THE COMFORT BLANKET

The Meadow case obscures a trend in the gradual erosion of experts' immunity

The Roy Meadow case was a "hard" case. While the Court of Appeal confirmed that Mr Justice Collins got it wrong we can understand why he gave the judgment he did. He was strongly influenced by the shortage of medical practitioners prepared to give evidence in cases such as the Sally Clarke trial.

Thankfully this is not a problem in the world of construction disputes which is most familiar to me: a veritable industry has grown up for expert witness services. Expert witnesses of the relevant disciplines are plentiful and it is difficult to envisage any shortage.

Expert evidence is just as important in deciding the outcome of construction disputes as it is to criminal trials. But if you were to ask those who instruct and pay experts whether they deserve protection from negligence at trial I suspect most would say 'no'. Experts should also say 'no' (for reasons I will explore) but unfortunately the law currently says 'yes'. This cannot, and should not, last.

Meadow is a salutary reminder of the dangers of experts straying outside their expertise (as the Professor did by saying that the chances of two children dying naturally in the prevailing circumstances was 73 million to one). However, the latest judgment should not mislead experts. The immunity, such as it is, is gradually being eroded - a point which *Meadow* and the publicity it has attracted obscures.

The Court of Appeal in *Meadow* only decided that experts have no immunity from disciplinary proceedings in respect of complaints made by affected parties. The Court did not review the blanket immunity that traditionally protects an expert from an action for negligence in the giving of evidence at trial and preliminary work such as the expert's report.

There are good reasons to doubt whether the immunity will survive in its current form. To begin with the European Court of Human Rights has told the English courts that a principle of public policy which provides for immunity from suit may be contrary to the right to a fair trial. The aim of such a rule must be considered against the merits of the particular case. A blanket immunity does not allow this.

If one turns to the aim of the immunity it is apparent that there are three principal justifications for it (which I will refer to as Grounds 1, 2 and 3):

1. The first and most important is that experts owe overriding duties to the court: the expert should not have to worry about legal action if, say, he tells the court he has changed his mind.

2. A subsidiary justification is to avoid a court judging a negligence action against the expert considering how the expert's negligence affected the outcome of the case and thereby re-deciding it.

3. The final ground is specific to certain fields (such as child abuse cases) where there are already shortages of experts such that if there were no immunity there might be no, or too few, experts.

Reasons equivalent to Grounds 1 and 2 were once used to support advocate's immunity. The House of Lords abolished this in 2000. Simply put, it is difficult to see why experts should be any different from advocates who can be sued for negligence at trial.

Of course that overlooks Ground 3. However, given the European Court of Human Rights' views we should only be looking at immunity on a case-by-case basis. For instance why should experts in construction disputes be immune?

The objection to a case-by-case approach is that experts should know whether they are protected before, and not after, giving evidence. This relies upon Ground 1 above (which the House of Lords has already

discounted in the analogous case of advocates). Grounds 2 and 3 are equally consistent with a case-by-case approach.

Outside of court proceedings there already appears to be a case-by-case approach. In tribunals (such as arbitration or statutory adjudication under construction contracts) it is not obvious if and when immunity exists even where English law clearly applies. Where an expert owes no overriding duty to the tribunal (equivalent to that owed to a court) Ground 1 does not apply and it is harder than usual to see why the immunity should too.

In fact, case-by-case in the courts, the scope of the immunity is considered, such as whether an expert's allegedly negligent work is preliminary to a trial and therefore covered. It is also being eroded in a similar fashion to advocate's immunity before it disappeared. In extreme cases, for serious offenders, there are the rarely invoked sanctions ranging from perjury to contempt of court (for instance for a falsely verified statement of truth at the end of an expert's report).

At one level down in severity, where an expert witness acts in flagrant and reckless disregard of his duties to the court, he is at risk of a costs order being made against him. It will, however, be a rare case (like *Phillips v Symes* (2004)) where a party seeks a costs order against another party's expert. One might expect the instructing party to be insolvent (and therefore not worth pursuing for costs) as well as consequences from the expert's failings that are compensable as costs.

The Expert's Protocol of 2005 makes it ever more likely that the courts will impose costs orders and, perhaps, other sanctions against miscreant experts. Given the courts' proactivity one might also expect sanctions to be applied against experts without parties necessarily applying for them.

If Ground 3 is any justification at all for expert's immunity it is a pretty weak one. In principle experts might (and already sometimes do) include limitation of liability clauses in their terms and conditions. As for reputational damage at first blush this a constant with or without immunity. It is only necessary to remind ourselves of the publicity surrounding Dr Meadow to realise that trial by media is an irresistible force or, in less well-publicised cases, word of mouth.

In fact one might expect fewer occurrences of judicial criticism of experts if there were no immunity or immunity on a case-by-case basis. There is an increasing propensity for experts to be publicly criticised in judgments. It appears that this is as much to do with raised expectations of what is required from experts as judicial concern that otherwise the expert might escape scot-free. Some judges seem more predisposed to this than others creating something of a lottery for experts.

It is usually the instructing party who is best placed to know whether their expert has not performed and why he has not. The *Pearce v Ove Arup* case is a salutary reminder. The trial judge criticised the claimant's expert architect in the strongest terms and suggested that the expert should be referred to RIBA. Over a year later the Architects Registration Board (the independent body which deals with complaints about architects) exonerated him completely. In the interim the expert lost up to £100,000 in income and legal fees with no right of redress.

But it is the overall administration of justice (Ground 1) that is said to be the higher concern. Consider each of these situations which have cropped up in recent times where an expert has been criticised but has been immune from action. In each of them it is difficult to see why the expert's duty to the court differs from his duty to, and the interests of, his instructing party (which duty must include complying with his obligations to the court):

1. Mis-stating qualifications or claiming to be a member of an organisation when the expert is not (see *Raiss v Palmano* (2000) where the blanket immunity was applied);

2. Opining on matters outside the expert's discipline;

3. Overlooking key factual or technical material;

4. Acting as an advocate or in a partisan fashion.

It is only in example 4 that the expert might have felt a divergence between his duty to the court and those instructing him.

If the instructing party has played any part through, say, inappropriate pressure in the partisanship of their expert, any negligence action, if they dared to bring it, would surely fail (or at least any damages awarded would suffer a significant reduction for contributory negligence). Why should that expert, therefore, be worried about legal action if he changes his opinion in the box?

If there were no immunity it would further persuade instructing parties to take their duties seriously. Inappropriate pressure would effectively gift the expert immunity. It would also jeopardise the case in hand because if the expert is felt not to obey his duties to the court his evidence may be rejected or his opposite number's evidence preferred.

For any expert who does not give his honest opinion at all times or who acts in a partial fashion without inappropriate pressure, what hope is there of him recognising his duties to the court in the box even with the immunity carrot? Can he really expect to avoid judicial censure or his reputation taking a downward plunge?

One should not overstate the problem of negligent experts. This jurisdiction is blessed with a wealth of high quality experts. In fact, on the whole, the quality of experts has improved (particularly since the Civil Procedure Rules came into force in 1999) and continues to improve. However, the limited scale of the problem only supports the removal of the immunity or at the very least its application on a case-by-case basis. It is the choice between the one and the other that is the real area of debate and not whether the immunity should be extended to prevent disciplinary proceedings (as was considered in *Meadow*).

The days for the blanket experts' immunity are surely numbered. There must be a good chance that it will shortly go wholesale - just don't ask me to calculate the odds.

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