Edward Powell explores the benefits of hot tubbing, and considers whether a recent case on report disclosure gives defendants an unfair advantage

In the hot seat

I was involved in a high-profile claim in the High Court last year. The case was heavily dependant on expert evidence on the question of liability.

At a pre-trial conference with leading counsel I raised the possibility of hot tubbing the expert witnesses. It was clear from the look of shock on his face that he had no idea what I meant, so I explained to him what I was talking about. Hot tubbing, or concurrent evidence, is a method where the claimant's and defendant's experts are in the witness box at the same time so that they can give their evidence on an issue-by-issue basis. It was developed in Australia but raised by Lord Justice Jackson in his review of civil litigation costs. A trial was set up in Manchester and the preliminary report was published in January 2012.

After my explanation our silk responded that it sounded ghastly and we certainly wouldn't be doing anything like that at trial. I was dutifully put back in my place and trial preparation continued at pace.

At trial several weeks later, the defendant's lay witnesses had finished giving evidence and our expert was on the stand. A new issue had arisen from the lay witnesses in cross-examination relating to some photos of the accident location. Our expert was pointing to some photographs and the defendant's counsel was turning to his expert for guidance on a technical point. The judge suggested the defendant's expert come to the front to point out some features on the photographs and the respective experts dealt with the point together quite professionally. The judge commented that we appear to be hot tubbing and our leading counsel agreed with the judge that it was a most sensible way of dealing with the point.

"The experts have to be very much on the ball. They don't get to hear the other experts' evidence and then consider overnight how they would respond to that point"

I never asked our counsel whether he was a convert to the idea or whether he was simply showing judicial deference, but having seen a glimpse of hot tubbing in action I believe we made swifter progress than if one expert had to finish all of their evidence and the previous expert then had to be re-sworn.

Results of the pilot scheme

My firm was involved in a trial in Manchester relating to the provision of emergency service vehicles. Again the issues were very technical and both sides were reliant on expert evidence to prove their case. The case formed part of a pilot scheme being run by the High Court District Registry and Mercantile Court.

Professor Dame Hazel Genn has published her interim report into the hot tubbing pilot scheme. It can be found at www.ucl.ac.uk/laws/judicial-institute/docs/Interim_Report_Manchester_Concurrent_Evidence_Pilot.pdf ▶

Report disclosure: sliding in favour of the defendant?

In *Edwards-Tubb v JD Wetherspoon PLC* [2011] EWCA Civ 136, the Court of Appeal confirmed that the courts should normally order a party to disclose a report obtained pre-issue (upon which they do not intend to rely) as a condition of getting permission to rely on a 'new' expert.

Edwards-Tubb was really an extension of the principles of *Beck v MoD* [2003] EWCA Civ 1043, and *Hajigeorgiou v Vasiliou* [2005] EWCA Civ 23, which dealt with a party changing experts after the issue of proceedings.

Possibly the unintended consequence of *Edwards-Tubb* is to give the defendant an unfair opportunity to influence what evidence is before the court.

Let's consider this example. The claimant, aged 40, sustains a knee injury in an accident at work. She had injured the same knee previously aged 20 playing netball. The claimant obtains a report from Dr A and he believes that the netball injury would have led to mild arthritis developing in the knee when the claimant was 60, but the second injury has bought forward that by five years and she will now retire at age 55 as a result.

The defendant doesn't like the claimant's evidence and in view of the value of the claim gets their own evidence from Dr B. Dr B states that in his view the claimant will develop arthritis ten years earlier as a result of the workplace injury and will struggle with work from age 50 onwards. He adds that he thinks, because of the knee injury, pain in the hip will also develop (a point not identified by Dr A). This report is clearly much more helpful to the claimant in terms of the value of the claim. It would also be of great interest to the claimant in terms of her health and future plans.

Will the claimant ever see the report or learn of its contents? Of course not. The defendant will not disclose the report and the claimant's claim goes on to be valued on the basis of Dr A's evidence. The claim would most likely settle before trial.

The court does not (and indeed it cannot) order the defendant to disclose the medical evidence upon which they do not wish to rely. The defendant can continue to argue the claimant's claim and take points on the claimant's expert, notwithstanding they have more pessimistic evidence that they have not disclosed.

But what if the claimant had got Dr A's report and not liked the contents? They get a fresh report from Dr B who gives the same report detailed above and the claimant discloses his evidence with the service of proceedings. Following *Edwards-Tubb*, the claimant is ordered by the court to disclose Dr A's report as a condition of being granted permission to

rely on Dr B. The defendant then adopts the evidence of Dr A and proceeds to trial with there being no concessions from the experts along the way. At trial the judge accepts the evidence of Dr A.

In these examples the claimant has been forced to disclose unhelpful evidence and the defendant has not. The defendant has in effect been able to expert shop by choosing which evidence the court has to consider. The claimant has been denied access to a personal and helpful medical report obtained by the defendant.

There are no doubt cases where defendants would point out they are denied their own evidence entirely. The reasoning behind the *Edwards-Tubb* decision is to limit expert shopping, but in practice it allows the defendant an opportunity to hide unhelpful evidence when the claimant is denied that opportunity.

▶ The preliminary conclusions are not conclusive. With only three cases that entered the scheme actually progressing to trial (most settled and a few are awaiting trial) there was limited data upon which to base the report.

The questionnaires completed by the parties showed a mixed response from the experts, counsel and solicitors involved, but they were broadly positive about the process.

The recommendation in the report is that "it would seem entirely appropriate that… the use of concurrent evidence should be included in the part 35 practice direction as an optional procedure which can be adopted if the judge so directs".

My colleagues who dealt with one of the trial cases have a similar view to the interim report. It was not such a success that it should be rolled out in all litigation but neither was it such a disaster that the idea should be abandoned.

One feature that was clear was that the judge (who had been appointed to hear cases taking part in the trial) took a much more inquisitorial role with the advocates mopping up any points not covered by the judge.

If hot tubbing is going to take off the Court Service may need to spend some money expanding the size of the witness box. I understand that the experts were placed in the usual 'built for one' witness box one and were only a few inches apart. They also shared a set of trial bundles as there was no room for more than one set on the stand.

The experts have to be very much on the ball. They don't get to hear the other experts' evidence and then consider overnight how they would respond to that point.

So, it is likely that it will form part of a trial judge's tools to help manage a case. Whether it will be embraced by the judiciary is another matter.

Edward Powell is a partner and head of personal injury at Ellisons Solicitors (www.ellisonssolicitors.com)