

LIMITED IMMUNITY

Robert Lazarus

In *Meadow v General Medical Council* [2006] EWHC 146 (Admin), [2006] All ER (D) 229 (Feb) Collins J upheld an appeal by Professor Sir Roy Meadow against a finding by the Fitness to Practise Panel of the General Medical Council (GMC) that he was guilty of serious professional misconduct in relation to his evidence as an expert witness in the trial of Sally Clark. In so doing the Court held that the GMC lacked the jurisdiction to consider Professor Meadow's case at all, because the disciplinary proceedings offended against the immunity from suit enjoyed by witnesses in court proceedings.

This decision is of considerable importance both to those who act as expert witnesses in all disciplines and those who instruct them. Unsurprisingly, the decision has been hailed as a victory by expert witnesses (see *NLJ*, 24 February 2006, p 301 and *NLJ*, 24 February 2006, p 385), citing the common concern that without such an immunity litigants may find themselves without access to expert input. Be that as it may, there are a number of potential difficulties arising from the judgment.

Historical background

The immunity from suit has a long history (see *R v Skinner* (1763) Lofft 54, [1558-1774] All ER Rep 321). It has been said that the reason for the rule is to protect a witness who has given evidence in good faith in court from being harassed and vexed by an action for defamation brought against him in respect of the words which he has spoken in the witness box (see *Darker (as personal representative of Docker,*

deceased) v *Chief Constable of the West Midlands* [2001] 1 AC 435, [2000] 4 All ER 193).

However, consideration of the impact of the immunity on evidence given by experts is, however, a relatively recent development. Such witnesses are most unlikely to find themselves subject to an action in defamation – the more probable concern being a claim in professional negligence brought by the party that retained them.

That the immunity does extend to expert witnesses is not in doubt (see Lord Hoffman in *Arthur J S Hall & Co (a firm) v Simons*; *Barratt v Ansell (trading as Woolf Seddon (a firm))*; *Harris v Schofield Roberts & Hill (a firm)* [2002] 1 AC 615, [2000] 3 All ER 673). In *Stanton v Callaghan* [2000] QB 75, [1998] 4 All ER 961 this was said to be the consequence of a general public policy that witnesses should not be inhibited from giving frank and fearless evidence (see Nourse LJ). Nevertheless, while counsel for the GMC conceded that Professor Meadow would be immune from suit in civil proceedings, what was novel, and in dispute, was whether the immunity extended to disciplinary proceedings by professional regulatory bodies.

Meadow: court's reasoning

The reasoning of Collins J can be summarised thus:

- The immunity from suit is based on public policy which requires that witnesses should not be deterred from giving evidence by the fear of litigation at the suit of those who may feel that the evidence has damaged them unjustifiably.

- The possibility of disciplinary proceedings based on a complaint by someone affected by the evidence has a serious deterrent effect.
- Public policy therefore requires that the immunity has to cover a complaint made by a party or any other person who may have been upset by the evidence given.
- Furthermore, the immunity would apply even if the complaint alleged bad faith or dishonesty. Although the immunity is there to protect the honest witness, to be effective the immunity must be absolute.

At first blush that logic seems sound. Indeed, the court heard compelling evidence of the increasing reluctance of medical practitioners to act as experts in child protection cases because of the considerable adverse publicity surrounding cases such as that of Professor Meadow. However, if the immunity is to have the impact intended it ought to be all embracing, but it is not. Indeed, there are significant limitations.

Limitations on immunity

The immunity from suit relates only to actions arising out of the witness's evidence itself. This concept has been interpreted quite broadly. For example, the immunity does extend to statements made preparatory to giving evidence such as the preparation of a proof. Notably in *Stanton v Callaghan* it extended to conclusions reached at a without prejudice meeting of experts. However, there appears to be no basis on which the immunity would encompass observations made by an expert acting in an advisory capacity, before he could properly be regarded as a witness. Thus an expert who wrongly advised his client in relation to the decision to commence and the preparation of proceedings would not fall within the scope of the immunity.

Another limit to the immunity was highlighted in *Darker v Chief Constable of the West Midlands*. Here a distinction was drawn between allegations relating to the content of evidence and those relating to acts such as the creation of evidence, the immunity covering the former, but not the latter. Given this distinction it is at least arguable that experts who are retained to carry out and report on tests would benefit from the immunity if they incorrectly reported or interpreted the results of the tests but not if the results were incorrect because the expert had performed the tests incompetently. This seems to be a subtle and somewhat arbitrary distinction.

Professional regulatory bodies

The extent to which the immunity might apply to differing procedures adopted by professional regulatory bodies is also unclear. For example, many professional bodies have regulatory processes which are not truly analogous to court proceedings. A typical example is the way in which some regulators deal with practitioners whose performance may be impaired by health problems. Often the procedure is primarily rehabilitative rather than adversarial. It would seem somewhat exceptional if an expert was immune to referral to his regulatory body if the evidence he gave in court suggested that he may have mental health problems.

If an expert is to be truly protected in the way the judgment suggests that they ought then it is difficult to reconcile the policy approach adopted by Collins J with the decision in *Phillips v Symes; Symes v Phillips* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519. In *Phillips v Symes* it was held that for the purposes of costs an expert could be made party to the proceedings in which he had given evidence. An expert would be held liable for costs incurred by those who suffered as a result of evidence given

recklessly in flagrant disregard of the expert's duties to the court. In particular, Peter Smith J stated that he did not accept that experts would, by reason of exposure to adverse costs awards, be inhibited from fulfilling their duties.

What is perhaps most significant is that Collins J did note that on a number of prior occasions referrals to professional bodies have been made by a judge before whom an expert had given evidence (see *Hussein v William Hill Group* [2004] EWHC 208 (QB), [2004] All ER (D) 296 (Feb) and *Pearce v Ove Arup Partnership Ltd (No 2)* [2001] All ER (D) 32 (Nov). Collins J concluded that the discretion of the judge to make such a referral should be retained.

Judicial referrals

In relation to such judicial referrals, Collins J conceded that where serious defects in the expert's evidence only came to light after a court hearing, it may be possible to go back to the judge to ask him to consider a referral. One can only wonder how such an application might operate. For example what test is to be applied? Must the judge be satisfied that the expert is in fact guilty of the relevant misconduct or merely that it is arguable, and if so to what standard? It seems entirely plausible that such an application could involve an extensive hearing covering both factual and expert evidence.

For example, if it were alleged that an expert's report had failed to disclose material findings it would firstly be necessary for the court to determine whether or not, as a matter of fact, there had been such a failure. Consideration of expert evidence would then be necessary to assess how serious the failing was. Following such a hearing the

question of costs would also have to be determined. In this regard it is noted that whilst most professionals have the benefit of an indemnity in relation to civil proceedings for professional negligence, similar arrangements in relation to the costs of disciplinary matters are far less common. Such an application may become the very thing that the immunity is intended to prevent.

It is clear that, even with the immunity set out in the *Meadow* case, experts are far from protected from the risk of significant sanction for matters arising out of their involvement in litigation. The public policy justification set out in *Meadow* seems significantly diluted. The answer is perhaps to be found in Lord Hoffman's analysis of the immunity in *Hall v Simons*:

[The immunity enjoyed by an expert] seems to me to fall squarely within the traditional witness immunity. The alleged cause of action was a statement of the evidence which the witness proposed to give to the court. A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth. There seems to me no analogy with the position of a lawyer who owes a duty of care to his client.

If the immunity is explained by reference to duty of care (or lack thereof) then there ought be no basis to extend it to disciplinary proceedings pursued by regulatory bodies. Concepts of duty of care have little bearing on such proceedings. What matters is whether or not, in the light of the conduct alleged, the professional is fit to practice.

On 1 March 2006, the GMC announced their intention to seek permission to appeal the *Meadow* decision in so far as it extends the immunity from suit to disciplinary proceedings. For the reasons set out in this article, such an appeal may well succeed. Indeed the very fact that courts have themselves made referrals in the past seems to be the strongest evidence suggesting that the immunity does not apply. Such referrals do not amount to the court attempting to regulate the immunity as the *Meadow* decision would seem to imply. Either a witness is immune or is not. The court cannot have the jurisdiction to arbitrarily disapply the immunity at its discretion. If it did then it would be in its gift to give leave to pursue defamation proceedings against a lay witness and that cannot be right. We can only await with interest to see what the Court of Appeal has to say about this interesting decision.