Full disclosure?

Chris Pamplin debates the disclosability of pre-action expert reports

IN BRIEF

- Should a pre-action expert report be disclosed when a party choses not to rely on it & seeks leave to rely on the evidence of another expert in the same field.
- *Edwards-Tubb case*: All reports prepared for use by the court will be disclosable.

The Civil Procedure Rules (CPR) *Pre-Action Protocol for Personal Injury Claims* states at para 3.15: "Before any party instructs an expert he should give the other party a list of the name(s) of one or more experts in the relevant speciality whom he considers are suitable to instruct." This is designed to give the other party the opportunity to object to any of the names. If there is no objection, there is a presumption against them instructing their own expert.

The question that arises is what effect this procedure has on whether a pre-action expert report should be disclosed when a party chooses not to rely on it and seeks leave to rely on the evidence of another expert in the field.

In the early years of CPR, Brook LJ in *Carlson v Townsend* [2001] EWCA Civ 511, [2001] 3 All ER 663 said that the aim of the CPR protocol was not to deprive a claimant of the opportunity to obtain confidential pre-action advice about the viability of his claim, and that the court should not act to override privilege in such documents. To some commentators, this position was eroded by the subsequent case of *Beck v Ministry of Defence* [2003] EWCA Civ 1043, [2003] All ER (D) 406 (Jun). This case concerned a party that wanted to instruct an alternative expert mid-way through proceedings, after losing confidence in the first expert. The Court of Appeal said that in almost all cases, disclosure of an earlier expert's report should be required when allowing a party to instruct a fresh expert.

Are advisory reports secure?

The question arises, however, as to whether *Beck* relates only to expert witness reports, or if it also affects expert adviser reports.

Helpfully, the case of *Jackson v Marley Davenport Ltd* [2004] *EWCA Civ* 1225, [2004] All ER (D) 56 (Sep) allowed the Court of Appeal to hold that when an expert adviser is subsequently instructed as an expert witness, his advising reports remain privileged, unless the privilege is expressly waived. Did this mean that it was only unwanted expert witness reports that would face disclosure before leave to instruct another expert would be given, and that expert advisory reports would remain privileged? Not according to Bristol County Court.

In *Carruthers v MP Fireworks Ltd* (unreported), a judge sitting at Bristol in 2007 ordered the disclosure of a report by an expert who had advised the claimant prior to the issue of proceedings as a condition of allowing the claimant to rely on the report of a subsequent expert witness.

The issue has ever since remained somewhat ambiguous. But in a judgment given in February 2011, the Court of Appeal gave clarification. In *Edwards-Tubb v JD Wetherspoon plc* [2011] EWCA Civ 136, [2011] All ER (D) 276 (Feb), the court specifically considered whether a pre-action expert report should be disclosed when a party chooses not to rely on it and seeks leave to rely on the evidence of another expert in the same field.

In brief, the facts in *Edwards-Tubb* were that the claimant had been injured at work. Under the pre-action protocol, the claimant's solicitors gave notice prior to proceedings of three experts who they might instruct and invited objections within 21 days. No objections were received and the claimant duly instructed one of the experts, who provided a report shortly thereafter. This report was never disclosed to the defendant and was not relied on by the claimant.

After more than a year had elapsed, the claimant issued proceedings. Those proceedings were accompanied by the report of another expert who had not been one of those named in the original list. The defendant did not dispute liability, but there was a dispute as to the extent of the claimant's injury and thus on quantum. Relying on *Beck*, the defendants sought an order for disclosure of the earlier report as a condition of the permission the claimant needed under CPR 35.4 to rely on a new expert. The claimant argued unsuccessfully that the court's power to order disclosure was only appropriate to a change of expert after the issue of proceedings and did not apply to reports obtained pre-action. However, the trial judge agreed with the defence—that there was no distinction between the two—and ordered disclosure as a condition of granting leave. On appeal, the decision was reversed and the appeal judge held that the pre-action report should remain privileged. The defendant referred the question to the Court of Appeal.

CPR distinction

In allowing the appeal, Hughes LJ said that the CPR had created a distinction between experts who were instructed to advise a party privately and those who were not. CPR 35.2 referred to expert reports that were prepared "for the purpose of proceedings". The court took the view that this was the only important difference and that there was otherwise no distinction to be made between a change of expert instructed pre-issue and a change of expert once proceedings had commenced.

Where a party had elected to take expert advice pre-protocol, at his own expense, Hughes LJ did not think that, save for the existence of some unusual factor, the court should act to override privilege in that advice, as such an expert (instructed to write a report not for the court) was outside CPR 35.2. However, a formal duty to the court arose when an expert was instructed "for the purpose of proceedings".

One of the factors the pre-action protocols were designed to facilitate was the nomination and appointment of expert witnesses. Consequently, once a party had embarked on the pre-action protocol procedure of obtaining co-operation in selecting expert witnesses, there was no justification for not disclosing a report obtained from an expert who had been put forward by that party as suitable for the case and who had, in fact, reported. It was important for the court to exercise the control afforded by CPR 35.4 to maximise the information available to the court and to discourage "expert shopping".

Hughes LJ pointed out in his judgment that the damaging effects of expert shopping, which the CPR was designed to avoid, were exactly the same whether or not it happened pre-action or after commencement of proceedings. Although matters of disclosure would remain at the discretion of the court, Hughes LJ said that, save in exceptional cases, it should be usual for the courts to order disclosure of an earlier report of an expert witness as a condition of giving leave to instruct a second expert.

Adviser or witness?

The important point here is the distinction between the expert instructed as an expert adviser and the expert instructed as an expert witness. In the former case, the expert is instructed

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outside of CPR, as one of the litigation "team", and the resulting report is likely to be very different from the sort of report that would result from an instruction to work as an expert *witness*. As an adviser, the expert will be helping his team to understand the strengths and weaknesses of the case, and will often assist in development of the litigation strategy. The expert has no overriding duty to the court, but is beholden only to those who instruct him. An expert instructed to prepare a report for the court is entirely different.

The decision of the Court of Appeal in *Edwards-Tubb* is a helpful reassertion of this important distinction. All reports prepared for use by the court, whether or not favourable and whenever commissioned, will be disclosable. To retain privilege in a report and to prevent any suggestion that it was obtained "for the purpose of proceedings", it would be sensible to specifically instruct experts as expert advisers with clear instructions that they have not been appointed as expert witnesses to the court.

Using experts as advisers has always been an expensive option suited only to higher value cases. But with *Edwards-Tubb* to hand, and clear instructions, no party need fear ready disclosure of an expert adviser's report. But would this hold true if the expert adviser became the expert witness? That transition has ever been loaded with difficulty, and *Edwards-Tubb* does not change that. NLJ

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses.
E-mail: *nlj@jspubs.com.*
Website: *www.jspubs.com*