Expert shopper

A Court of Appeal ruling that fetters litigation privilege in relation to expert reports could have far-reaching implications beyond personal injury, writes **Louisa Chambers**

THE RECENT COURT of Appeal decision in the case of *Ricky Edwards-Tubb v JD Wetherspoon Plc* [2011] EWCA Civ 136 has significance for all parties involved in personal injury (PI) litigation.

Following the ruling, they will have to be acutely aware from the outset of their case that they may be required to waive their right of privilege over an expert's report in exchange for being allowed to rely upon a preferred second expert's report.

This is a common issue in PI litigation – the situation in which the claimant obtains a report from expert A, loses confidence in the expert and commissions a report from expert B, upon whom they subsequently seek to rely.

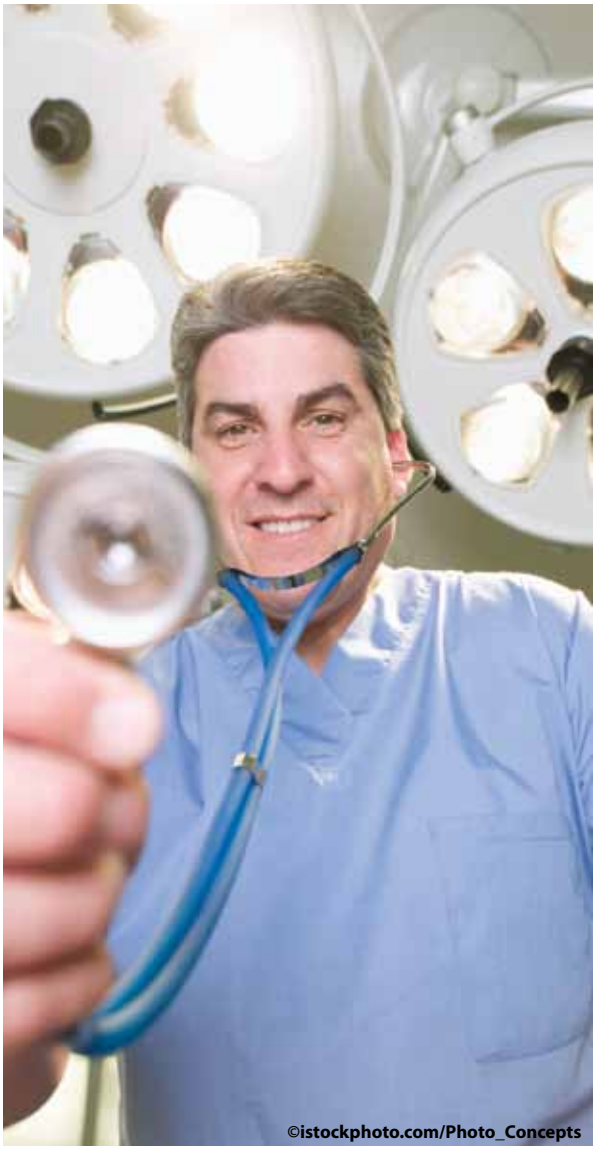
The appeal court's decision in *Edwards-Tubb* places the claimant in a position where they have no real choice but to waive their right to privilege, justified by the court as a means to limit what they see as expert shopping, and to maximise the information before trial judges.

Privilege protection

The doctrine of litigation privilege is well established. A party who holds the privilege may voluntarily waive it, but they cannot be forced to waive it. In accordance with this doctrine, an expert's report obtained by a party who is contemplating or involved in legal action is protected by litigation privilege, providing the dominant purpose of the report was the litigation.

When considering a medical expert's report obtained in *Edwards-Tubb*, LJ Hughes stated: 'There can be no doubt that the report… was and is a privileged document… The privilege belongs to the claimant… His privilege to keep this document to himself is a substantive right in law.'

However, the court found itself balancing the claimant's substantive right in law to privilege against the 'general power of the court to grant relief by way of case management directions which are subject to conditions… specifically provided for by CPR 3.1(3)(a)'.



©istockphoto.com/Photo_Concepts

Injury cases: choosing between reports from medical experts could involve difficult decisions

The Court of Appeal held that the court has the power under that rule to use it's discretion to give permission to rely upon a report from expert B, subject to the condition that expert A's report is disclosed, regardless of whether the change of expert occurs pre-issue or post-issue, so long as the first expert's report was obtained within the spirit of the PI pre-action protocol.

The court granted this conditional order using CPR 3.1(3)(a), despite acknowledging that such an order 'would amount to a significant practical fetter upon the exercise of privilege', and 'was not contemplated by Lord Woolf in his *Access to Justice* report, and if imposed routinely would be 'a disproportionate interference with the established right of privilege'.

The judgment states that although the instruction of a medical expert is routine in most personal injury cases, it is appropriate for the court to exercise the control afforded by CPR 35.4 in order to maximise the information available to the court and to discourage expert shopping.

Altered balance

This decision does not maintain a balance of power in personal injury litigation. Although the Court of Appeal justified the decision by stating that the claimant still had a choice whether to disclose the earlier report, so preserving the doctrine of privilege, this is no real choice.

If the claimant maintains their privilege over the first report, they will not have permission to rely on the second report and they will be left with no suitable evidence at all; the only option being to use the unwanted report from expert A.

The only alternative open to the claimant to avoid this situation is to obtain an advisory report, pre-protocol, to 'sound out' the expert before nominating under the PI protocol for a medico-legal report. But by doing so the claimant would be faced with a fee for a report they cannot use as part of the litigation process.

This would also cause delay at the outset of such cases. Are claimant's to do their 'shopping' at this pre-protocol stage, in the event that upon receipt of the preliminary advice

continued on page 36

continued from page 35

report, the claimant does not wish to proceed with that expert?

Furthermore, if the claimant then nominates and instructs an expert from whom they have already obtained a preliminary report, does this not place the defendant at a disadvantage and fly in the face of the principles at the heart of the CPR and pre-action protocols – that is, a fair and open approach?

It is not uncommon in PI litigation for a defendant to obtain their own expert report, only to decide upon receiving it that it does not assist their case, and never disclose it.

In accordance with the judgment in *Edwards-Tubb*, it may be open to claimants to seek an order for the disclosure of defendants' experts' reports in order to 'maximise the information available to the court'.

Extra costs

The Court of Appeal does not envisage this type of order being routine, but it is difficult to imagine a situation in which a defendant would not seek such an order for disclosure of an earlier report, which is more than likely going to be in their favour.

One might reasonably assume that the court would take a similar view in relation to any type of expert report

The court suggested *obiter* that it might be appropriate to compel a defendant to call expert A to court to give oral evidence to avoid any unfair tactical advantage. This may put defendants off seeking disclosure.

Such a situation where oral expert evidence is required will only serve to add to case management and legal costs, and take more of the court's time when in reality the issue of expert shopping is not resolved because the claimant is still using their preferred expert B. The defendant may well rely upon expert A, but if the claimant has good reason, the evidence is likely to be discredited at trial, and the defendant will have to pay the cost.

Although the *Edwards-Tubb* decision was in relation to a medical report, one might reasonably assume that the court would take a similar view in relation to any type of expert report, given that the principles relating to privilege and expert evidence are mirrored across the CPR and other pre-action protocols, not just specifically relating to PI.

This is a decision which will have wide-reaching consequences not only for PI litigants, but for any practitioner involved in civil litigation where the input from an expert is required.

Louisa Chambers is a personal injury specialist Fellow and solicitor at CS2 Lawyers Limited

continued from page 34

The national family law organisation Resolution encourages a non-confrontational approach to resolving family problems and all of its members – family lawyers, mediators and other family professionals – adhere to a code of conduct that puts children's best interests at the heart of family problems.

Resolution runs a parenting information programme consisting of 'Parenting after Parting' workshops nationwide that are designed to give information to help those involved in relationship breakdown (see www.resolution.org.uk).

The government has recognised the key role mediation can play in helping parents to sort out a solution to their problems. In new rules that came into force on 6 April 2011, it is now necessary for parents to attend a mediation information meeting before issuing court proceedings in relation to children matters. Of course, mediation will not be appropriate for everyone (for example, where there are allegations of domestic abuse).

However, in highlighting mediation by making it a pre-requisite to court proceedings, the government hopes to encourage people to look at ways other than issuing court proceedings to resolve family issues.

National Audit Office figures on legally aided mediation show that the average time for a mediated case to be completed is 110 days, compared to 435 days for court cases on similar issues. Therefore, if mediation is successful, it's a win-win situation.

Last resort

In an imperfect world, relationships flounder and some breakdown. This is often devastating for the couple concerned. The children from a broken relationship also carry the burden of their parents' separation and are less well equipped to deal with the strong emotions that follow.

As lawyers, we need to recognise when professional counselling/therapy would benefit our clients and refer them on for the benefit of the whole family. There will be families who will need court intervention to resolve family disputes but court should be a last resort when other possibilities have been explored.

If parents can be helped to come to an agreement over arrangements for their children rather than going through the stress and angst involved in disputing matters in court, then they are probably more likely to stick to the terms agreed because they have decided and agreed matters themselves.

The effect of an agreed decision is that contact handovers are less hostile (because parents are not being forced to comply with a court order, about which they may feel resentful), and the children do not feel caught in the middle of a war zone every time their parents meet.

Frances Kelly F.Inst.L.Ex. works in the family department of London law firm Cumberland Ellis