

# The Key

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Legal advice in black and white

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## Solvency II

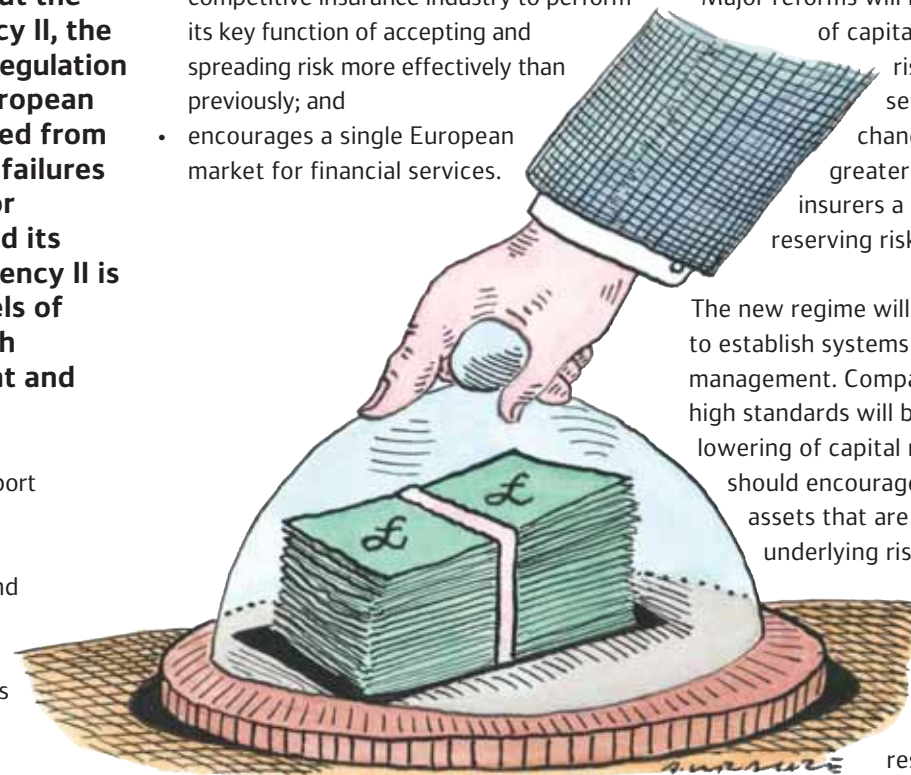
A new solvency framework is being developed for the insurance market.

**There is a great deal of press speculation at present about the potential impact of Solvency II, the next generation of capital regulation being developed by the European Commission. Lessons learned from recent insurance company failures have increased the need for scrutiny by the industry and its regulators. The aim of Solvency II is not to increase overall levels of capital, but to ensure a high standard of risk assessment and capital allocation.**

The industry has voiced strong support for a Solvency II framework that:

- enables institutions to absorb significant unforeseen losses and increases the confidence of policyholders ;
- gives the supervised institutions an incentive to measure and control their risks properly;

- helps a better managed and more competitive insurance industry to perform its key function of accepting and spreading risk more effectively than previously; and
- encourages a single European market for financial services.



### Impact of the reforms

Major reforms will include the introduction of capital charges for investment risk and new rules on setting reserves. The changes should lead to greater transparency and give insurers a better understanding of reserving risk.

The new regime will also require companies to establish systems and controls for risk management. Companies that instigate such high standards will be rewarded by a lowering of capital requirements. This in turn should encourage companies to invest in assets that are appropriate to the underlying risk involved.

There has been concern that the changes could affect investment patterns, resulting in significant

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movements between asset classes and depressing markets. Careful preparation for the implementation of the framework is therefore required. An important part of this preparation is to raise awareness of the insurance market well in advance of the start date of the new regime.

### The future

Solvency II is not expected to be implemented across Europe until 2010. However, it should act as a catalyst for insurers to rethink how they hold capital to meet liabilities and to review business models dealing with live and discontinued business.

Solvency II is also likely to lead to the corporate restructuring of certain insurers, especially those operating in multiple jurisdictions. They will need to review how and where they manage their liabilities and assets. Many companies may consider running off or selling capital-intensive parts of their business.

All this can only be good news for the insurance industry. After all, a lower risk of company failure will lead to greater confidence in the industry and financial stability.

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# The Human Tissue Act 2004

The implications for healthcare providers.

**The Human Tissue Act 2004 (the Act) repealed and replaced a number of older Acts deemed outdated in light of the public inquires into the events at the Bristol Royal Infirmary and the Royal Liverpool Children's Hospital, Alder Hey.**

Few could forget the dramatic circumstances surrounding the retention of adult brains following coroners' post mortems and the storage of human remains and foetuses. The first draft bill was described as a sledgehammer that missed the nut but, following a lengthy consultation, parliament passed the Act, ruling that living patients must consent to the retention and use of their organs and tissue for particular purposes beyond their diagnosis and treatment. It ensured there must be consent when removing, retaining and using the tissue of deceased individuals. With the Act came the Human Tissue Authority (HTA), a regulatory body created to advise those affected by the Act and police the new system.

### What is human tissue?

Human tissue is termed "relevant material" from the human body consisting of human cells. This does not include hair and nails from living people or live gametes and embryos –

which are covered by the Human Fertilisation and Embryology Act 1990 – although such tissue would be relevant when carrying out genetic analysis.



### Consent requirement

Arguably, the Act's greatest shift in the law relating to human tissue has been over consent. Matching societal trends, which encourage individual empowerment, people are now given the right to consent or refuse requests for their tissue to be used while living and after death, with a few notable exceptions. Consent is the hallmark of legitimacy in

dealing with human tissue. Consequently, appropriate permission must be obtained for a healthcare organisation lawfully to retain and use body parts, organs and tissue from living or deceased individuals for specific health-related purposes.

It is likely the meaning of appropriate and qualifying consent will need further clarification, perhaps through the courts and the HTA. The Human Tissue Authority created codes of practice, which can be found on the HTA website ([www.hta.gov.uk](http://www.hta.gov.uk)). These make it clear that "consent need not always be given in writing to be appropriate and informed", and explain that "seeking consent is a process which involves listening, discussing and questioning so as to arrive at shared understanding". Once such an understanding has been reached, signed consent forms are recommended and will be available on the HTA website.

In providing consent, individuals must understand the nature and purpose of what is proposed and be able to make balanced judgements. To do so, practitioners must make them aware of "material" or "significant" risks involved in taking the sample, and explain how the tissue will be used. Individuals must be aware of the possible implications of the use of their material, particularly with genetic tests.

It is worth noting that broad consent will suffice where tissue obtained from a living person – which has been left over from diagnostic or surgical procedures – is to be used for medical research, assuming that the tissue is surplus or residual and provided the research project has ethical approval and the researcher cannot identify the tissue donor. Implications of genetic testing have not been tested and it is likely the courts and the HTA will need to determine certain issues. Protection against DNA theft is now in place to ensure clandestine tests are not carried out without relevant consent, although criminal investigations are excluded from this provision. The overlap with the Data Protection Act may be relevant here.

It is presently unclear where the line is drawn in relation to the ownership of certain information, although the Act seems weighted towards individual ownership over familial material. To give an example of the problem: if an individual consents to tissue being used for analysis, and a genetic condition is diagnosed which might affect other family members, then, if the individual refuses to give consent to the results of the investigation being broadcast, this could have detrimental implications for other family members potentially affected by the condition.

The table below is a schedule of the type of work involving human tissues at healthcare bodies and the level of consent required.

Work undertaken	Level of consent
Anatomical examinations	Witnessed consent in writing
Pathologist carrying out a post-mortem on the orders of a coroner to determine cause of death	No specific consent required
Establishing the efficacy of a drug or other treatment administered to a deceased individual during life – eg via a hospital post-mortem	Appropriate consent under the circumstances
Obtaining scientific or medical information about a living or deceased person, which may be relevant to another person – eg genetic tests	Appropriate consent under the circumstances
Public display	Written consent before death
Research in connection with disorders or functioning of human body	Appropriate consent under the circumstances
Transplantation of bodily material – eg blood, bone marrow, skin, tissue and organs	Appropriate consent under the circumstances
Clinical audit relating to deceased individuals	Appropriate consent under the circumstances
Education or training relating to human health	Appropriate consent under the circumstances
Performance assessment – eg testing medical devices	Appropriate consent under the circumstances
Public health monitoring	Appropriate consent under the circumstances
Quality assurance	Appropriate consent under the circumstances

### Who can consent?

Consent must be given from the “appropriate person”, which, in the case of a living person with capacity, would be that individual. For a child, assuming that they are deemed competent and able to understand the consequences, their consent would be sufficient. Otherwise, it would be for those with parental responsibility to give consent.

For deceased individuals, where they did not give their permission in advance, the appropriate person will either be a representative nominated by the deceased prior to death or a qualifying relative, such as a spouse or partner, parent or child, brother or sister. When there is a conflict between qualifying relatives, it is sufficient that one individual of the same rank has consented.

The Act has not finalised the law on the use of human tissue where the living person does not have capacity and cannot give consent. It is likely that permission will be regarded as having been given in cases (1) where it is in the best interest of the incapacitated person, or (2) it is necessary to allow for clinical research involving the tissue from incapacitated persons, in line with other regulations.

### Penalties

Offences relating to failure to obtain appropriate consent and misusing tissue include:

- 1 The storing or using of human tissue donated for a scheduled purpose for another purpose
- 2 Trafficking in human tissue for transplantation purposes
- 3 Carrying out licensable activities without a licence from the HTA

- 4 Having human tissue with the intention of its DNA being analysed without the consent of the person whom it came from or those close to the person if they have died (medical diagnosis/treatment and criminal investigations are excluded).

These are criminal offences and carry penalties ranging from fines to imprisonment for up to three years, or both. It will be a defence if the healthcare defendant can show that it had a “reasonable belief” that consent had been provided or was not required.

### Further action

It is vital that all healthcare entities take due consideration to the HTA codes of practice (which can be found on the HTA’s website) and ensure these are adopted. In translating these codes into practical action, it would be sensible if a senior member of the clinical risk team was employed to oversee procedures relating to the use of human tissue and to ensure close liaison throughout with the HTA.

It is recommended that use is made of HTA consent forms (see HTA website) and that training is given to ensure that all relevant staff are fully aware of the Act and its implications.

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# New Corporate Governance for the Australian Insurance Industry

A number of dramatic changes.

**The Australian insurance industry has recently experienced a number of dramatic changes. In recent years it has felt the effects of the legislative and regulatory reform resulting from the high profile collapse of the HIH group in 2001 with a deficit of claims as against the provisions made of up to Aus\$5.3 billion. The Royal Commission Report in 2003 found that mismanagement and poor corporate governance were largely to blame.**

The fallout from HIH continues with ongoing high profile disqualifications and convictions. Following the demise of HIH, there has been a marked increase in regulation, with consumer protection a key objective.

Correspondingly, there have been questions as to the cost of compliance and the knock-on effect on the affordability of insurance. A sense of balance and proportionality is slowly returning to the sector. Notably, the Australian regulatory bodies have gone so far as to modify previous proposals for the prudential supervision of insurance groups in response to industry concerns about the amount of work involved with compliance.

Nonetheless, corporate governance remains high on the agenda for Australian regulatory bodies. Directors' duties are under close scrutiny; the

extent to which senior management below board level should incur personal duties and liabilities is also on the radar following a report by the Corporations and Marketing Advisory Committee in June 2006.

The Australian insurance industry has a new Code of Practice, new standards for decision makers and new standards on corporate governance, all outlined below.

## Fit and proper standards for insurance company decision makers

From 1 October 2006, insurers must have in place a fit and proper policy that meets the new Prudential Standard issued by the Australian Prudential Regulation Authority (APRA) (GPS 520 Fit and Proper).

- The insurer must implement a written fit and proper policy;
- The fitness and propriety of a 'responsible person' must generally be assessed before their appointment and reassessed as close to annually as practicable;
- An insurer must take all prudent steps to ensure that a person is not appointed to, or does not continue to hold, a 'responsible person' position for which they are not fit and proper.

The standard is aimed at senior managers – anyone playing a significant role in the management or control of the regulated institution, or involved with services or support

which are prudentially significant. Each insurer must document the competencies required for each 'responsible person' position. That person's characteristics must include competence, diligence, honesty, integrity, judgement to perform properly the duties of the 'responsible person' a position free from conflict of interest.



One aim of the standard is to identify behaviour which constitutes grounds to disqualify that senior manager from continuing in that role under the statutory framework that applies to insurers in Australia.

Significantly, the fit and proper policy must include adequate provision to allow whistle blowing if anyone believes that a responsible person does not meet the insurer's fit and proper criteria. The insurer (and any of its subsidiaries) must ensure that it does not have an internal policy or contractual arrangement which explicitly or implicitly restricts or discourages communication by a notifying person to APRA.

## Corporate Governance for insurers

From 1 October 2006, life insurers, general insurers and authorised deposit taking institutions (ADIs) are required to comply with APRA's new Prudential Standard on corporate governance (GPS 510 Governance).

While there has been much debate in Australia in relation to the new obligations, what is set out is really no more than good practice that should already be followed by insurers.

The key features of the Standard include:

- Who can sit on a board: boards must contain a minimum of five directors. The majority must, at all times, be independent directors. Directors and senior management are required collectively to hold the full range of skills needed for the effective and prudent operation of the regulated institution. Each director must have the skills to allow him or her to make an effective contribution to the board's deliberations and processes
- Independent directors: an independent director is defined as a non executive director, i.e. someone who is not a member of management, who is free from any business or other association that could materially interfere with the exercise of his or her independent judgement.

The performance of the board and of individual directors must be assessed annually. This requires setting the board's objectives, such as establishing an overall strategy for the regulated institution, and assessing operating and financial conditions against forecasts or making key decisions in a timely manner.

### New Insurance Code

The new general insurance Code of Practice covering the Australian insurance industry was introduced on 18 July 2006.

The code aims to raise service standards, improve claims and complaints handling and help customers to gain a better understanding of how general insurance works. The code is not intended to represent a new way of doing business, but simply to formalise the insurer's current approach to the handling of claims.

The code covers nearly all types of general insurance business and is different from the previous code. It places on insurers a number of minimum requirements which include:

- Meeting set timetables for handling claims or responding to complaints
- Fast tracking claims or making advance payments to customers with financial hardship
- Giving reasons for a decision not to provide cover and referring applicants to a different insurer for information about insurance options available. If the applicant is unhappy with the decision, the insurer must provide the applicant with information about its complaints handling procedure
- Accepting responsibility for the quality of workmanship and materials used by a repairer authorised by the insurer

- Establishing internal processes for responding to catastrophes and disasters. In this regard, the code seeks to take compassionate considerations into account
- Providing up-to-date and clear information to the community to assist it in understanding how insurance works

The code is voluntary and applies on an opt-in basis. It covers all general insurance products except workers' compensation, medical indemnity insurance, compulsory and third party insurance and marine insurance. It does not apply to life and health insurance products issued by life insurers or registered health insurers, or to reinsurance. A key extension in the application of this code is that it extends to insured businesses as well as insured individuals.

Responsibility for the new code has been granted to the Insurance Ombudsman's Service (IOS) which monitors compliance with the code and receives complaints about insurers.

If the insurer still fails to implement such a plan and correct the breach, the IOS has the authority to report the matter to the Code Compliance Committee (CCC). The CCC has the power to impose sanctions which may comprise corrective action within a specified time frame, such as a compliance audit or corrective advertising. Alternatively it might require publicity of the issue of non compliance. Decisions by the CCC are binding on all insurers that have adopted the new Code

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# Expert immunity

*Is it a thing of the past?*

**Until recently, the courts have worked on the principle that, as a matter of policy, professionals who act as experts are immune from criminal prosecutions and civil liability. However, a recent Court of Appeal decision reveals the first chinks in the armour of expert immunity. Is it only a matter of time before experts, like other professionals, are held fully accountable for their actions?**

It is a well-established principle of law that a witness who gives evidence in good faith should do so without fear of recrimination. This principle extends to professionals who act as expert witnesses and covers civil and criminal penalties.

The principle of expert immunity was further extended earlier this year in the first instance decision of *Meadow v The General Medical Council* [2006] EWHC 146. The court held that expert immunity covered not only criminal and civil proceedings but extended to disciplinary proceedings before an expert's regulatory body.

However, on appeal, the Court of Appeal overturned the first instance decision and held that there had to be an element of accountability and that experts could be disciplined by their governing bodies (see further *General Medical Council v Professor Sir Roy Meadow* [2006] EWCA Civ 1390).

### Background

In 1999, Professor Sir Roy Meadow gave evidence in the prosecution of solicitor Sally Clark. Two of Mrs Clark's three children had died in what, according to Professor Meadow, were suspicious circumstances.

Professor Meadow is the exponent of the theory that one cot death in a family is tragic, two suspicious and three murder. Professor Meadow's evidence indicated that there was only a one in 73 million chance that two of Mrs Clark's children could have died of cot death. This evidence was instrumental in Mrs Clark's conviction.

Subsequent appeals resulted in the House of Lords finding that Professor Meadow's statistics were wrong, criticising his methods and quashing the conviction.

In the light of the principle of expert immunity, Mrs Clark could not pursue a civil or criminal claim against Professor Meadow. Instead, her father made a complaint to the General Medical Council, which found Professor Meadow guilty of serious professional misconduct and struck him off the medical register.

### The High Court decision

Professor Meadow appealed against the GMC's decision and, in February 2006, the High Court ruled in his favour on the basis that disciplinary proceedings were a back-

door method of bypassing the principle of expert immunity and therefore unacceptable.

Mr Justice Collins expressed his concern that disciplinary proceedings would deter professionals from acting as experts. He took the view that experts should be immune from disciplinary action, although not absolutely. In future, it would be up to judges to refer an expert to their regulatory body if the judge thought the expert's conduct had fallen below the standard expected. However, the regulatory body itself could not bring disciplinary proceedings against the expert, either on its own account or as a result of a complaint.

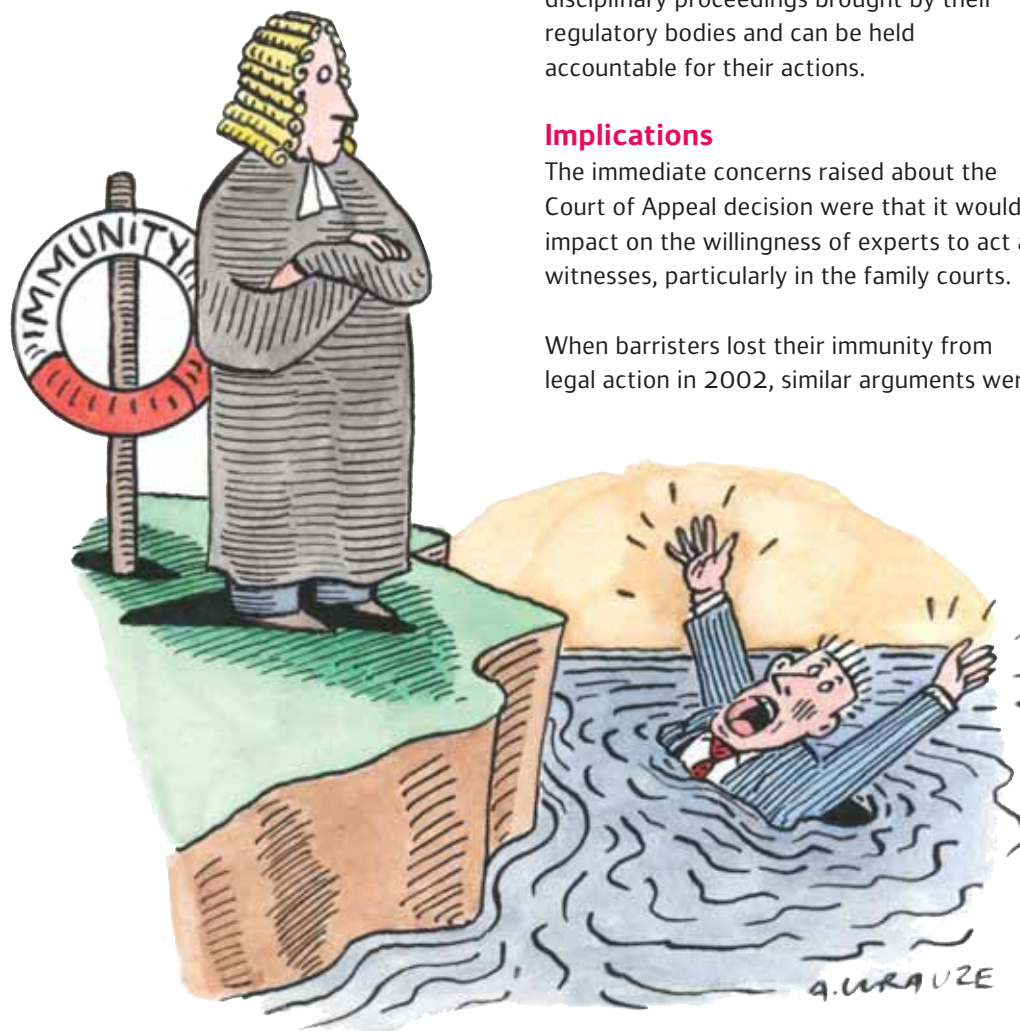
### The Appeal

This decision effectively rendered the GMC and other professional bodies toothless in dealing with their members. Not surprisingly, the GMC appealed.

Given the significance of the decision in terms of policy and public confidence in the administration of justice, the Attorney-General Lord Goldsmith intervened in the appeal to support the GMC. He argued that disciplinary proceedings against experts were in the public interest and that the threat would help to deter experts who might be tempted to give partisan evidence.

The Court of Appeal agreed. The Master of the Rolls commented that: "It would to my mind be very striking, not to say astonishing, if the way in which an expert gave evidence or the content of that evidence showed that he was not fit to practise in a particular discipline, but the [GMC] could not consider it because the

expert was immune from disciplinary proceedings by some absolute common law immunity".



The Court of Appeal took the view that the extension of expert immunity to disciplinary proceedings would be inconsistent with the duty of the GMC and other professional bodies to investigate and determine such

proceedings against the expert. Accordingly, that element of the appeal was dismissed.

As a result, experts are not immune from disciplinary proceedings brought by their regulatory bodies and can be held accountable for their actions.

### Implications

The immediate concerns raised about the Court of Appeal decision were that it would impact on the willingness of experts to act as witnesses, particularly in the family courts.

When barristers lost their immunity from legal action in 2002, similar arguments were

raised. It was also thought that there would be a flood of claims and that barristers would be deterred from defending their clients properly. That has not occurred and the likelihood is that experts will follow suit.

Most experts are fully aware of their obligations to the court and comply with their duties. While some experts have reacted to the Meadow decision by withdrawing their services, there is unlikely to be a wholesale exodus.

The more significant impact is likely to be seen in the professional indemnity market, with insurers left to pay fees for disciplinary proceedings brought against professionals who offer expert services.

The other issue for insurers to consider is the extent to which the Meadow decision may be the first sign that the courts could lift expert immunity altogether. The fact is that all other professionals involved in the litigation process are accountable. The question is why should experts be treated differently? As a matter of policy and public confidence in the administration of justice, the principle of expert immunity is becoming ever harder to defend. The Meadow decision brings us much closer to expert immunity being lifted completely, an issue which would have a serious impact on the professional indemnity market.

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# Free to view

There is now a new freedom of access to court documents.

**Until recently, anyone who was not a party to a court action was restricted as to the court documents they were allowed to see. Under Part 5 of the Civil Procedure Rules (CPR 5), the only ones they could get access to were claim forms and a judgment or order made in public.**

This meant that, although journalists could trawl through claim forms, picking up snippets of information about ongoing litigation, little other information was available and the finer details of cases were the subject of speculation. Anyone wishing to find out more would have to seek the court's permission and would need to make an application, giving full reasons why the disclosure should be made.

## Greater transparency

A change occurred on 2 October 2006, when most of the amendments brought about by the 42nd update of the CPR came into force. It is now possible for any non-party to an action to obtain a copy, not only of the claim form, but also of the statement of case filed at court. Clearly, this will give much more information to non-parties about the claim being pursued – though it is still necessary to apply to the court for access to

any further documents which the parties may have filed, such as schedules of special damages or medical evidence, which would be annexed to the statement of case.

There is still provision for a party to the action to apply to the court to prevent access to these documents and any decision on this will be at the court's discretion. In an age of increased accessibility and freedom of information, it remains to be seen how courts will tend to respond to this sort of application; they will have to balance the interests of the parties with the wider aims of openness.

## Retrospective effect?

There has been considerable debate about whether the amendment will have a retrospective effect. Initially, it seemed that, under this rule, the courts were likely to allow access to documents in actions, which had begun before 2 October 2006. This would have meant that; as no

formal notice is given to the parties, of any application of this kind by a non-party, statements of case in any existing action would be subject to wide-ranging scrutiny.



Clearly, it had never been envisaged that this would occur.

This led the Law Society to obtain a temporary injunction, which prevented the

retrospective disclosure of statements of case in actions, which had begun before 2 October 2006. This injunction was to remain in place until a full hearing, which was expected to take place at the beginning of November 2006. Unsurprisingly, the Law Society's application was challenged by representatives of the media, who clearly stood to gain the most by greater access to court documents both past and future.

## Present position

Following a recent development, the Law Society has withdrawn its application. It has been agreed that the change in the rules (CPR 5) as to accessibility will not now be retrospective; it will apply only to new claims lodged after 2 October 2006. This rule came into force on 18 December 2006.

From now on, it is clear that any litigant wishing to limit non-parties' access to statements of case will need either to make an application to the court to restrict access or to look at alternative means of dispute resolution, such as mediation or arbitration.

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# A matter of timing

From a limitation point of view, when is a claim actually brought against someone else?

**Under the Limitation Act 1980, a tort or contract action for damages cannot be brought after six years have elapsed from the date on which the cause of action originally arose. This raises a critically important question for defendants: how do they know when proceedings have actually been brought so that they can be sure that their legal action is still in time?**

A claim begins on the date that a claim form is issued. CPR 7.2 is headed How to Start Proceedings and says:

- (1) proceedings are started when the court issues a claim form at the request of the claimant; and
- (2) a claim form is issued on the date entered on the form by the court.

Consequently, one might reasonably expect that, to meet the demands of the Limitation Act, a claim form must be issued on or before the date of expiration of the limitation

period. But in the recent case of *Barnes v St Helens Metropolitan Borough Council* [2006] EWCA Civ 1372, the Court of Appeal has ruled otherwise.

## Barnes case

In the *Barnes* case, primary limitation expired on 5 November 2004. The claimant's solicitors delayed issuing protective proceedings until that very day. However, on 5 November, court staff at the local court were taking industrial action and nobody was available in the court office to seal a claim

form. So the solicitor left the form at the court office and departed with a stamped letter, confirming receipt on 5 November. The claim form was not in fact sealed until 8 November.

The Court of Appeal decided that, while a claim had not been started until 8 November 2004 (that is to say, until the date of issue), proceedings had in fact been brought (as required by the Limitation Act 1980) when

the claim form was delivered to the court office – ie on 5 November 2004. Expressed as a principle, the issue date is therefore only indicative in determining when proceedings are brought; it is not absolute. The claimant then had four months to serve the



claim form from the date of issue (not the date the claim was brought).

The court accepted that this conclusion could result in some uncertainty for defendants. However, it pointed out that details of the date when the court office has received the claim form can be requested under the CPR 7 practice direction, and this will remove the uncertainty.

## Lessons for the future

When issues of limitation are raised, therefore, it is important to consider the date the court received the claim form, not the date on which it was sealed and issued. What must be certain, though, is that the documents were sent to the court complete, on the correct day and to the correct location. Arguments are likely to arise where the claim form has been delayed in the post, the issue fee is wrong (or not included with the claim form) or where the last date for bringing a claim is on a day when the court is closed.

Overall, however, solicitors' professional indemnity insurers should welcome the decision in *Barnes* because it will help those solicitors who insist on waiting to the very last minute to issue protective proceedings.

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Legal advice in black and white

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