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Case No: CO/5763/2005

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mr Justice Collins
Case No: CO/5763/2005

Royal Courts of Justice
Strand, London, WC2A 2LL
26/10/2006

B e f o r e :

SIR ANTHONY CLARKE MR
LORD JUSTICE AULD
and
LORD JUSTICE THORPE

Between:
THE GENERAL MEDICAL COUNCIL
Appellant

- and -

PROFESSOR SIR ROY MEADOW
-with-
HER MAJESTY'S ATTORNEY GENERAL
Respondent

Intervening

Roger Henderson QC and Adam Heppinstall (instructed by the Principal Legal Adviser,
General Medical Council) for the Appellant.
Nicola Davies QC, Ian Winter and Kate Gallafent (instructed by Hempsons) for the
Respondent
Lord Goldsmith QC, AG , Jonathan Crow and Ben Watson for the Intervenor
Hearing dates: 10, 11 and 12 July 2006

HTML VERSION OF JUDGMENT

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Sir Anthony Clarke MR:

Introduction

This appeal arises out of evidence given by Professor Sir Roy Meadow, whom I will call Professor Meadow, in the prosecution of Sally Clark. In November 1999 Mrs Clark was tried for the murder of her two sons. The Crown relied in part upon Professor Meadow's evidence to refute the proposition that Mrs Clark's children may have died from Sudden Infant Death Syndrome ("SIDS"), or cot death. Mrs Clark was convicted. Her first appeal was dismissed in October 2000. Her second appeal was allowed on 29 January 2003 on the ground that the verdicts were unsafe because of material non-disclosure by the Crown's pathologist. Full argument on Professor Meadow's evidence was not heard during the second appeal but the court indicated that, if it had been, the appeal would "in all probability" have been allowed on that ground too. No retrial was ordered.

Mrs Clark's father made a complaint to the GMC alleging serious professional misconduct on the part of Professor Meadow. The complaint was heard by the Fitness to Practise Panel ("FPP") of the General Medical Council ("GMC"), which concluded in July 2005 that Professor Meadow was guilty of serious professional misconduct and ordered that his name be erased from the register. Professor Meadow appealed to the High Court and on 17 February 2006 Collins J allowed his appeal and quashed the order of the GMC. This appeal is brought by the GMC pursuant to permission granted by Brooke LJ on 28 March 2006.

There are two distinct parts of the appeal. The first raises an important question of principle, namely whether an expert witness should be entitled to immunity from disciplinary, regulatory or fitness to practise proceedings (together "FTP proceedings") in relation to statements made or evidence given by him in or for the purpose of legal proceedings. The second entails a consideration of the GMC's challenge to the judge's decision that Professor Meadow was not guilty of serious professional misconduct. It seeks to restore the finding of the FPP that he was guilty of serious professional misconduct, although it does not seek to uphold the penalty of erasure from the register.

These two parts of the appeal are entirely separate and I will consider them separately. The Attorney General has intervened in connection with the first part but not the second. He supports the GMC's appeal.

PART I IMMUNITY FROM FTP PROCEEDINGS

Introduction

This part of the appeal arises out of a point taken by the judge and not by or on behalf of Professor Meadow, either before the FPP or in the grounds of appeal to the High Court. It is common ground that at common law a witness, whether he is giving evidence of fact or opinion, and whether or not he is an expert witness, has immunity from civil suit in respect of evidence which he gives in court. It is also common ground that the immunity extends to any statement the witness makes for the purpose of giving evidence. Where it exists the witness has immunity even in a case where he gave his evidence dishonestly or in bad faith. The judge recognised in paragraph 10 of his judgment that before this case the immunity had not been extended to prevent the bringing of FTP proceedings.

The judge held that an absolute or blanket immunity was unnecessary but that it was necessary to balance the countervailing public interests and, having carried out the balancing exercise, he concluded that in some circumstances an expert witness should be immune from FTP proceedings. His reasoning can be seen from paragraphs 21 to 25 of the judgment:

"21. Since I am applying a principle based on public policy to grant an immunity which has not hitherto been explicitly recognised, I can, I think, consider whether public policy requires that an absolute immunity should be granted. The approach of their Lordships in Darker's case indicates that immunity from suit, in respect of which the law has granted absolute immunity, should be confined as narrowly as reasonably possible. That approach and the need to balance the countervailing public interests persuades me that a blanket immunity is not necessary. Barristers and solicitors owe duties to the court and may be subjected to disciplinary action in respect of their conduct in litigation. That does not inhibit them because they know that they must maintain the necessary standards before the court and will be liable to action if they do not. But witnesses are in a somewhat different position, particularly when they become involved in litigation fortuitously, perhaps because as a doctor they treated a particular child and abuse is suspected.

22. In my 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, as reflected in the observations of the various judges which I have cited, requires at least that. But I see no reason why the judge before whom the expert gives evidence (or the Court of Appeal when that may be appropriate) should not refer his conduct to the relevant disciplinary body if satisfied that his conduct has fallen so far below what is expected of him as to merit some disciplinary action. I note that such referrals have been made, although I do not think the immunity point has been argued: see *Hussein v William Hill Group* [2004] EWHC 208 (QB), per Hallett J and *Pearce v Ove Arup* (unreported) 2 November 2001, per Jacob J. In that case, Jacob J said, at para 62: "I 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."

The witness should, as Jacob J stated, be given an opportunity to make representations before any referral took place.

23. Such 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. Normally, evidence given honestly and in good faith would not merit a referral. Mr Henderson was concerned that to draw the line at dishonesty or recklessness could mean that a practitioner who gave seriously defective evidence which was honestly given but resulted from for example ill health was able to continue in practice to the danger of the public. I recognise that possibility: the judge is likely also to recognise it if it arises in any given case.

24. No system can be perfect. It is, as Mr Henderson submitted, at least in theory possible that a practitioner whose shortcomings are not recognised by the court may escape deserved sanctions. This would particularly be so if the practitioner did not give evidence because court proceedings were, as in *Stanton v Callaghan* [2000] QB 75, never pursued. However, I think that this problem is more theoretical than real. It is unlikely that a single case involving a poor report or evidence would on its own show that the practitioner was unfit to practise and so a danger to the public. His report would become known and he would not be invited to give evidence in the future. Further, if he was so poor, he would be likely to show his defects in a subsequent case. Mr Henderson raised the issue of accreditation which, for example, would affect a pathologist. Could he be removed from the list of those entitled to act for the Home Office on the basis of poor evidence in a particular case? The answer must be that he could. Just as a private client is entitled to cease to instruct an expert if dissatisfied with his performance so can the Home Office. If that is done, he has a right of appeal.

25. The precise boundaries of the immunity will have to be established on a case by case basis. For example, 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. If there is an appeal, the Court of Appeal can take the necessary action. But what is of fundamental importance is that a witness can be assured that if he gives his evidence honestly and in good faith, he will not be involved in any proceedings brought against him seeking to

penalise him. The risk of a judge deciding that there should be a referral in such circumstances is so remote as to be virtually non-existent."

Thus, although the judge said that the precise boundaries of the immunity will have to be established on a case by case basis, it is plain from the above passage that he envisages that an expert witness will be immune from FTP proceedings unless his conduct is referred to the FPP (or equivalent) by the trial judge in the proceedings in which he gives evidence, whether they are civil or criminal proceedings. As I understand it, that control mechanism was the judge's idea. It was not suggested to him on behalf of the parties. As appears below, Ms Davies does not support the judge's approach. She has suggested a different control mechanism to which I return below.

I should note in passing that the Attorney General did not intervene before the judge. The Expert Witness Institute ("EWI") did apply for permission to intervene but did not inform the other parties of its intention. It did however send written submissions to the court. In the circumstances the judge said (in paragraph 7) that he had only taken EWI's submissions into account in relation to the general duties of an expert and to the jurisdiction of FTP authorities.

The judge allowed Professor Meadow's appeal on the ground that the case against him was based upon his evidence at Mrs Clark's trial and that, in the light of the principles the judge had identified (as set out above), he was immune from FTP proceedings before the FPP. The trial judge had not of course referred the matter to the GMC.

It is convenient to consider this part of the appeal under a number of headings as follows: witness immunity at common law (ie before this case), extending the immunity, the role and responsibility of the expert witness, FTP proceedings and the role of the common law before asking whether the immunity should be extended to FTP proceedings.

Witness immunity at common law

The principles

The immunity with which this appeal is concerned is entirely a common law concept. It is common ground that it applies to all witnesses including expert witnesses and I do not think that there is any or any significant dispute about its nature and extent as explained in cases before the decision of the judge in this case. I can therefore take the principles as accurately set out in the written submissions made by or on behalf of the Attorney General. The protection afforded by immunity from civil suit is that:

"no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice."

That is a quotation from the judgment of Kelly CB in *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 264. It was approved by Lord Hutton in *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 at 464B.

The immunity extends to cover the following:

i) the preliminary examination of witnesses: *Watson v M'Ewan*; *Watson v Jones* [1905] AC 480;

ii) evidence from potential witnesses in criminal proceedings at a time when proceedings are in contemplation but have not yet been commenced: *Evans v London Medical College (University of London)* [1981] 1 WLR 184;

iii) an expert's report prepared in circumstances where, if there were to be proceedings for child abuse, the report would be relied upon: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, per Lord Browne-Wilkinson at 755G; and

iv) statements made out of court that could fairly be said to be part of the process of investigating crime with a view to prosecution: *Taylor v Director of the SFO* [1999] 2 AC 177.

The immunity does not extend to things done at the investigative stage which could not fairly be said to form part of the witness's participation in the judicial proceedings. It does not therefore protect police officers from a claim for misfeasance in public office for having fabricated evidence: *Darker*. Importantly, the immunity only bars civil suits. It does not protect a witness against a criminal prosecution for perjury, for perverting the course of justice or for contempt of court. Thus, as Lord Morris put it in *Roy v Prior* [1971] AC 470 at 477F:

"If a witness gives false evidence he may be prosecuted if the crime of perjury has been committed but a civil action for damages in respect of the words spoken will not lie."

The rationale

I would accept the Attorney General's submission that the underlying rationale for the immunity from civil suit is ordinarily expressed as promoting two objectives: see eg *Roy v Palmer* per Lord Wilberforce at 480, *Silcott v Commissioner of Police for the Metropolis* [1996] 8 Admin LR 633, per Simon Brown LJ at 637C-E; *Stanton v Callaghan* [2000] QB 75, per Chadwick LJ at 100 to 101 and *Darker*, per Lord Clyde at 456. Those two objectives are:

i) ensuring that witnesses give evidence "freely and fearlessly" (*Darker* per Lord Clyde at 456), "in an atmosphere free from threats of suit from disappointed clients" (*Stanton v Callaghan*, per Otton LJ at 108F), with the corollary that "persons who may be witnesses in other cases in the future will not be deterred from giving evidence for fear of being sued for what they say in court"; and

ii) "to avoid multiplicity of actions in which the value or truth of their evidence would be tried over again" (*Roy v Prior*, per Lord Wilberforce at 480).

The benefit and purpose of the second objective have been variously described over the years. The Attorney General has identified two short quotations which seem to me fairly to demonstrate the position. In *Marrinan v Vibart* [1963] 1 QB 234, which was subsequently upheld by this court, [1963] 1 QB 528, Salmon J said at page 237:

"The administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled or possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation."

In *Munster v Lamb* (1883) 11 QBD 588 at 607 Fry LJ said that the purpose of the rule was

"to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

As Auld LJ put it in this court in *Darker*, in a passage approved by Lord Hope in *Darker* at 447B:

"The whole point of the first public policy reason for the immunity is to encourage honest and well-meaning persons to assist justice even if dishonest and malicious persons may on occasion benefit from the immunity."

In *Stanton v Callaghan* Otton LJ said at page 107A that the 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."

Extending the immunity

The courts have shown a marked reluctance to extend the immunity. It is perhaps convenient to refer to some of the judicial statements which exemplify this approach. They include:

i) "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* (1997) 71 ALJR 903, approved by Lord Hutton in *Darker* at 446F-G;

ii) 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*, per Lord Cooke at 453 and Lord Clyde at 456;

iii) "the protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice": *Rees v Sinclair* [1974] 1 NZLR 180, per McCarthy P at 187;

iv) whether immunity is necessary must "be checked against a broad view of the public interest": *Roy v Prior*, per Lord Wilberforce at 480;

v) "once a situation has been identified as deserving of immunity it may readily be accepted that the immunity is in its quality absolute": *Darker*, per Lord Clyde at 456; and

vi) "those principles should be of general application regardless of the particular form of the action; thus, for example, whether the action is one of defamation or of negligence or, as in the present case, of conspiracy to injure and misfeasance in public office, the same principles should apply: *Darker*, also per Lord Clyde at 456.

The Attorney General has also referred us to this statement of Lord Hoffmann in *Taylor* at 214:

"The policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. If this object is to be achieved, the person must know at the time he speaks whether or not the immunity will attach."

As appears from paragraph 21 of his judgment, quoted above, the judge had well in mind the principle that, since where it exists the immunity is absolute, any extension of the existing immunity should be confined as narrowly as reasonably possible. That was why he rejected the notion of a blanket immunity. He was in my opinion correct both to approach the problem in that way and to conclude that a blanket immunity for expert witnesses from FTP proceedings arising out of statements made as a witness is not necessary. Ms Davies' position is not the same as that of the judge. She does not submit that the immunity is the same as that from civil suit because she says that there should be no immunity from FTP proceedings where the evidence or statements relied upon amount to a crime, but in all other cases she submits that the expert is or should be immune from FTP proceedings in the same circumstances as he would be immune from civil suit. She thus says that, save in her excepted cases, the immunity is absolute. This is I think a new suggestion not made in any previous case. I will return to it below.

The question whether there should be any extension of the immunity of expert witnesses to FTP proceedings should I think be answered with the role and responsibilities of expert witnesses in mind.

The role and responsibilities of the expert witness

In paragraph 20 of his judgment the judge quoted what are now well-known principles identified by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, 81-82. Those principles were approved by Otton LJ in *Stanton v Callaghan* and are now accepted and understood throughout what may be called the expert witness community. Cresswell J put them thus:

"The duties and responsibilities of expert witnesses in civil cases include the following: 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 (*Whitehouse v Jordan* [1981] 1 WLR 246, 256, per Lord Wilberforce). 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see *Polivitte Ltd v Commercial Union Assurance Co plc* [1987] 1 Lloyd's Rep 379, 386, per Garland J and *In re J* [1990] FCR 193, per Cazalet J). 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 (*In re J*). 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 re J*). 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 (*Derby & Co Ltd v Weldon* *The Times*, 9 November 1990, per Staughton LJ). 6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court. 7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports (see 15.5 of the Guide to Commercial Court Practice)." The judge added at the end of that quotation that in addition to those considerations, the expert witness will know that he must give evidence honestly and in good faith and must not deliberately mislead the court. He will not expect to receive protection if he is dishonest or malicious or deliberately misleading.

Those principles have recently been reflected and expanded in an important document entitled "Protocol for the Instruction of Experts to give evidence in civil claims", which was prepared in the light of work done by the EWI and the Academy of Experts and others and which was approved by Lord Phillips as Master of the Rolls. Paragraph 4 of the protocol is entitled "Duties of experts" and includes the following:

"4.1 Experts always owe a duty to exercise reasonable skill and care to those instructing, and to comply with any relevant professional code of ethics. However when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court in matters within their expertise (CPR 35.3). This duty overrides any obligations to the person instructing them or paying them. Experts must not serve the exclusive interests of those who retain them" (my italics).

The Attorney General also drew our attention to *Harmony Shipping Co SA v Orri* [1979] 1 WLR 1380, where it was held that there is no property in an expert witness (in that case a

handwriting expert) and that any contract purporting to impose an obligation to give evidence for only one side in a dispute would be contrary to public policy (see per Lord Denning at 1385F-G). Lord Denning also said (at page 1386H):

"There being no such property in a witness, it is the duty of a witness to come to court and give his evidence in so far as he is directed by the judge to do so."

The Attorney General submits that both limbs of the rationale underlying the immunity from civil suit, which may be summarised as the need for fearless testimony and the need to prevent multiple litigation apply with less force to experts than they do to witnesses of fact. In this regard he relies in particular upon this passage in the judgment of Chadwick LJ in *Stanton v Callaghan* at 91C:

"There is, if I may say so, no difficulty in recognising the need for immunity in relation to the investigation and preparation of evidence in criminal proceedings - or in child abuse cases - in order to ensure that potential witnesses are not deterred from coming forward. For my part, however, I find it much more difficult to recognise an immunity founded on the need to ensure that witnesses are not deterred from giving evidence by the possibility of vexatious suits in a case where the witness is a professional man who has agreed, for reward, to give evidence in support of his opinion on matters within his own expertise - a fortiori, where the immunity is relied upon to protect the witness from suit by his own client, towards whom, prima facie, he owes contractual duties to be careful in relation to the advice which he gives. I think that there is much force in the observation of Mr. Simon Tuckey Q.C., when sitting as a deputy judge of the Queen's Bench Division in *Palmer v. Durnford Ford* [1992] Q.B. 483, 488d: ". . . I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court."

It is important to keep in mind that expert witnesses have the safeguard, in common with other professional men, that they will not be held liable for negligent advice unless that advice is such as no reasonable professional, competent in the field and acting reasonably, could give. I find it difficult to believe that the pool of those who hold themselves out as ready to act as expert witnesses in civil cases, on terms as to remuneration which they must find acceptable, would dry up if expert witnesses could be held liable to those by whom they are instructed for failing to take proper care in reaching the opinions which they advance. Indeed, I would find it a matter of some surprise if expert witnesses offer their services at present on the basis that they cannot be held liable if their advice is negligent."

The Attorney General relies in particular upon the parts of that passage which I have italicised.

He also submits that the conclusion that expert witnesses are or may be expected to be more robust than their lay counterparts is supported by this statement made by Mr Simon Tuckey QC, sitting as a Deputy High Court Judge, in *Palmer v Durnford Ford* at 488D-E:

"Generally I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court. . . . I can see no good reason why an expert should not be liable for the advice which he gives to his client as to the merits of the claim, particularly if proceedings have not been started, and a fortiori as to whether he is qualified to advise at all."

I would accept those statements as generally correct. However, in *Stanton v Callaghan*, Otton LJ, while recognising the force of the points made by Chadwick LJ, said at page 104G that the same considerations may not apply with equal force in every case. As Thorpe LJ has demonstrated in his judgment, a draft of which I have read, different considerations may apply in different parts of the justice system, and there may indeed be good reason why some greater measure of protection to expert witnesses than exists at present should be afforded to some classes of expert, perhaps in the field of family justice, in order take proper account of

what the Attorney General correctly recognised is " a countervailing public interest in not unnecessarily discouraging competent expert witnesses from giving evidence." However, the question is whether the introduction of such a measure of protection into an area where such protection has not been afforded hitherto is a matter for the development of the common law (and if so what) or whether it is a matter for Parliament. Both the Attorney General and the GMC say that it is the latter.

In the instant case it is said there should be a measure of protection against FTP proceedings. It follows, as it seems to me, that in order to answer the question just posed, it is important to focus on the nature and rationale of FTP proceedings and their statutory basis.

FTP proceedings

While this appeal is of course concerned with FTP proceedings before a GMC panel, there are many other professions and occupations which are regulated in one way or another by detailed regulations and there are many disciplinary panels of different kinds. We were referred to a considerable number of different regulatory and disciplinary bodies in different areas of modern life. In addition to the GMC, they include the General Dental Council, the General Chiropractic Council, the General Osteopathic Council, the General Optical Council, the General Social Care Council, the Health Professions Council and the Nursing and Midwifery Council. The statutory FTP procedures are similar to those of the GMC and require the Council in each case to investigate complaints or to refer an allegation to the relevant FPP for investigation. None of them contains a provision entitling the person being investigated to object to the jurisdiction of the Council or FPP on the ground that the complaint relates to evidence in court and that he is immune from FTP proceedings.

The same is true of boards set up under the Royal Prerogative. They include the Home Office Policy Board for Forensic Pathology and the Council for the Registration of Forensic Pathologists. The lawfulness of the former was recently upheld in *R (Heath) v Home Office Policy and Advisory Board for Forensic Pathology* [2005] EWHC 1793 (Admin). In addition, architects are regulated under a statutory scheme and many professions, including accountants, actuaries, engineers and surveyors are regulated by professional bodies incorporated under Royal Charter. Amendments to the relevant bye-laws, including FTP provisions, require the approval of the Privy Council, which only gives approval after consultation with the relevant Government Department. Typical bye-laws have similar provisions.

The purpose of all these bodies is to regulate the profession or occupation 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. Thus in *Ziderman v General Dental Council* [1976] 1 WLR 330 at 333, Lord Diplock, giving the judgment of the Privy Council, said:

"The purpose of disciplinary proceedings against a dentist who has been convicted of a criminal offence by a court of law is not to punish him a second time for the same offence but to protect the public who may come to him as patients and to maintain the high standards and good reputation of an honourable profession."

Similarly, in *Gupta v GMC* [2002] 1 WLR 1681 at 1702, Lord Rodger, giving the judgment of the Privy Council, approved the approach of Sir Thomas Bingham MR in *Bolton v The Law Society* [1994] 1 WLR 512 at 517-9, where he said that a professional body was not primarily concerned with matters of punishment. In this connection, I do not think that the judge was quite right to say or suggest in paragraph 25 of his judgment that FTP proceedings of this kind against an expert are "seeking to penalise him". That may be their effect but it is not their purpose.

Similarly, in *Antonelli v Secretary of State for Trade and Industry* [1988] QB 948, it was held by this court that a statute introduced to protect the public against the activities of fraudulent or dishonest or violent estate agents applied to those who had been guilty of a relevant criminal offence before the Act came into force: see eg per Beldam LJ, with whom Kennedy and Aldous LJ agreed, at 958H-959C.

In short, the purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past. It would to my mind be very striking, not to say astonishing, if the way in which an expert gave evidence or the content of that evidence showed that he was not fit to practise in a particular discipline, but the FPP could not consider it because the expert was immune from disciplinary proceedings by some absolute common law immunity. That would especially be so if the only evidence of unfitness to practise derived from evidence given in court. It was no doubt in part at least for those reasons that the judge did not hold that expert witnesses are entitled to a blanket immunity of the kind which witnesses enjoy from civil suit.

I should note here that Ms Davies submits that there is no or no significant difference between FTP proceedings and civil proceedings, so that the substance of the common law immunity from civil suit should apply to FTP proceedings. I recognise that both sets of proceedings may involve a consideration of some of the same issues of fact. I would not however accept Ms Davies' submission. The crucial distinction is that to which I have just referred. In FTP proceedings the FPP is concerned 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 introduces a further public interest which is not present in the ordinary civil suit. It is precisely for this reason that, as appears below, Ms Davies submits that, where the facts alleged against the expert amount to a crime, the expert is not immune from FTP proceedings based on those facts.

I turn to consider the jurisdiction exercised by the FPP in this case. In the present context, in which we are considering whether a professional should have immunity from FTP proceedings at common law, and if so in what circumstances, the importance of the statutory provisions which govern the GMC is that they are similar to those which regulate other professions and occupations. However, I should say at once that in this regard I accept the submission made by Mr Henderson on behalf of the GMC. It is that, although the need for fearlessness and the avoidance of a multiplicity of actions has been held to outweigh the private interest in civil redress, hence the immunity from civil suit, those public policy benefits do not and cannot (or at least should not) override the public interest in the protection of the public's health and safety enshrined in the GMC's statutory duty to bring FTP proceedings where a registered medical practitioner's fitness to practise is impaired. A similar point can be made in the case of other professions and occupations, with more or less force depending upon the particular circumstances.

Given the fact that the judge limited the immunity to cases in which the trial judge in civil or criminal proceedings does not refer the matter to the GMC, so that in a case where no such referral is made (like this) the FPP has no jurisdiction, whereas where a referral is made the expert has no immunity and the FPP's jurisdiction is unfettered by any such common law rule, the question arises whether there is anything in the relevant statutory provisions which supports such an approach. The answer is that there is not and nobody has suggested that there is.

The jurisdiction of the GMC is for the most part set out in the skeleton arguments of the GMC and Professor Meadow for this appeal and is not in dispute. I need only refer to its salient

features. The powers and duties of the GMC have been governed by the Medical Act 1983 ("the 1983 Act") for many years. The 1983 Act has been amended from time to time and has, indeed, been amended since the events to which this appeal relates occurred. As I understand it, when the matter was before the FPP, the powers exercised by the panel were those set out in section 36 of the Act, as then amended. Those powers were exercisable where a fully registered medical practitioner was judged by the panel to be guilty of serious professional misconduct. The matter having been referred to the panel, it was the duty of the panel to decide whether Professor Meadow was guilty of serious professional misconduct.

It is, as I understand it, common ground that there is nothing in the 1983 Act or any of the rules made under it which suggests that Professor Meadow was immune from proceedings before the panel by reason of the fact that the allegations against him arose out of his conduct as an expert witness. Indeed, it is common ground that, absent such an immunity, it was the duty of the Registrar of the GMC to investigate the complaint under regulation 6 of the GMC Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988 ("the 1988 Rules") and to consider whether it should be referred to the Preliminary Proceedings Committee. On such a reference it was the duty of the Preliminary Proceedings Committee under regulation 11 to determine whether the case should be referred to the Professional Conduct Committee ("the PCC") and, in the case of an allegation of serious professional misconduct, it was its duty in making a reference to "indicate ... the matters which in their opinion appear to raise a question whether the practitioner has committed serious professional misconduct". There are then detailed rules as to the formulation of charges before the PCC and as to the procedure before the Committee which are set out in Parts IV and V of the 1988 Rules. It was those rules which applied to the proceedings before the FPP in this case, as it made clear when it made its findings of fact.

As already indicated, nobody suggested before the panel that it adopted the wrong procedure or that it lacked jurisdiction. Equally nobody suggested that the FPP could not investigate the question whether Professor Meadow was guilty of serious professional misconduct because the alleged misconduct occurred in connection with evidence prepared and given in court and did not arise out of a clinical or doctor and patient relationship. This is scarcely surprising since there is ample authority for the proposition that a professional may face FTP proceedings, not just for conduct strictly within his professional capacity, but also for conduct in his private capacity: see eg *A County Council v W (Disclosure)* [1997] 1 FLR 574, approved by the Privy Council in *Royle v GMC (No 2)* [2000] 1 AC 311 at 332. In any event this is of course a case in which the allegations related to conduct within Professor Meadow's professional capacity. Moreover, there have been cases in which a judge has referred the conduct of an expert witness to his professional body, or in which the conduct has been referred as a result of criticisms of a trial judge: see eg by Hallett J in *Hussein v William Hill Group* [2004] EWHC 208 (QB), by Jacob J (at paragraphs 59-61) in *Pearce v Ove Arup*, unreported, 2 November 2001 and by Browne-Wilkinson J (at paragraphs 40-41) in *National Employers Life Assurance Co v ACAS* [1979] ICR 620.

As stated above, it was the judge who made the suggestion for the first time that the FPP might lack jurisdiction because Professor Meadow might be entitled to immunity from FTP proceedings. It seems to me that the effect of the judge's decision that Professor Meadow was immune from such proceedings is to modify the jurisdiction of the FPP to consider whether a registered medical practitioner was guilty of serious professional misconduct, in circumstances where, but for the immunity, the GMC would be under a duty to investigate and, in an appropriate case, the FPP would be under a duty to consider and determine the questions raised by section 36 of the Act.

I hope that I have correctly (if not fully) stated the position as it was in relation to the FTP proceedings against Professor Meadow. The position was, if anything, made clearer by reason of section 35C of the 1983 Act as amended. That section provides for the powers of an

Investigation Committee in relation to allegations of, among other things, whether a person's fitness to practise is impaired by misconduct. By section 35C(4) the Investigation Panel "shall investigate the allegation" and decide whether it should be considered by an FTP and in that event, by subsection (5), it "shall give a direction to that effect to the Registrar". In the event that the matter is referred to an FTP, it is for the FTP to decide whether the person's fitness to practise is impaired, in which case it has certain powers under section 35D.

It is I think inconceivable that the draftsman of any of these provisions could have thought that a person against whom there was a case to answer that he was guilty of serious professional misconduct or, now, that his fitness to practise was impaired, would or might be entitled to an immunity of the kind suggested here. Such immunity would, to my mind, be inconsistent or potentially inconsistent with the principle that only those who are fit to practise should be permitted to do so.

The role of the common law

The Attorney General submits that, whatever changes might be desirable, it is inappropriate for a fresh immunity to be created by the common law. Any such change is a matter of policy which should be made by Parliament after suitable public debate. He submits that that would be so if what was suggested was a wholesale extension of the immunity of a witness from civil suit to encompass an immunity from FTP proceedings. He submits that in any event the common law should not permit a partial extension of the immunity, either of the kind suggested by the judge, or at all.

I would accept those submissions, although in doing so 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. However, all depends upon the particular context. I turn therefore to the question whether the common law immunity should be extended in this context.

Should the immunity be extended to FTP proceedings?

This involves considering whether there should be a wholesale (or blanket) extension and, if not, whether there should be a partial extension and, if so, what.

Wholesale extension?

I would answer this question in the negative. Indeed nobody suggests that the answer is yes, although Ms Davies' submissions are perhaps closer to it than the proposals made by the judge. The above discussion shows that the courts have shown a marked reluctance to extend the immunity from civil suit at all. To my mind there is no principled basis for extending the immunity to all FTP proceedings. The judge did not think that it should be so extended and he was in my opinion correct so to hold. I have already expressed the essential reason. It is that the purpose of FTP proceedings is distinct from the purpose of civil proceedings. It is to ensure, so far as reasonably possible, that those who are not fit to practise do not do so. If the conduct or evidence of an expert witness at or in connection with a trial, whether civil or criminal, raises the question whether that expert is fit to practise in his particular field, the regulatory authorities or FPP should be entitled (and may be bound) to investigate the matter for the protection of the public.

I would accept 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 to preserve the integrity of the trial process and public confidence both in the trial process and in the standards of the professions from which

expert witnesses come. As stated earlier, the purpose of FTP proceedings is the protection of the public.

The duties of the regulatory authority will in most classes of case have been laid down by statute or by Royal Charter or by the exercise of the Royal Prerogative and very often in mandatory terms. I do not think that it is appropriate for the common law to introduce a qualification upon those duties. Whether to do so seems to me to be rather a matter for Parliament or the relevant authorities, after suitable public debate.

The importance of the particular FTP authority exercising its own judgment is emphasised by a passage from the judgment of Sir Edwin Jowitt in *R (Lannas) v Secretary of State for the Home Department* [2003] EWHC 3142 (Admin). In that case Dr Lannas challenged a decision of the Home Office Policy Board for Forensic Pathology ("the Board"). The Board was set up by the Home Secretary and operates a system for the accreditation of pathologists seeking appointment to the register and for their review and auditing after appointment. The decision challenged by way of judicial review was a decision removing Dr Lannas from the register. She submitted inter alia that the Board should not have acted until it knew of the outcome of the referral of her case to the GMC. Sir Edwin Jowitt rejected that submission. He said at paragraph 35:

"[Counsel for the Secretary of State] points out that the forensic pathologist is an important figure in the prosecution case. It is very important if justice is to be done that he should be a person of ability. It is very important if the public are to have confidence in the doing of justice [that] they can be confident that [Home] Office pathologists are pathologists of real quality. The scheme is there not simply to see what standards are, or even to maintain them. [The] purpose of the scheme is to do both those things but also to raise standards where possible and to deal with matters of current interest and to see how they are dealt with so that the Board is a teaching body as well as a monitoring body. Those are important matters when it comes to public confidence in the way in which the forensic pathological service in this country is conducted on behalf of prosecutions. The scheme is one promulgated under the Royal Prerogative. It is the Minister's responsibility and duty to administer the scheme and to see that the proper standards are maintained and that they are elevated. It is for the Minister, through the Board, to set the standards which are required. Those standards, for all I know, may be more exacting than the standards of other Bodies who look into these things, but it is the Minister's responsibility. It is right that he should act in accordance with this scheme for he is responsible to Parliament for the way in which the scheme is run. It would be quite wrong if he did take a course which would amount to delegating the performance of his duty to the General Medical Council, a Body over which he has no control and whose standards are for them and are not standards devised by him through the Board."

As the Attorney General observes in his written submissions, the role of the Board, in considering whether to remove a pathologist from the register is similar to the role of an FPP in FTP proceedings. The relevance of the passage just quoted, with which I agree, is that it emphasises the importance of the relevant body, there the Board and here the FPP, being left to decide the questions which, whether by the Royal Prerogative or by statute, it is under a duty to answer.

In short, it would be wrong in principle for the court to cut across or impliedly to limit the powers of an FPP by extending the immunity from civil suit to FTP proceedings. In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 the House of Lords was considering whether a local authority owed a duty of care in discharging a statutory function. Lord Browne-Wilkinson said at 739 that the question whether there was such a common law duty and, if so, its ambit, must be profoundly influenced by the relevant statutory framework and added:

"... a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties".

So here, the extension of the immunity would be inconsistent with the duty of the FPP to investigate and determine the FTP proceedings against the expert.

Partial extension?

I would also answer this question in the negative, for essentially the same reasons. To introduce the solution proposed by the judge would again cut across or impliedly limit the powers of an FPP by extending the immunity from civil suit to FTP proceedings, which would be wrong in principle. Here again it seems to me to be essentially a matter for Parliament or the relevant authorities to decide what, if any changes should be made. The Attorney General submits that the common law does not offer any criteria for determining the 'right' answer, if there is such a thing. This is I think demonstrated by the argument in this appeal as to the appropriateness of the distinction drawn by the judge and as to the problems potentially facing the courts in different fields.

The judge recognised the importance of expert witnesses assisting the court conscientiously and objectively and (I think) of the public interest referred to above but he relied upon his perception of a competing public interest that, in the absence of immunity in at least some cases, competent expert witnesses, especially doctors, would be discouraged unnecessarily from giving evidence in court for fear of FTP proceedings. The judge was struck by the problems faced, especially in the Family Justice System, in persuading doctors to give evidence. He said in paragraph 6:

"There can be no doubt that the decision [in this case] 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."

I quite understand the problem identified by the judge and emphasised by Thorpe LJ. However, as I see it, one of the difficulties with the judge's solution is to distinguish the cases in which the witness will be immune from those in which he will not. As Lord Hoffmann put it in Taylor in the passage quoted above, "the person must know at the time he speaks whether or not the immunity will attach". If the judge's solution is adopted, he will not know until the trial judge decides, presumably much later, whether to refer the matter to the GMC or its equivalent.

The judge says in paragraph 22 (quoted above) that a witness should not be immune from FTP when the trial judge or this court is satisfied that the conduct of the witness "has fallen so far below what is expected of him as to merit some disciplinary action". This is to make the trial judge or this court the sole arbiter of the question who should be immune and who should not. No such restriction exists in any of the statutory or other schemes which provide for investigation of the conduct of experts or for FTP proceedings. I agree with the Attorney General that the judge was here engaged on what was a legislative process, which was not appropriate.

The judge's approach seems to me to be inconsistent with the principle identified by Lord Clyde in Darker (and referred to above) that a common law immunity must be an absolute immunity.

Further, I agree 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 FPP and whose conduct should not. 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. To impose such a duty on all trial judges in both civil and criminal cases seems to me to be inappropriate.

While I understand the judge's view that these are problems to be worked out on a case by case basis, that seems to me to underline the point that, if there is to be a system of referring some cases but not others, the relevant rules and criteria would have to be very carefully worked out. Many potential questions arise. Could the judge act only of his own motion or would it be open to an interested party (or indeed any member of the public) to apply to the judge for an appropriate direction? Would the expert have a right to make submissions? What would the test be? Would it be the same as or different from the test applied by the particular FPP or regulatory authority? These questions do not seem to me to be fanciful. They highlight the point that the answers to them essentially involve matters of policy, which in turn involve balancing the various competing public interests. They should be answered, not by a judge, but by Parliament or the appropriate authority, after considering detailed evidence – certainly much more detailed evidence than was before the judge. In short, they are not matters which can properly be determined by a judicial decision extending the kind of common law immunity described above.

Further, the present immunity from suit extends to the contents of witness statements. Many civil cases settle before the trial, in which case there is of course no trial and thus no trial judge to form a view on the particular expert. Yet the statement or statements of an expert witness might well evidence unfitness to practise. On the judge's approach such a person would be entitled to immunity at common law, whereas if the same expert had given evidence and perhaps been cross-examined on his statements before a trial judge, the immunity would be lost if the trial judge chose to refer him to his professional body.

In all the circumstances, the judge's proposal seems to me to be arbitrary and not fairly to draw the line between one expert and another. It is arbitrary from the standpoint both of the expert and of anyone aggrieved by the alleged unfitness of the expert, and as such cannot be in the public interest.

The Attorney General gave a number of examples of these problems. I refer to only two, those of Dr Heath and Dr Lannas. Dr Heath was referred to the Board by experts retained by the defence in two trials. His conduct had not been criticised by the trial judges. The trials took place in 2002 but the conviction in one of them was not quashed until 2005. In his judgment in *Heath* (referred to above) Newman J said at paragraph 6:

"The regulation provided by the Board is of particular importance because the users of forensic pathology services are, in the main, not in a position to assess for themselves the technical standards of the work carried out by forensic practitioners. Accordingly, the Board has a vital role to underpin the proper functioning of the criminal justice system and to prevent miscarriages of justice."

I agree. So here the GMC seems to me to have a similar role. I should add in parenthesis that I say nothing about the merits of Dr Heath's case because I think it is ongoing. In any event I do not know what they are.

The case of Dr Lannas (see above) demonstrates a different problem, namely what to do where the trial judge is unaware of the position. In *Lannas* issues relating to Dr Lannas were referred to the Home Office by a number of other pathologists and two coroners. In the case of *R v Kayretli* [1999] EWCA Crim 3445, it is plain that the trial judge was not aware of the problems and did not criticise her. The Court of Appeal said at paragraph 26:

"What neither judge nor jury nor, we are confident, the prosecution knew was that the quality of Dr Lannas' work had recently been called into question. Indeed prior to the trial commencing, the Home Office Policy Board for Forensic Pathology through its Quality Assurance and Scientific Standards Committee (which monitors the work of Home Office pathologists) had in 1996 held two of Dr Lannas' reports to be below standard." Those cases seem to me to exemplify the problems with the judge's solution in this case.

I appreciate that we have had much more detailed argument on these questions than the judge did. It may well be that, if he had had as much assistance as we have had, he would have reached a different conclusion but I do not think that it is appropriate or principled for the court to afford a paediatrician, or indeed any other expert, the kind of new conditional immunity at common law suggested by the judge, where all depends upon a subsequent decision by the trial judge or by this court. As Ms Davies in substance put it, it is wrong in principle for the jurisdiction of a regulatory body to be determined by a different body, however independent, namely the trial judge or the Court of Appeal.

Ms Davies nevertheless seeks to uphold the judge's decision that Professor Meadow was immune from FTP proceedings. She recognises I think that there are problems as to where precisely the line is to be drawn but she submits that, wherever it is, Professor Meadow is entitled to immunity. She stresses the public interest in ensuring that there are competent doctors, especially paediatricians willing and able to give evidence in sensitive and sometimes high profile cases, both in the criminal courts and in the Family Justice System. She relies upon the material which was before the judge and his conclusion in paragraph 6 of his judgment quoted above. These concerns are emphasised by Thorpe LJ in his judgment and should not in any way be belittled. Certainly nothing in this judgment is intended to belittle them.

Ms Davies submits that both limbs of the rationale for the immunity from suit discussed above apply to paediatric experts, namely that to ensure that witnesses give evidence freely and fearlessly and that they are not exposed to a multiplicity of litigation going over the same ground by disgruntled litigants, often with hopeless cases. She focuses particularly on paediatricians rather than on expert witnesses generally and submits that it is or may be appropriate to treat different professions differently, relying upon the observations of Otton LJ in *Stanton v Callaghan* quoted above.

As I stated earlier, Ms Davies does not argue for the same immunity as the immunity from civil suit which I have discussed at some length. Her proposal is different from that of the judge. She recognises that expert witnesses have never been immune from contempt proceedings or from criminal process. Thus they can be prosecuted for perjury or conspiracy to pervert the course of justice. She also accepts that, like any witness, a civil action will not lie against an expert witness on the basis of anything said as a witness, whether or not what is said amounts to a crime: see eg *Darker*. However, she proposes that FTP proceedings should be permitted in respect of any statement made by a witness which amounts to a crime. So, for example, a witness could be sued for conspiracy to injure.

This is an entirely new suggestion which has not, so far as I am aware, been made before. It does not have the defects of the judge's solution, so far as it depends upon the decision of the trial judge, to which I have referred at some length, but it has what to my mind is the same underlying difficulty. It involves the extension of the common law immunity from civil suit to a common law immunity from FTP proceedings. It seems to me that the same objections apply to this extension as apply to the blanket immunity discussed above. In particular, such an immunity would cut across and interfere with the statutory responsibilities of the GMC or its equivalent. It would limit the power (and duty) of the GMC to investigate an allegation that an expert is unfit to practise except in cases where the facts alleged amount to a crime. I

see no principled basis upon which the common law could impose such a limit. I would not therefore adopt Ms Davies' proposal.

I should add that in reaching these conclusions I have not overlooked the problems adverted to by the judge and emphasised by Thorpe LJ in his judgment. He has set out there some of the history of recent events in the particular field with which this case is concerned. It is to be hoped that a solution to the particular problems identified can be found by discussion between those directly concerned, and that, if appropriate, changes can be made, including changes to the relevant rules governing the GMC. In particular, 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.

However, for the reasons that I have given, 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. Ms Davies was right not to challenge the jurisdiction of the GMC, either before the FPP or before the judge. For these reasons I would allow this part of the appeal and hold that the FPP had jurisdiction to entertain the allegations against Professor Meadow.

PART II SERIOUS PROFESSIONAL MISCONDUCT

This part of my judgment should be read after and in the light of the judgments of Auld and Thorpe LJ, which I have read in draft. They have set out the facts in considerable detail and it would serve no useful purpose for me to do the same. They have concluded that the judge was correct to allow the appeal from the decision of the FPP that Professor Meadow was guilty of serious professional misconduct. It follows that the GMC's appeal on this question will be dismissed. I have reached a different conclusion from the other two members of the court and thus find myself in a minority. In these circumstances I do not think that it is appropriate for me to do any more than shortly to express the reasons for my conclusion that Professor Meadow was guilty of serious professional misconduct.

As to the relevant test, I agree with the approach adopted by Auld LJ in paragraphs 117 to 127 below. I turn to the facts.

It is common ground between the parties that the relevant principles to be adopted by expert witnesses are summarised by Cresswell J in *The Ikarian Reefer* in the passage quoted in paragraph 21 above. I extract these principles as being of particular relevance:

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.

It is in my opinion of the utmost importance that an expert should only give evidence of opinion which is within his particular expertise and that, where a statement, whether made in writing or orally, is outside his expertise, he should expressly say so. If, for example, it depends upon work done or opinions expressed by others, that work or those opinions should be identified in the statement, so that their validity can be ascertained by the parties to the proceedings or by the court. All reasonable attempts should be made check the validity of an opinion which is not within the expert's expertise. These are simple precautions which should be taken by experts because of the risk that the opinion might be wrong, with what may be very serious consequences. This seems to me to be of particular importance in a serious criminal matter such as the trial of a defendant for murder.

It was the failure of Professor Meadow to adopt these principles and to adopt these precautions which, in my opinion, amounted to serious professional misconduct. I agree with Auld and Thorpe LJ that it was not appropriate for the FPP to judge Professor Meadow more harshly because of his great experience and eminence but these seem to me to be elementary precautions, which should have been taken. The judgments of Auld and Thorpe LJJ both focus in particular upon the judgments of the Court of Appeal Criminal Division, especially that given by Henry LJ in the first appeal. I accept that those judgments are relevant and that it was most unfortunate that the parties agreed (for different reasons) that neither judgment should be put before the FPP but we should be careful not to place too much weight upon them. We should judge the conduct of Professor Meadow at the time he made his statements and gave evidence.

The key parts of the evidence given by Professor Meadow which were scrutinised by the FPP and the judge are set out by Auld LJ. As Auld LJ says in paragraph 130, the main focus of Professor Meadow's evidence prepared for the committal proceedings was a consideration, in the light of the pathological material before him and his clinical findings, of various possible alternative causes of death, with a view to determining a possible or probable cause of each of the deaths. Professor Meadow's statement included this passage under the heading "Two Infant Deaths in One Family":

"Even when an infant dies suddenly and unexpectedly in early life and no cause is found at autopsy, and the reason for death is thought to be an unidentified natural cause (Sudden Infant Death Syndrome) ["SIDS"], it is extremely rare for that to happen again within a family. For example, such a happening may occur 1:1,000 infants, therefore the chance of it happening twice within a family is 1:1m. Neither of these two deaths can be classified as SIDS. Each of the deaths was unusual and had the circumstances of a death caused by a parent."

I agree with Auld LJ that, as he puts it in paragraph 131, there is no doubt that this statement, if and when given in evidence at trial, would tend to negative any SIDS defence and thus support in the eyes of the jury a view that these deaths were not natural. As Auld LJ says in paragraph 132, and as is now common ground, the conversion, or "squaring", in this passage of the odds of 1:1,000 deaths for one death to 1:1m deaths for two deaths, is only valid if each of the deaths is truly independent of the other, that is without, at the very least, the shared genetic and environmental circumstances of the children being members of the same family. So squaring of this sort should only be considered valid where true independence of each event from the other has been established. There was no such independence on the facts here.

It is fair to say that at the committal proceedings, at which the Professor again referred to the squaring, the principle was not challenged on behalf of the defence. Auld LJ has explained the events in some detail. He has also explained in paragraphs 136 to 138 how the draft CESDI report came to be used as the source of the figure of 1 in 73 million which so struck the FPP. Before the trial Professor Meadow produced a further witness statement which included the following:

"Since writing my report, I have read the reports of other medical experts. Apart from non-accidental injury, no likely specific medical cause of death has been proposed. Thus, it is suggested that the deaths of both children should be considered as examples of SIDS. The likelihood of SIDS rises with social circumstances. The most recent estimation of the incidence in England is that for a family in which the parents do not smoke, in which at least one has a waged income, and in which the mother is over the age of 26 years, the risk is 1 in 8,543 live births. Thus the chance of two infant deaths within such a family being SIDS is 1 in 73m."

The other medical experts were or included Professor Fleming and Professor Berry, who were co-authors of the CESDI report. They had made statements to the defence which had been disclosed to the prosecution. The additional statement of Professor Meadow was served on the defence because, in the light of the defence reports, it was thought that the defence would rely upon SIDS at the trial, although in the event it did not do so.

In paragraph 37 of his judgment the judge said this about that statement:

"As will be obvious, this was based on the extract from the CESDI study which I have already cited. It was a statement based on a misunderstanding of the significance of the squaring. The squaring was not intended to be a guide to the risk of recurrence. The figures given were estimates based on a mathematical modelling and were not observed rates. Since independence could not be assumed, the squaring was a statistically invalid assumption and was intended to do no more than show that it produced in truth an underestimate of the real risk. I am bound to say, having read Professor Fleming's evidence (he was a witness before the FPP), I am far from clear why the squaring exercise was included at all."

In paragraphs 38 and 39 the judge then described Professor Meadow's attempt to contact Professor Fleming, set out the material faxed by Professor Fleming to counsel for the defence and said that the defence had all the necessary ammunition to question the appellant's use of statistics. Auld LJ has described the evidence at the trial in some detail between paragraphs 142 and 158. The CESDI report was put before the jury by the prosecution without the qualifying text quoted by Auld LJ in paragraph 137. As Auld LJ says in paragraph 151, Professor Meadow prefaced his answers about the table with the observation that it was necessary to approach statistics with caution but described the CESDI study as the largest, latest and most reliable in the country and did not refer to the qualifications in the text. On the one hand, I agree with Auld LJ that Professor Meadow did not say (at any rate expressly) either that it represented the odds against Mrs Clark's children having died natural deaths or that it supported the prosecution case by showing a probability that they had died from unnatural causes. On the other hand, I also agree with Auld LJ that that can have been the only possible relevance of such evidence to the case and was capable, without a firm warning from the judge, of being misunderstood by the jury.

In paragraphs 152 to 154 Auld LJ sets out the key evidence which Professor Meadow gave as to the significance of the table. The professor explained that it calculated the risk of two infants dying of SIDS in a family by chance:

"... you have to multiply 1 in 8,543 times 8,543 and ... in the penultimate paragraph. It points out that it's approximately a chance of 1 in 73 million."

He added:

"... in England, Wales and Scotland there are about say 700,000 live births a year, so it is saying by that happening will occur about once every hundred years."

And in response to the following question by Mr Spencer:

"So is this right, not only would the chance be 1 in 73 million but in addition in these two deaths there are features which would be regarded as suspicious in any event?"

He replied "I believe so."

Mr Bevan did not challenge the admissibility of this evidence either on the ground that it was irrelevant or on the ground that it was unfairly prejudicial. He cross-examined Professor Meadow on the basis that the chances of a second child dying were the same as the chances of the first child doing so, viz in this example about 1 in 8,500. Professor Meadow agreed that it is just like tossing a second coin but added:

"This is why you take what's happened to all the children into account, and that is why you end up saying the chance of two children dying naturally in these circumstances is very, very long odds indeed, one in 73 million."

In answer to the next question he said:

"... it's the chance of backing that long-odd outsider at the Grand National, you know; let's say it's an 80 to 1 chance, you back the winner last year, then the next year there's another horse at 80 to 1 and it is still 80 to 1 and you back it again and it wins. Now here we're in a situation that, you know, to get to these odds of 73 million you've got to back that 1 in 80 chance four years running, so yes, you might be very, very lucky because each time it's just been a 1 in 80 chance and you know, you've happened to have won it, but the chance of it happening four years running we all know is extraordinarily unlikely. So it's the same with these deaths. You have to say two unlikely events have happened and together it's very, very, very unlikely."

He was then asked whether he had ever heard the expression 'Lies, damned lies and statistics' and he said "I don't like statistics, but I'm forced into accepting their usefulness".

The case against Professor Meadow is that he should not have introduced the notion of squaring in presenting the various statistics to the court, either in his statements or in his oral evidence. Thus he should not have referred to the chances of a second SIDS death being one in a million without explaining that this statistic would only be valid if the deaths were truly independent of one another. More strikingly he should not have referred to the chances being 1 in 73 million without explaining the qualifications in the CESDI paper. Yet more strikingly still, he should not have used the Grand National analogy, which likened the chances of a second SIDS death to successfully backing four 80 to 1 outsiders to win the Grand National, especially when he immediately added that "it's the same with these deaths. ... You have to say two unlikely things have happened and together it's very, very, very unlikely." I do not think that there can be any doubt that in giving the answers quoted in paragraphs 79 and 80 above, he was applying the 73 million to 1 statistic, the one in a hundred years' chance and the Grand National analogy to these deaths.

The failure of Professor Meadow to introduce the qualifications to the figure of 73 million to one was described by Kay LJ, giving the judgment of the second court of appeal as follows in paragraph 102:

"None of these qualifications were referred to by Professor Meadow in his evidence to the jury and thus it was the headline figures of 1 in 73 million that would be uppermost in the jury's minds with the evidence equated to the chances of four 80 to 1 winners of the Grand National in successive years."

Later Kay LJ said in paragraph 175:

"Putting the evidence of 1 in 73 million before the jury with its related statistic that it was the equivalent of a single occurrence of two such deaths in the same family once in a century was tantamount to saying that without consideration of the rest of the evidence one could be just about sure that this was a case of murder."

I entirely agree with both those statements. Professor Meadow must surely have appreciated that that was the case or, if he did not, he was to my mind grossly negligent in not doing so.

Professor Meadow is not a statistician and had no relevant expertise which entitled him to use the statistics in the way he did. I entirely accept the point that he made a mistake which other non-statisticians have made but that does not seem to me to exonerate him. He gave the evidence as part of his expert evidence and, moreover, did so in a colourful way which might well have been attractive to a jury without expressly disclaiming any expertise in the field on an issue the only possible relevance of which can have been (as stated above) to support the prosecution's case that the children had both died from unnatural causes. He knew that he had no such experience and should have expressly disclaimed any. To my mind, that amounts to serious professional misconduct, as the FPP held.

I appreciate that this view is different from that of both the judge and of my Lords and that their views are based to a significant extent upon the views expressed by the first court of appeal. In particular, I appreciate the force of these considerations, which are accurately described in detail by Auld LJ:

- i) The case against Mrs Clark as presented to the jury, which of course included the evidence of Dr Williams, was a strong one. It was that the deaths were not from natural causes and that the children must have been murdered.
- ii) The evidence of the statistics was a side show at the trial because it was not the defence case that the deaths were SIDS deaths. The defence case was that the deaths were caused by natural causes. By the end of the trial, as Henry LJ put it in paragraph 166 of the first court of appeal's judgment, the precise measure of rarity was not a significant issue.
- iii) The central issue in each case was whether the prosecution could exclude death by natural causes. The effect of the medical evidence as a whole was that neither child was the subject of a SIDS death and the lowest common denominator (as Henry LJ put it) was that each death was unexplained and consistent with an unnatural death.
- iv) There was a considerable amount of evidence in addition to that of Professor Meadow, including the evidence of Dr Williams, and the essential basis of his evidence was not the statistical evidence of which complaint is made.
- v) As appears in paragraph 144 of Henry LJ's judgment, the court concluded that Professor Meadow's opinion was based on his expert assessment of the medical and circumstantial evidence and not on the statistical material.
- vi) The first court of appeal rejected the suggestion that Professor Meadow contributed to the danger of misinterpretation (paragraph 155). The 1 in 73 million figure was merely a distraction (paragraph 162). Professor Meadow did not misuse the figures, although he did not help to explain their limited significance (paragraph 163).
- vii) The defence was aware of the point about squaring, Professor Berry made the point and, indeed, the judge reminded the jury about Professor Berry's evidence in his summing up (paragraph 139 of Henry LJ's judgment).
- viii) The criticism which the first court of appeal made of the trial was not misuse by Professor Meadow of the statistics but of the direction given to the jury by the judge in the course of his summing up. The court's concern was that counsel for the prosecution should not have said to the jury in his closing speech that the existing injuries led to "... even longer odds ..." than the 73 to 1.

ix) The court's concern can be seen in paragraphs 166 and 168 which are quoted by Auld LJ in paragraph 165:

"166. We have made clear what the judge should have told the jury: that it was the prosecution's case that to have one unexplained infant's death with no suspicious circumstances in the family was rare, and for there to be two such in the same family would be rarer still. That was the only relevance of ... [the table], and the statistics were capable of showing that, but nothing more. They could not help as to whether the defendant was guilty or not guilty. ... The difficulty we feel ... is that by the time of the speeches, rarity was largely accepted, so the measure of rarity, the CESDI Study was not important. The 73 million figure should have been cleared away as a distraction. Instead the judge considered that the statistics could be considered. Might the jury have been misled into attributing to those statistics a significance they did not have, i.e. as lengthening the odds against the deaths being natural?

...

168. ... we conclude that there is some substance to the criticism that the judge appeared to endorse the prosecution's erroneous approach in this particular. ...".

x) Notwithstanding that conclusion the court did not consider the convictions unsafe. As quoted by Auld LJ in paragraph 166, it stated its conclusions thus:

"256. ... we consider that there was an overwhelming case against the appellant at trial. If there had been no error in relation to statistics at the trial, we are satisfied that the jury would still have convicted on each count. In the context of the trial as a whole, the point on statistics was of minimal significance and there is no possibility of the jury having been misled so as to reach verdicts that they might not otherwise have reached. ...

257. It follows that in our judgment the error of approach towards the statistical evidence at trial ... did not render the convictions unsafe."

Although I recognise the force of my Lords' conclusions, I am not persuaded that those considerations lead to the conclusion that Professor was not guilty of serious professional misconduct when he used the statistics as he did as part of his evidence that, in his opinion, the deaths of the children were not natural. I recognise that he had other reasons for his opinion, that there was other evidence which supported it, that the defence was able to cross-examine him on the statistics and of course that he was not responsible for the way in which prosecuting counsel addressed the jury or for the way the defence conducted the case. However, to my mind, none of that justifies the evidence he gave arising out of the statistics.

None of it justifies Professor's Meadow's decision to give the evidence summarised in paragraphs 79 and 80 above in which he related the statistics to these deaths. The views of the second court of appeal quoted in paragraph 82 above are in my opinion plainly correct and, in so far as there is any difference between those views and the views of the first court of appeal, are to be preferred. My Lords have expressed the views of the second court of appeal as tentative. I would prefer to describe them as provisional.

The judge accepted that Professor Meadow could properly be criticised for not making it clear that he was not an expert statistician but ultimately expressed his conclusions in this way in paragraphs 54 and 55 of his judgment:

"54. I have no doubt that that conclusion is not justified by the evidence before the FPP. ... he made one big mistake, which was to misunderstand and misinterpret the statistics. It was a mistake, as the panel accepted, that was easily and widely made. It may be proper to have criticised him for not disclosing his lack of expertise, but that does not justify a finding of serious professional misconduct.

55. Ms Davies submits that the conclusion that he had acted in good faith and that there was no evidence of calculated or wilful failure to use best endeavours to provide evidence precluded a finding of serious professional misconduct. I accept that such a finding can be

made even though there has been no bad faith or recklessness. But it will only be in very rare case that such a finding will be justified. The lapse in question must be serious indeed to lead to such a finding in the absence of bad faith. I am satisfied that the lapses in this case did not justify the finding."

I accept the judge's conclusion that it will be a rare case in which a person should be held to be guilty of serious professional misconduct in the absence of bad faith and I entirely accept that Professor Meadow was held not to have acted in bad faith or to have intended to mislead the court or anyone else. I also agree that, as the judge put it, the lapse in question must be serious indeed before the conduct in question can be regarded as serious professional misconduct. Auld LJ noted in paragraph 201 that it is common ground that serious professional misconduct may take the form of incompetence or of negligence of a high degree. All depends upon the circumstances of the particular case.

It is important to have in mind that the way a case is developed at and before trial is essentially a matter for the parties and their lawyers and that an expert must not be blamed for the shortcomings of the lawyers or indeed the judge. Equally, proper account must be taken of what Auld LJ describes as the alien confines of the witness box, where the witness is giving evidence in an adversarial contest in which the judge and the lawyers hold sway. All questions of legal relevance and admissibility are for the parties and the judge and not for the expert. As Auld LJ puts it in paragraph 205, it is important to assess the expert's conduct in the forensic context in which the allegations arise and it is of great importance to take account of the circumstances in which he came to give the evidence and of the potential effect on the outcome. I do not think, however, that it is relevant in deciding the question whether he is guilty of serious professional misconduct (as opposed to the question of penalty) to take account of the actual outcome.

On the other hand, I agree with Auld LJ that none of this absolves the expert from what he calls in paragraph 207 professional or forensic impropriety in the presentation and form of his evidence, although his conduct must be judged in the context of the particular circumstances in which he or she is placed.

The difference between the view that I have formed and that formed by my Lords is not on the question whether Professor Meadow was guilty of professional misconduct but whether he was guilty of serious professional misconduct. I agree with the conclusions which Auld LJ sets out in paragraph 210, which expresses in this way:

"210. The first [starting point] is that Professor Meadow was undoubtedly guilty of some professional misconduct. In his preparation for, and presentation of evidence at, the trial of Mrs Clark he fell below the standards required of him by his profession. Although not an expert in the use of statistics or calculation of probability, he put forward a theory of improbability of recurrence of unexplained and seemingly natural infant deaths, applicable only where recurrence occurred in familial, environmental and economic circumstances wholly independent of those of a first such death. In doing so, he relied initially on statistical figures of uncertain source and scientific validity and then on those in the CESDI Report, which had nothing to do with the probabilities of recurrence in any individual case, and which, in any event, he misunderstood and, by implication and the use of an inappropriate analogy, misapplied. In addition, and importantly, he did not expressly draw the court's attention to the fact that he had no expertise in the field of statistics or calculations of probability in this or any other field."

These seem to me to be serious shortcomings. The essential features of his evidence which have persuaded me that Professor Meadow's shortcomings amount to serious professional misconduct and not simply to professional misconduct are that he did not simply state that the statistics were relevant only to SIDS deaths, which these were not, and that they were not

relevant to and did not help to decide whether the deaths of the children were caused by natural causes. On the contrary, the way in which he gave the evidence quoted in paragraphs 79 and 80 above in my opinion suggested that his opinion was that the 73 million to 1 statistic, the one in a hundred years' chance and the Grand National analogy all applied to the chances of these deaths being caused by natural causes. The second court of appeal expressed that opinion in paragraphs 102 and 175 of their judgment (quoted in paragraph 82 above), albeit without hearing full argument on the point, and I agree. To put it at its lowest, there was to my mind a serious risk that the jury would so understand the evidence and accept it.

I entirely accept that Professor Meadow did not intend to mislead the court and that he honestly believed in the validity of his evidence when he gave it. I also accept that some of the FPP's reasoning was flawed. Thus (as stated above) I do not think that it was right in the circumstances of this case to judge Professor Meadow more harshly because of his undoubted eminence. Also I do not think that he can fairly be criticised in relation to the figure of 1 in 1000. It was his use of the squared figures which is open to criticism. Moreover I quite understand that in giving his oral evidence he was answering questions asked by counsel.

Nevertheless, none of the points which can be made in Professor Meadow's defence, either singly or when taken together, seem to me to negative the key points set out above. In particular, although (as already stated) Henry LJ said that, although he can be criticised for not helping to explain the limited significance of the figures, he did not misuse the figures, that seems to me to be a very narrow view. It is true that the figures related to SIDS deaths and these were not SIDS deaths and that at the trial it was not said that they were, it seems to me that Professor Meadow did misuse the figures in that he applied the 1 in 73 million figure to the deaths of these children without qualification in the context of his opinion that the deaths were not natural. Moreover, he did so by using colourful language including the reference to the one in a hundred year chance and the Grand National analogy.

It is true that Professor Meadow did not intend to mislead the jury and that no-one challenged what he did but, as Kay LJ put it in paragraphs 102 and 175 quoted above, that was the picture that would be uppermost in the jury's minds and was tantamount to saying that without consideration of the rest of the evidence one could be just about sure that this was a case of murder. In my opinion Professor Meadow should have appreciated that there was (to put it no higher) a serious risk that that would be the effect on the jury and should not have made the unqualified statements that he did. In short this is one of those rare cases in which the FPP was correct to hold that the expert was guilty of serious professional misconduct without acting in bad faith.

For these reasons I would have allowed the appeal. Since this is a minority view, the question of sanction does not arise. However, it is right to observe that the GMC did not seek to uphold the sanction of erasure from the register. It was in my opinion correct not to do so. In all the circumstances of the case, erasure was not appropriate. Indeed, given the professor's experiences since the trial, the mitigating factors referred to by Auld LJ, his long and distinguished service to the public and his age a finding of serious professional misconduct would be enough.

Lord Justice Auld :

INTRODUCTION

Professor Sir Roy Meadow is an eminent paediatrician. He is now aged 73, and, before the FPP proceedings he had retired from the clinical practise of medicine. He had long held a well-deserved reputation as one of the pre-eminent paediatric and child healthcare specialists in this country, through his clinical practice, his published research, the giving of lectures and the giving of evidence in family and criminal proceedings on child abuse. His eminence had

been marked by a number of positions in the world of paediatric medicine, notably in his presidencies of the British Paediatric Association and of the Royal College of Paediatrics and Child Health.

In 1998 Professor Meadow was instructed by the Cheshire Constabulary to provide a medical opinion on the causes of the successive deaths of each of the two infant sons, Christopher and Harry, of Mrs Sally Clark and her husband, Mr Stephen Clark. There were a number of similarities relating to each death, one of which was that they had occurred whilst in the care of Mrs Clark and in the absence of her husband. Professor Meadow reviewed all the material provided to him by the police, including the reports of the findings of the pathologists who had conducted the post-mortems. In 1998 he provided the police with a report expressing the view, on the pathological and other information put before him, of the improbability of their deaths from natural causes and as having the characteristics of deaths caused by a parent. He included in his report a brief reference, under the heading, "Two Infants' Deaths In One Family", to some statistics as to the likely occurrence and recurrence of a sudden and unexplained unexpected infant death in a family, known as "Sudden Infant Death Syndrome" ("SIDS"). This reference derived from a study in 1981 of the American National Institutes of Health on "sudden death of an infant unexpected by history, and which remains unexplained after a thorough investigation of the circumstances of death and the conduct of a post-mortem to a satisfactory standard".

Professor Michael Green, a consultant pathologist to the Home Office also provided the police with a report, in which, in reliance on the pathological material and information as to the circumstances of each death, he too opined that the deaths were not due to natural causes.

Largely on the strength of the expressed views of those two experts, the police charged Mrs Clark with the murder of her sons. Both gave evidence at the committal proceedings and at trial. Professor Meadow's principal evidence, like that of Professor Green was as to the significance of the pathological and circumstantial evidence relating to each death. But, in circumstances to which I shall return in a little more detail, he also spoke of and developed the point made in his witness statement on the SIDS statistics. The jury, by a majority of ten to two, found her guilty of murder of both children.

In 2000 Mrs Clark appealed unsuccessfully to the Court of Appeal against those convictions. The Court found the pathological and circumstantial evidence to be overwhelming proof of guilt, regardless of the various complaints made in the grounds of appeal, one of which went to Professor Meadow's use of the statistics. The Court regarded that evidence as irrelevant to the issue whether the deaths of Mrs Clark's infants had been natural or unnatural, voiced no criticism of Professor Meadow as to his use of it, expressed some concern that that the trial judge had not ruled it inadmissible or given a stronger warning to the jury about it than he did, but held that it did not, in the light of the other evidence, render the conviction unsafe.

Subsequently, it was discovered that the pathologist, Dr Alan Williams, who had conducted the post-mortem of Christopher and the initial post-mortem of Harry, had not disclosed to the prosecution or at trial highly relevant results of certain biological tests on Harry. That led the Criminal Cases Review Commission to refer her case back to the Court of Appeal, which this time upheld her appeal. It did so, on the basis of that non-disclosure. It did not order a re-trial since the prosecution did not seek it, having regard to the fact that, if the non-disclosed material had been disclosed and considered at the time, it was likely that further tests, not possible years after the event, would have been undertaken. In the circumstances, the Court did not need to, and did not, hear full argument or any evidence on the implications for the safety of her convictions of Professor Meadow's statistical evidence. Nevertheless, it expressed, albeit tentatively, some concern about the possible impact of that evidence on the jury, and stated that, if the point had been argued before the Court, it would probably have provided "a quite distinct basis upon which the appeal had to be allowed".

In the light of the success of Mrs Clark's appeal and of that tentative indication by the Court, Mrs Clark's father complained to the GMC that Professor Meadow, in his use of the statistics in his capacity as an expert witness for the prosecution, acted outside the range of his expertise and that his evidence was so flawed that it amounted to serious professional misconduct. The FPP, following a 16 day hearing in late June and early July 2005, found him guilty of serious professional conduct, and ordered the erasure of his name from the Register of Medical Practitioners.

Professor Meadow appealed the finding of, and sanction imposed by, the FPP to the High Court pursuant to section 40 of the Medical Act 1983, and on 17th February 2006 Collins J allowed the appeal. In doing so, he held: 1) that Professor Meadow was entitled to immunity from regulatory proceedings before the FPP arising out of his evidence in the trial of Mrs Clark, an immunity which the Judge ruled - based as it was on public policy that witnesses should not be deterred from giving evidence by fear of subsequent proceedings arising from their evidence - applied to regulatory or disciplinary proceedings as well as civil suits in the courts, and whether or not it was given dishonestly or otherwise in bad faith; and 2) if, contrary to his view, the immunity did not extend to the proceedings before the FPP, (a) although the proceedings were not limited to a review, the test for intervention by the court was whether it considered the finding or sanction to be "clearly wrong", and (b) that he considered the FPP's finding and sanction were clearly wrong, since, in his view, Professor Meadow's error consisted in making only one mistake, namely of misinterpretation and misunderstanding of the evidence.

The GMC, in challenging the Judge's rulings and findings, seek to restore the FPP's finding of serious professional misconduct, but not the sanction of erasure, suggesting instead that he should subject to a condition not to undertake medico-legal work.

PART 1

IMMUNITY FROM FPP PROCEEDINGS

I respectfully agree with the Master of the Rolls, for the reasons he has given, that Professor Meadow has no immunity from disciplinary proceedings before the FPP in respect of his evidence in the murder trial. In deference to the concerns expressed by Thorpe LJ in his judgment about the problems of securing expert evidence in the Family Justice System, and having regard to the important issue of principle raised as to the common law limits of witness immunity, I add a few words of my own.

There are two complementary starting points for consideration of the principle.

The first is that immunity from suit for anything done or said in the course of judicial proceedings is itself an exception from the operation of the most fundamental feature of our system of law that breach of it should be remediable through the courts. *Ubi jus, ibi remedium*.

The second, witness immunity from civil suit, came into being a long time ago for the same purpose, to protect the integrity of the legal system so that those who administer justice and those who seek it, or help those who seek it, are not deterred from doing so by the possibility or threat of subsequent civil suit arising out of what they say or do in the proceedings.

These complementary - but in the limited exception of the one to the other – also opposing, principles require that the exception should extend no further than necessary to ensure that justice may be sought and administered without constraint in the courts. To that end, the immunity should apply and extend only insofar as it is necessary to achieve that purpose.

Hence the few, but well-established, exceptions to the immunity of suits for malicious prosecution, prosecutions for perjury and proceedings for contempt of court, a common feature of which, if well-based, is to prevent abuse of the process of the courts for unlawful ends.

For the system to function efficiently and with justice to all who may be affected by the prospect of recourse to subsequent proceedings arising out of what they have said or done in court, those who may be, or who may consider themselves, vulnerable to such complaint must have certainty as to whether they are immune and, if so, that their immunity is absolute.

The fact that a witness - expert or otherwise - may be deterred from making himself available to give evidence in civil, criminal or other judicial proceedings for fear of disciplinary proceedings by his professional body arising out of serious professional misconduct by him in the witness box is no basis for extending the immunity to such proceedings. There is high and firm authority militating against any such extension, to which the Master of the Rolls has referred; see in particular the reasoning and citation of authorities by Lord Clyde in *Darker*, at 456-457. It is important to emphasise that we are talking about serious professional misconduct here, not some civil wrong falling short of it, but of disciplinary proceedings in protection of the profession and the public.

That, it seems to me, is the answer to Collins J's purported justification, in paragraph 17 of his judgment, for his extension of the immunity from civil suit to disciplinary proceedings so as not to deter medical practitioners, in particular paediatricians, from giving evidence in court. The reason why the immunity should not be extended to professional disciplinary proceedings is that, to enable expert witnesses to give evidence unconstrained by their professional codes of conduct and/or the accepted norms of their profession, would run contrary to the public policy for immunity, which is based on the need to protect the administration of justice. Put in another way, why should an expert witness be entitled to go into the witness box secure in the knowledge that what he says will have immunity not only from civil suit, say in negligence or other civil wrong, but also disciplinary proceedings for conduct so bad that, if established, would bring his profession into disrepute and, if unchecked, be potentially harmful to the public?

For similar reasons, and for those given by the Master of the Rolls in paragraphs 64 and 65 of his judgment, I can see no logical basis or one that is permitted to us on authority for extending the immunity, as suggested by Miss Davies, to expert witnesses, and paediatricians in particular, in respect of professional misconduct falling short of a crime.

As to Collins J's suggestion, in paragraphs 22 to 26 of his judgment, that, a judge could, on a case by case basis, set aside the immunity he proposed by referring a witness's conduct he regards as particularly bad to the appropriate disciplinary body, I can see nothing but disaster. The frailty of such a suggestion lies in Collins J's observation in paragraph 26 of his judgment that "[t]he precise boundaries of the immunity will have to be established on a case by case basis". It goes to the very root of the core principle of immunity that it must be certain in its extent and it must be absolute. And that must be equally so where the boundary line is between – in the case of medical practitioners – serious professional misconduct or no, or between serious professional misconduct and serious professional conduct so bad ("super serious professional misconduct") that a judge in a particular case considers it necessary to refer the matter to a disciplinary body. As the Master of the Rolls has put it, in paragraph 53 of his judgment, that would make the trial court or this Court the sole arbiter, on a case by case basis, as to who should be immune and who should not. It is difficult to see how such a proposal can stand with the imperative of the need for certainty articulated by Lord Hoffmann in *Taylor*, at 214, and by Lord Clyde in *Darker*, at 457 C-E. Lord Hoffman said:

"... the person must know at the time he speaks whether or not the immunity will attach."

Lord Clyde said:

"... there has to be some degree of certainty about the existence of an immunity for it to be effective. The matter cannot be entirely left as one to be determined on each and every occasion. For the immunity of a witness to be effective it is necessary that the person concerned should know in advance with some certainty that what he or she says will be protected. So even although the matter may depend in any case upon a balancing of interests it ought to be possible to predict with some confidence whether or not an immunity will apply. The law has sought to achieve this by making it clear that the substance of the evidence presented to the court in judicial proceedings will be immune from attack. ..."

For similar reasons, I agree with the Master of the Rolls, for the reasons he has given in paragraphs 28 – 30, 34, 66 and 67 of his judgment, that there is no basis upon which this Court could distinguish in this respect between medical practitioners, paediatricians in particular, from other professional persons called upon to give expert evidence in the courts. Such distinction, would be highly case-sensitive, and difficult objectively to draw on a case by case basis, the distinction presumably turning on the relative degree to which members of different professions may be deterred from giving expert evidence when called upon to do so, because of their vulnerability to disciplinary proceedings if they misconduct themselves professionally in the witness box. If change, or fine-tuning, in this respect is required – as it may be – it is a matter for the legislature, not for the courts.

PART II

SERIOUS PROFESSIONAL MISCONDUCT

The section 40 test

Section 40 of the 1983 Act provides for an appeal from a decision of the FPP ordering erasure to the High Court. The basis on which such a decision can be challenged is to be found in the Civil Procedure Rules and Practice Direction. CPR. 52.11 provides, so far as material:

"(1) Unless it orders otherwise, the appeal court will be limited to a review of the decision of the lower court unless –

- (a) a practice direction makes different provision for a particular category of appeal; or
- (b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.

The Practice Direction to Part 52 does provide otherwise for appeals to the High Court under section 40 of the 1983 Act, requiring them to be supported by written evidence and, if the court so orders, oral evidence, and to be "by way of rehearing".

CPR 52.22 also provides

"(2) Unless it orders otherwise, the appeal court will not receive –

- (a) oral evidence; or
- (b) evidence which was not before the lower court;
- (3) The appeal court will allow an appeal where the decision of the lower court was -
 - (a) wrong; or
 - (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

(4) The appeal court may draw any inference of fact which it considers justified on the evidence."

The Judge dealt shortly with the test for the High Court on an appeal under section 40. He noted that such an appeal is not limited to a review, but said that the court would not interfere unless persuaded that a decision, whether in respect of a finding of misconduct or of sanction was "clearly wrong", the test with which, without further gloss, he said he would apply.

Appeals under section 40 were transferred from the Privy Council to the High Court on 1st April 2003[1]. As Mr Henderson noted, the Privy Council, shortly before, in *Ghosh v General Medical Council* [2001] Lloyd's Rep Med, 433, and *Preiss v General Dental Council* [2001] 1 WLR 1926, had begun to distance itself from earlier expressions of deference to specialist regulatory and disciplinary bodies. The change of approach, which, it seems to me, is more of emphasis than clear definition, is that, though such disciplinary bodies are in general better able than the courts to assess evidence of professional practice in their respective fields, the courts should still accord them an appropriate measure of respect; see e.g. *CHRHP v GMC & Ruscillio* [2005] 1 WLR 717, CA. Those were undue leniency appeals by the Council for the Regulation of Health Care Professionals under section 29 of the NHS Reform and Health Care Professions Act 2002 against decisions of the relevant regulatory bodies to take no or no adequate disciplinary action. Lord Phillips of Worth Matravers MR, as he then was, giving the judgment of the Court in *CRHCP*, said at paragraph 78:

"...Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected..."

However, the courts should be ready in appropriate cases and, if necessary, to substitute their own view for that of disciplinary bodies.

Submissions

The impetus for the change of emphasis to less deference by the courts to specialist tribunals and the PD requirement for section 40 and like appeals to be by way of rehearing was, submitted Mr Henderson, prompted by the Human Rights Act 1998, to introduce, where necessary, appeal processes that could cure any defect in disciplinary procedures below, namely by way of rehearing. However, he maintained, drawing on observations of Collins J in *Nandi v General Medical Council* [2004] EWHC (Admin) 2317, at para 29, and in *Watson v General Medical Council* [2006] EWHC (Admin) 18, that there was no longer need for any significant change from the pre *Ghosh* and *Preiss* position, certainly so far as section 40 appeals are concerned, since the reorganisation in 2002 of the GMC's disciplinary processes, have now made them more Article 6 compliant. In *Watson*, Collins J said, at paragraph 11:

"The Privy Council rarely if ever had witnesses give evidence before it. There is no reason to believe that when Parliament provided that appeals should come to this court instead it intended to widen the scope of those appeals. In *Nandi* ... I considered this question and observed that Practice Direction 22.3(2), which disapplied CPR 52.11(1), was inappropriate. It may be that it reflected a view that Article 6 of the European Convention on Human Rights required fuller appeal rights since at that time there were doubts about the independence of the GMC committees. The reforms have established that the FPP's now have sufficient independence to mean that an appeal which is in the form of a review is all that is needed to comply with Article 6".

By that route, Mr Henderson submitted, this Court should now treat as otiose, and disregard, the requirement in the PD that a section 40 appeal must be by way of re-hearing, and accord the FPP the due deference that, he claims, Collins J did not. He likened the role of the GMC's FPP's to specialist juries charged with determining whether the facts found by them constitute serious professional misconduct - a value judgement upon which differently constituted panels might reasonably differ, closely analogous to the exercise of a discretion on which the courts should not readily intrude, citing Mance LJ, as he then was, in *Todd v Adam*[2002] 2 All ER (Comm) 1, at para 129, Clarke LJ, as he then was, in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 377, at paras 15 – 17, and the approach of Stanley Burnton J in *Threlfall v General Optical Council* [2004] EWHC (Admin) 2683, at paragraph 20, that, although the PD required an appeal to be by way of re-

hearing, "a re-hearing in this context is in general a review of the decision of the lower court ...".

Mr Henderson submitted, therefore, that Collins J erred in identifying the test as whether the decision of the FPP was "clearly wrong" without identifying the basis upon which he could so find. He said that an approach of expressly allowing appropriate deference in an appellate review to the judgemental process of a professional regulator would provide a more objective and valid approach to a determination whether the evaluation was wrong or "clearly" wrong. It is not clear, he submitted, that that was how Collins J approached it.

Miss Davies challenged the rationale of Mr Henderson's contention that there is no longer any need for the PD's requirement of a re-hearing in such appeals, and submitted that, in any event, the PD remains in force and the Court is not entitled to disregard it. She accepted the "clearly wrong" test, but not on the basis urged by Mr Henderson, of it being outside the range of reasonable judgment of a properly advised and directed FPP, which she suggested, smacked inappropriately of a *Wednesbury* irrationality approach. She regarded it as a reflection of the *Ghosh, Preiss and Todd v Adam* approach, namely of the appellate tribunal making its own decision on the facts found below subject to giving the FPP such appropriate respect as it deserves in the circumstances.

Conclusion

For the following reasons, I can see no basis for faulting Collins J's simple expression of the test, save that I doubt whether the adverbial emphasis of "clearly" adds anything logically or legally to an appellate court's characterisation of the decision below as "wrong".

First, whatever the rationale behind the PD requirement of a re-hearing and whatever the strength or otherwise of Mr Henderson's arguments for saying that it has now disappeared, there is no basis on which the Court can disregard its requirement that the appeal "be by way of re-hearing" as "otiose". The Civil Procedure Act 1997, pursuant to which the CPR are made and have legal force, provides, in Schedule 3, paragraph 6, that they may, instead of providing for any matter, refer to a provision made or to be made about that matter by directions, which is what CPR 22.3(2) does.

Secondly, if there is anything in practice between the contentions of Mr Henderson and Miss Davies on this point, it is so finely shaded as to be of no practical importance in the circumstances of this case. First, whether the appeal is by way of "review" under CPR 52.11(1) or a re-hearing under CPR 11.1(a) by reason of the PD, the material test for quashing a decision of the FPP is whether, as provided in CPR 52.11.3(a), it is "wrong". Collins J's conclusion was that the FPP's decision was "clearly", or plainly, wrong because it was "not justified by the evidence before the FPP". His subsequent analysis of the FPP's treatment of the matter shows that his approach fell within both formulations of the test to the extent, if at all, that they differed in the circumstances here.

Thirdly, given the structure of CPR 52.11, the difference between a "review" and a "re-hearing" is clearly thin and variable according to the circumstances and needs of each case, not least in the stipulation in CPR 52.11(2) of the norm for both processes of no oral evidence or evidence not before the lower court. The analysis of May LJ in *E.I. Du Pont Newmours & Co v S,T, Du Pont* [2003] EWCA Civ 1368, CA, at paragraphs 92-98, is instructive on the overlap between the two, namely that a "re-hearing" in rule 52.11(1) may, at the lesser end of the range, merge with that of a "review", and that "[a]t this margin, attributing one label or the other is a semantic exercise which does not answer such questions of substance as arise in any appeal". But even when a review is a full re-hearing in the sense of considering the matter afresh, if necessary by hearing oral evidence again and, even admitting fresh evidence, the appellate court should still, said May LJ at paragraph 96, "give to the decision of the lower

court the weight that it deserves". This elasticity of meaning in the word "re-hearing" in CPR 52.11 should clearly apply also to the same word in the PD. It all depends on the nature of the disciplinary tribunal, the issues determined by it under challenge and the evidence upon which it relied in doing so, how the High Court should approach its task of deciding whether the decision of the tribunal was, as provided by CPR 52.3(a) "wrong", and, whether on the way to reaching such a conclusion, it draws, pursuant to CPR 52.4 "any inference of fact which it considers justified on the evidence".

The FPP's finding Of Serious Professional Misconduct - The facts

SIDS

The main thrust of Professor Meadow's evidence in the trial of Sally Clark, giving rise to the disciplinary proceedings before the FPP was, as I have said, within his expertise as a paediatrician, and not the subject of any complaint. It was his treatment of the statistics towards the end of his evidence in chief in response to questions by Mr Robin Spencer QC, leading counsel for the prosecution, and then in cross-examination by Mr Julian Bevan QC, leading counsel for the defence, that led to the proceedings before the FPP.

The starting point for that evidence lay in the short reference to SIDS that he included in his first witness statement provided to the police in June 1998 and which was read in the committal proceedings in May 1999 as his evidence in chief. The main focus of that evidence was consideration, in the light of the pathological material before him and his clinical findings, of various possible alternative causes of death, with a view to determining a possible or probable cause of each death. The statement included the following passage under the heading "Two Infant Deaths in One Family":

"Even when an infant dies suddenly and unexpectedly in early life and no cause is found at autopsy, and the reason for death is thought to be an unidentified natural cause (Sudden Infant Death Syndrome) ["SIDS"], it is extremely rare for that to happen again within a family. For example, such a happening may occur 1:1,000 infants, therefore the chance of it happening twice within a family is 1:1m. Neither of these two deaths can be classified as SIDS. Each of the deaths was unusual and had the circumstances of a death caused by a parent." There is no doubt that that statement, if and when given in evidence at trial, would tend to negative any SIDS defence and thus support in the eyes of the jury a view that the deaths were not natural.

However, as only later identified on appeal, the conversion, or "squaring", in this passage of the odds of 1:1,000 deaths for one death to 1:1m deaths is only valid if each of the deaths is truly independent of the other, that is without, at the very least, the shared genetic and environmental circumstances of the children being members of the same family. So squaring of this sort should only be considered valid where true independence of each event from the other has been established.

The committal proceedings

In the committal proceedings in June 1999, Mr John Kelsey-Fry, counsel for Mrs Clark, put to Professor Meadow various research papers as a basis for suggesting that there was a greater risk of SIDS than represented by the statistics included in his witness statement put in evidence, but did not challenge the propriety of his recourse to such evidence. Professor Meadow adhered to his evidence on this, and also referred to a paper of his entitled "Unnatural sudden infant death", published in Archives of Disease in Childhood, in January 1999 – that is, after he had made his witness statement – of a study of 81 children, including in a number of instances two or more children in the same family, thought to have died of

natural causes, but subsequently found to have been killed. The paper included the following passage:

"The reason that more than half the reported families included more than one dead child is likely to be because the courts were impressed by evidence that it was highly improbable for two or more children to die in infancy of undiagnosable natural causes: 'if there is a 1/1000 chance of a child dying suddenly and unexpectedly of natural causes in the first year of life, the chance of two children within a family so dying is 1/1000 000'. A parent who kills only one child is much less likely to be incriminated than one who kills or abuses two or more. Nevertheless, the finding of 26 serial killers is worrying."

When asked, later in the trial and in his evidence to the FPP, about the source of the apparent quotation in that passage, he said that he thought it had come from someone in the audience at a lecture he had given, and that he put it on a blackboard, but he could not recall when or where. Later, he indicated that the figure of 1/1000 could have come from him, but he wasn't sure, but that, if it had, it was not a product of his own experience; it was "a ballpark figure for the incidence" of SIDS over the period covered by the paper; and the 1/1,000,000 figure resulted from his squaring of the 1/1,000 figure –

"I squared it because I did not think there was a meaningfully increased recurrence rate of sudden infant death syndrome, so it seemed to me a legitimate thing to do."

Whatever the provenance and/or accuracy of the 1 in 1,000 figure, it is now common ground that his squaring of it to produce a 1 in 1m chance against recurrence was statistically unsound in that it wrongly assumed independence of the two deaths without stating the assumption. To have any relevance to a case of two unexplained and seemingly natural infant deaths in the same family, it should have been based on an assumption of dependence between the two deaths, so as to produce a greater risk, that is a significantly lower figure than that of the 1m resulting from the squaring exercise. In short, the failure to assume such dependence invalidated the squaring exercise.

The CESDI Report

In August 1999, shortly after the committal of Mrs Clark for trial, Professor Meadow, at the request of Professor Fleming, Professor of Infant Health and Development Physiology at the Institute of Child Health at Bristol University, wrote a preface to a report in draft of a study of which Professor Fleming was the main author, known as "the CESDI Study", commissioned by the Department of Health. It was a study of factors contributing to sudden and unexpected deaths in infancy. But it was not intended to inform the reader, by way of statistics or otherwise, of the probabilities of recurrence of such deaths in the same family. The draft of the Report sent to Professor Meadow to enable him to write his preface indicated a ratio of about 1 SIDS death to every 1,300 deaths – i.e. not far removed from the 1 in 1,000 in his 1999 paper. It identified three important, but not the only factors, capable of lessening that ratio, that is, households at increased risk of such a death, namely those with smokers and/or with no wage-earners and/or with mothers below the age of 26, none of which applied to Mrs Clark's family.

The draft CESDI Report contained a table, with accompanying explanatory text, showing that, for infants in families with all three increased risk factors present, the risk was 1 in 214, compared with a risk of 1 in 8,543 for infants in families with none of those factors. But it produced odds of 1 in 73m – that is, dramatically higher than the 1 in 1m that Professor Meadow had quoted in his 1999 Paper for a second SIDS death in the same family, the principal source of what was later to give rise in his evidence to what has been called "the prosecutor's fallacy", namely the fallacious use of statistics in evidence to create a false impression.[2] The passage in the draft Report accompanying this analysis continued with the following important caveats where two unexplained infant deaths occur in a family, and

nowhere suggested that the statistical information in the table would enable diagnosis of the cause of an unexplained and seemingly unnatural death in an individual case.

"Since the factors will generally remain the same (with the possible exception of maternal age below 27 years) for a subsequent child, the risk of SIDS to a subsequent child in a family in which one infant has already died will range from 1 in 214 to 1 in 8543. This does not take account of possible familial incidence of factors other than those included in the above table. For a family with none of these three factors, the risk of two infants dying as SIDS by chance alone will thus be 1 in (8,543 x 8,543) i.e. approximately 1 in 73m. for a family with all three factors the risk will be 1 in (214 x 214) i.e. approximately 1 in 46,000. Thus, for families with several known risk factors for SIDS, a second SIDS death, whilst uncommon, is 1,600 times more likely than for families with no such factors. Where additional adverse factors are present, the recurrence risk would correspondingly be greater still.

... When a second SIDS death occurs in the same family, in addition to careful search for inherited disorder there must always be a very thorough investigation of the circumstances – though it would be inappropriate to assume maltreatment was always the cause." [My emphases]

As will appear, only the table, of which that text was an explanation, not the text itself, was put before the jury at the trial in the Crown Court. It was given to them by Mr Spencer in the course of his examination in chief of Professor Meadow. And, as Collins J noted, the evidence of Professor Meadow at the trial, based on his understanding of that table, was largely the source of the complaint that led the FPP to its finding of serious professional misconduct.

After committal and before trial, disclosure by the Crown of reports of Professor Fleming, led those representing Mrs Clark to retain him and Professor Berry, a co-author with him of the CESDI Report, as defence experts for the trial, and to serve copies of their reports on the prosecution. Professor Meadow then provided a short supplementary witness statement adding a short passage from the CESDI Report as to the new odds against two SIDS in the same family, an implication as to probability of recurrence which, as I have said, was an over-simplification or misunderstanding of the significance of the CESDI figure. This is how it read:

"Since writing my report, I have read the reports of other medical experts. Apart from non-accidental injury, no likely specific medical cause of death has been proposed. Thus, it is suggested that the deaths of both children should be considered as examples of SIDS. The likelihood of SIDS rises with social circumstances. The most recent estimation of the incidence in England is that for a family in which the parents do not smoke, in which at least one has a waged income, and in which the mother is over the age of 26 years, the risk is 1 in 8,543 live births. Thus the chance of two infant deaths within such a family being SIDS is 1 in 73m."

The prosecution duly served the supplementary witness statement on the defence because it considered that had been part of Professor Meadow's diagnostic exercise and because Professor Fleming's and Berry's reports led it to anticipate that the defence would rely on SIDS at trial. In the event, they did not, but that did not become clear until Professor Berry went into the witness box for the defence. As Collins J observed in paragraph 37 of his judgment, the squaring exercise, applied this time to the much higher CESDI odds against two SIDS in one family, was not intended to be a guide to the risk of recurrence, but estimates drawn from mathematical modelling based on a statistically invalid assumption of true independence between two SIDS deaths in a single family.

Shortly before the trial, Professor Meadow tried, without success, to contact Professor Fleming to check whether he had correctly understood the significance of the table. Professor Fleming, who, although retained to advise in the defence of Mrs Clark was not to be a witness at the trial, sent to her solicitors on 19th October 1999 a letter for use in cross-examination of

Professor Meadow and other prosecution experts. In the letter, he commented in detail on Professor Meadow's supplementary statement and the CESDI Report, pointing out that he had not drawn attention to the many and significant qualifications to any application of the statistics in it, particularly in relation to two infant deaths in the same family. He summarised his warnings in this way:

"... therefore, the risk scoring system which we have developed is primarily aimed at trying to identify families for whom the risk of a subsequent baby dying is substantially increased compared with the general population. Because of the extreme rarity of sudden death in families with none of these risk factors, the use of this risk score for such families is potentially less reliable."

Thus, as Collins J commented in his judgment, the defence were primed before trial to deal with such reliance as the prosecution and Professor Meadow in evidence might place on the CESDI statistics. However, at no stage during the trial did the defence challenge its admissibility or, save through the evidence of Professor Berry, the validity of the squaring exercise as an indicator of probabilities of causation.

The trial

In the trial of Mrs Clark, which took place before Harrison J and a jury at Chester Crown Court in the Autumn of 1999, the prosecution case was that, although there was no direct evidence as to how each of the deaths had been caused, neither could be considered as SIDS, because of the presence of signs of recent and old injuries in each case. Its positive case, as summarised by Henry LJ, giving the judgment of the Court in the first appeal to the Court of Appeal, Criminal Division (R v Sally Clark (No 1) CACD 2/10/00), was that there were similarities in the two deaths that would make it an affront to common sense to conclude that either was natural; it was beyond coincidence for history so to repeat itself. The similarities were that: 1) the babies died at the same age; 2) they were both found by Mrs Clark, and both, on one version given by her, in a bouncy chair; 3) they were found dead at almost exactly the same time in the evening, having been well and successfully fed shortly before, and at a time when she admitted she had become tired in coping; 4) on each occasion Mrs Clark was alone with the baby when, on her account, she found him lifeless; 5) on each occasion her husband was away from home or about to go away; 6) in each case there was evidence of previous abuse; and 7) in each case there was evidence of recent deliberate injury.

In the case of Christopher, the prosecution's evidence included that of three pathologists, Dr Williams, Professor Green and Dr Keeling, and Professor Meadow. Dr Williams had carried out the initial post mortem in both cases. In the case of Christopher, he had originally formed the view that some of the recent injuries could have been caused by attempts at resuscitation and that death had been natural, certifying the cause of death as lower respiratory tract infection. Because of that conclusion, there was no further post-mortem in Christopher's case. However, Dr Williams later changed his opinion. His evidence at the trial was that, while he could not exclude the possibility of some of the recent injuries to Christopher having been caused by attempts at resuscitation, the cause of his death was suffocation or smothering. And, contrary to his earlier conclusion, he now ruled out infection as a possible cause of death. (Kay LJ, giving the judgment of the second Court of Appeal, after considering the transcript of Dr Williams' evidence at trial, noted, at paragraph 55 of the judgment, that he had been unable to explain why he had altered his position in that way, and commented that, at the very lowest, it called into question his competence.)

Professor Green, Dr Keeling and Professor Meadow expressed the view that Christopher's injuries were unlikely to have been a product of attempts at resuscitation, and Dr Keeling and Professor Meadow suggested the injuries were a sign of abuse and consistent with smothering. Their combined evidence, with the addition in the case of Professor Meadow, of

the statistics derived from his paper and the CESDI Report study, was that the deaths of the two boys were not from natural causes.

In the case of Harry, because of his injuries, Dr Williams concluded from his post-mortem examination that he had not died naturally but had been shaken to death. In the light of that conclusion, there was a second post-mortem examination carried out by Professor Emery and Dr Rushton. Professor Meadow and Dr Smith, a consultant neuropathologist, expressed the view that it was not a natural death, and Professor Green and Dr Keeling, while not dismissing that as a possibility, considered the most appropriate diagnosis to be "unascertained".

The defence case was that both deaths were natural. However, when the defence experts, in particular Professor Berry, gave evidence, it became apparent that, while they were broadly supportive of the defence contention that the deaths were or could have been natural, they did not suggest that either was a true SIDS death. As Kay LJ observed in paragraph 93 of the Court's judgment in the second appeal, on the medical evidence available at trial, this was a difficult case, since there was a wide difference of view in respect of each death as to the conclusions that could properly be drawn from it. Much depended in both cases upon the competence and reliability of Dr Williams' evidence as to what he found in his post-mortem examinations, and if the jury could not be sure that either one of the deaths was murder, it would have been difficult in the state of the evidence for them to be sure that the other was.

As to the statistical evidence given by Professor Meadow, Henry LJ in the first Court of Appeal, regarded it as of little or no relevance, commenting at paragraph 166 of the Court's judgment that, though the precise measure of rarity was not a significant issue by the end of the trial, the principle of rarity was.

Mrs Clark gave evidence that she did not kill the boys or do anything that could have caused their deaths, and that they must have died of natural causes. Expert evidence called in her support included, as I have said, that of Professor Berry, one of the authors of the CESDI Report, and also Dr Rushton and other paediatric specialists, two of them pathologists. The combined effect of their evidence in the case of each death was to cast doubt on the existence or significance of the observed injuries and to indicate their view that the cause of death could not be ascertained.

Thus, in the case each of the deaths, the only candidate for murder, if it was murder, was Mrs Clark, and the only options for causation were unnatural or natural death. The central issue was whether the prosecution could exclude death by natural causes. As Henry LJ put it, at paragraph 15 of his judgment:

"Thus the central issue on each count was whether the Crown could exclude death by natural causes. The effect of the medical evidence as a whole was that neither baby was the subject of a SIDS death and there was consensus, as the lowest common denominator, that each death was unexplained and was consistent with an unnatural death. But the medical evidence did not stand alone. In the circumstances the credibility of the parents' evidence was crucial for the jury to consider. The absence of any explanation by the appellant for the medical findings, and the inaccuracy of the husband's evidence ... [on one important matter] were matters of great potential importance."

When Professor Meadow began his evidence at the trial he outlined his medical qualifications, appointments present and past and his professional experience. None of that included or suggested any expertise in the field of statistics. However, he did not then, or later when referring to and giving his opinions on statistical matters, expressly disclaim any expertise in that field.

Towards the end of Professor Meadow's evidence in chief, Mr Spencer asked him about the CESDI Report, to which he was then writing a preface. Professor Meadow began by saying that it was necessary to approach statistics with caution. He went on to describe the CESDI study as the largest, latest and most reliable in the country. As I have said, Mr Spencer then put the table in the Report before the jury, but not the explanatory text containing the important qualifications (see paragraph 137 above). And, unfortunately Professor Meadow did not refer in his evidence to any of them. As to the table, he did not say that it represented the odds against Mrs Clark's children having died natural deaths in the circumstances of this case or - put another way - that it supported the prosecution's case by showing a probability that they had died from unnatural causes. However, that can only have been the only possible relevance, if any, of such evidence to the case, and was capable, without firm warning from the Judge, of being so misunderstood by the jury.

As to the evidence Professor Meadow did give about the table, he explained that it calculated the risk of two infants dying of SIDS in a family by chance:

"... you have to multiply 1 in 8,543 times 8,543 and ... in the penultimate paragraph. It points out that it's approximately a chance of 1 in 73 million."

He added:

"... in England, Wales and Scotland there are about say 700,000 live births a year, so it is saying by that happening will occur about once every hundred years."

And in response to the following question by Mr Spencer:

"So is this right, not only would the chance be 1 in 73 million but in addition in these two deaths there are features which would be regarded as suspicious in any event?"

He replied "I believe so."

As I have also indicated, at no point in the trial did Mr Bevan apply to have this evidence excluded on the ground of irrelevance or that it was unfairly prejudicial. Nor did he challenge in his cross-examination of Professor Meadow, the CESDI figures or the concept of squaring. On the contrary, his cross-examination about those matters suggested acceptance by the defence of the relevance of the evidence and the principle of squaring. His principal challenge, by way of suggestion, was that the figure of 1 in 8,543 for a single death from natural causes might be much too high, to which the Professor responded by adhering to the figure, but stating that, for practical purposes, the figure was a "starting point" for the incidence of risk. When Mr Bevan asked him about the figure of 1 in 73m for two deaths by natural causes, the Professor, in an analogy that he subsequently acknowledged had been insensitive, sought to illustrate it by reference to the odds of winning the Grand National in four successive years. He said:

"... A: ... you take what's happened to all the children into account, and that is why you end up saying the chance of two children dying naturally in these circumstances is very, very long odd indeed, one in 73m ...

... A: ... it's the chance of backing that long-odd outsider at the Grand National, ...; let's say it's an 80 to 1 chance, you back the winner last year, then the next year there 80 to 1 and you back it again and it wins. Now here we're in a situation that ... to get to these odds of 73m you've got to back that 1 in 80 chance four years running, so yes, you might be very, very lucky because each time it's just been a 1 in 80 chance and ... you've happened to have won it, but the chance of it happening four years running we all know is extraordinarily unlikely. So it's the same with these deaths. You have to say two unlikely events have happened and together it's very, very, very unlikely.

Q: Have you ever heard ... the expression 'Lies, damned lies and statistics'? A: I don't like statistics, but I'm forced into accepting their usefulness."

The defence case on the evidence was supported in part by evidence from Professor Berry to the effect that the risk of a SIDS death were inherently greater where there had already been one SIDS death. Whilst he accepted the 8,543 statistic in relation to a first SIDS death in low risk families as an observed figure, he regarded squaring it to calculate the risks of a second SIDS death to be an illegitimate over-simplification. And he drew attention to the accompanying warnings in the text of CESDI Report to which I have referred. Over-all his position was that statistics do not enable determination in any individual case whether cause of death was natural.

Harrison J, dealt relatively briefly with this issue in his summing-up. He reminded the jury, without criticism or other comment as to the applicability or otherwise to the facts of this case, of the statistics in the table of CESDI Report. He gave them a very brief summary of Professor Meadow's commentary in evidence of their effect and of his view that neither death was a SIDS death or a natural death. He then expressed the following words of caution about the statistics:

"Reliance was also placed by the prosecution on the statistics mentioned by Professor Meadow for the probability of two SIDS deaths within the family, namely one in 73 million and even longer odds, it was said, if you take into account the existence of the old and fresh injuries, and reliance was also placed on the ... similarities between the two deaths ..., and which the prosecution suggest make it beyond coincidence that these two deaths were natural deaths.

I should I think ... just sound a note of caution about the statistics. However compelling you may find those statistics to be, we do not convict people in these courts on statistics. It would be a terrible day if that were so. If there is one SIDS death in a family it does not mean that there cannot be another one in the same family. That part of the evidence relating to statistics is nothing more than that. It is a part of the evidence for you to consider. Although it may be part of the evidence to which you attach some significance, it is of course necessary for you to have regard to the individual circumstances relating to each of these two deaths before you reach your conclusion on the two counts in the indictment. [my italics]

Having said that ..., I turn then to what truly were the conclusions of the relevant experts relating to Harry. ..."

The first Court of Appeal was to express concern about the adequacy of that caution.

The first Court of Appeal

It was not until the case reached the Court of Appeal that any point was taken either as to the statistical validity of the CESDI figures or as to their inadmissibility as irrelevant to the issue of causation before the jury. It was then taken as one of five grounds of appeal. As I have indicated, the Court dismissed the appeal on what it regarded as the overwhelming case against Mrs Clark at trial, having regard to the pathological evidence and the similarities between the two deaths.

The ground of appeal as to the use of the statistics consisted of three related complaints, namely that:

- i) the evidence given by Professor Meadow of the statistical probability of two SIDS deaths in one family undermined the safety of the convictions in that the figures cited were wrong;
- ii) his opinion that the deaths were unnatural was wrongly founded in part on the statistical evidence; and
- iii) the judge failed to warn the jury against the 'prosecutor's fallacy' in appearing, in his summing-up, to endorse the prosecution's erroneous use of the statistical evidence, including

a comment made by Mr Spencer in his closing address to the jury, to which the Judge referred in the part of his note of caution that I have italicised.

Although Henry LJ, when giving the judgment of the Court, considered each of these sub-grounds and the expert evidence before the jury on it in some detail, he nevertheless regarded the statistics and the use made of them at trial as a "side-show" As to the first two, directed at the conduct of Professor Meadow in his account and use of them, the Court rejected the complaints; as to the third, directed principally at the erroneous inclusion by Mr Spencer in his closing address of the statistics as one of the pointers to guilt, and the Judge's apparent endorsement of it, the Court had misgivings. However, it found them insufficient to overcome the strength of the prosecution evidence even if there had been no such errors.

It is interesting to note at this point that, while the first Court of Appeal regarded the issues engendered at the trial by Professor Meadow's evidence on the statistics as a "side-show", the second Court of Appeal, looking at its possible impact on the jury, took a somewhat different approach, Kay LJ observing at paragraph 102 in relation to the qualifications in CESDI text accompanying the table:

"None of these qualifications were referred to by Professor Meadow in his evidence to the jury and thus it was the headline figures of 1 in 73 million that would be uppermost in the jury's minds with the evidence equated to the chances of four 80 to 1 winners of the Grand National in successive years."

As to sub-ground i, Henry LJ said, in the following passages of the judgment:

"126. While to deal properly with this ground of appeal in its context in the trial it has been necessary to consider the evidence and issues in some detail, it was very much a side-show at trial. The experts were debating the incidence of genuine SIDS (unexplained deaths with no suspicious circumstances) in a case where both sides agreed that neither Christopher's death nor Harry's death qualified as such.

...

139 ... The existence of arguments against squaring was known to the jury at the trial. Professor Berry made the points ..., and the judge reminded the jury about these in his summing-up. But ... the precise figures are not important, since the Crown was making the broad point that repeat SIDS deaths were very unusual, in which exercise the number of noughts separating the lower risk households from higher risk household did not matter once the overall point was made, as here it was.

...

166. Thus we do not think that the matters raised ... [in sub-ground i] are capable of affecting the safety of the convictions. They do not undermine what was put before the jury or cast a fundamentally different light on it. Even if they had been raised at trial, the most that could be expected to have resulted would be a direction to the jury that the issue was the broad one of rarity, to which the precise degree of probability was unnecessary."

As to sub-ground ii, Henry LJ exonerated Professor Meadow from any impropriety in the form of stepping outside his expertise or of misleading the jury. He said:

"144. ... in our judgment, Professor Meadow did not overstep the line between the expert's role and the task of the jury when he gave it as his opinion that Christopher and Harry did not die natural deaths. Mr Bevan's submission proceeds on the basis that Professor Meadow's opinion was founded both on the medical and circumstantial evidence and on the statistical evidence, and that it was in founding himself on the statistical evidence that Professor Meadow fell into error. In our judgment, however, Professor Meadow's opinion was based on his expert assessment of the medical and circumstantial evidence, not on the statistical material. Most of his examination in chief was concerned with the medical issues. He nowhere suggests that ... [the table] (which did not deal with deaths such as these) provides any evidence that these deaths were unnatural, only that true SIDS were rare. ... it is clear

from reading his evidence that his conclusion was firmly based on that medical and circumstantial evidence ... He then dealt briefly with the statistical material towards the end of the examination in chief, before being brought back in conclusion to "these two babies" for the purpose of expressing an opinion on whether the deaths were natural or not. As we read the transcript, that involved a move away from the subject of statistics and back to the medical and circumstantial evidence relating specifically to Christopher and Harry.

...

154. ... it is stating the obvious to say that the statement 'In families with two infants, the chance that both will suffer true SIDS deaths is 1 in 73 million' is not the same as saying 'If in a family there have been two infant deaths, then the chance that they were both unexplained deaths with no suspicious circumstances is 1 in 73 million'. You do not need 'the prosecutor's fallacy' for that to be clear. It is clear that the second statement does not follow from the first, nor does it tell you anything about the children or their parents other than there were no smokers in the household, there was one waged income, and the mother was 27 or over – all being factors which put the Clarks in the lowest of all risk categories.

155. It is suggested by Dr Evett ... that the fact that the second statement does not follow from the first needs to be carefully explained to the jury. As a generalisation, we agree, but it all depends on just what was said. He also suggests that Professor Meadow contributed to the danger of misinterpretation. We do not agree that he did.

...

161. ... because ... [the table] addresses the chance of any family being so afflicted and does not help us as to the likelihood that a specific parent or parents abused their child, because it tells you nothing relevant to the question of guilt or innocence. That is a different question the answer to which cannot affect the ... [table] question: namely what is the risk of a two child family suffering a double SIDS?

162. Therefore, we accept that when one is looking ex post [facto] at whether two deaths were natural or unnatural, the 1:73 million figure is no help. It is merely a distraction. All that matters for the jury is that when your child is born you are at a very low risk of a true SIDS death, and at even lower risk with the second child.

163. Professor Meadow did not misuse the figures in his evidence, though he did not help to explain their limited significance."

As to sub-ground iii, The Court's real concern was, as I have indicated, not Professor Meadow's references to the statistics in his evidence, but the possibility that the jury might have regarded the Judge's inclusion of the statistics in his synopsis of the prosecution case in summing up as probative of guilt. It was also, as I have said, unsure whether the Judge's warning to the jury about statistics was sufficient to prevent such possible prejudice to the defence:

"164. ... In our judgment, counsel for the Crown should not have said that the existing injuries led to '... even longer odds ...' than the 73 million to one. The existing injuries to the infants went to guilt, the odds went to rarity, and it was a mistake to put them together.we are not persuaded that counsel for the appellant or the judge then understood the Crown to have submitted to the jury that the odds against the appellant being innocent were, because of the statistics ... [in the table] 73 million to one against. That submission would in our judgment have been obviously fallacious, and had it been made, we would have expected Mr Bevan for the defence to have objected, the judge to have upheld the objection, and the 1 in 73 million figure would have gone as an unnecessary distraction. That there was no such application suggests the lack of impact of '... 1 in 73 million and even longer odds ...' on the third day of the summing-up of this long trial. But we must and do assume that counsel said what the judge reported him as having said. Might the jury have focused on that to the exclusion of the real and compelling evidence in this case?

166. We have made clear what the judge should have told the jury: that it was the prosecution's case that to have one unexplained infant's death with no suspicious circumstances in the family was rare, and for there to be two such in the same family would be rarer still. That was the only relevance of ... [the table], and the statistics were capable of

showing that, but nothing more. They could not help as to whether the defendant was guilty or not guilty. ... The difficulty we feel ... is that by the time of the speeches, rarity was largely accepted, so the measure of rarity, the CESDI Study was not important. The 73 million figure should have been cleared away as a distraction. Instead the judge considered that the statistics could be considered. Might the jury have been misled into attributing to those statistics a significance they did not have, i.e. as lengthening the odds against the deaths being natural?

...

168. ... we conclude that there is some substance to the criticism that the judge appeared to endorse the prosecution's erroneous approach in this particular. ..."

However, as we know, at the end of the Court's consideration of all the issues and material evidence in the appeal, it did not consider its concern in the above respects sufficient to render the convictions unsafe:

"256. ... we consider that there was an overwhelming case against the appellant at trial. If there had been no error in relation to statistics at the trial, we are satisfied that the jury would still have convicted on each count. In the context of the trial as a whole, the point on statistics was of minimal significance and there is no possibility of the jury having been misled so as to reach verdicts that they might not otherwise have reached. ...

257. It follows that in our judgment the error of approach towards the statistical evidence at trial ... did not render the convictions unsafe."

The second Court of Appeal

The Court of Appeal, in the second appeal, was invited to consider two grounds of appeal. The first was the non-disclosure by the prosecution at the trial of records of results of microbiological tests on samples gathered by Dr Williams in the initial post-mortem examination of Harry, as rendering the convictions unsafe. The second was the unreliability of the statistical evidence put before the jury as to the degree of unlikelihood of two natural infant deaths in the same family, as distinct from the use made of it at the trial.

In the event, the Court felt constrained to uphold the appeal on the first ground in relation to both deaths, and did not, in consequence, consider the second ground in any great detail, or rule on it.

The new evidence was that of Professor Morris, a consultant pathologist, to the effect that Harry had probably died from natural causes, derived from reports of testing of the previously undisclosed samples taken by Dr Williams. The absence of such evidence in Harry's, but not Christopher's case, was noted by the jury in two pointed questions. Professor Morris's conclusion was challenged in evidence put before the Court by the Crown from another specialist in this field, Dr Klein. However, having regard to the guidance given by this Court in *R v Pendleton* [2002] 1 Cr App 441, the Court did not attempt to resolve the issue for itself. It held that it was obliged to allow the appeal in the case of Harry's death because, if Professor Morris's evidence had been available to, and had been relied upon by, the defence at the trial, it might have caused the jury to reach a different verdict. It followed, the Court also held, that, if the jury would have concluded that Harry's death may have been from natural causes, they could not have failed to reach a different conclusion in relation to the weaker prosecution case in respect of Christopher. As the Court observed, those reasons were sufficient to dispose of the appeal relating to both deaths.

Nevertheless, the Court returned briefly, in paragraphs 172 – 180 of its judgment, to the statistics, their admissibility and the point it had made in paragraph 102 of its judgment of the leaving of Professor Meadow's analogy of the Grand National odds uppermost in the jury's minds (see paragraph 155 above). In doing so, it acknowledged that the matter had only been the subject of brief argument before it and that it had heard none of the evidence.

As to admissibility of the statistical evidence, the Court echoed the first Court of Appeal's firm view that the statistics were irrelevant and should never have been put before the jury:

"173. It is unfortunate that the trial did not feature any consideration as to whether the statistical evidence should be admitted in evidence and particularly, whether its proper use would be likely to offer the jury any real assistance. ...

174 ... juries know from their own experience that cot deaths are rare. The 1 in 8,543 figure can do nothing to identify whether or not an individual case is one of those rare cases.

175. Generally juries would not need evidence to tell them that two deaths in a family are much rarer still. Putting the evidence of 1 in 73 million before the jury with its related statistic that it was the equivalent of a single occurrence of two such deaths in the same family once in a century was tantamount to saying that without consideration of the rest of the evidence one could be just about sure that this was a case of murder.

...

177. Like the Court of Appeal on the first occasion we are quite sure that the evidence should never have been before the jury in the way that it was when they considered their verdicts. If there had been a challenge to the admissibility of the evidence we would have thought that the wisest course would have been to exclude it altogether.

178. The argument before us would have addressed the question whether the 1 in 73 million figure was misleading in itself quite apart from the use made of it at trial. On the material before us, we think it very likely that it grossly overstates [sic] the chance of two sudden deaths within the same family from unexplained but natural causes. ... Quite what impact all this evidence will have had on the jury will never be known but we rather suspect that with the graphic reference by Professor Meadow to the chances of backing long odds winners of the Grand National year after year it may have had a major effect on their thinking notwithstanding the efforts of the trial judge to down play it.

...

180. ... it seems likely that if this matter had been fully argued before us we would, in all probability, have considered that the statistical evidence provided a quite distinct basis upon which the appeal had to be allowed."

Thus, the Court of Appeal in relation to both deaths were agreed as to the irrelevance of the statistics to the issue of Mrs Clark's guilt on the other evidence, including the pathological evidence of Professor Meadow of which there was no complaint.

As Henry LJ in the first Court of Appeal's judgment dismissing the appeal had made plain, it had done so on account of the overwhelming evidence as to similarities between the two deaths and on the pathological evidence. Nevertheless, although the first Court of Appeal had regarded the debate engendered by the statistical evidence as a side-show, it had examined with great care Professor Meadow's and the other evidence on that evidence. In the result, it expressly concluded that, put in the context of what happened at the trial, Professor Meadow did not misuse the statistics.

It is true that the Kay LJ, in giving the judgment in the second appeal - to the success of which the statistical evidence was equally irrelevant - was more uneasy about the possible impact of Professor Meadow's evidence on the jury. However, it is plain from the judgment that the Court did not consider the matter in anything like the detail the first Court of Appeal had done. Its criticism of the admission of such evidence was necessarily tentative and it did not single out Professor Meadow as at serious fault. As will appear, for reasons that I shall touch on shortly, the FPP were denied the opportunity to consider the two judgments of the Court of Appeal, an opportunity that would have enabled them to consider - in the context of the trial - why, and the manner in which this statistical evidence had been deployed, and the seeming overwhelming strength of the other evidence to support the conviction (in the absence of the undisclosed pathological evidence).

The FPP hearing.

With effect from 1st November 2004 the GMC's disciplinary procedures were reformed by the Medical Act (Amendment) Order 2002 (SI 2002/3135). The concepts of serious professional misconduct, seriously deficient performance and seriously impaired health were replaced by a unified concept of impaired fitness to practise. The FPP, before which these proceedings were conducted in late June and early July 2005, by virtue of a transitional provision in the Order,[3] exercised the earlier jurisdiction of the Professional Conduct Committee of the GMC by reference to serious professional misconduct

The charges that Professor Meadow faced before the FPP, on complaints made by Mr Frank Lockyer, Mrs Clark's father, was a prolix mixture of assertions of primary and secondary fact, and of related and sometimes overlapping, particular and general complaints of unprofessional conduct. The FPP dealt with each of them, first making findings of fact in relation to each of the allegations, and then, in a somewhat discursive way, making its determination of serious professional misconduct purportedly by reference to those findings.

As Collins J noted in paragraph 28 of his judgment, the conduct of Professor Meadow that the FPP found proved, and which it decided amounted to serious professional misconduct, did not touch on his skills as a doctor or impugn his evidence on pathological matters.

The matters in respect of which the FPP found Professor Meadow guilty of serious professional misconduct may be summarised as follows:

- 1) use of statistical material of which he had no expert knowledge or experience;
- 2) failure to disclose to the jury that he lacked such expertise or experience;
- 3) mistaken reliance and/or use in evidence of erroneous and/or irrelevant statistical material;
- 4) incompetence in misunderstanding and presenting that evidence, in his original figures of 1 in 1 million and then the CESDI figures of 1 in 73 million, as indicative of probabilities of recurrence of SIDS death so as to suggest similarly long odds against Mrs Clark's children having died from natural causes and thus as supportive of the prosecution case that she had killed them; and
- 5) his foray into statistics outside his expertise and his incompetence and the manner in which he did so were particularly serious for a man of his experience and eminence in his profession in the potential harm caused to justice and to the reputation of his profession.

The hearing, which took 16 days in late June 2005 and early 2006, included oral evidence in support of the complaints from Professor Fleming, Professors Sir David Cox and Colin Aitkin, statisticians, and Professor Jean Golding, a paediatric epidemiologist. Professor Meadow and witnesses who gave evidence of his qualities and reputation as a paediatrician were the sole defence witnesses.

Professor Fleming gave an account to the FPP of the CESDI Study, indicating, by reference to its publications, its primary purposes, namely the identification of risk factors and associations for SIDS, but not of recurrence rates. He accepted in cross-examination that the purpose and some of the CESDI statistics were open to misinterpretation and had been misinterpreted by others.

Professor Cox criticised Professor Meadow's use of the statistics as a tool for calculating probabilities, including his assumption in the use of his squaring calculation that one natural infant death in a family decreases the probability of a second. He said that the occurrence of one event would almost invariably increase the probability in a similar situation. However, he acknowledged, as did Professors Aitkin and Golding, that the multiplication by non-statisticians of probabilities in relation to events that were not independent of each other - of which this was an instance - was an easily made mistake.

Professor Golding's evidence as to probabilities may well have left the Panel unclear whether one unnatural infant death in a family increased or decreased the probability of another, all other things being equal.

Professor Meadow gave evidence over a number of days. In it, he acknowledged that his reference to the statistics in the context of the issue as to the probabilities of the causes of death of Mrs Clark's children was an error. He said that he had misunderstood the CESDI table, and he expressed his regret for having used the Grand National analogy. Much attention was given in his evidence in chief and in cross-examination - now some years after the event - to the origin or basis of the 1 in 1,000 figure in his 1999 Paper. He gave the same account - that he was uncertain as to its precise provenance - as he had given in his evidence at the trial of Mrs Clark.

The FPP did not have before it the two judgments of the Court of Appeal, apparently because Miss Davies wanted the first in, but Mr Seabrook objected; and Mr Seabrook wanted the second one in, but Miss Davies objected. I understand that, in the result, counsel agreed that the Panel should see neither.

The FPP's findings and determination

As to Professor Meadow's unqualified squaring of the CESDI figures, the FPP, in its determination, stated:

"The Panel has heard expert statistical evidence (which it accepts) that the squaring of the 1:1000 ratio to conclude that there was 1 in a million incidence of double SIDS deaths within a family was incorrect. Furthermore you were unable to explain from where you derived these figures. You said in evidence before this Panel that you thought someone in the audience of a lecture you were giving had said this, and that you had remembered putting the figures 'on a blackboard somewhere', although you could not remember when and where. The Panel considered this explanation to be unacceptable, and the members were of the opinion that this highlighted your less than rigorous use of statistics and inability to adhere to strict scientific principles in so doing."

As to the propriety of Professor Meadow relying on the table of figures in CESDI Report, the Panel accepted Professor Fleming's evidence that the exercise from which those figures was derived was not a study of recurrence of SIDS and that, although Professor Meadow had not intended to mislead, he should not have given evidence implying that it could be taken as such:

... The Panel found that you failed to provide a fair context for the limited relevance, if any, of SIDS deaths, by not referring, amongst other things, to common environmental or genetic factors or interaction of such factors.

You erroneously implied that two such deaths would be independent of one another and failed to justify or explain your assumption of the independence of the postulated second SIDS death from the first.

...

The incidence of two SIDS deaths in a family was far greater than you stated and the Panel found that you gave misleading and erroneous evidence, although it has found that you did not intend to mislead. You did not take account of familial factors and your use of the SIDS statistics when giving expert evidence (which was to the effect that Harry and Christopher had died unnatural deaths) was not relevant. It was described succinctly in evidence by Sir David Cox as the 'the prosecutor's fallacy' whereby the statistics are used fallaciously thus creating a false impression of the evidence. The Panel accepted [Sir David Cox's evidence that] it would be possible for people to derive from your evidence that there was only a 1 in 73 million chance that these children died from natural causes, the false implication being that there was only 1 in 73 million chance that Sally Clark had not killed her children. You should

have taken great care to provide a context for the benefit of those people who may well have been under the impression that you were still giving evidence in the realm of your expertise. This was a grave error, one which had serious implications and repercussions for many people, not least those who work in the field of child protection.

The Panel noted your regret expressed during these proceedings of having used the insensitive Grand National analogy."

The FPP concluded that, in his evidence of and treatment of the statistics, Professor Meadow had strayed outside the ambit of his expertise and had done so without warning the jury of that fact. Its findings included the following general propositions, which it variously also particularised:

"The Panel has found that you were ready, willing and considered yourself able to give expert evidence as to child abuse and unnatural infant deaths, Sudden Infant Death Syndrome (SIDS), the probability of occurrence and recurrence of SIDS claims within a family, and the statistical consideration of data relating thereto as well as the forensic presentation of such evidence.

The Panel found that you owed a duty of familiarising yourself with all relevant data and published (or yet to be published) work, sufficient to provide competent, impartial, balanced and air forensic evidence of scientific validity. Insofar as you chose to use statistics to support your evidence it was your responsibility to only use them in accordance with good statistical principles and practice in relation matters within your expertise.

You owed a duty to identify relevant matters including assumptions on which your statistical evidence was based. You failed in this duty. You should have refrained from giving expert evidence upon matters beyond your competence, but this again, you failed to do.

...

The Panel concludes that in giving your evidence to the Court, as an expert witness, you were under a duty to satisfy yourself as to the scientific validity of that evidence, and, insofar as that evidence was of a statistical nature, of the statistical validity of that evidence, notwithstanding that (as the Panel accepts) you are not yourself a statistician. You failed in this duty."

The FPP concluded those findings with a determination that they constituted serious professional misconduct, indicating in doing so that his conduct was aggravated by two factors, his eminence in his profession and his adherence to his case that his conduct did not merit such condemnation:

"The Panel considered carefully your Counsel's emphasis on its findings that you did not intend to mislead. However, your misguided belief in the truth of your arguments, maintained throughout the period in question and indeed throughout this inquiry, is both disturbing and serious. It is because of your eminence and authority that this misleading evidence carried such great weight. It was also argued, in your defence, that the CESDI ... study was unclear on the point at issue, and that your erroneous squaring of odds was a mistake easily and widely made. That may be the case, but you were giving expert evidence and using that erroneous statistic to support that evidence. If, as you have said repeatedly, you were not a statistician this should have been made clear to the Court: instead you spoke authoritatively outwith your own field of expertise.

...

The Panel, having considered all these matters, has concluded that your errors compounded by repetition, over a considerable period of time, constitutes such a serious departure from, and falling short of the standards expected of, a registered medical practitioner, that it finds you guilty of Serious Professional Misconduct."

As to sanction, the FPP again acknowledged that Professor Meadow had not intended to mislead, the high regard in which he was widely held in the profession and that the role of sanctions in this field was not one of punishment. It correctly identified the three main reasons for sanctions before considering and deciding on that of erasure; first, the need to protect patients; second, to maintain public confidence in the profession; and third, to declare

and uphold proper standards of conduct. Before turning to erasure, it considered and rejected all the lesser alternatives. This is how it expressed its decision:

"The Panel concluded that it was not appropriate to conclude your case by taking no further action. Your breaches of the duties of an expert witness were significant and grave and to take no action would be wholly inappropriate and not in the public interest.

Next the Panel considered whether it was sufficient to conclude the case with a reprimand. ... However, it ... considered the need to recognise the public interest and the need to maintain public confidence in those who give evidence to the courts as well as the crucial need for judges and families throughout the country to be confident that those medical practitioners who give evidence before the courts have complied with the accepted duties of an expert. That you failed to do.

...

Your errors, compounded by repetition over a considerable period of time were so fundamental and so serious it is the Panel's view that a period of suspension would be inadequate, not in the public interest and would fail to maintain public confidence in the profession."

Appeal to Collins J.

Professor Meadow, in his appeal to Collins J, did not challenge the FPP's findings of primary fact, but focused on its findings that he had misinterpreted and misapplied the CESDI statistics, and that, in doing so, he had wrongly gone outside his area of expertise and had done so without alerting the court to that fact.

Collins J, after considering the record of the evidence given to the FPP, held: 1) that the FPP wrongly found the Professor Meadow had been guilty of serious professional misconduct in giving evidence in the way he did of the statistical material and of his understanding of its effect. He said, at paragraph 51 of his judgment:

"... the FPP acted too harshly in concluding as it did. The appellant gave evidence of his concerns at giving evidence and the difference between criminal and family courts. He had honestly and as he believed correctly relied on his understanding of the statistics. He had not concealed their source and he was aware that 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. While I accept that he can properly be criticised for not making it clear that he was not an expert in the field, I do not accept that his failure was as heinous as the FPP indicated."

As to the FPP's condemnation of Professor Meadow for his lack of any precise source for the 1 in 1,000 figure in his 1999 Paper, Collins J, in paragraph 52 of his judgment, characterised it as "unfair", given the Professor's evidence at trial and before the FPP of uncertainty as to where it first came from and the general acceptance of it in the profession as a "ballpark" figure. As Collins J had put it earlier in his judgment, at paragraph 47:

"... In reality it seems that it was based on his general experience and was used as an average. That it was properly so regarded became apparent from the CESDI report, which gave an average of 1 in 1,300-odd. It may well be that the appellant did not explain things as clearly as he should have done. ..."

As to the FPP's finding that Professor Meadow had wrongly interpreted and applied the statistical material in the CESDI Report ("the prosecutor's fallacy") and had wrongly persisted in justifying his interpretation, Collins J roundly rejected it in paragraph 53 of his judgment:

"In dealing with the CESDI study, the FPP said that it produced evidence that 'there is an elevated risk of a second SIDS death in one family after there has been one such death'. I am far from sure that that reflects evidence; it may depend on what is meant by elevated risk. Elevated above what? Their criticism based on the prosecutor's fallacy was also unfair and

might well not have been made if they had seen the judgment of the first Court of Appeal. The appellant did not produce the prosecutor's fallacy. He merely gave what he believed to be accurate evidence based on the CESDI study. It was not for him to decide what use was made of that evidence. The FPP stated that his eminence meant that he had a unique responsibility to take meticulous care in such a grave case. I do not think that eminence imposes a greater burden. The FPP said: 'Your misguided belief in the truth of your arguments, maintained throughout the period in question and indeed throughout the inquiry is both disturbing and serious'. That in my judgment was hardly fair. In truth, until he had the criticisms put to him, he made one mistake and had no reason to believe that he was wrong. His evidence at the inquiry was given to try to show that he had honestly believed that he had not made any mistake."

Collins J finally concluded, in paragraphs 54 and 55 of his judgment, that the FPP's over-all conclusion, in the light of all its findings, of serious professional misconduct was not justified on the evidence before it:

"54. I have no doubt that that conclusion is not justified by the evidence before the FPP. ... he made one big mistake, which was to misunderstand and misinterpret the statistics. It was a mistake, as the panel accepted, that was easily and widely made. It may be proper to have criticised him for not disclosing his lack of expertise, but that does not justify a finding of serious professional misconduct.

55. Ms Davies submits that the conclusion that he had acted in good faith and that there was no evidence of calculated or wilful failure to use best endeavours to provide evidence precluded a finding of serious professional misconduct. I accept that such a finding can be made even though there has been no bad faith or recklessness. But it will only be in very rare case that such a finding will be justified. The lapse in question must be serious indeed to lead to such a finding in the absence of bad faith. I am satisfied that the lapses in this case did not justify the finding.

Submissions

Mr Henderson submitted to this Court that:

1) the gravamen of the case against Professor Meadow in the proceedings before the FPP was that he had proffered at the trial evidence outside his expertise that was erroneous and irrelevant to the issues in the case, and potentially gravely prejudicial to justice and to the damage of the medical profession;

2) he had done so without making clear that the evidence was outside his expertise, and the fact he had done so in good faith did not prevent it from being serious professional misconduct;

3) the lack, to his knowledge, of any scientific provenance for his original figure of 1 in 1,000 odds against a single SIDS death in his initial witness statement, the 1999 Paper and his evidence in the committal proceedings;

4) his incompetence in misleading the jury as to the effect of the 1 in 73m odds against two SIDS deaths in the same family, wrongly bolstering the other prosecution evidence against Mrs Clark; and

5) his sole responsibility for introducing this statistical evidence before the court and for underlining it with inappropriate analogies.

Miss Davies, in her submission, relied heavily on the reasons given by Collins J in his judgment allowing Professor Meadow's appeal, in particular that:

- 1) his evidence on statistics had been given without intention to mislead and in the honest but mistaken belief of its accuracy and appropriateness to the issue of probability of cause of the two deaths;
 - 2) the FPP wrongly imposed a higher professional duty on him than it considered would otherwise have been appropriate because of his eminence in his profession;
 - 3) he had not held himself out to the court as an expert on statistics and that the FPP did not consider his evidence and the way in which he had come to give it, and without challenge as to its admissibility, in the context of the trial process;
 - 4) the FPP, in certain respects, misunderstood his and other evidence as to the statistics and their possible impact on the trial, and his subsequent explanations about the source of the 1 in 1,000 figure and of his mistaken understanding of the CESDI figures and their effect.
- Conclusions

On an appeal from a determination by the GMC, acting formerly and in this case through the FPP, or now under the new statutory regime, whatever label is given to the section 40 test, it is plain from the authorities that the Court must have in mind and give such weight as is appropriate in the circumstances to the following factors:

- i) The body from whom the appeal lies is a specialist tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserve respect;
- ii) The tribunal had the benefit, which the Court normally does not, of hearing and seeing the witnesses on both sides;
- iii) The questions of primary and secondary fact and the over-all value judgement to be made by tribunal, especially the last, are akin to jury questions to which there may reasonably be different answers.

As to what constitutes "serious professional misconduct, there is no need for any elaborate rehearsal by this Court of what, on existing jurisprudence, was capable of justifying such condemnation of a registered medical practitioner under the 1983 Act before its 2003 amendment. And, given the retention in the Act in its present form of section 1(1A), setting out the main objective of the GMC "to protect, promote and maintain the health and safety of the public", it is inconceivable that "misconduct" - now one of the categories of impairment of fitness to practise provided by section 35C of the Act - should signify a lower threshold for disciplinary intervention by the GMC.

It is common ground that Professor Meadow, in giving and/or purporting to give, expert medical evidence at the trial of Mrs Clark, was engaged in conduct capable of engaging the disciplinary attention of the GMC.

As Lord Clyde noted in *Roylance v General Medical Council* [2000] 1 AC 311, PC, at 330F-332E, "serious professional misconduct" is not statutorily defined and is not capable of precise description or delimitation. It may include not only misconduct by a doctor in his clinical practice, but misconduct in the exercise, or professed exercise, of his medical calling in other contexts, such as that here in the giving of expert medical evidence before a court. As Lord Clyde might have encapsulated his discussion of the matter in *Roylance v Clyde*, it must be linked to the practice of medicine or conduct that otherwise brings the profession into disrepute, and it must be serious. As to seriousness, Collins J, in *Nandi v General Medical Council* [2004] EWHC (Admin), rightly emphasised, at paragraph 31 of his judgment, the need to give it proper weight, observing that in other contexts it has been referred to as "conduct which would be regarded as deplorable by fellow practitioners".

It is also common ground that serious professional misconduct for this purpose may take the form, not only of acts of bad faith or other moral turpitude, but also of incompetence or

negligence of a high degree. See Preiss, at para 28. It may also be professional misconduct where, as here, a medical practitioner, purporting to act or speak in such expert capacity, goes outside his expertise. Whether it can properly be regarded as "serious" professional misconduct, however, must depend on the circumstances, including with what intention and/or knowledge and understanding he strayed from his expertise, how he came to do so, to what possible, foreseeable effect, and what, if any, indication or warning he gave to those concerned at the time that he was doing so.

Particular considerations thrown up by the circumstances giving rise to this appeal are the duality and overlap of forensic and professional roles of an expert witness in the trial process. These do not appear to have figured sufficiently in the FPP's brisk dismissal of his mitigation of his conduct, that, like others, he had misunderstood the effect of the statistics:

"The Panel has noted with care the argument put forward on your behalf that others within the court system did not question your erroneous application of statistics in the police statement, Magistrates' and Crown Courts. You, however, were the expert witness, you provided the statistics, spoke to them with authority and it was your expert evidence which was relied upon by the other parties to the Court proceedings."

There may be tensions between what is sought from an expert witness and seemingly legally admissible and what he can say having regard to the limits of his professional expertise. Questions of relevance, as a matter of logic and, hence, legal admissibility, as well as of professional propriety in proffering sought evidence on the border of, or outside, a witness's expertise may be in play. Depending on the vigilance of the lawyers and of the medical expert in the forensic interplay of the courtroom, each may complement or distract the other from the respective high professional standards demanded of them. It seems to me that the latter was the case here.

An expert, who is called to give, and gives evidence, of opinion or otherwise, on matters within his own professional knowledge and experience has an "overriding duty" to the court to assist it objectively on matters within his expertise. He is also bound both by the ethical code and generally accepted standards of his profession. The former is expressly acknowledged in civil matters in Rule 35.3 of the Civil Procedure Rules, and has been usefully elaborated by Cresswell J in his much cited analysis in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, at 81-82. The same or similar principles have been applied for many years in criminal and family cases. There is clearly much overlap in the two categories of obligation, but, in the hurly-burly of the trial process, especially seen through the eyes of the expert witness they may not, in practice, always complement each other.

Where the conduct of an expert alleged to amount to a professional offence under scrutiny by his professional disciplinary body arises out of evidence he has given to a court or other tribunal, it is, therefore, important that that body should fully understand, and assess his conduct in the forensic context in which it arose. Of great importance are the circumstances in which he came to give the evidence, the way in which he gave it, and the potential effect, if any, it had on the proceedings and their outcome. If the disciplinary body lacks information to enable it properly to assess the expert's conduct in that forensic context, or fails properly to take it into account, a court reviewing its determination, is likely to bring important insights of its own to the matter. Not least among those should be an appreciation of the isolation of an expert witness, however seasoned in that role, in the alien confines of the witness box in an adversarial contest over which the judge and the lawyers hold sway.

In criminal or civil proceedings, it is for the parties' legal representatives and ultimately the judge, to identify before and at trial what evidence, lay or expert, is admissible and what is not. In the case of expert evidence, involving, as it often does, opinion evidence as to causation, it is critical that the legal representatives of the party proposing to rely on such evidence should ensure that the witness's written and oral evidence is confined to his expertise

and is relevant and admissible to the important issues in the case on which he has been asked to assist. Equally, it is incumbent on the legal representatives on the other side not to encourage, in the form of cross-examination or otherwise, an expert to give opinion evidence which is irrelevant to those issues and/or outside his expertise, and, therefore, inadmissible. And, throughout, it is for the judge, as the final arbiter of relevance and admissibility, to ensure that an expert is assisted or encouraged to keep within the limits of his expertise and does so relevantly to the issues in the case on which he is there to assist.

All of this is not to absolve the expert of responsibility from professional or forensic impropriety in the presentation and form of his evidence. As a medical expert, he should know his limits. In most instances, his knowledge and instincts in his particular field should alert him to confining his evidence to those limits and the true issues identified for the court by the legal representatives of the parties. However, the forensic process, in preparation and in action at trial, is not always as ordered and considered as it should be. The issues may not always be sufficiently carefully defined, or the evidence, lay and expert, adequately prepared and tailored in advance, to deal with them. The trial process itself can be unpredictable in direction. From time to time the questioners and the questioned can lose sight of the essential issues in exploring or "trying out for size" areas of evidence that, on careful examination, have no bearing on the case. The line and pace of the questioning may leave little time for calm analysis by an expert witness called to deal with a variety of issues on one or more of which he is required to express an opinion that is, or he knows is, to be, challenged. The same may be said for those questioning him and, indeed for the Judge who is trying to keep up with the evidence as it is given. In that, sometimes, fevered process, mistakes can be made, ill-considered assertions volunteered or analogies drawn by the most seasoned court performers, whatever their role.

It is in those respects that I believe the respective insights of the two Court of Appeal judgments would have been of help to the FPP. Unfortunately, as I have mentioned, it did not take or have the opportunity to consider them. In consequence, it appears, in my view, to have misunderstood or mistaken certain aspects of Professor Meadow's evidence and the circumstances in which he came to give it, and to have wrongly exaggerated the heinous effect, as it saw it, of what he said and its possible effect on the integrity and outcome of the trial.

Given those considerations, it is plainly important to consider and assess the significance of the evidence of Professor Meadow under question to the issues of causation in the trial and how he came to give it. There are two starting points for the Court's consideration.

The first is that Professor Meadow was undoubtedly guilty of some professional misconduct. In his preparation for, and presentation of evidence at, the trial of Mrs Clark he fell below the standards required of him by his profession. Although not an expert in the use of statistics or calculation of probability, he put forward a theory of improbability of recurrence of unexplained and seemingly natural infant deaths, applicable only where recurrence occurred in familial, environmental and economic circumstances wholly independent of those of a first such death. In doing so, he relied initially on statistical figures of uncertain source and scientific validity and then on those in the CESDI Report, which had nothing to do with the probabilities of recurrence in any individual case, and which, in any event, he misunderstood and, by implication and the use of an inappropriate analogy, misapplied. In addition, and importantly, he did not expressly draw the court's attention to the fact that he had no expertise in the field of statistics or calculations of probability in this or any other field.

The second starting point is that Professor Meadow did not intend to mislead the trial court and that he honestly believed in the validity of his evidence when he gave it. The FPP so found, expressly stating that there was "no evidence of calculated or wilful failure to use [his] best endeavours to provide evidence'. As Collins J observed in paragraphs 55 and 56 of his

judgment, in the absence of bad faith or recklessness, only a very rare case could justify a finding of serious professional misconduct, and that

"... It ... [was] is difficult to think that the giving of honest albeit mistaken evidence could save in an exceptional case properly lead to such a finding."

The question, therefore, is whether such misconduct as the FPP properly found in the circumstances of this case was "serious", or, if it was, sufficiently serious to justify the sanction of erasure from the Register imposed by the FPP? I should preface my answers to those questions by commenting on two strands of the FPP's reasoning that clearly permeated its approach to both its conclusions against Professor Meadow.

The first was that, the Professor's eminence gave him "a unique responsibility to take meticulous care in such a grave case", suggesting that the FPP was entitled to find misconduct proved that it could not otherwise have done, or misconduct to be more serious than otherwise it would have been. Collins J rejected that submission, saying "I do not think eminence imposes a greater burden". I agree with him in the circumstances of this case, where the error or errors consisted in Professor Meadow's misunderstanding of a discipline outside his expertise and his failure expressly to draw the trial court's attention to the latter. As I have noted more than once, it was not suggested that he had intended to mislead or had wilfully failed to use his best endeavours to provide honest and accurate evidence. If Homer could occasionally nod, without it costing him his reputation and place in history, so also should similar allowance be made where appropriate to eminent leaders of professions. However, I would not wish to be taken as dismissing eminence as a possibly relevant consideration in other types of cases, for example, where some moral turpitude or bad faith is involved, or perhaps when it is shown that a leader of a profession has deliberately or recklessly cast aside the norms of his professional obligations in the confident expectation that his authority will carry the day.

The second strand in the FPP's reasoning was its reliance, in its determination of serious professional misconduct and in fixing on the sanction of erasure, on what it regarded as Professor Meadow's persistence in an unwarranted denial that he had been guilty of sufficiently heinous conduct to amount to serious professional misconduct. But the essence of his case was that he, like others, had misunderstood the statistics and had been honest, albeit mistaken, in his use of them at the trial, a case substantially acknowledged by the FPP in its findings. That was his defence, and the first time he had had to advance it was in the FPP proceedings. Whilst Collins J, in paragraphs 53 and 54 of his judgment, may have understated somewhat his culpability by categorising it as only "one mistake", namely misunderstanding and misinterpreting the statistics, he correctly pointed out the Professor's stance before the FPP had been to acknowledge and explain it and point, as was the case, that others in the profession had similarly misunderstood them. The same could be said about his mistake in not having expressly drawn attention when giving evidence to the fact that he was not an expert in statistics; it was never suggested that he had dishonestly or wilfully withheld that information from the jury. Accordingly, I agree with the following conclusion of Collins J in paragraph 55 of his judgment:

"... It was a mistake, which was to misunderstand and misinterpret the statistics. It was a mistake, as the panel accepted, that was easily and widely made. It may be proper to have criticised him for not disclosing his lack of expertise, but that does not justify a finding of serious professional misconduct."

I turn now to the main findings of the FPP, as I have summarised them in paragraph 178 above:

1) use of statistical material of which he had no expert knowledge or experience

Professor Meadow's reference to the statistics, albeit in the incorrect anticipation that the defence intended to rely on them, was clearly open to criticism, given his lack of expertise in that discipline; the second principle identified by Cresswell J in *The Ikarian Reefer*. But, in his misunderstanding of the figures and in his failure before and at trial to appreciate their irrelevance and, therefore, their inadmissibility on the issue of probability as to the causes of death in the circumstances of this case, he appears to have been in good medical and legal company respectively. As Collins J noted in paragraph 49 of his judgment:

"Mr Henderson was compelled to accept that if the appellant had said that he was not an expert in statistics but believed that his interpretation of the figures in the CESDI report was correct, he might have had difficulty in seeking to uphold the finding of serious professional misconduct."

2) failure to disclose to the jury that he lacked such expertise or experience

The FPP rightly found that Professor Meadow should have alerted the jury to the fact that he was not a statistician and thus not qualified to interpret the statistics in the way he appeared to do; the fourth principle identified by Cresswell J in *The Ikarian Reefer*. However, experts frequently refer to other disciplines of which they are not masters as part of the base material for their expert conclusions, and his lack of expertise in this field was a matter that was open to attention by counsel on either side and by the Judge, if the defence had chosen to challenge him on his understanding and use of the statistics. As I have said, there was no such challenge, only to the make-up of the base figures for squaring, and as to whether the occurrence of one event increased or decreased the probability of its recurrence in like circumstances.

3) mistaken reliance on and/or use in evidence of erroneous or dubious and/or irrelevant statistical material,

The FPP's condemnation of Professor Meadow for "less than rigorous use of statistics and ... inability to adhere to strict scientific principles in so doing", in relation to his evidence as to the source of the 1 in 1,000 figure for one SIDS death was, in my view, unfair. As Collins J observed, in paragraph 47 of his judgment, on a proper reading of the Professor's evidence at the trial and to the FPP, he had throughout indicated no clear recollection of the precise source of the ratio, save to mention the blackboard incident, and to describe it as a "a ballpark figure", one in general currency at the time. In the event, as pointed out to the FPP, it was within reach of CESDI's own average of 1,300 for one SIDS death. It is plain that the FPP, in making this stringent criticism, failed to give effect to his evidence on the matter read as a whole or, at the very least, misunderstood it.

4) use of the CESDI statistics to imply that there was only a 1 in 73m chance that Mrs Clark's children died from natural causes and correspondingly, that there was 1 in 73 million chance against her not having not killed them

The implication of Professor Meadow's evidence, by reference to the CESDI Report, was that the occurrence of one possibly natural death decreased the probability of another in the circumstances of this case ("the prosecutor's fallacy"). On the FPP's understanding of the evidence on this issue, it increased it. As I have indicated, there was some confusion of evidence about this, but, whatever the scope for error in Professor Meadow's evidence in this respect, he simply gave, as the FPP accepted, what he had honestly believed to be the effect of the CESDI figures in response to questions put to him by counsel. It is notable that, despite the FPP's excoriation of him in its determination on this issue, it had found two of the three allegations associated with it not proved. The figures were not his: and counsel, not he, produced them to the jury whilst, as Henry LJ observed in paragraph 163 of the first Court of Appeal's judgment (see paragraph 164 above), he can be criticised for not helping to explain their limited significance, he did not misuse the figures.

5) failure to provide a fair context for the squaring application, in particular in his seeming unqualified application of it to the circumstances of this case.

This was a mistake, but as I have indicated, no-one challenged it; indeed Mr Bevan in his cross-examination of Professor Meadow, appeared to accept the principle of squaring as an appropriate method, or starting point, for calculating second natural deaths within the same family. It was also a mistake, as the FPP accepted in the light of the GMC's witnesses, that was easily and widely made.

Accordingly, for all those reasons, and applying whichever end of the narrow range of rival formulations of the test for Collins J of "wrongness" of the FPP's, or for this Court, of his conclusion, respectively advanced by Mr Henderson and Miss Davies, I am firmly of the view that the FPP was wrong and that Collins J was right on this ground of appeal.

Accordingly the question of sanction does not arise. But, as I have said, the GMC did not seek restoration of erasure, suggesting instead that, in the absence of an appropriately defined undertaking, the imposition of a condition along the lines considered by Collins J in paragraph 58 of his judgment that Professor should not undertake medico-legal work would have been appropriate. It is difficult to reach and express a contingent view on the appropriate sanction on a hypothesis of a finding of serious professional misconduct with which I could not agree. But, like Collins J, given the undisputed circumstances of the trial that I have summarised in this judgment, I could not contemplate erasure as an appropriate penalty for Professor Meadow's uncharacteristic honest errors in this difficult case. If it had been necessary to mark his conduct with a finding of serious professional conduct, 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.

Perhaps the best way to conclude this judgment is to refer to the following comment by the distinguished jurist and scholar of the vexed subject of expert evidence, Sir Louis Blom-Cooper QC in Public Law, Issue 1, 2006, [4] and to adopt it as a succinct and apt summary of my view on the FPP's finding of serious professional misconduct against Professor Meadow:

"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 serious professional misconduct – 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 his professional service; whereas his mistake or misjudgement had properly to be viewed in the context of the criminal trial in October 2003 for the murder of her two sons. (She was ultimately acquitted by the Court of Appeal (Criminal Division) second time round in January 2003, on a ground totally unconnected with Sir Roy's evidence on statistical probabilities."

Accordingly, I would dismiss the GMC's appeal on this ground.

Lord Justice Thorpe:

Family Justice Background.

In his skeleton argument and in his oral submissions the Attorney General rightly emphasised the importance of the regulatory and disciplinary functions of the GMC and other like bodies. The public interest depends upon protection from those who fall below the generally accepted professional standard let alone from the charlatan.

However the identification of the public interest in the round will vary from one justice system to another. In criminal and civil justice there are many fields of expertise beyond the

medical from which dependable witness must be available to the courts. There are a corresponding number of professional men whose livelihood in part, and sometimes in large part, is gained from court work. In a marketplace where supply exceeds demand there is a particular need for ensuring dependability both in the field of the witnesses expertise and also in the observation of the forensic standards set by the courts. Accreditation through an association such as the Council for the Registration of Forensic Practitioners provides a reliable badge of dependability.

However the position is very different in the Family Justice System. Here most of the required experts are either medically qualified or otherwise qualified in the mental health professions. The majority will be employed under NHS consultant contracts. By contrast to the other justice systems this is a market in which demand exceeds supply. It is thus very sensitive to increasing or newly emerging disincentives. This factor is compounded by a paucity of incentives. The fee for the work will often be paid to the trust employer. The employer may be reluctant to release the consultant from other duties. Keeping up with the demands of the court's timetable may involve evening or weekend work.

The consequential threat to a sustainable future supply of experts was recognised by the President's Interdisciplinary Committee in 1998 and in collaboration with the Department of Health and the Lord Chancellors Department day conferences were arranged to debate the problem and seek solutions. Only limited progress was made with the introduction of training and mentoring schemes for specialist registrars. The resolution of the profounder underlying problems foundered on the difficulties inherent in renegotiating contractual terms for consultants.

It was the judgment of the Court of Criminal Appeal in the case of *R v. Cannings* (2004) 1 WLR 2607 that elevated the public debate concerning the trial and conviction of mothers for the murder of their babies to a level that demanded Government intervention. Professor Sir Roy Meadow had also given evidence in the trial of Mrs Cannings. The inter-relationship of the two trials is considered in paragraphs 16 of the judgment of the court as follows:

"As is well known, the conviction of Sally Clark has been quashed. Save superficially, however, this appeal is dissimilar, and raises different issues. Unlike the Court of Appeal (Criminal Division) in that case, we have not been presented with evidence of apparent misconduct and serious non-disclosure by an expert witness, Dr Williams, called by the Crown, which came to light after conviction. Of itself, that would have been sufficient for the conviction to be quashed. In addition, expert evidence describing statistical probabilities was also severely criticised. The evidence was given by an expert witness of great distinction, if not pre-eminence in this field, Professor Sir Roy Meadow, whose evidence would undoubtedly have carried great weight with the jury which tried Sally Clark. If it were flawed, as it was, the safety of the jury's decision was further called into question. Professor Meadow's evidence in the present case did not extend to the flawed statistical evidence presented to the jury during the trial of Sally Clark. The present convictions therefore cannot be quashed on either or both the grounds relied on in her appeal, and the observations on the facts in the Court of Appeal (Criminal Division) in that case were case-specific, and not otherwise of general application to the present appeal."

The judgment in *Cannings* was delivered in January 2004 and led to the Attorney's statement to Parliament that past cases in which conviction or care orders had been made upon the premises so severely criticised by the court would be reviewed. (In the event there were only two appeals brought from care orders made in the Family Division and both were dismissed).

More pertinently the then Minister for Children made a statement to Parliament in June 2004 which contained the following:

"Today we are announcing an initiative to determine how best to ensure the availability of medical expert resources to the family courts. Professor Sir Liam Donaldson, the Government's Chief Medical Officer, will lead this work and plans to involve a wide range of interests, including judicial, legal, clinical specialities, scientific, statistical and consumer interests as well as health regulatory bodies."

The volume and the nature of the public criticism of Professor Sir Roy Meadow caused anxious concern to the President and Council of the Royal College of Paediatrics and Child Health. Members of the Royal College were either withdrawing from or declining to enter forensic work, a vital ingredient of overall child protection services. Accordingly the Department of Health had convened a meeting in May 2004 bringing together representatives of the Royal College of Paediatrics, the Chief Medical Officer, officials of the department, the President and myself as the Chairman of the Interdisciplinary Committee.

The early following announcement of the Minister for Children seemed to meet many of the concerns expressed at the Department of Health's meeting, particularly because it was anticipated that the CMO's report would be available early in the new year.

However there was one independent development that flowed from the meeting, namely collaboration between the GMC and the Chairman of the Interdisciplinary Committee to endeavour to speed disciplinary processes brought against consultants solely in connection with evidence given in family proceedings. Part of the oppression to the consultant resulting from an unfounded or malicious complaint was its duration. The GMC were finding that existing procedures for the disclosure of case papers from family proceedings heard in chambers were leading to unacceptable delays. An accelerated procedure needed to be sought. Then there was a question as to whether the judgment that concluded the proceedings might not provide the basis for a filter to eliminate complaints that would be revealed to be akin to frivolous or vexatious.

The issues, although seemingly relatively straightforward were in fact complex as a result of, on the one hand, the GMC's statutory duty to investigate and, on the other hand, the confidentiality of family proceedings and the need to ensure that interested parties within the proceedings had an opportunity to make representations upon any application for the release of case papers.

Accordingly these two separate but allied issues were the subject of negotiation between representatives of the GMC and myself as the Chairman of the President's Interdisciplinary Committee assisted by Baron J. over the course of some eighteen months, culminating in an agreement in October 2005 which was subsequently approved by the President.

The less contentious and easier issue was the procedural acceleration, although even that required wide consultation. More difficult was the adoption of a system that, piloted in the Family Division, would ensure that the judge would in all cases consider and appraise the quality of any expert evidence, with that part of his judgment, subsequently transcribed, being made available to the GMC in the event of any complaint being received.

Inherent difficulties were emphasised when at the judges meeting in January 2006 the proposal for the implementation of the pilot scheme was rejected.

Further pursuit was apparently rendered unnecessary by the judgment of Collins J allowing Professor Meadow's appeal.

However the utility of this development was offset by the mounting delay in the publication of the report of the CMO. The draft delivered to the Department of Health was in confidential circulation for comment in August 2005. Thereafter further progress was apparently beset by

inter-departmental debate over the legal problems that would result from the implementation of his proposals.

Against that background and against the background that the majority of paediatric expert evidence is given in family proceedings, the written submissions of the Attorney General deal with this fundamental problem hardly at all. In paragraph 14.3 there was some recognition of the deterrent factor: -

"There is also a countervailing public interest in not unnecessarily discouraging competent expert witnesses from giving evidence, and also in avoiding the risk of multiple proceedings, but the common law protects that interest by maintaining the immunity of expert witnesses from civil liability: it does not also demand their immunity from FTP proceedings."

In paragraph 98 an argument was advanced in relation to the deterrent factor: -

"The Attorney General's inquiries to date suggest that FTP proceedings are on occasion brought against experts in relation to evidence given by them for the purpose of court proceedings, but only rarely. If this is a fair reflection of the general picture, it suggests two things. First, it suggests that the threat of FTP proceedings has a salutary effect in helping to ensure that expert evidence is given responsibly: were it otherwise, such proceedings would have been more common. Secondly, it suggest that the likelihood of FTP proceedings being brought is sufficiently remote not to have any significant chilling effect on the willingness of competent expert witnesses generally to give evidence in court.

Evidence demonstrating concern among paediatricians was adduced before Collins J, hence the use of the word generally."

Finally in paragraph 110 it was submitted: -

"To the extent that any particular profession, or any particular specialism within a profession, is exposed to exceptional risks in this regard and requires special treatment, the matter can be dealt with locally without the need for creating a general immunity at common law applicable to all expert witnesses in all circumstances, and then subjecting it to an unsatisfactory exception."

In paragraph 40 and 41 reference was made to "an important public interest in ensuring an adequate supply of competent expert witnesses and regulating their conduct appropriately."

There followed the reference to the CMO's report "on which work is still continuing".

In his oral submissions the Attorney General was able to inform the court that the CMO's report would be published in about eight weeks. He was also able to say that it would propose incentives to encourage specialist registrars to undertake forensic work. What he was not able to say was that the report would propose minimising existing disincentives or deterrents.

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.

Mr Henderson during the course of his oral submissions produced a document which he submitted would meet the future needs of the Family Justice system by the creation of a judicial mechanism. The document is headed Professional Regulators – Court Disclosure/Judicial Referral. Paragraphs 5 and 6 read as follows: -

"What can reasonably be required of Judges and Tribunals in aid of the statutory duty of GMC and other Professional Regulators in terms of qualitative judgments of experts and particularly of matters relevant to fitness to practise and in terms of notification and provision of transcripts, documents and information to professionals and regulators, preferably being such as to promote:

- (a) alerting of professional regulators to professionals whose fitness to practise is open to question, whether as an expert or otherwise (e.g. mental health);
- (b) permitting professional regulators to draw an inference when considering a complaint that the absence of referral by a Judge/Tribunal provides some evidence of absence of impairment. Should a judge refer a professional to a professional regulator and/or consider an application for disclosure when a case is subject to appeal? Should the referral/application be dealt with the appellate court or be stayed pending the appeal or otherwise?"

Mr Henderson's document follows shortly after his disclosure of the correspondence passing between the GMC and the Family judges in 2005. Therefore Mr Henderson's proposal seems to replicate what was agreed as a Family Division pilot. Subsequent events demonstrate that it would be rash to invest confidence that the experiment will develop into the control mechanism envisaged by the Attorney General.

All the above may be said to be peripheral to the determination of the principal issue in the appeal, the issue that attracted the Attorney Generals intervention. On that issue I have had the advantage of reading in draft the judgment of the Master of the Rolls, with which I am in complete agreement.

Serious Professional Misconduct

The courts have defined the standards expected of expert witnesses, classically in the judgment of Cresswell J in the *Ikarian Reefer*. We were told that the standards which he set for experts in civil cases apply equally at criminal trials. Identical standards apply to witnesses in family proceedings: see *Re J* [1991] FCR 193 @ 226 per Cazalet J. and *Vernon v Bosley* No. 1 [1997] 1 All ER 577 @ 612.

In this appeal there can be no doubt that Professor Sir Roy Meadow fell short of the required standards. He advanced a probability theory that can only be applied in the calculation of the odds against the happening of two truly independent events. He was not expert in the calculation of probability. The calculation which he advanced in his original witness statement for the trial of Mrs Clark was drawn from a paediatric paper which he had published in the *Archives Child Diseases* in 1999, without any citation of the source. In the days immediately preceding the trial he submitted a supplemental witness statement in which he advanced an even more extreme calculation drawn from the CESDI study by Professor Fleming and others. He knew from the text of the article that simple squaring was not a reliable basis for the calculation of the probability of recurrence given that two infant deaths within the same family are not independent events. He, who had introduced the CESDI study to the case, allowed the bare table for the calculation of probability by squaring to go before the jury without the qualifications expressed in the accompanying text. When cross examined, far from fairly admitting the need for qualification, he elaborated the figure produced by simple squaring with illustrations, one of which (backing an eighty to one Grand National winner in four consecutive years) he has subsequently acknowledged to be inappropriate and insensitive. Such breaches of the duties imposed upon an expert witness must amount to misconduct even if the witness had no intention to mislead and honestly believed in the validity of his opinion. However I cannot accept that in the context of this particular case Professor Meadow was guilty of serious professional misconduct as construed by the Privy Council authorities.

Let me explain that conclusion. The first publication of the statistic in the 1999 paper of course demonstrated a lack of scientific rigor and perhaps presaged an over casual approach to the incorporation of seeming expertise from a neighbouring scientific discipline. However at the trial of Sally Clark the fundamental fallacy, namely that the recurrence of a second SIDS death in the same family could be calculated by simple squaring was common ground between prosecution and defence. That is demonstrated by Professor Meadow's cross examination at the committal proceedings before the stipendiary. Mr Kelsey-Fry for Mrs Clark put the following questions: -

"Am I right in thinking that, in the event of a family suffering a cot death, a SIDS, an unexpected death, a SIDS, an unexplained death, research shows that the chances of a repeat occurrence, once the first has happened, of course, the chances of a repeat occurrence are effectively the same?

In other words, the fact that there is one, does not enhance the chance of another; nor does it detract from the chance of another?

A. No.

Q. That is right, is it not?

A. I agree.

Q. Which is why, I am right, Professor, that you giving the general figure of 1:1, 000 then you multiply for the chances of the double occurrence?

A. Yes.

Q. The result of one in a million in your view makes it one in a million unlikely that both deaths in such a family were natural?

A. Yes.

Q. Unlikely in the sense of one in a million?

A. Yes.

Q. But the fact remains the chances of one death in a family remains as one in a thousand?

A. Correct."

At the trial itself Mr Bevan QC leading Mr Kelsey-Fry, with the agreement of Mr Spencer QC for the prosecution, put before the judge and the jury the bare table extracted from the CESDI study. In cross examining Professor Meadow on the table Mr Bevan did not challenge, indeed plainly accepted, that simple squaring is the correct route to the calculation of the probability of a second SIDS death in the same family. This is illustrated by the exchange during Professor Meadow's cross examination as follows: -

"Q. On your table when Christopher was born his chances in relation to a cot death were, taking your own figure, 1 in 8,543? -- A. Around there, yes. I say around because as this paper mentioned, this figure analyses the three biggest risk factors and there are other things that can modify it, but I think for practical purposes 2 in 8,5000 is a starting point.

He died. When Harry came into this world, yes? -- A. Yes.

When he was born the chances of Harry dying, the chances of him dying of a cot death were exactly the same, were they not, 1 in 8,543? -- A. Yes, that is correct.

It's a bit like a coin, isn't it? If you flip a coin, heads or tails, yes? -- A. Yes.

Q. It's the same odds each time, isn't it, one to one? -- A. Yes, and that's why you don't just look at... This is why you take what's happened to all the children into account, and that is why you end up saying the chance of two children dying naturally in these circumstances is very, very long odds indeed, one in 73 million. You know, I mean...

That's a double death every hundred years, -- A. I know, but I mean, you know, I know Mr. Kelsey-Fry is interested in betting odds and you know, it's the chance...

Q. I don't know how you knew that. -- A. At a previous hearing; but it's the chance of backing that long-odd outsider at the Grand National, you know; Let's say its an 80 to 1 chance, you back the winner last year, then the next year there's another horse 80 to 1 and it is still 80 to 1 and you back it again and it wins. Now here we're in a situation that, you know, to get to these odds of 73 million you've got to back that 1 in 80 chance four years running, so yes, you might be very, very lucky because each time it's just been a 1 in 80 chance and you know,

you've happened to have won it, but the chance of it happening four years running we all know is extraordinarily unlikely. So it's the same with these deaths. You have to say two unlikely events have happened and together it's very, very, very unlikely.

Q. Have you heard -- I hope it's not too frivolous a remark to make but have you heard the expression "Lies, damned lies and statistics"? -- A. I don't like statistics but I'm forced into accepting their usefulness."

Nor was Mr Bevan short of scientific ammunition. On the 20th October his instructing solicitor and his junior received by fax a letter from Professor Fleming in which he explained why the table that later went to the jury had been published and the considerable limitation in its use as an indicator of risk. Additionally Mr Bevan had one of the co-authors, Professor Berry as his expert.

With the advantage of hindsight this acceptance on the part of Mrs Clark's very experienced counsel seems hard to understand. However I stress that evidence as to the probability of recurrence only related to SIDS and it was common ground at this trial that the two deaths in issue were not SIDS deaths, certainly after the evidence of Professor Berry.

Thus Professor Meadow proceeded on the footing that the principle of simple squaring was agreed, even if the numbers to be squared were in issue. In a sense whether the numbers were 1:73,000,000 or 1: 1,000,000 is of limited significance, given that even the lower figure is at the highest end of improbability. Professor Meadow's duty to be fair has to be assessed in the context of an agreed proposition. His introduction of the CESDI figures for SIDS was not entirely gratuitous since at the exchange of experts' statements it appeared from the statement of Professor Berry that he would raise the possibility that both infant deaths were SIDS. That he was not in fact supporting that hypothesis only emerged from his evidence. Thus the issue might have been, and in my view should have been, disposed of by a direction from the judge that the evidence as to recurrence rates was irrelevant and the table put before the jury by agreement should have been withdrawn.

My view of the context is much reinforced by the subsequent analysis of the trial carried out by the first appeal to the Criminal Division of this court. Judgment was given on the 2nd October 2000 approximately eleven months after the Chester trial. Counsel for the appellant and for the Crown were those who had appeared at the trial. There were five grounds of appeal the third being: -

"The evidence given by Professor Meadow of the statistical probability of two SIDS deaths in one family undermine the safety of the convictions, in that the figures cited were erroneous, Professor Meadow's opinion as to the deaths being unnatural was wrongly founded in part on the statistical evidence, and the judge failed to warn the jury against the 'prosecutors fallacy' in relation to the use of statistical evidence."

That third ground was very thoroughly considered between paragraphs 101 – 168 of the judgment. The court concluded that the judge had not dealt with the statistical evidence correctly. The resulting error had to be looked at in the round in order to consider whether it rendered the conviction unsafe. (See paragraph 166-168 and 231).

The courts ultimate judgment in the round was thus expressed in paragraph 256: -

"For all those reasons, we consider that there was an overwhelming case against the appellant at trial. If there had been no error in relation to statistics at the trial, we are satisfied that the jury would still have convicted on each count. In the context of the trial as a whole, the point on statistics was of minimal significance and there is no possibility of the jury having been misled so as to reach verdicts that they might otherwise not have reached."

There are two paragraphs within the court's review of the statistical evidence that are in my opinion of relevance to the principle question in the present appeal. In paragraph 126 the court settled the context thus: -

"While to deal properly with this ground of appeal in its context in the trial it has been necessary to consider the evidence and issues in detail, it was very much a side-show at trial. The experts were debating the incidence of genuine SIDS (unexplained deaths with no suspicious circumstances) in a case where both sides agreed that neither Christopher's death nor Harry's death qualified as such."

Then at paragraphs 162 and 163 is the court's evaluation of Professor Meadow's shortcomings: -

"Therefore we accept that when one is looking ex post at whether two deaths were natural or unnatural, the 1:73 million figure is no help. It is merely a distraction. All that matters for the jury is that when your child is born, you are at a very low risk of a true SIDS death, and at even lower risk with the second child.

Professor Meadow did not misuse the figure in his evidence, though he did not help to explain their limited significance."

The conviction was returned to the Criminal Division by the Criminal Cases Review Commission in 2002. Judgment on the resulting appeal was given on the 11th April 2003. At the appeal two grounds were advanced: the first was the failure by the Crown's pathologist, Dr Williams, to disclose microbiological reports with the result that important aspects of the case which should have been before the jury were never considered at trial. The second ground of appeal was, again, that statistical information given to the jury about the likelihood two SIDS in a family misled the jury.

The appellant's case on the first ground was very strong and resulted in the appellant's release on bail prior to the hearing and the discharge of the conviction on the hearing of the appeal. Thus it was not necessary for the court to rule determinatively on the second ground of appeal. However the court's judgment dealt with the statistical evidence between paragraphs 94 and 110, particularly recording that at the first appeal this ground had only failed because of the court's conclusion in the round that there was an overwhelming case against the appellant.

Since that overwhelming case had been destroyed by the discovery of the microbiological reports: -

"The Court of Appeal on the last occasion would, it seems clear to us, have felt obliged to allow the appeal but for their assessment of the rest of the evidence as overwhelming. In reaching that conclusion the court was as misled by the absence of the evidence of the microbiological results as were the jury before it. We are quite satisfied that if the evidence in its entirety, as it is now known, had been known to the court it would never have concluded that the evidence pointed overwhelmingly to guilt.

Thus it seems likely that if that matter had been fully argued before us we would, in all probability, have considered that the statistical evidence provided a quite distinct basis upon which the appeal had to be allowed."

Thus it is clear that there is no discord between the two judgments on the issue of statistical evidence. However it is clear that the judgment given in April 2003 was more critical of the evidence of Professor Meadow than had been the judgment in October 2000. However the issue was more profoundly canvassed at the first appeal and the tentative conclusion expressed by the second court was further qualified by its introductory paragraph 172: -

"Finally we should say a little about the statistical evidence led before the jury. The matter was the subject of only brief argument before us and we certainly heard none of the evidence."

Thus I do not consider that the observations of the court in the Cannings appeal cited in paragraph 5 above fairly summarise the role of Professor Meadow at Mrs Clark's trial it is of course only a brief summary but the focus on the second appeal alone risks distortion.

Insofar as there is a difference of view between two courts partly addressing the same issue, it is, in my opinion, an indication that Professor Meadow's failings were not extreme.

With the advantage of hindsight it seems both extraordinary and disadvantageous to deny the panel both judgments of the Court Appeal (Criminal Division). Miss Davis naturally wanted the panel to have the advantage of the judgment in the first appeal, Mr Seabrook, who led for the GMC at the panel hearing, wanted the panel to have the judgment of the court in the second appeal. Apparently the resulting agreement between leading counsel was that neither judgment should go to the panel.

The predictable outcome, in my judgment, was that the panel failed to understand the full context in which Professor Meadow gave evidence. Their reasons suggest that they never understood that Professor Meadow's evidence as to probabilities went to a non-issue at the conclusion of the evidence.

It is also apparent that the panel regarded Professor Meadow as responsible for misleading the jury by the introduction of the squaring mechanism for the calculation of probability. It does not seem from their reasons that they understood that it was common ground between prosecution and defence that that was the correct mechanism. Had they had the judgment of the court on the first appeal they would have appreciated that a legitimate evaluation demonstrated: -

- a) The probability of a recurring SIDS death in one family was a side-show at the trial; and
- b) Professor Meadow's evidence, flawed though it was, fell far short of serious professional misconduct.

There are other more minor criticisms of the panel's reasoning. Having quoted the crucial paragraph from Professor Meadow's witness statement the panel continued: -

"The Panel has heard experts statistical evidence (which it accepts) that the squaring of the figure 1:1000 ratio to conclude that there was 1:1,000,000 incidents of double SIDS deaths within a family was incorrect. Furthermore you were unable to explain from where you derived these figures. You said in evidence before this Panel that you thought someone in the audience of a lecture you were giving had said this and that you had remembered putting the figures "on a blackboard somewhere", although you could not recall when and where. The Panel considered this explanation to be unacceptable and the members were of the opinion that this highlighted your less than rigorous use of statistics and your inability to adhere to strict scientific principles in so doing."

I regard that critique as less than fair. The figure of 1:1000 was in fact conservative and the only error was the squaring. As to the Professor's oral evidence of derivation, the charges all related to his evidence in the criminal proceedings and not to the research preceding the publication of his 1999 paper.

Furthermore the panel seemingly misunderstood the evidence of Sir David Cox that Professor Meadow had been responsible in his evidence for setting up "the prosecutor's fallacy" to mislead the jury.

Finally the panel was, in my judgment, wrong to state: -

"You are an eminent paediatrician whose reputation was renowned throughout the world, and so your eminence and authority carried with it a unique responsibility to take meticulous care in a case of this grave nature."

Whilst Professor Meadow undoubtedly was a paediatrician of the greatest eminence and authority, the duties imposed upon an expert witness do not rise or fall in proportion to the witness's standing.

The only passage in the panel's reasoning which demonstrates their endeavour to appreciate the context of Professor Meadow's evidence is this paragraph: -

"The Panel has noted with care the argument put forward on your behalf that others within the court system did not question your erroneous application of statistics in the police statement, magistrates and crown courts. You however were the expert witness, you provided the statistics, spoke to them with authority and it was your expert evidence which was relied upon by the other parties to the court proceedings."

That paragraph seems to me to demonstrate that the Panel had not properly understood: -

- a) That Professor Meadow's evidence mainly concentrated on factors to suggest that neither infant death was natural;
- b) Professor Meadow's was one of a bevy of experts at the trial;
- c) Professor Meadow's expert evidence was certainly not relied upon by the other parties to the proceedings. It was substantially challenged by the team of experts called by the defence;
- d) Even within the statistical side-show the defence had available to them Professor Fleming's letter and the evidence of his co-author Professor Berry.

Collins J did have available to him the judgments of the court in the two appeals. Thus his evaluation of Professor Meadow's evidence demonstrates a proper understanding of the context and finds the criticisms that he made of the Panel's decision set out in paragraphs 50 – 54 inclusive of his judgment. Those criticisms are broadly similar to those I have expressed above. I share his evaluation and his conclusion: -

"It follows that I would allow the appeal against the finding of serious professional misconduct. It is difficult to think that the giving of honest albeit mistaken evidence could save in an exceptional case properly lead to such a finding."

Privy Council authorities have established what is meant by serious professional misconduct. In *Preiss v General Dental Council* [2001] 1 WLR 1926 it was defined in the following terms:

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"It is settled that serious professional misconduct does not require moral turpitude. Gross professional negligence can fall within it. Something more is required than a degree of negligence enough to give rise to civil liability but not calling for the opprobrium that inevitably attaches to the disciplinary offence."

Whilst the Privy Council was, and now the Queen's Bench Judge is, free to upset the decision of the panel if clearly wrong, it has always been recognised that the appellate court must accord due deference to the evaluation of a panel substantially composed of doctors for the obvious reason that they are better placed to make a peer judgment. There can be no doubting that proposition where the charge before the panel relates to clinical work. But where the only charge relates to the doctor's evidence given during legal proceedings there is no similar foundation for deference. It is the judges, in judgments such as the *Ikarian Reefer* who set the standards that they require of the expert witnesses appearing before them. In my opinion the judges are best placed to evaluate whether and to what extent an expert witness fell below those standards.

It is for these reasons that I would support the judgment of Collins J and reject the GMC's appeal on this important issue.

I add that I have also had the advantage of reading in draft the judgment of my Lord, Auld L.J. on the Section 40 test, with which I agree.

Note 1 NHS Reform and Health Care Professions Act 2002, and 4th Commencement order (SI 833/2003) [Back]

Note 2 See R v Doheny & Adams (1997) 1 Cr App R 369, CA, per ... at 372G-374A [Back]

Note 3 Sch 2, para 10 [Back]

Note 4 See, in particular, Experts in the Civil Courts, OUP 2006 [Back]

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