – May 2011 Mediation: Seizing the Moment

The CMC's 5th National Conference will be taking place on Tuesday 10th May at The Lowry Hotel, Manchester.

Tickets are now on sale and we are happy to report that last year's prices have been held again for this year.

Confirmed speakers include:

- ❑ Jonathan Djanogly MP, Parliamentary Under Secretary of State at the Ministry of Justice.
- ❑ Helen Alexander President of the CBI.

Sessions will include a combination of workshops, presentations and debates.

CMC Elections

The Academy is pleased to announce that it has recently been elected to the Board of the Civil Mediation Council.

TAE will be on the Board for one year as part of the new rotation structure



that has been put into effect following the recent changes made to the CMC Constitution.

As well as sitting on the Board TAE sits on the CMC's Communications and Accreditation committees.

Mediation in Jersey

Jersey continues to expand its use of mediation in the court system.

Mediation has already been used in the Petty Debts Court where over two thirds of cases are solved before trial and now it is being used in the Royal Court.

It is hoped that this will lead to similar success levels.

Admissibility of Expert Evidence in Criminal Proceedings

Law Commission Recommendations

The Law Commission has published its final recommendations following their 2009 paper on the Admissibility of Expert Evidence in Criminal Proceedings in England and Wales.

This consultation came against the backdrop of a number of high profile cases where the expert evidence was 'unreliable' and miscarriages of justice had occurred.

The Commission took the view that too much:

"expert opinion is admitted without adequate scrutiny because no clear test is being applied to determine whether the evidence is sufficiently reliable to be admitted".

This caused concerns to the Commission in relation to jurors due to the complexity of the evidence being heard because the Commission felt:

"there is a danger that they may simply defer to the opinion of the specialist who has been called to provide expert evidence".

In addition, because there is no clear legal test on the reliability of expert evidence, Counsel may not cross-examine experts effectively and therefore not reveal possible flaws in the

experts' methodology, data and reasoning.

The final recommendations were published on 22nd March entitled Expert Evidence in Criminal Proceedings in England and Wales (Law Com No 325).

The recommendations are for a new reliability-based admissibility test for expert evidence in criminal proceedings. The test would only be applied to appropriate cases and would result in the exclusion of unreliable expert opinion evidence. At the same time a draft Criminal Evidence (Experts) Bill has published annexed to the report and this sets out the test that judges would need to apply to exclude unreliable expert evidence as well as giving guidance on applying the test.

The Bill will bring together in a Single Act of Parliament all aspects of admissibility of evidence. It will also give powers to the Criminal Procedure Rules Committee to create further procedural rules to supplement the Bill.

It is believed that the recommendations will provide a proper framework in criminal proceedings for screening expert evidence at the admissibility stage and should also promote higher standards amongst expert witnesses.

Full details can be found at:

www.lawcom.gov.uk/expert_evidence.htm

Consultations

Civil Justice

On 29th March The Ministry of Justice launched a consultation setting out proposals to reform the civil justice system in the courts in England and Wales. The consultation seeks views on:

- The prevention of cost escalation in civil disputes
- The role of alternative dispute resolution mechanisms
- Restoring the authority of the judgment order
- Improving the debt recovery and enforcement processes
- The appropriate levels at which civil work should be dealt with.

The proposals are intended to contribute significantly to the Government's plans to tackle the compensation culture, restore proportionality in costs for court users (particularly businesses) and promote quicker, cheaper alternative dispute resolution where appropriate.

The closing date for responses is 30 June 2011 and responses can be submitted using the online questionnaire, by email or post. TAE will, of course, be making a submission so if you would like to contribute please send any comments you may have to consultations@academy-experts.org.

A copy of the consultation document '**Solving disputes in the county courts: creating a simpler, quicker and more proportionate system**' and details of how to respond can be found on the MoJ website:

www.justice.gov.uk/consultations/solving-disputes-county-court.htm

Costs

The Ministry of Justice has published the Government response to the consultation on implementing a package of reform of civil litigation funding and costs recommended by Lord Justice Jackson.

Following full consultation, the Government will be implementing the primary recommendations contained in Lord Justice Jackson's report for a fundamental reform of no win no fee conditional fee agreements.

Overall it is intended that the new arrangements will help provide access to justice at proportionate costs for claimants and defendants while removing substantial unnecessary costs from the system.

A copy of the response document '**Reforming Civil Litigation Funding and Costs in England and Wales - Implementing Lord Justice Jackson's Recommendations**' is available on the Ministry's website:

www.justice.gov.uk/consultations/jackson-review-151110.htm



NEWS & ANNOUNCEMENTS

Family Procedure Rules

The Family Procedure Rules came into force on 6th April. The full rules (Part 25 deals with Experts) and practice directions are available from the MoJ website www.justice.gov.uk. One result of the new rules is that there is a new, separate, Expert's Declaration for Family Proceedings. The changes are to the last two paragraphs which must be amended to recognise the new rules and practice. The new declaration will be published very shortly - contact TAE in the meantime for guidance if your need is urgent.

Whilst the rules are now in force from 6th April your attention is drawn to PD25 which says:

"this guidance does not apply to proceedings issued before 6 April 2011 but in any such proceedings the court may direct that this guidance will apply either wholly or partly. This is subject to the overriding objective for the type of proceedings, and to the proviso that such a direction will neither cause further delay nor involve repetition of steps already taken or of decisions already made in the case."

www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/index.htm

Bribery Act 2010

On 30th March the Ministry of Justice published the long awaited guidance about the procedures that organisations can put in place to prevent persons associated with them from committing acts of bribery. There is a quick start guide which is aimed primarily at SMEs. The UK Bribery Act, which received Royal Assent in April 2010 will finally come into force on 1st July 2011. The new offences are:

- Offering or receiving a bribe
- Bribery of foreign officials
- Failure to prevent a bribe being paid

It should be noted that reasonable corporate hospitality to meet and network with clients is not likely to fall foul of the legislation. Cases may be brought only when either the Director of Public Prosecutions or the Director of the Serious Fraud Office is satisfied both that:

- i. a conviction is more likely than not; and
- ii. prosecution is in the public interest.

An organisation that can prove it has adequate procedures in place to prevent persons associated with it from bribing will have a defence to the section 7 offence.

The guidance, published under section 9 of the Act, will help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery, as mentioned in section 7.

A quick start guide has also been published which sets out the key points.

www.justice.gov.uk/guidance/bribery.htm

Legal Services Board

David Edmonds has been reappointed as Chairman of the Legal Services Board for a further three-year term. The reappointment is from 1st May 2011 until 30th April 2014.

The reappointment was made by the Lord Chancellor in consultation with the Lord Chief Justice in accordance with the Legal Services Act 2007.

TEDR

Articles & Adverts

The next closing date for submissions to TEDR is 22nd July.

If you would like to submit an article or take advantage of the advertising opportunities it presents please either call the office or send an email to the editor:



tedr@academy-experts.org

Diary Dates

April

Wednesday	13	➤ Evening Meeting
Friday - Saturday	15-16	➤ Mediation Assessment
Friday	22	Good Friday
Monday	25	Easter Monday
Friday	29	Bank Holiday - Royal Wedding

May

Monday	2	Bank Holiday
Tuesday	10	➤ CMC Conference - Manchester
Tuesday - Wednesday	10-11	➤ Law & Procedure
Wednesday	11	➤ Evening Meeting
Monday	30	Bank Holiday

June

Wednesday	8	➤ Council Meeting
Wednesday	8	➤ Evening Meeting
Tuesday - Wednesday	14-15	➤ Foundation Course
Thursday	16	➤ Into Court
Thursday - Friday	23-24	➤ Expert Determination

July

Friday	22	TEDR Article Deadline
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September

Wednesday	14	➤ Evening Meeting
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October

Wednesday	12	➤ Evening Meeting
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November

Wednesday	2	➤ Council Meeting
Wednesday	2	➤ President's Dinner

See members.academyofexperts.org for more dates

Key to events:

- Academy Courses
- Academy Events & Meetings
- External/Joint/Supported Events

Unless otherwise shown all courses/meetings will be held in London