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**(1) Introduction<sup>1</sup>**

1. It is a pleasure and an honour to have been asked to give the keynote address to your annual conference. When I was first invited to give this address I thought that it would be a good idea to focus my attention on *Jones v Kaney*<sup>2</sup>. However, when I looked at your conference programme and saw how it had concentrated, and understandably concentrated, on that landmark decision, I reconsidered. In doing so, I think and hope that I was acting in just the way in which an expert witness, when confronted with fresh evidence, should act. However, perhaps like many expert witnesses, while I have radically changed my focus, I won't entirely resile from my original position.
2. Looking at today's programme, I was particularly struck by the title of Christine Freedman's paper: '*A Brave New World; Life after Jones v Kaney*'. The title hints at a truth wider than the case. I think that it now is becoming apparent that the Woolf Reforms have created a brave new world for experts and expert witnesses, and that the decision in *Jones v Kaney* is both symptomatic of the new climate of that world and another facet of the new climate's novelty. Accordingly, it strikes me as a good idea to spend a little time this morning looking at some aspects of this brave new world, and how it may well become braver and newer. In particular I want to touch on the

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<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture.

<sup>2</sup> [2011] UKSC 13, [2011] 2 WLR 823.

growth of an inquisitorial approach to expert evidence, including the seductively named hot-tubbing.

## **(2) Adversarial v Inquisitorial**

3. First, then, the development of inquisitoriality. In a recent review of Paul England's new book on Expert Privilege<sup>3</sup>, Dr Dwyer – herself an expert on expert witnesses – made an interesting point on the development of expert evidence. She said this,

*'Expert privilege' [and for that read the whole area of expert evidence] is one of the most salient areas of conflict between the traditions of adversarial litigation, on the one hand, and Lord Woolf's procedural reforms of the late 1990s, on the other. The traditions of adversarial litigation tell us that a party should be able to put his best possible case to the court. That includes that a party chooses the evidence which he actually adduces, and that may be only a subset of all the evidence available to him. It also includes that work done in preparation for litigation, including related communications, is privileged from disclosure to third parties, particularly one's opponent ('litigation privilege'). The Woolf Reforms direct, however, that parties should avoid disproportionate and unnecessary expense, that they should act with 'cards on the table', and that experts owe their overriding duty to the court, rather than to their litigant paymaster.<sup>4</sup>*

In other words, the Woolf reforms started, or, perhaps it is more accurate to say, gave greater impetus to, a trend towards adoption of certain facets of an inquisitorial model of justice. Active case management, the overriding objective, cards on the table, and pre-action protocols all point towards greater inquisitoriality. Indeed, in the field of expert evidence, the reforms do a little more does more than simply point.

4. The concern that there was a problem of expert partiality, that is expert witnesses identifying too closely with the party that instructed them, has been around ever since expert witnesses have been giving evidence. And it was this perennially perceived vice of the expert as hired gun which the Woolf reforms sought to address. They did so by providing that experts, like solicitors and barristers, owe a duty to the court. The imposing on expert witnesses of a primary, or in CPR language an overriding, duty to the court was intended to eliminate the problem of partiality. Thus, this duty to the court trumps the expert's duty to his client, the instructing party, as it places a duty on each

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<sup>3</sup> England, "Expert Evidence" in *Civil Evidence*, (Hart) (2011).

<sup>4</sup> Dwyer, *Publication review*, "Expert Evidence" in *Civil Evidence*, *International Journal of Evidence & Proof* 2011, 15(3), 277 at 277.

expert to assist the court to find the truth and do justice. As Dr Dwyer put it pithily, one way ‘*to approach the nature of the expert’s duty to the court is to say that an expert has a duty to tell the truth, in the same way that an ordinary witness of fact does.*’<sup>5</sup> This is clearly what Woolf intended. It is entirely consistent with the introduction of the overriding objective, and the imperative it imposes on court and parties alike to ensure that justice is done through finding the truth – and applying that to right law, in order to reach a just determination of a dispute through the application of a proportionate process.

5. One could be forgiven for wondering why it was necessary to require expert witnesses to tell the truth when expressing their opinions given that, like any witness, an expert has always been required to take an oath to tell the truth, and therefore would seem obliged to give his honest view on the matter or matters on which he opines. A cynic might say that the failure of experts generally to give their honest views was a comment on the low esteem into which the oath had fallen. A more hardened cynic might ask why, if the oath has not succeeded in getting an expert witness to tell the truth, the Woolf reforms should make any difference. While it would be absurd to deny that the hardened cynic does not have a point, I think that the answer is that a change in culture, such as that embodied in the Woolf reforms, can have a real effect on judicial, legal and professional attitudes. Human behaviour does not always comply with strict logic.
6. However, the new emphasis in the court rules on expert witness impartiality may embody a wider development, in that it may be a manifestation of the slow evolution of the civil justice system along inquisitorial lines. A duty on the court to find the truth is imposed as a result of the overriding objective’s implicit incorporation of it. At first sight, there seems nothing radical about this objective: surely, the court’s role is to find the true facts and to apply the right law. However, in this country, unlike in mainland Europe, we have the common law system, which, of course, involves opposing parties adopting an adversarial, even an aggressive and combative, approach to litigation. As for the judge, it was Lord Wilberforce who famously observed that the traditional function of a common law judge was not to seek the truth. As he put it,

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<sup>5</sup> Dwyer, *The Judicial Assessment of Expert Evidence*, (CUP) (2008) at 350.

*'In a contest purely between one litigant and another . . . the task of the court is to do, and be seen to be doing, justice between the parties . . . There is no higher or additional duty to ascertain some independent truth. It often happens, from the imperfection of evidence, or the withholding of it, sometimes by the party in whose favour it would tell if presented, that an adjudication has to be made which is not, and is known not to be, the whole truth of the matter: yet if the decision has been in accordance with the available evidence and with the law, justice will have been fairly done.'*<sup>6</sup>

7. In that sense, the new rules of court, with their emphasis on the court's duty to arrive at the truth, implicit in the overriding objective and the parties' duty to co-operate in that exercise, by way of CPR 1.3, can be seen as a radical change. It can also be seen as a move towards the inquisitorial system, with the judge no longer the passive umpire deciding the case by reference to the parties' evidence and arguments, but rather a seeker after truth - more of a John Deed than a serene Justitia – blind Justice – weighing the balance.
8. At first sight, there is nothing particularly revolutionary about the expert witness having his or her primary duty to the court: it simply seeks to ensure that all witnesses are equal and balanced in respect of their duty to the court, and are on the same footing in relation to the parties, whether they are lay witnesses, expert witnesses, whether party-appointed, or those who Lord Esher MR stated<sup>7</sup> (and the Court of Appeal fifteen years later, to put it gently, doubted<sup>8</sup>) could be appointed by the court at common law. The overall intention is that this requirement of expert witnesses should help achieve two of the aspects of the overriding objective – a level playing field and the right result. In this it is part and parcel of the admirable, if idealistic (to its supporters) or naïve (to its detractors) notion that not only the judge, but all the lawyers, and experts, involved in the case, should work together to arrive at the right result.
9. The notion that the decision in *Jones v Kaney* is consistent with the overriding objective seems to have underpinned the judgments of both Lord Brown and Lord Collins: Potential liability for negligence in relation to their evidence would, in Lord Brown's view, render experts more circumspect in their views, and in how they pitch them to their clients. Most importantly

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<sup>6</sup> *Air Canada v Secretary of State for Trade* [1983] 2 A.C. 394 at 438.

<sup>7</sup> *Coulson v Disborough* [1894] 2 QB 316. For a discussion see Dwyer [2008] at 313.

<sup>8</sup> *Re Enoch and Zaretsky, Bock & Co.'s Arbitration* [1910] 1 KB.327.

though, in his judgment, it would increase the expert's ability to assist the court fairly determining proceedings<sup>9</sup>. It would better enable the expert to assist the court in finding the truth and determining cases justly. It might therefore be said to push experts towards adopting the more objective approach of the overriding duty to the court. In this, might *Jones* reinforce that duty, further reduce partiality, and enhance the court's ability to find the truth. I hope so.

10. But what of the potential drawback of abolishing immunity from suit? Might it, notwithstanding Lord Phillips PSC's judgment<sup>10</sup>, reduce the number of individuals willing to act as experts? And might it accordingly reduce the court's ability to find the truth? That is something on which the courts, and organisations such as yours, will need to keep a careful eye. If practice does see a reduction in experts willing to act as such either generally or in specific cases the pursuit of justice will suffer.

11. In such an eventuality it may well be the case that attention will focus on Lord Esher's questionable view that the court has a rarely used common law power to appoint an expert witness on its own initiative. If the court has such power, a court-appointed expert would, as I see it, not owe liability in negligence to the parties, although they would, of course, still owe the court an overriding duty. It is a curious paradox that the enviable position of such an expert would be in stark contrast to that of a jointly appointed expert: while he would appear to enjoy the same sort of position as a court-appointed expert, namely unbiased either way, he would owe a duty to both parties. This, it may well be that an unintended consequence of *Jones* will be to increase this aspect of inquisitoriality in our [still] adversarial system.

### **(3) Hot-Tubbing**

12. Something else which is for the future, but in this case the near future, is hot-tubbing – or as it is more drily, and properly, known, concurrent

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<sup>9</sup> [2011] UKSC 13, [2011] 2 WLR 823 at [67] ‘ . . . in my opinion the most likely broad consequence of denying expert witnesses the immunity accorded to them (only comparatively recently) by the decisions in *Palmer v Durnford Ford* [1992] QB 483 and *Stanton v Callaghan* [2000] QB 75 will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date. I for one would welcome this as a healthy development in the approach of expert witnesses to their ultimate task (their sole rationale) of assisting the court to a fair outcome of the dispute (or, indeed, assisting the parties to a reasonable pre-trial settlement).’ And see [81] per Lord Collins.

<sup>10</sup> [2011] UKSC 13, [2011] 2 WLR 823 at [52] – [57].

evidence<sup>11</sup>. As far as I am aware, this Australian innovation was first discussed here by Justice Heerey of the Australian Federal Court in 2004 in an article in the Civil Justice Quarterly. He explained the process in these terms

*‘ . . . the parties’ experts giving evidence in the presence of each other after all the lay evidence on both sides has been given. The experts are sworn in and sit in the witness box or . . . a suitably large table which is treated notionally as a witness box. . . . A day or so previously, each expert has filed a brief summary of his or her position in the light of all the evidence so far. In the box the plaintiff’s expert will give a brief oral exposition, typically for ten minutes or so. Then the defendant’s expert will ask the plaintiff’s expert questions, that is to say directly, without the intervention of counsel. Then the process is reversed. In effect a brief colloquium takes place. Finally each expert gives a brief summary. When all this is completed, counsel cross-examine and re-examine in the conventional way.’<sup>12</sup>*

My predecessor as Master of the Rolls, Lord Clarke, alighted on Justice Heerey’s article in 2007 and suggested that it was something which we should examine in greater depth and *‘consider introducing . . . in suitable cases.’<sup>13</sup>* He noted how the process was understood to save time and cost; two pluses which would endear it to anyone with an interest in improving access to justice. Sir Rupert Jackson, in his magisterial examination of civil litigation costs, agreed that there was a strong case to be made in favour of hot-tubbing, but, like Lord Clarke, he sensibly took the view that it needed to be studied in greater depth. To that end he proposed that a pilot scheme should be introduced to assess whether, and in which cases, it did produce the anticipated reduction in litigation time and cost<sup>14</sup>.

13. The pilot scheme commenced in Manchester in June last year<sup>15</sup>. In the world of civil justice reform three years from first suggestion, via endorsement, to an operative pilot is – to say the least – pretty good. The pilot is entirely voluntary; it only applies to proceedings where the judge, the experts, the lawyers and parties consent. And it can be more flexible than Justice Heerey’s description: for instance, the experts could even attend a

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<sup>11</sup> Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO) (December 2009) (Jackson, Final Review), at 382 (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/jackson-final-report-140110.pdf>).

<sup>12</sup> Heerey, *Recent Australian Developments*, (2004) CJQ (23) 386 at 390 – 391.

<sup>13</sup> Clarke, *The Role of the Expert After Woolf*, (Clinical Disputes Forum lecture, 12 July 2007) Clinical Risk (2008) (14) (No 3) 85 at [48ff].

<sup>14</sup> Jackson, *Review of Civil Litigation Costs: Preliminary Report* (Vol 2) (May 2009) at 415, 593 (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/jackson-vol2-low.pdf>); Jackson, Final Review at 382 – 385, 469.

<sup>15</sup> Judicial Pilots for the Civil Litigation Costs Review (March 2011) (<http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/judicial-pilots.pdf>)

round table meeting, with solicitors and counsel, chaired by the judge. The first two cases to which it has applied have now reached final judgment. Two cases is of course too little evidence from which firm conclusions can be drawn. However, hot-tubbing in the two cases appears to have resulted in the promised reduction in cost. And the parties and their legal representatives appear to have been generally happy with the process. Early indications are therefore positive. If further results are equally positive, we will be in a position to expand the pilot to other courts, and then introduce it formally within the CPR.

14. Lord Clarke did not merely identify efficiency and economy as advantages to follow from hot-tubbing. He noted how it might also increase the quality of evidence through increasing the prospect that each expert's preconceptions, theories, and working assumptions are challenged and debated, under cross-examination and the immediate scrutiny of the other experts, before the court. Traditional sequential cross-examination of experts may appear to many people to be artificial and susceptible of being manipulated unfairly, if perfectly honestly, by clever advocates. Further, in Justice Heerey's words, '*the physical removal of the [expert] from his party's camp into the proximity of a respected professional colleague tends to reduce partnership.*<sup>16</sup>' So, there is a powerful case for thinking that hot tubbing not only increases evidential scrutiny but also objectivity and the court's ability to find the truth.

15. In this prospective development, we can see a further move away from the pure pre-Woolf adversarial model. Elements of the adversarial model remain. The experts are still party-appointed experts. But the process by which they give evidence is again moving towards a model more akin to that which might be expected by a court-appointed expert, more akin to an inquisitorial litigation model.

#### **(4) Conclusion**

16. I started this morning by referring – or should I say borrowing – Christine Freeman's reference to *Brave New World*; Huxley's dystopian vision of the future. But the future for the relationship between expert witnesses and the courts is not by any means necessarily a dystopian one. The implications of

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<sup>16</sup> Heerey (2004) at 391.

*Jones* will undoubtedly need to be worked through. It seems to me though that the field of expert evidence is likely to be one of the most fertile areas for the development of our civil justice system, and will be at the forefront of its evolution over the coming years into one which while retaining its essential adversarial character, will in part become more inquisitorial, in order to enable the courts to dispense equal justice for all.

17. Thank you.

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