Some relief for expert witnesses

H Marcovitch

Appeal of Professor Sir Roy Meadow against the GMC finding him guilty of professional misconduct

On 26 October 2006, the Court of Appeal for England and Wales handed down its judgement on the General Medical Council's appeal from the decision of Mr Justice Collins, who, in the High Court of Justice in London in February 2006, had allowed the appeal of Professor Sir Roy Meadow against the finding of the General Medical Council (GMC) that he had been guilty of serious professional misconduct (SPM). Mr Justice Collins had quashed the finding and the direction to erase Sir Roy's name from the medical register.¹

By a majority of 2 to 1 (Sir Anthony Clarke dissenting), the appeal court found that Professor Meadow had not been guilty of serious professional misconduct and, that even had that been the case, the Court "could not contemplate erasure as an appropriate penalty for [his] uncharacteristic honest errors in this difficult case;" Lord Justice Thorpe, commenting on the GMC sanction, added: "If it had been necessary to mark his conduct with a finding of SPM, I would have considered that, after his long and distinguished service to the profession and the public and given his age, that finding would have been enough."²

A GMC Fitness to Practice Panel (FPP) had come to its decision in July 2005, following an inquiry which was limited to charges regarding alleged failure in erroneously applying statistical data when giving evidence as an expert witness.³ This was in respect of a murder trial wherein Professor Meadow quoted the chance of two siblings in a low-risk family dying from sudden infant death syndrome as 1 in 73 million, a statistic he took from a draft copy of a report by the Confidential Enquiry into Sudden Death in Infancy, 1999. It was alleged that he should have amplified the words "by chance alone", as the chances of two deaths in one family were unlikely to be independent risks.

The FPP concluded that his evidence was in this respect "erroneous and misleading", and that because his reputation was "renowned throughout the world" his "eminence and authority carried with it a unique responsibility to take meticulous care in a case of this grave nature". It added that it found "no evidence of

calculated or wilful failure to use [his] best endeavours to provide evidence but went beyond the limits of his professional competence by straying into the area of statistics without revealing [his] admitted limited understanding of the subject...".

In deciding to go beyond a reprimand, imposing conditions on his practice or suspending him for up to 1 year (sanctions available to the FPP), but to erase his name from the register, the panel emphasised its concern that his actions undermined public confidence in the pivotal role doctors can have in the criminal justice system.

In his judgement on Professor Meadow's appeal in February 2006, Collins J stated that the FPP had acted too harshly in concluding that Professor Meadow failed to meet his responsibility to use statistics "in accordance with good statistical principles and practice in relation to matters within [his] expertise." His opinion was rather that Professor Meadow had "honestly and, as he believed, correctly relied on his understanding of the situation. He had not concealed their source and he was aware the defence had access to experts. He expected his evidence to be challenged and the adversarial process to establish any errors. He never put himself forward as an expert in statistics."

The judge also commented on the sanction of erasure. He said it had been unnecessary since Sir Roy had retired and had been imposed in the teeth of the many testimonials and his undoubted major contribution to paediatrics. He regarded the FPP's comment about undermining public confidence as unjustified "if the full facts are taken into account and the media campaign based on a lack of knowledge of all the circumstances is ignored." Devastatingly he ended by stating that the determination that his "conduct was fundamentally incompatible with what is expected by the public from a registered medical practitioner approaches the irrational."

In the latest judgement, Thorpe LJ stated that he adopted as "a succinct and apt summary" of his view on the FPP's finding of SPM, a statement by Sir Louis Blom-Cooper QC: "The FPP's adjudication that, in giving an incorrect piece of statistical

evidence about the repetition of the deaths of infants by their carers, Sir Roy was guilty of SPM—and hence struck off the register of medical practitioners—was not just a disproportionate finding and/or penalty. It was fundamentally flawed, since it perceived Sir Roy's error as part of the professional service; whereas his mistake or misjudgement had properly to be viewed in the context of the criminal trial in October 2000 for ... murder... ([The accused] was ultimately acquitted by the Court of Appeal (Criminal Division) second time around in January 2003 on a ground totally unconnected with Sir Roy's evidence on statistical probabilities.)"⁴

In dismissing the GMC's appeal with regard to the finding of SPM, the Court of Appeal allowed it with regard to the right of the GMC to police medical expert witnesses. Collins J had offered the following perspective on how we should view the public interest, "There can be no doubt that the decision [of the FPP] 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."

Immunity from suits arising from evidence given in court or in a statement prepared for a court has long been the right of witnesses to fact. In allowing Professor Meadow's appeal, Collins J went further, removing (albeit, now temporarily) the right of all regulatory bodies—medical and non-medical—to discipline those whom it supervises because of what they might have said when giving evidence in a court of law. Had the judgement not been overturned in October 2006, the only exception would have been when the trial judge himself considered the expert witness's conduct had fallen so far below what was expected that he might need to be removed from practice or made subject to conditions regulating his practice, such as a prohibition on his acting as an expert witness. The Appeal Court disagreed and has reversed this—so that expert witnesses remain answerable to their registration body.

This was a potential major change in the way expert witnesses are perceived, to such an extent that the Attorney General (the UK government's senior law minister) intervened. In allowing that part of the GMC's appeal, Sir Michael Clarke, Master of the Rolls (England's third most senior judge) concurred with the Attorney General's submission that: "in general the threat of fitness to practice proceedings is in the public interest because it helps to deter those who might be tempted to give partisan evidence and not to discharge their obligation to assist the court by giving conscientious and objective evidence. It helps preserve the integrity of the trial process and public confidence in the trial process

and in the standards of the professions from which the expert witnesses come."

The Appeal Court's judgement covers 70 pages and its ramifications are yet to be assessed. But its judgement is of enormous importance for any paediatrician who proposes to give expert evidence. They would do well to familiarise themselves with what is expected of them, by reading paragraphs 21–67 of the Appeal Court judgement and familiarising themselves with Part 35 of the Civil Procedure Rules.⁵ They will not find it so easy to get to grips with the evolving Criminal Procedure Rules, however. The website of the Department of Constitutional Affairs currently (October 2006) states, under the rubric of expert evidence in criminal trials, the simple comment: "There are currently no rules in this Part." Box 1 details, however, what the courts normally expect of expert witnesses.

The judgement may not be enough to persuade new entrants to the specialty that they should follow a career in child protection, at least so long as pressure group campaigns and media naivety continue to demonise them. They may feel more confident, having read the recommendations from the RCPCH, detailed in the executive summary of its investigation into complaints against paediatricians involved in child protection.⁶ Interim training courses are recommended to "fast-track" child protection training for career grade doctors while the College's substantive training courses are being developed. Such training should include helping doctors understand the boundaries and limitations of other professionals and to communicate more effectively with families as well as undertaking modules and role-plays in relation to court appearances. So far as trainees are concerned, the dilemma remains of fitting in the new packages into the reduced working hours available. The report also advises the

Box 1 What the courts normally expect of expert witnesses

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

College to provide accurate information to members in relation to legal rulings on court findings and to exploit opportunities to inform the media on child protection work and the role of paediatricians.

They might also take heart from the comment of Clarke MR in his judgement (paragraph 66) on the issue of expert witnesses: "It does seem to me that it should be possible to devise a scheme which reduces to an absolute minimum the risk of expert witnesses being vexed by unmeritorious complaints to regulatory bodies like the GMC."

ACKNOWLEDGEMENTS

I am grateful to Bertie Leigh of Hempsons Solicitors for checking my first draft for legal howlers.

Arch Dis Child 2007;**92**:102–103.
doi: 10.1136/adc.2006.097600

Correspondence to: H Marcovitch, Honeysuckle House, Balscote, Banbury OX15 6JW, UK; h.marcovitch@btinternet.com

Competing interests: HM is an associate of the GMC, and sits on and chairs Fitness to Practice Panels. The views expressed in this article are his own and do not represent the views of the GMC.

REFERENCES

- 1 <http://www.bailii.org/ew/cases/EWHC/Admin/2006/146.html> (accessed 26 February 2006).
- 2 <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1390.html> (accessed 29 October 2006).
- 3 http://www.gmc-uk.org/concerns/decisions/search_database/ftp_panel_meadow_20050715.asp (accessed 26 February 2006).
- 4 Blom-Cooper L. Disciplining expert witnesses by regulatory bodies. *Public Law* 2006:3–5.
- 5 http://www.dca.gov.uk/civil/procrules_fin/contents/part/part35.htm (accessed 1 March 2006).
- 6 Royal College of Paediatrics & Child Health. An investigation into the nature and impact of complaints made against paediatricians involved in child protection proceedings. Executive Summary September 2006. London RCPCH.