

EXPERT IMMUNITY AFTER *GMC v Meadow*

Nicholas Peacock and Charles Foster debate the consequences of the decision in *GMC v Professor Sir Roy Meadow* [2006] EWCA Civ 1390

PROFESSOR SIR ROY MEADOW'S APPEAL

against the finding by a Fitness to Practise Panel (FTPP) of the General Medical Council (GMC) that he was guilty of serious professional misconduct (SPM) was upheld by the Court of Appeal last week (26 October), though only on one of the grounds that Collins J had determined below. Collins J overturned the GMC's decision on SPM and also found separately that Meadow was in any event immune from disciplinary proceedings.

The Court of Appeal held, by a majority, that Collins J had been correct in overturning the GMC's decision on SPM. The GMC did not find that Meadow's conduct was intended to mislead the court at Sally Clark's murder trial and there was no evidence of any calculated or wilful failure to use his best endeavours to provide evidence. The GMC found that he had acted in good faith, but had misinterpreted the statistics, a mistake that it found was easily and widely made. Notwithstanding Sir Anthony Clarke MR's dissenting judgment in the Court of Appeal, the lesson appears to be relatively uncontroversial: there is no such thing as "no-fault misconduct". This appears to be in line with Privy Council judgments such as *McCandless v GMC* [1996] 1 WLR 167 and *Preiss v General Dental Council* [2001] 1 WLR 1926. To have found otherwise, as the GMC did, was perverse.

Less immunity

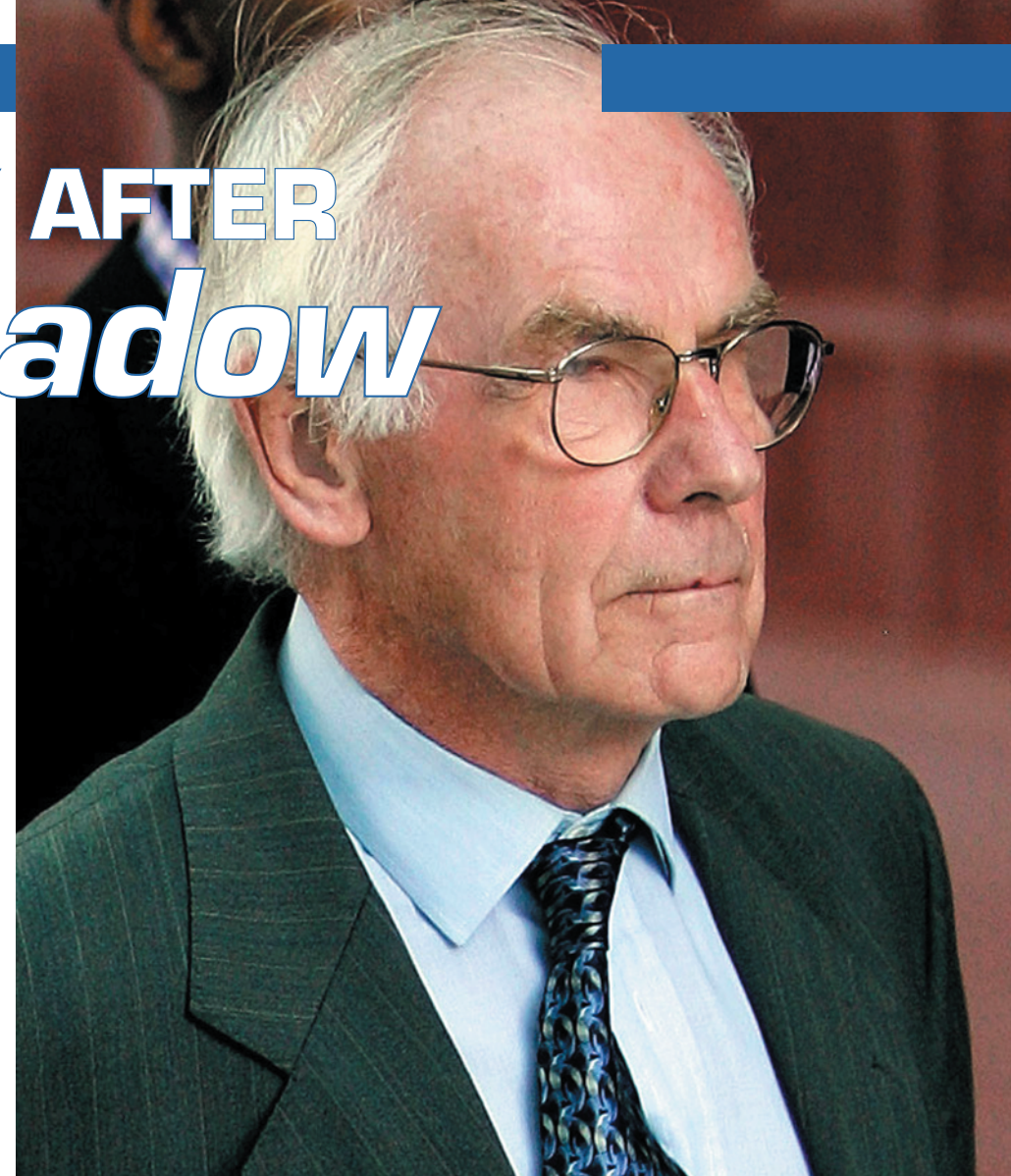
However, the common law is growing less and less fond of immunities. Advocates' immunity from civil suit was finally demolished in *Hall v Simons* [2002] 1 AC 615, HL. The immunity for experts (a branch of witness immunity) from civil proceedings in respect of their reports in civil cases (which survives the *Hall* decision and the ambit of which was set out in *Stanton v Callaghan* [2000] 1 QB 75, CA) has been increasingly restricted. The ambit of the immunity in

respect of evidence in criminal cases is slightly greater. However, to invent an immunity (or as Collins J put it "[to apply] ... an immunity which has not hitherto been explicitly recognised") in favour of expert witnesses giving evidence in criminal cases and which bars subsequent disciplinary proceedings against them was always going to be a bold step. It is perhaps noteworthy that counsel for Meadow had not sought, either before the GMC or (until expressly invited to do so) before Collins J, to argue in favour of any such immunity. Finally, it is worth pointing out that the immunity that still exists in favour of witnesses and experts only bars civil suits; it does not protect a witness against a prosecution for, eg, perjury.

There are some good policy arguments in favour of immunity for experts from disciplinary proceedings. Indeed, Thorpe LJ's judgment in *Meadow* seemed at first to be heading towards supporting the new immunity and makes a powerful plea with respect to the Family Court system and the supply of appropriate and willing experts in future (see paras 225-249).

Filter mechanism

Ultimately, however, the policy arguments that protect witnesses from civil suit simply do not apply to the protective jurisdiction in which the GMC's disciplinary and regulatory functions fit. As is often repeated, the GMC's jurisdiction is the protection of patients and the public interest. Even Collins J did not think that there should be blanket immunity from disciplinary proceedings, holding that it would be open to a judge before whom the expert gives evidence to refer the expert to the relevant disciplinary body. And therein lies the real problem, the introduction of a judicial filter mechanism. It has long been held that a common law immunity must be absolute (see Lord Clyde in *Darker v Chief Constable of West Midlands* [2001] 1 AC



435, HL, at 457). Certainty, at least in the mind of the witness, is crucial. As Lord Hoffmann said in *Darker*: "The person must know at the time he speaks whether or not the immunity will attach." Put simply, how can the witness know when he gives his evidence in court that he is immune when the filter mechanism will not operate until some time after the conclusion of the case? That the filter mechanism will usually be wearing a red dressing gown may or may not provide a measure of reassurance. It is the arbitrary nature of the control mechanism that militates against an extension of witness immunity.

This is not, of course, necessarily the end for witness immunity from disciplinary proceedings. As above, there are good policy arguments in its favour, but the immunity will have to be granted by Parliament. The Chief Medical Officer's report 'Bearing Good Witness' on the use of medical experts in the family courts has just been published for consultation until 28 February 2007 - make your views known!

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And, second, immunity prevents a multiplicity of proceedings based on one set of facts. Most good things have a price, and so it is here: the immunity gives a shield to the wrongdoer as well as to the innocent.

How do these ancient and uncontroversial principles apply to the issue facing the court in *Meadow*? At first instance, Collins J, that most strenuously independent of English judges, thought that both limbs of the rationale for immunity plainly applied. And surely he was right. It is common knowledge that, since the GMC's outrageous forensic lynching of Sir Roy Meadow, there has been a marked reluctance on the part of paediatricians to get involved in cases involving the abuse and death of children. Thorpe LJ, in the Court of Appeal, confirmed that this was the position in family cases. It is obviously of crucial public importance that the courts in these types of cases have the expert evidence needed to reach a just conclusion.

The expert has immunity in relation to an action for damages. But disciplinary proceedings are often far scarier and more serious. They carry with them the threat not merely of a judgment for a sum that will be paid by an insurer, but of professional disgrace and total ruin. The argument for immunity based on the agreed rationale is stronger for disciplinary than for civil proceedings.

Keeping the principle in check

Collins J, alert to the principle that immunity (being a very mixed legal blessing) should be kept on as tight a rein as is compatible with the overall aim of ensuring the administration of justice, declined to say that there should be a blanket immunity in relation to subsequent disciplinary proceedings. He said that the judge presiding over the trial in which the relevant evidence was given should act as a gatekeeper. He and only he should decide if the immunity should be lifted in order to permit disciplinary proceedings. This was an imaginative solution that cleverly reconciled the competing principles in play. True, some serious thought

would have to be given to the intellectual mechanics of that gatekeeping function, but it seems plainly workable. There are few regulatory law practitioners who would not prefer the judgment of a trial judge to the judgment of the notoriously arbitrary screening committees of the GMC. A hundred years ago, when this really was a common law jurisdiction, noted for its bespoke judicial solutions to legal problems, an imaginative judge would be applauded. Now he is denounced as a constitutionally offensive judicial legislator. And that is what happened here.

In the public good?

The Court of Appeal noted that the GMC has a statutory duty to investigate allegations about doctors that might suggest that they are not fit to practise. It is plainly in the public interest that they discharge that duty. The court appeared to say that the obvious public good in the investigation of doctors should be conclusively presumed to trump the public good that might result from the imposition of an immunity, and that it was wrong for a judge effectively to oust the jurisdiction of the GMC by arrogating to himself the power to say whether or not a complaint should go further. This is a strange conclusion. In every single case of witness immunity there is, by definition, an ousting of jurisdiction. That is what the principle means. The question should be in each case whether the ousting is in the interests of the administration of justice. Who is best placed to assess that? The judge, I'd say; but the Court of Appeal has no such confidence in the judges.

The already dog-eared common law tradition has taken another nasty knock. But the real casualty of this judgment is the administration of justice, particularly in the most emotive and serious cases in the criminal and family courts.

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WHERE WITNESS IMMUNITY APPLIES, A

witness is immune from civil suit, even if he has acted with gross negligence or even dishonesty. An immunity with such a draconian effect needs to be watched carefully. It runs counter to a central principle of justice – that there should be no wrong without a remedy. A principle so central will not be displaced easily. And indeed it is not. The courts have repeatedly emphasised that witness immunity should not be applied unless it is clearly necessary. It has been presumed to be necessary in relation to all civil proceedings subsequent to the proceedings in which the relevant evidence has been given. But should it be extended to cover subsequent disciplinary proceedings in which the witness's evidence grounds a complaint against him?

Why immunity?

The immunity is granted to facilitate the administration of justice. How does immunity help? In two related ways: first, by ensuring that witnesses are not scared out of giving evidence "freely and fearlessly" by the possibility of subsequent comeback.

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