SOLICITORS JOURNAL

Legal developments

30 June 2006

Rupert Butler looks at the impact of the *Professor Sir Roy Meadow* decision, the Attorney General's 'Disclosure: Expert's Evidence and Unused Material – Guidance Booklet for Experts', *Thomas Bowman*, shopping for experts and bias

Professor Sir Roy Meadow's highly publicised role in the conviction of Sally Clark, for murdering her infant sons, which was subsequently quashed on appeal, has already been the subject of much debate. So the unusual decision in February, by Mr Justice Collins sitting in the Administrative Court, to declare that the General Medical Council (GMC) was wrong to find Professor Sir Roy Meadow guilty of serious professional misconduct, also deserves attention.

Meadow appeal

At Clark's trial, Meadow gave evidence for the Crown that the chance of sudden infant death syndrome affecting two children of the same family was one in 73 million. As this statistic was flawed his evidence was rejected on appeal, and the GMC struck him from the register following a complaint by Clark's father about his fitness to practice.

Meadow sought a judicial review of the GMC's decision and Collins J found in his favour on two grounds:

1. the making of an honest mistake on statistics did not justify a finding of serious professional misconduct; and

2. because an expert enjoys immunity from suit for evidence given in court, the GMC could not base a disciplinary charge on what Meadow said at Clark's trial.

The GMC is, unsurprisingly, appealing this decision.

The first ground of the judgment, which effectively usurps the GMC's function by the judge imposing his own view as to the definition of serious professional misconduct, seems hard to bear given the catastrophic impact of Meadow's "honest mistake". Even harder is the decision to prevent a professional regulatory body from taking any disciplinary action against its member for giving flawed evidence in court. Ironically, both grounds risk undermining public confidence in the medical profession, at a time when the GMC was working hard to nurture public confidence by removing Meadow.

Collins J was concerned that if an expert witness feared that disciplinary proceedings might follow whenever he expressed his opinion in court, it might affect the quality of his expert evidence to the detriment of the court's decision-making. The judge's rationale for following this immunity from suit through to disciplinary proceedings (a ground that was not raised by the parties prior to the hearing) follows the public policy argument, as Lord Hoffmann put it in an earlier case, that witnesses, including experts, when giving evidence should be allowed to "speak freely without fear of being sued, whether successfully or not". However, as the effect is to put expert witnesses beyond the reach of their professional bodies, this not only gives

undue priority to the local administration of justice, but will also erode professional standards generally in an age when some professionals have dedicated their professional standing to becoming career expert witnesses. Such a tilted balance is almost certainly intolerable to the public and it will be interesting to see what happens on appeal.

Collins J did acknowledge that there was an exception to the general immunity of experts from suit. However, this exception may, ultimately, torpedo his own reasoning. If a court is dissatisfied with an expert's performance, it may refer him to his professional body on the grounds that his evidence (or conduct) fell below the professional standards reasonably to be expected of him. If this is the only route to registering an effective grievance against an expert witness, and as his professional conduct must be an objective issue that exists independent of any party's interest in the case, there is a serious risk that the parties to the proceedings may seize on this to threaten each other tactically with an application to the trial judge to make such a reference. The stakes will be high because, if the application is pursued, there is no appeal from the judge's grant or refusal to make the reference, however arbitrary or mistaken, and so the arguments for and against will be rehearsed and pursued vigorously. This will have precisely the chilling effect on the expert's evidence that Collins J was trying to avoid. As proper notice of such an application would need to be given to all concerned, not only will this lay siege to the expert's evidence before he crystallises his opinion in the witness box, but it will lead to a satellite case, after the trial, in which the expert will need to be separately represented to resist the application to refer him, as he will be in conflict with his instructing party. Such applications would be like wasted costs hearings and, with separate representation, especially if professional indemnity insurers become involved, the costs burden on all sides will be vastly increased.

At that moment the judge will have to switch from presiding over, say, a criminal trial, in order to preside over pseudo-disciplinary proceedings to determine whether the threshold has been crossed that there is a prima facie case of professional misconduct to be answered. In such instances, it is going to be safer for a judge to abdicate the responsibility to the professional body by declaring the threshold criteria as being met and making the reference because, as things stand, if he does not make the reference, the professional body can do nothing. The reference keeps all options open. There could be an explosion of references. Apart from the fact that judges are not equipped to perform this exercise and the courts should not become cluttered up hearing 'dress rehearsals' of disciplinary hearings, it is neither fair nor desirable to burden experts with such threats, which, as against the parties, become tools of oppression in the wrong hands.

While the professional body is entitled to take no notice of the judge's reference, it will be bound to investigate the complaint, and, if such references become routine, this could stretch to breaking the resources of the investigative department of the professional body and increase delay, which will further dent public confidence.

Also, while disciplinary tribunals, such as the GMC, are highly competent and well-advised, there is an inevitable risk of subconscious bias against the expert if the threshold criteria have already been met

in the forum from which the complaint emanates. The Court of Appeal is always keen to point out that the trial judge is the person best placed to judge the witnesses before him and so the same principle is likely to apply to disciplinary proceedings.

But what if the expert defends himself? Judges who complain about barristers can and sometimes do, become witnesses at the Bar Council's disciplinary tribunals. Is it in the public interest for a judge and an expert to go head to head in the witness box during professional disciplinary proceedings? Amusing as the prospect seems, I suspect public policy insists this will not take place.

Shaken Baby Syndrome Review

On 14 February 2006, the Attorney General, announcing the outcome of his review of Shaken Baby Syndrome cases, published three papers, including a booklet entitled 'Disclosure: Expert's Evidence and Unused Material- Guidance Booklet for Experts'. The instructions contained in this booklet are "designed to provide a practical guide to disclosure for expert witnesses instructed by the prosecution team". The booklet sets out three key obligations arising for an expert as an investigation progresses. The relevant steps are described as to retain, to record and to reveal. It sounds obvious but, apparently, has caused some difficulties.

Court of Appeal guidance for experts

In *R v Thomas Bowman* [2006] EWCA Crim 417, Lord Justice Gage commented that he felt the Attorney General's guidance on good practice should apply to experts for the defence too and used his judgment to encourage a new culture that will increase the quality and probity of expert evidence in criminal cases. As a result of shortcomings in the contents of the reports on that appeal, the court has reiterated its advice to experts contained in *R v Harris (Lorraine)* [2005] EWCA Crim 1980, with some added guidance, summarised below, on the specific factors to be included in an expert report, which will now resemble a report in a civil case:

(a) Details of the expert's academic record and professional qualifications, range of experience and any limitations on expertise.

(b) The substance of the instructions received, questions upon which an opinion was sought, the materials provided and considered and the information or assumptions that were material to the opinions expressed.

(c) Information about who carried out measurements and tests, the methodology, and whether they were supervised by the expert.

(d) Where there was a range of opinion in the matters dealt with in the report, a summary of the range of opinion and the reasons for the opinion given. In that connection, any material facts or matters that detracted from the expert's opinion and any points that should fairly be made against any opinions expressed should be set out.

(e) Relevant extracts of literature or other material that might assist the court.

(f) A statement that the expert had complied with his duty to the court to provide independent assistance by way of objective unbiased opinion, and an acknowledgement that the expert would inform all parties and, where appropriate,

the court, if his opinion changed on any material issue.

(g) The same guidelines should be followed in any supplemental report.

Regular readers will recall the debate in this feature over the amount of "relevant extracts of literature and other material that might assist the court" that should be included. There is an obvious tension between the expert presenting his own opinions and the reliance he needs to demonstrate on the source materials from which he derives his expertise. I have previously suggested that reports whose reading list and appendices start weighing more than the report itself should be avoided if at all possible.

Shopping for experts

In *Nyiry v Intercontinental Hotels* [2006] (Unreported), HHJ Griggs found that where a claimant seeking personal injury damages had made available the first report of a medical expert instructed by her independently, but had not sought to rely upon the expert in any way, she was not obliged to disclose the expert's second report and the court had no power to order disclosure of that privileged opinion that had been prepared for litigation. Finding that this case did not amount to an example of a party shopping around for a sympathetic expert to opine in her favour, the judge held that a party was entitled to instruct any number of experts to compile reports without permission from the court. However, she was not bound to use or to reveal these further opinions if she did not wish to do so. This case serves as a restatement to practitioners that, contrary to popular myth, the Woolf reforms did not prevent parties from seeking out and using their own expert evidence, but only limited the use that could be made of them in court.

Bias

To finish off, an oddity cropped up in the Court of Appeal from an immigration adjudication in *Detamu v Secretary of State for the Home Department* [2006] EWCA 604, where an immigration adjudicator took against an expert to such an extent that he described him as biased in favour of the asylum-seeker and rejected his entire evidence and the application. However, the Court of Appeal, whose members were clearly mystified, found that the expert was not only a leading authority on his subject, was completely impartial and had pointed out serious inconsistencies in the applicant's evidence, which leads to the bizarre result of… appeal allowed!

Rupert Butler is a barrister practicing from the 3 Hare Court, Temple

rbutler@3hare court.com

This article was first published in the Solicitors Journal 30 June 2006