Your Witness

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A meagre meal from the Master of the Rolls who is busy eating his own cake

This issue is turned over to the Court of Appeal judgment in *GMC -v- Meadow* and the long-awaited report of the Chief Medical Officer (CMO) – *Bearing Good Witness* – into the problems with expert witnesses in public law family cases (child care proceedings and the like).

In short, just as the CMO publishes proposals designed to attract more doctors into expert witness work, the Court of Appeal hands down a judgment re-establishing perhaps the main reason why many doctors avoid it!

I found great merit in Mr Justice Collins's proposals. Despite the Court of Appeal's assertion that he set about to *extend* witness immunity to cover professional disciplinary hearings, I question whether he believed he was so doing. If he had believed so, how could he have concluded that, *at the time of the GMC hearing*, Meadow was protected by witness immunity? Our analysis of Collins's judgment is as follows: he was simply pointing out that witness immunity already encompassed professional disciplinary proceedings, but no one had yet taken that defence at such proceedings.

Collins's proposals meshed perfectly with the central tenets of the Better Regulation Commission's *Principles of Good Regulation*, of being proportionate, accountable, consistent, transparent and targeted. That's not something that can be said of the GMC! On a case-by-case basis, the court could determine whether an expert's performance, in the context of the litigation, had slipped so badly as to warrant referral to a professional body. It would no longer be possible for dissatisfied parties in litigation (or their fathers), often at no cost to themselves, to outflank witness immunity and vex experts through professional disciplinary proceedings. Nothing in Collins J's decision left professional regulators impotent to deal with seriously flawed experts. Collins simply stated that the court is the only gatekeeper competent to refer an expert witness to them.

I have come to regard our judiciary as a group who know a thing or two about writing a reasoned argument. This is particularly true of Lord Justices of Appeal. When I am faced with an important judgment to read, I can console myself with the knowledge that I am about to study some superbly crafted text.

I was, then, expecting a feast of sorts with this Court of Appeal judgment. And I wasn't let down by Auld LJ on the GMC's FPP reasoning. He dissected it with forensic precision, baring its flaws for all to see. Similarly for Thorpe LJ on the problems in the Family Court. But, and I almost hesitate to put this on paper, the decision by Sir Anthony Clarke, Master of the Rolls, on the issue of immunity was a much more meagre meal.

It is as if the Master of the Rolls had decided at the outset that Collins's proposal must not stand. His decision is not based on a succession of small, but undeniable, truths building into an overwhelming argument against Collins. Instead, he appears to labour peripheral points, such as whether immunity should be absolute when that isn't what had been suggested. He also does some fine-line walking as he resorts to using the Attorney General's submissions to justify overruling Collins. What, for example, do you make of the following?

The Attorney General submitted that it was inappropriate for a fresh immunity to be created by the common law. Any such change, he stated, was a matter of policy which should be made by Parliament. The common law should not permit a partial extension of the immunity. The Master of the Rolls said in his judgment 'I would accept those submissions...'

But the Master of the Rolls saw the implicit contradictions contained therein. Witness immunity *is* a common law immunity which *has* been refined by the common law over the years. So he was forced to follow his acceptance of the Attorney General's submissions, without even having the time to insert a full stop, with '... I do not intend to say that the common law could never extend a recognised common law immunity, if principle required an extension. After all, the common law is always capable of development to meet new challenges.' Now isn't that a case of having one's cake and eating it?

The Court of Appeal, noting that immunity exists to enable witnesses to speak freely, argued that the case-by-case approach was *inappropriate* as the witness would not know before he gave evidence whether immunity would apply.

We do not accept that experts require an absolute immunity. The Collins approach would mean experts knew at the outset that, providing they give their opinion evidence *competently and in good faith*, they could not be vexed through fitness to practise proceedings. Expert witnesses need no greater degree of protection than that. Indeed, experts readily accept that it is vital that any expert whose performance as a witness is very poor should be referred to the relevant professional regulatory body **by the court**.

But then again, I'm just a publisher. What do I know?

Chris Pamplin

Inside

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No shield from FTP proceedings

Court of Appeal overturns Collins J

On 26 October 2006 the Court of Appeal delivered its verdict in the General Medical Council's (GMC) appeal of Collins J's decision in *GMC -v- Meadow*.[1] As reported in *Your Witness* 43, Mr Justice Collins ruled that what an expert witness says in court is immune from disciplinary proceedings by an expert's regulatory body *without leave of the court*. He added that experts would not be allowed to lie under oath or give 'ludicrous' evidence, but that professional bodies should not 'punish' experts over evidence *given in good faith*. (We will return to the word *punish* later.)

In ruling that Professor Meadow should not have been struck off, Collins J also overturned the GMC's decision to find him guilty of serious professional misconduct. He said Professor Meadow had misunderstood and misinterpreted the statistics, but that this was 'a mistake... that was easily and widely made'. While it was proper to have criticised him for not disclosing his lack of expertise, Collins J ruled that this did not justify a finding of serious professional misconduct.

Broad support for Collins from experts

Following that decision, there was an almost audible sigh of relief from the expert witness community. Fears had been expressed that the GMC's decision in the Meadow's case represented a serious erosion of an expert's immunity from suit and created the real prospect of experts being made vulnerable to vexatious complaints by disgruntled parties. The view of the majority of experts who contacted the *UK Register of Expert Witnesses* was that immunity should be retained and that it should extend to disciplinary proceedings by regulatory bodies, save at the sole discretion of the trial judge. It was widely held that to do otherwise would inevitably discourage specialists from giving expert evidence and could act to prevent such evidence from being given freely and without fear.

GMC goes to the Court of Appeal

This was not the view of others. A solicitor acting for the family of Sally Clark said that the decision of Collins J had 'neutered' the professional bodies, and Angela Cannings is reported to have been 'disappointed and disheartened' by the ruling. The GMC, too, was far from pleased at what it regarded as an impediment to its freedom to act to protect the public when a doctor has fallen significantly below acceptable standards.

Immunity should only be extended by legislation

So the GMC appealed the decision. The appeal fell into two distinct heads. The first dealt with the important question of principle, namely whether an expert witness should be entitled to immunity from disciplinary, regulatory or fitness to practise proceedings ('FTP proceedings') in relation to statements made or evidence given by him in or for the purpose of legal proceedings. The second dealt with the judge's decision that Professor Meadow was not guilty of serious professional misconduct. The Attorney General, Lord Goldsmith, intervened to support the GMC on the first head of the appeal, but not the second.

Court of Appeal decision

The appeal was heard by the Master of the Rolls, Sir Anthony Clarke, and Lord Justices Auld and Thorpe. The Court of Appeal overturned Mr Justice Collins's ruling in relation to the first head of the appeal (concerning immunity for expert witnesses in FTP proceedings) but dismissed the GMC challenge to the High Court finding that Sir Roy was not guilty of serious professional misconduct. The GMC did not seek to reinstate the striking off of Sir Roy, 73, who has retired from the profession.

The decision of the Court will dismay many experts and will do nothing to address the increasing reluctance of specialists to submit themselves to expert witness work.

Court of Appeal on immunity

The reasoning of the Court of Appeal appears to be as follows. It was accepted that, at common law, a witness, whether he is giving evidence of fact or opinion, has immunity from civil suit in respect of evidence given in court. It was also common ground that the immunity extends to any statement the witness makes for the purpose of giving evidence. Where such immunity exists, the witness has immunity even in a case where he gave his evidence dishonestly or in bad faith. However, this was not, as recognised by Collins J, a 'blanket immunity', and it was still necessary to balance the countervailing public interests. Collins J had considered that, having carried out this balancing exercise, it was right that, in some circumstances, an expert witness should be immune from FTP proceedings.

Experts are not analogous to lawyers

Collins J had reasoned that lawyers owe duties to the court and may be subjected to disciplinary action in respect of their conduct in litigation. He took the view, however, that the position of witnesses (including experts) was fundamentally different, particularly when they become involved in litigation simply because, as a doctor, they treated a particular child and abuse is suspected. He said that, in his judgment, the immunity has to cover proceedings based on a complaint (whether or not it alleges bad faith or dishonesty) made by a party or any other person who may have been upset by the evidence given. Public policy, he said, requires at least that. The balancing exercise that would prevent the creation of a blanket immunity was to be found within the discretion of the judge.

Judge as gatekeeper – case-by-case

Citing the case of *Pearce -v- Ove Arup*[2] (see *Your Witness* 32), Collins J repeated Jacobs J's finding,

that he could 'see no reason why a judge who has formed an opinion that an expert had seriously broken his Part 35 duty should not, in an appropriate case, refer the matter to the expert's professional body if he or she has one. Whether there is a breach of the expert's professional rules and if so what sanction is appropriate would be a matter for the body concerned'. Collins J took the view that this provided an adequate safeguard where the expert's conduct had fallen so far below what is expected of him as to merit some disciplinary action; in all other respects, the expert's immunity should be, in effect, absolute. He considered that experts should have the right to make representations before such a referral was made, and that 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 regulating his practice such as a prohibition on acting as an expert witness'. Collins J added that, normally, evidence given honestly and in good faith would not merit a referral. Accordingly, he took the view that the precise extent of the immunity could only be established on a 'case-by-case' basis. Indeed, in every instance it was for the judge to decide whether a referral should be made.

Rationale for immunity

The Court of Appeal accepted the Attorney General's submission that the underlying rationale for immunity from civil suit is ordinarily expressed as promoting two objectives, namely:

- to ensure that witnesses give evidence freely and fearlessly in an atmosphere free from threats of suit from disappointed clients, and
- to avoid multiplicity of actions in which the value or truth of their evidence would be tried over again.

It was accepted that the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled or impecunious persons, against whom they gave evidence, might subsequently involve them in costly litigation. The Court of Appeal also accepted the views of Otton LJ in *Stanton -v- Callaghan*[3] when he said that immunity:

> *'... is not granted primarily for the benefit of the individuals who seek it. They themselves are beneficiaries of the overarching public interest, which can be expressed as the need to ensure that the administration of justice is not impeded. This is the consideration which should be paramount.'*

However, in considering whether Collins J had been right to rule that immunity also applied to FTP proceedings, which were not civil proceedings within the meaning of existing common law, the Court of Appeal expressed grave doubts.

Court's reluctance to 'extend' immunity

The Master of the Rolls, pointing to the marked reluctance of the courts to 'extend' the immunity, quoted from three previous judgments. He said that 'the general rule is that the extension of absolute privilege is viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated' (*Mann -v- O'Neill*[4]) and that 'the immunity is only conferred grudgingly because the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy' (*Darker -v- Chief Constable of West Midlands*[5]). Accordingly, the protection of immunity should not be given any wider application than is absolutely necessary in the interests of the administration of justice (*Rees -v- Sinclair*[6]).

Specifically in relation to expert witnesses, there were additional considerations. The Court of Appeal referred to the duties of experts. It pointed out that experts will know that they must give evidence honestly and in good faith and must not deliberately mislead the court. Consequently, an expert would not expect to receive protection if he is dishonest or malicious or deliberately misleading.

Considering Collins J's view that the application of immunity should be decided on a case-by-case basis, the Court of Appeal said that the purpose of the immunity is to enable people to speak freely without fear of being sued. If this object is to be achieved, the person must know at the time he speaks whether or not immunity will attach. The Court thought it inappropriate that this decision should be taken after the event.

Purpose is not to 'punish'

Going on to consider the nature and purpose of the regulatory bodies themselves, the Court of Appeal said that these bodies exist to regulate the profession concerned for the benefit of the public. It has been held that the essential purpose of FTP proceedings is to protect the public and not to punish the practitioner.[7] The Master of the Rolls called this a 'crucial distinction'. He said that such proceedings were designed to protect the public for the future and not to determine the rights and obligations of the parties in the same way as in a civil action. This, he said, introduces a further public interest which is not present in an ordinary civil suit.

The Court accepted the Attorney General's submission that, in general, the threat of FTP 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, said the Court, to preserve the integrity of the trial process and public confidence in both the trial process and the standards of the professions from which expert witnesses come.

Continued on page 4

Judicial referrals case by case seen to defeat the aim of immunity

FTP proceedings are not about punishment

Continued from page 3

Ironic that Court tells GMC to sort out the problem

No basis for asking judges to refer...

The Court further agreed with the Attorney General that there is no principled basis upon which trial judges should be charged with the responsibility for deciding whose conduct should be referred to an FTP panel and whose conduct should not. The court commented that 'the judge presiding over a criminal trial has many duties, some of which are very onerous. So too does a trial judge in a civil action of any complexity. Although trial judges have been free in the past (and will no doubt be free in the future) to refer the conduct of an expert to his professional body, it has never been part of a trial judge's duty to consider whether or not to do so'. In the view of the Court of Appeal, to impose such a duty on all trial judges in both civil and criminal cases would be inappropriate.

... it must be left to the professions

In allowing the GMC's appeal under the first head, Sir Anthony said 'it seems to me that the solution to particular problems in particular professions must be reached by discussion and, if appropriate, rule change, not by what to my mind would be an unprincipled extension of the common law immunity from civil suit.'

Was Collins seeking to 'extend' immunity?

The majority of experts will be disappointed with the verdict. It rejects Collins J's proposals on the ground that they extended immunity too far. But did Collins J's judgment really seek to 'extend' immunity? In para 21 of the judgment he said that in being asked to apply a principle based on public policy to grant an immunity *which has not hitherto been explicitly recognised*, he was entitled to consider whether public policy requires that an absolute immunity should be granted. There is a critical distinction between defining the boundaries of an existing privilege based on considerations of public policy and seeking to extend it to an area it was not designed to cover.

It is difficult to see how what an expert says or does in court can be construed as a potential risk to the public so as to warrant consideration of his fitness to practise. If he lies or breaches his duty to the court, there are existing sanctions, including charges of perjury or contempt. In rare cases where an expert's conduct has been so poor as to fall below acceptable standards of professional competence, it is always open to the judge to refer the expert to a professional regulatory body. The distinction made by Collins J was that, if experts are to speak freely and without fear, their words and actions should be privileged under the existing common law in all cases where they have acted *honestly and in good faith*. He was not suggesting that protection should be given to experts who act maliciously, incompetently or in breach of their primary duty to the court. Far from it, he was at pains to establish a balancing mechanism that would act to deter such behaviour. However, he did feel that immunity covered those who had made a simple mistake.

Politics and the Court of Appeal

It appears to us that in focusing on the rationale, public policy considerations and the need to 'protect the public' from rogue, partisan or biased experts, the Court of Appeal has missed the point – or, at least, chosen to interpret the public policy issues in such a way as to shift the problem back to the policy makers.

The Court of Appeal did recognise that something needed to be done to protect experts from unprincipled or vexatious complaints and to address the discouraging effect this might have on the supply of experts. When the Attorney General was questioned about what legislative changes he had in mind to deal with the expert supply problems, immunity having been ruled out, it appears that he had no answers. Thorpe LJ was moved to comment in para 246 of the Court of Appeal judgment that:

> *'Having submitted that Collins J's extension of witness immunity was either unlawful or impermissible the Attorney General submitted that the real issue became what should be the control mechanism to protect expert witnesses from unfounded or malicious complaints. He had no positive suggestions as to what the control mechanism might be. Whilst plainly there can be no progress pending the publication of the CMO's report, it is hardly encouraging that the Attorney General was not in a position to give any indication of the Government's contribution to the development of the mechanism. Past experience demonstrates that inter-professional collaboration alone has not sufficient power to achieve an effective solution. Commitment and action by the relevant departments of government seem essential. It is equally clear that the creation of the mechanism is long overdue. This is now urgent business.'*

The solution to the problem, then, lies with the legislature and the regulatory bodies which need to make appropriate changes to their rules.

The irony of it all

In the interim it is, perhaps, ironic that the Court of Appeal has strongly reinforced the view that complaints against medical *expert witnesses*, even a complaint that the doctor gave an opinion on something other than medical matters, should be handled by the GMC, the very body which two courts have now found to have wrongly dealt with Professor Meadow!

The losers will be those who turn to the courts to help them settle disputes or who are charged with a crime. As already recognised by the Chief Medical Officer, it is becoming increasingly difficult to locate competent experts willing to put at risk a primary career for what is, essentially, an extra-curricular activity.

Case references

[1]*GMC -v- Meadow* [2006] *EWCA Civ* 1390.

[2]*Gareth Pearce -v- Ove Arup Partnership Ltd & Anors* [2001] *EWHC* 2 Nov.

[3]*Stanton -v- Callaghan* [1998] 4 *AER* 961.

[4]*Mann -v- O'Neill* [1997] 71 *ALJR* 903.

[5]*Darker -v- Chief Constable of West Midlands* [2001] *1 AC* 435 at 464B.

[6]*Rees -v- Sinclair* [1974] *1 NZLR* 180.

Opinion by committee?

Far-reaching proposals have been announced that would, if implemented, radically overhaul procedures for expert evidence in child care cases in the Family Court. Although a report was expected, the recommendations it contains have taken many by surprise.

Origins of the report

It may almost have escaped your memory that in 2004 Harriet Harman told the House of Commons that there was to be an examination into the cases of 258 women who had been convicted of murdering their babies over the previous decade. This was in direct response to the public outrage following the successful appeals of Clark and Cannings in 2003.

Experts, with Professor Sir Roy Meadow at the fore, were painted as the villains of the piece. For a time, the reputations of expert witnesses generally seemed tarnished, and the media sought to make scapegoats of experts in every case of wrongful conviction in which expert evidence had featured. Reputations and careers were at stake, and many potential experts baulked at putting their heads on the block.

The then Children's Minister, Margaret Hodge, echoed the fears of many medical doctors and paediatricians when she said that there was a real danger that this would lead to a reluctance by many doctors to appear in trials at all. The warning was prophetic. Particularly in child abuse cases, it has become increasingly difficult to find the necessary experts willing to act.

In a written Ministerial Statement on 17 June 2004, Margaret Hodge announced that as well as the other activities arising from the baby-death appeals, the Chief Medical Officer (CMO) would begin a 'programme of work to determine how best to ensure the availability and quality of medical expert resources to the family courts'. The CMO's terms of reference included reporting back to Ministers in early 2005.

On 30 October 2006 the results of the study were published by the CMO, Sir Liam Donaldson. These were contained in a 68-page report with the strangely biblical sounding title *Bearing Good Witness.* There will now follow a 4-month period of consultation. *Amen!*

A problem of supply, not quality

When the enquiry was announced in 2004, the sound and fury directed at experts was in full cry. It was expected that any recommendations that followed would be designed to deliver radical changes to the expert witness system. Still tighter controls on experts and their evidence would have been unsurprising. The danger was that this would discourage still more medical doctors from taking on the onerous role of expert.

In the intervening 2 years, it appears that this has been recognised. It is telling that, in launching the report at a press conference, Sir Liam referred to the serious difficulties in obtaining a suitable medical expert when one was required. He said that it was necessary to ensure that the system is one 'both the expert witnesses and general public can be confident is of the highest possible standard'. In his preface to the report he states that:

> *'... in developing my proposals, it has become clear to me that the problem is more one of supply than of quality. Nevertheless, the courts need to be confident both that an appropriate witness will be available when needed and that the evidence provided is of the highest quality, is based on high-quality research and represents the current state of knowledge about the issue in question. Therefore, my proposals address both quality and supply'.*

Delayed report on experts in the Family Court published

Cause of the supply problem

His report identifies what he sees as the serious difficulties in maintaining an adequate supply of medical expert witnesses. He believes that:

- the system is not well organised and is dependent on multiple small agreements between individual doctors and solicitors
- there is no real succession planning so, as experienced doctors retire, there are few younger doctors stepping in to replace them
- most medical expert witness work is concentrated in a relatively small number of hands
- highly specialised medical input is sometimes vital to the courts (e.g. paediatric radiology) and there are few specialists nationally in such disciplines
- too few doctors are encouraged or motivated to be regular expert witnesses.

He takes the view that doctors are deterred from being expert witnesses because:

- there are few good comprehensive training programmes
- some doctors find the courts and legal processes intimidating and stressful or bureaucratic, slow and time-consuming
- some doctors had a fear of referral to the GMC by vexatious parties.

The purpose, then, of the recommendations is two-fold:

- to encourage more medical doctors to provide their services by removing the fear many have in doing so, and
- to improve the quality of expert evidence, so as to restore public confidence.

A tall order, indeed. So, how has the CMO sought to achieve these objectives?

Many of the 16 proposals are radical

Proposals

Move away from one-to-one instructions

The main plank of his 16 proposals is that we should move away from the current system of solicitors paying fees to individual doctors towards an entirely new system whereby a

Continued on page 6

Continued from page 5

GMC should review its complaints handling

public sector organisation, on a local or regional basis, reaches agreement with the NHS to provide expert advice. This would be a new 'team-based' approach with individual medical experts within local, multi-disciplinary groups (to include paediatricians, child psychologists, psychiatrists and other specialists). He proposes that, in time, such teams in adjacent NHS organisations may form managed local networks to 'enhance the viability of their services, specialisation and spread of expertise, and to share their resources and training more effectively'.

The main contract for providing medical expert evidence to the family courts within a particular area would be held by one or more NHS organisations and delivered by multi-disciplinary teams, rather than individual clinicians. However, this would not preclude parties to a case asking for an expert from outside the area or who is working as a private individual.

Current funding moved to the NHS

It is further recommended that the costs for the NHS in taking on this additional workload and in training and development to deliver a quality supply of medical witness expertise should be fully met. (Currently the cost of experts is shared by the Legal Services Commission and local authorities.) Indeed, funding of medical expert witness work from the NHS should be on the basis of an agreement as to the service to be provided, its cost and volume, in line with most NHS activity, to ensure proper workload and workforce planning.

A 'public sector organisation' would instruct

The proposals recommend that the views of key stakeholders should be sought as to which public sector organisation is best placed to commission the medical expert witness service from the NHS. When the commissioning organisation has been determined, consideration should be given as to whether there is scope to rationalise the funding system for expert witnesses used in public law Children Act proceedings.

Quality of instructions should be raised

It is proposed that the Law Society, in consultation with the Academy of Medical Royal Colleges and the GMC, should consider how the quality of instructions to medical experts might be improved and should disseminate information to their members.

What will get doctors to join the teams?

Improved education

It is recommended that the knowledge and skills needed in all court settings should be taught as part of basic and continuing medical education. Relevant educational and standard-setting bodies should develop a competence-based syllabus for court skills. Within this development, priority should be given to medical expert work in child protection cases.

Teams should be ISO 9000 accredited

Further proposals suggest that under the *Joint Memorandum between the Academy of Medical Royal Colleges and the Department of Health*, collaboration should be extended by the Academy to other relevant professional bodies, e.g. the British Psychological Society and the Council for the Registration of Forensic Practitioners, to develop accreditation for teams of medical expert witnesses based on ISO 9000.

GMC to review complaint handling

In the light of the consultation on *Good doctors, safer patients*, it is recommended that the Family Justice Council and relevant government departments should work with the GMC to investigate all possible ways of dealing with complaints to the GMC about the expert evidence given by a doctor. The aim is to ensure that routes of appeal through the courts are used when they are appropriate.

Central knowledge bank

Lastly, Sir Liam recommends that a National Knowledge Service (NKS) be established to support the medical expert witness programme.

Radical proposals – but could they work?

Sir Liam acknowledges that these are radical proposals 'which will require far-reaching changes to the way that medical expert evidence is provided to the family courts and in the relationship between family courts and the local NHS'.

At first sight it is not easy to discern how these proposals will encourage more specialists into medico-legal work. Sir Liam says that his proposals are driven by the conviction that it is the duty of medical professionals and health organisations to safeguard children. For the NHS, he says, that duty is now set out by law in the Children Act 2004. 'Ensuring that the family courts have access to the best information when making decisions that will affect the lives of some of our most vulnerable children is closely linked to that duty'. True, most doctors will act out of a sense of duty. But will this extend to volunteering their services when, as Sir Liam acknowledges, many still retain the fear of 'being made to look a fool' by a barrister or, still worse, having their credibility and reputation impaired? One presumes that the intention of the CMO is not that we should have expert evidence delivered by committee. Instead, it is envisaged that the individual expert will not step alone into the arena but will have the support of his NHS team, will have better training and will be able to draw on the accepted wisdom of the Orwellian-sounding 'National Knowledge Service'.

Impact on quality

Will the introduction of mentoring, education, training, supervision and peer review of the experts within those NHS teams provide a feeling of 'safety in numbers' that will encourage more

individuals into those teams? If so, will this necessarily improve the quality of expert evidence? Will it stifle the use of new, radical, cutting-edge science in developing areas? Will the expert be less vulnerable to personal criticism?

Sir Liam told the news conference he hoped the new system would result in medical expert witnesses who were 'judged by the quality, competence and experience they bring rather than purely by the length of their grey beards'. In practice, however, the effectiveness of expert witnesses will always be linked directly to their personal credibility, no matter how august the NHS team behind them. This includes how they look, how they talk and how they respond to cross-examination. Barristers know this, and will always look to probe areas that undermine this credibility. Traditionally such probing has included attacks on qualification, personal reputation and professional standing.

A system, as proposed by Sir Liam, might seek to shield the NHS expert in the cloak of the omnipotent. But what of the independent expert who might be eminently qualified in his field but whose views fall outside those espoused by the NKS? He had better have a very thick hide indeed. He may well end up playing the role of Darwin before a panel of militant creationists. For good or ill, we still have an adversarial justice system, and the voice of dissent should always be heard. Are we really ready for expert evidence to be given by consensus?

Where's the evidence of a need for the NKS?

The fact is, in the vast majority of child care cases, the experts substantially agree on the cause of harm. A recent review of cases of children who were the subject of care orders showed that in only a very small number of cases (26 out of 28,687) was the court's decision based on a serious disagreement between medical experts. Sir Liam says that the NKS has been designed to 'avoid the risk of reports… being biased by the view of a particular individual or lack of expertise'. Any miscarriage of justice is to be regretted and can be a personal tragedy to those involved. But given the tiny number of cases where biased expert evidence is to blame, one wonders whether an NKS is a workable solution. We suggest that a database of peer-reviewed material would not be unwelcome, but that more thought should be given as to how such material should be weighed against conflicting evidence, particularly in developing areas.

FTP immunity – a continuing barrier

Although Sir Liam recognises that many doctors are put off by the prospect of being referred to the GMC by vexatious parties, his suggested solution is not one that will inspire the confidence of the profession. This is a serious concern, particularly in the light of the decision of the Court of Appeal in *GMC -v- Meadow* (see page 2). The recommendation is that the Family Justice Council and relevant government departments should work with the GMC to investigate all possible ways of dealing with complaints. The aim is to ensure that routes of appeal through the courts are used when appropriate. This appears insipid and ineffective given the ruling of the Master of the Rolls that expert witnesses should not be immune from disciplinary action brought by their professional bodies. The courts now have no control over whether or not a complaint can or should be lodged. Until this is addressed, it will prove a deterrent to experts and an impediment to freely expressed evidence.

FTP immunity must be resolved if supply problem is to be rectified

Cost uncertainty

The real effect of the proposals may be directed at cost cutting. It was estimated in 2004 that there were 5,195 delays in family proceedings, of which 12% were a result of late submission of expert reports or the lack of suitable experts. An NHS machine such as that proposed might ease the passage of cases through the court, but how often have we seen similar public sector bodies become overstretched, overburdened and underfunded? When Sir Liam talks of 'scope to rationalise the funding system for expert witnesses', it has a somewhat depressing ring. It sounds too much like a desire to trim the fees of experts, currently amounting to 6% of the total cost to the public purse in child care proceedings.

The Department for Constitutional Affairs estimates the cost of all experts in the relevant cases to be around £20 million a year. Sir Liam suggests that the cost of this could simply be transferred to the NHS by the government departments that already carry the burden. £20 million is not so great a sum, but add to this the cost of implementation, administration, coordination and training – as called for by the recommendations – and the bill is likely to be more substantial. One wonders whether, whatever the outcome of the consultation, government funding will be forthcoming.

Lawyers – an ideal place to start

One of the most worthy of the recommendations concerns the need for solicitors to be better educated in the way they should instruct experts. This is almost lost amidst the more dramatic provisions of the CMO's report. Most experts would agree that, where problems exist, they are more often a result of insufficient clarity or lateness in instructions and, then, the way in which expert evidence is used and interpreted by the courts. It is only in rare cases that the fault lies in the expression of opinion by the expert. Here, then, is an ideal place to start. If the legal profession and the courts could get this right, there would be less criticism of experts, fewer miscarriages of justice and perhaps more specialists willing to appear as experts.

Call for lawyers to improve quality of instructions

Services for registered experts

Expert witnesses listed in the *UK Register of Expert Witnesses* have access to a range of services, the majority of which are free. Here's a quick run down on the opportunities you may be missing.

Factsheets – FREE

Unique to the *UK Register of Expert Witnesses* is our range of factsheets (currently 54). You can read them all on-line or through our *Factsheet Viewer* software. Topics covered include expert evidence, terms and conditions, getting paid, training, privilege, disclosure and fees. When you need clarification, the Factsheets should help. If not, call us for assistance on 01638 561590.

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