Editor's Note

Disclosure of Expert Reports

The Civil Procedure Rules 1998 sought to improve a number of troublesome aspects of civil litigation. One of them was the use of expert evidence, in relation to which two problems in particular had become pressing. The first was the adversarial use of experts and their tendency to provide partisan opinion rather than objective factual assessment of the issues in dispute. The second undesirable aspect of pre-CPR practice was the high and uncontrollable cost of expert evidence. Recent Court of Appeal decisions illustrate how difficult it is to overcome the tendency of parties to manipulate expert testimony to suit their interests, or at any rate the appearance that experts are used not so much for the purpose of helping the court to determine the truth but of helping the parties advance their cause.

In *Jackson v Marley Davenport Ltd* [2004] EWCA Civ 1225; [2005] C.P.Rep. 8 the claimant disclosed to the defendants an expert report concerning the nature and cause of his serious injuries. From this report it appeared that the expert had submitted an earlier report for conference with the claimant's lawyers, following which he gained further information that influenced his conclusions in the disclosed report. Not unnaturally, the defendants suspected that the first report may have proved unsatisfactory to the claimant and that his lawyers may have requested changes. They therefore applied for an order directing the claimant to disclose the earlier report. The district judge ordered disclosure, because he thought that to do so was required by CPR r.35.10(3) which provides: "The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written." The Court of Appeal upheld the circuit judge's reversal of this decision. Longmore L.J. pointed out that CPR r.35.10(3) could be invoked to require full disclosure of instructions only when there was reason to suppose that the expert had not accurately disclosed the nature of the instructions received from the party (see *Lucas v Barking, Havering and Redbridge Hospital NHS Trust* [2004] 1 W.L.R. 220) and that there was no reason to suppose that this had occurred in this case.

More fundamentally, Longmore L.J.'s view was that communications between an expert and his instructing solicitors were protected from disclosure by legal professional privilege (LPP) and that any cutting down of the immunity must be clearly stated by the rules. True, he explained, CPR

r.35.10(4) provides that a party's instructions to the expert shall not be privileged. "But the reference in Rule 35.10 to 'the expert's report' is," he said, "and must be, a reference to the expert's intended evidence, not to earlier and privileged drafts of what may or may not in due course become the expert's evidence" ([14]). He therefore went on to state: "The specific and limited exemption from privilege of the instructions given to the expert as the basis on which the report is to be written, shows, to my mind, that there cannot have been any intention in the minds of the draftsmen of the Civil Procedure Rules to abrogate the privilege attaching in other respects, eg to earlier drafts of a final report or to earlier reports whether said, in terms, to be draft reports or not" ([15]).

This conclusion is problematic because communications between a party's legal representatives and their retained expert are not merely a mode of preparing the party's case for litigation but also can create the very evidence that is then placed before the court. Legal professional privilege is indeed an indispensable requirement of fair trial in that it offers the parties a private and secure sphere within which to prepare for litigation. A party must be able to discuss his case with his lawyers, to test various ways of developing his arguments, to probe different explanatory possibilities of the events and the like. All this is undoubtedly indispensable for satisfactory preparation for litigation. What may, however, be questioned is whether it is also necessary not only to allow parties to create evidence under the guise of preparation but also to screen from the opponent the process by which the evidence was created. The rules recognise the need for introducing some transparency into this process because they require experts to disclose the substance of the instructions they received from the party. The reason for this is that an appreciation of the instructions is needed in order to enable the opposite side and the court to assess the weight to be attached to the expert's opinion. Yet, it is not only the initial instructions that help shape the expert's opinion but also the comments that the party's legal advisers make on the expert's early drafts. Indeed, Longmore L.J. drew attention to the practice by which draft expert reports are circulated among a party's legal advisers before a report is prepared for exchange with the other side ([13]). Suppose that the expert in this case had first reached a conclusion that was unhelpful to the claimant and that as a result he was then asked to examine the situation from a different point of view. It is not unreasonable to suggest, as the defendants' counsel did, that to be able to satisfactorily understand and test the disclosed report the defendants needed to see the earlier report too and learn what caused the expert to change his view. The present decision does not allow this because it creates an artificial distinction between "instructions" and other requests made by lawyers to their experts, which may be as influential as the initial instructions and just as important to know in determining the weight to be given to the eventual report adduced in court. There may have been nothing sinister in the revision of the expert's initial report, but it is difficult to escape the impression that the claimants may have had good reason to fear that disclosure of the early draft would have hurt their case and that the present rules have prevented the

defendants from fully probing the validity of the expert's conclusions. It may therefore be argued that this decision does little to reduce the potential for partisanship, which was the aim of the CPR in this area.

A party may influence expert evidence not only by requiring his expert to revise his opinions so that the final report would be more to the party's liking. Expert evidence may also be influenced by what has become known as "expert shopping". This consists in a party consulting successive experts until he receives the opinion he desires. Expert shopping may go hand in hand with a successive refinement of the instructions in order to ensure that later experts remain unaffected by, or unaware of, factors that led earlier experts to disappoint the party. The immunity offered by LPP to communications with third parties for the purpose of preparing for litigation enables determined parties to engage in expert shopping surreptitiously. But the court is not always powerless to counteract this process. In *Beck v Ministry of Defence* [2003] EWCA 1043 the court gave permission to each party to call one psychiatrist. The defendants' first psychiatrist examined the claimant and produced a report which the defendant considered to be unsatisfactory. They therefore asked the claimant to subject himself to a further psychiatric examination by another expert. When the claimant refused, the defendants applied for permission to change experts. The court gave permission but only on condition that the first expert's report was to be disclosed to the claimant. Simon Brown L.J. said: "I do not say that there could never be a case where it would be appropriate to allow a defendant to instruct a fresh expert without being required at any stage to disclose an earlier expert's report. For my part, however, I find it difficult to imagine any circumstances in which that would be properly permissible and certainly, to my mind, no such circumstances exist here" ([26]). Ward L.J. added that "expert shopping is to be discouraged, and a check against possible abuse is to require disclosure of the abandoned report as a condition to try again" ([30]). Lord Phillips M.R. agreed that it would be unreasonable to require the claimant to submit to a second psychiatric examination without showing him the first report.

This decision has now been distinguished in *Hajigeorgiou v Vasiliou* [2005] EWCA Civ 236. The claimant sued the defendant for breach of covenant of quiet enjoyment of the premises he rented for the purpose of opening a restaurant and sought compensation for the loss of money spent in improvements and for loss of profit. The defendant sought permission to call an expert valuer. In support of his application the defendant provided the court with the CV of the expert he proposed to call (Expert 1). Permission was given and Expert 1 was allowed access by the claimant and produced a report. But the defendant decided not to rely on his evidence and asked the claimant to allow Expert 2 access to the premises, which the claimant refused without sight of the report prepared by Expert 1. Before the Court of Appeal the defendant advanced two arguments. First, that he could call Expert 2 without needing court permission, so that the court had no opportunity to intervene and impose a condition. Secondly, he argued that if court permission was required, no disclosure condition should be imposed.

The Court of Appeal held that since the order giving the defendant permission to call an expert did not name Expert 1 specifically, the defendant was free to call any one expert he wished to instruct and since he did not wish to call Expert 1, there was nothing to prevent him calling Expert 2. *Beck v Ministry of Defence* was distinguished on the grounds that there it was assumed that permission was required to call the second expert and that, in any event, the claimant could not be forced to submit to a second and presumably invasive psychiatric examination without reasonable cause. The Court of Appeal in *Hajigeorgiou v Vasiliou* held that a party is free to instruct as many experts as he wishes. The CPR impose limitations only on the calling of experts not on their instruction. If a party was allowed to call one unnamed expert, he was free to call any one of the experts that he has instructed who fulfils the required criteria. The court concluded that the defendant did not need any fresh permission to call Expert 2 and that the claimant had no reasonable cause to refuse Expert 2 permission to inspect the premises.

This would have been sufficient to dispose of the case but Dyson L.J. went on to consider the second question raised on the appeal: If the order giving permission to call expert evidence had been limited to Expert 1, would the court have been justified in making permission of calling Expert 2 subject to a condition that the defendant disclose Expert 1's report? Although, as noted earlier, the *Beck* case was distinguished, Dyson L.J. fully endorsed the principle established in that case. He said:

> "29. The principle established in *Beck* is important. It is an example of the way in which the court will control the conduct of litigation in general, and the giving of expert evidence in particular. Expert shopping is undesirable and, wherever possible, the court will use its powers to prevent it. It needs to be emphasised that, if a party needs the permission of the court to rely on expert witness A in place of expert witness B, the court has the power to give permission on condition that A's report is disclosed to the other party or parties, and that such a condition will usually be imposed. In imposing such a condition, the court is not abrogating or emasculating legal professional privilege; it is merely saying that, if a party seeks the court's permission to rely on a substitute expert, it will be required to waive privilege in the first expert's report as a condition of being permitted to do so.
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> 30. A question that was not considered in *Beck* is whether the condition of disclosure should relate only to the first expert's final report, or whether it should also relate to his or her earlier draft reports. In our view, it should not only apply to the first expert's final report, if by that is meant the report signed by the first expert as his or her report for disclosure. It should apply at least to the first expert's report(s) containing the substance of his or her opinion.
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> 31. In the present case, the first expert had produced a draft interim report. It is reasonable to infer from the defendant's wish to change experts and refusal to provide an explanation that the draft interim report contains the substance of the first expert's opinion on some or all of the

> remaining issues in the case. In these circumstances, we consider that the judge was entirely justified in deciding that, if the defendant needed the permission of the court to rely on the evidence of Mr Negus [Expert 2], it should be a condition that he disclose to the claimant Mr Watson's draft interim report."

The view expressed in [30] above is not strictly inconsistent with *Jackson v Marley Davenport Ltd*, where Longmore L.J. expressed the view that the provisions of CPR Pt 35 requiring disclosure of the expert report on which a party proposes to rely and the substance of the expert's instructions do not override LPP in earlier draft reports by the same expert. Yet, Dyson L.J.'s view seems to be that had the defendant required court permission for Expert 2, the court would have been justified in requiring him not only to disclose the final signed report submitted by Expert 1, if such existed, by also of any earlier report containing the substance of that expert's opinion. Imposing a condition of this kind whenever a party seeks to depart from the order permitting expert evidence does provides some deterrent to expert shopping. However, if the CPR aim of counteracting the tendency of using experts as champions rather than witnesses is to be achieved, serious consideration needs to be given to removing altogether LPP from communications with experts. Such a change in the law would render transparent the process by which expert opinion is created, would remove the incentives for expert shopping and would increase public confidence in the process. This idea is not as radical as may appear at first sight because while LPP protects communications between parties and experts, it does not confer immunity on the expert from being required to disclose his factual observations and his professional conclusions. Indeed, this solution has been promoted by the Australian Uniform Civil Procedure Rules, r.212(2), and has already been adopted in Queensland.