

## **Professor Sir Roy Meadow's witness immunity**

### **Nicholas Peacock considers the case of *Meadow v GMC* on behalf of the Hailsham Chambers Professional Disciplinary Group**

Judges retain the power and ability to surprise. In the continuing jousting between medical regulators and lawyers, doctors reading successive judicial pronouncements must feel inclined to hang up their stethoscope sooner rather than later (see eg *R (Campbell) v GMC* [2005] 1 WLR 3488, CA). Once in a while (eg *R v GMC ex parte Cream* [2002] Lloyd's Rep Med 292) the judiciary remains capable of springing a surprise; the decision of Collins J in *Meadow v GMC* [2006] EWHC 146 (Admin)<sup>1</sup> is one such case.

The background is well known, but it is worth remembering the basis on which Professor Sir Roy Meadow (M) was prosecuted at the GMC. He had given evidence in the murder trial of Sally Clarke, whose second appeal against conviction was allowed by the Court of Appeal (her first having been rejected) on the basis of failure (not by M) to disclose significant results of microbiological tests. Her second ground of appeal concerned statistical evidence which M had given at committal proceedings and at the murder trial. In a supplementary statement for that murder trial he concluded that "...the chance of 2 infant deaths within [a family in which the parents do not smoke, in which at least one has a waged income and in which the mother is over the age of 26 years] is 1 in 73,000,000." He came to that conclusion based on his (mistaken) interpretation of statistical evidence, in particular the "CESDI study". The figure was produced by squaring the odds of one such child dying a sudden death. However, squaring the odds was only a legitimate statistical exercise if the deaths were truly independent of each other. (His original statement had used odds of 1:1000 for a single death and 1:1,000,000 for two sudden deaths, statistics which were also criticised at the GMC.)

The admissibility of that evidence was not challenged at the murder trial. Nevertheless, the Court of Appeal at the second appeal hearing suggested that it would probably have allowed the appeal on that ground also had it heard full argument.

At the GMC, M was prosecuted for (a) failing to provide a fair context for the limited relevance (if any) of the sudden infant deaths and for giving misleading and irrelevant statistics; (b) using the squaring exercise; (c) implying that the two deaths (Sally Clark's children) were independent and (d) failing to disclose that he was not an expert statistician.

The GMC found that M was guilty of serious professional misconduct (under the old GMC rules) because he had relied on statistical information in a flawed way which may have influenced the jury to convict of murder. The GMC did not find that M's conduct was intended to mislead the Court and there was no evidence of any calculated or wilful failure to use his best endeavours to provide evidence. The Fitness to Practise Panel found that he had acted in good faith but had misinterpreted the statistics, a mistake which it found was easily and widely made. Notwithstanding that finding, he was erased from the medical register.

M's appeal against the GMC's decision was allowed by Collins J on three grounds.

Firstly, a witness is now immune from disciplinary proceedings in respect of evidence which he gives in a court of law. This is a new development, an extension of the well known immunity which a witness has from civil suit (see eg *X v Bedfordshire CC* [1995] 2 AC 633, HL, and *Stanton v Callaghan* [2000] 1 QB 75, CA.) The same public policy reasons which underpin immunity from civil suit apply to immunity from disciplinary proceedings. (Interestingly, this argument was not pursued by M at the GMC, nor was it a ground of appeal; it was raised by the judge at the appeal hearing.)

Collins J was plainly influenced by the effect M's GMC proceedings had had on the administration of justice:

*“There can be no doubt that the decision has had a damaging effect in that it has increased the reluctance of medical practitioners to involve themselves in court proceedings, particularly in cases before the Family Court.”* (Para 6)

The immunity is not absolute; it covers proceedings based on a complaint made by a party or other person who may have been upset by the evidence given (the complainant in M's GMC case was Sally Clark's father). It will, however, be open to a judge before whom the expert gives evidence to refer the expert to the relevant disciplinary body. *“Such a referral would not be justified unless the witness's shortcomings were sufficiently serious for the judge to believe that he might need to be removed from practice or at least to be subjected to conditions regarding his practice such as a prohibition on acting as an expert witness. **Normally, evidence given honestly and in good faith would not merit a referral.**”* (Para 23, my emphasis.)

Whilst the limits of this new immunity will be developed by subsequent case law *“...what is of fundamental importance is that a witness can be assured that if he gives his evidence honestly and in good faith, he will not be involved in any proceedings brought against him seeking to penalise him. The risk of a judge deciding that there should be a referral in such circumstances is so remote as to be virtually non-existent.”* (Para 26.)

The case, Collins J held, should never have been pursued against M.

Secondly, on the actual merits of this case, Collins J repeated the now well-known propositions that (i) conduct which is not directly connected with a doctor's medical practice can amount to serious professional misconduct (see *Roynance v GMC* [2000] 1 AC 311, PC) and (ii) bad faith is not necessary for a finding of serious professional misconduct. Negligence may suffice, but it must be negligence to a high degree. *“The test has been described as conduct which would be regarded as deplorable by fellow practitioners or properly informed members of the public.”* (Para 30.) And, lest this section of the judgment be at risk of being forgotten because of the advent of the new rules and the new test of impairment of fitness to practise, Collins J said: *“The same test is likely to remain despite the amendments to the legislation, but I do not need to go into that.”* (*ibid.*)

The Judge also breathes some new life into the “isolated error” argument (see eg *Rao v GMC* and *Silver v GMC*, both since criticised by Dame Janet Smith and the Court of Appeal in *R (Campbell) v GMC* (*supra*) on other grounds), stating: “...[M] made one mistake, which was to misunderstand and misinterpret the statistics. It was a mistake, as the Panel accepted, that was easily and widely made. It may be proper to have criticised [M] for not disclosing his lack of expertise, but that does not justify a finding of serious professional misconduct.” (Para 54.)

Thirdly, lest there be any doubts about Collins J’s views of the GMC decision, he was even more damning about the decision to erase: “...to say, as the [Panel] did, that his conduct was ‘fundamentally incompatible with what is expected by the public from a registered medical practitioner’ approaches the irrational.” (Para 57.) Whilst a condition not to engage in medico-legal work would have been appropriate, in truth the finding alone of serious professional misconduct would have been sufficient.

Plainly the ramifications of this judgment extend, as the Judge himself pointed out, far beyond medical practitioners and the GMC; undoubtedly the witness immunity point will be raised and argued at length and in other tribunals. The media has already reported that the GMC may appeal in any event, though this almost certainly understates the likelihood of an appeal by the GMC. That the central ground for allowing the M’s appeal came about at the instigation of the Judge rather than the parties demonstrates the power and willingness of the judiciary (particularly, at present, in the Administrative Court) to bring about changes and developments in the law.

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<sup>1</sup> The decision can be found at <http://www.bailii.org/ew/cases/EWHC/Admin/2006/146.html>.