Exhibits list

FTP Panel (M rev) Dr D Southall 11-16 August & 20-21 September 2008

GMC

C1 - Review bundle
C2 - Additional GMC generated material
C3 - GMC documents
C4 - Extract from original 2004 hearing transcript D1/46-51
C5 - Extract from original 2004 hearing transcript D1/65-68
C6 - Letter of instruction to [redacted]
C7 - Article by Dr Williams published in the journal Family Law (June 2008)
C8 - Email dated 31 March 2008 [redacted]
C9 - Letter by Dr Williams published in the *Letters* section of BMJ (2 February 2008)
C10 - Report by [redacted] dated 30 August 2000
C11 - Meadow v GMC judgement

Defence

D1 - [redacted]
D2 - [redacted] report
D3 - [redacted] report
D4 - [redacted] report
D5 - [redacted] report
D6 - [redacted] report
D6a - [redacted] CV
D7 - Extract from GMC publication "0 - 18 years: guidance for all doctors"
D8 - [redacted] CV
D9 - Original letter of instruction to Dr Southall
D10 - Letter from [redacted] dated 11 January 2005
D11 - Paper on Epidemiology of oro-nasal haemorrhage in the first 2 years of life: implications for child protection
D12 - Paper on sudden oro-nasal bleeding in a young child
D13 - Extract from the transcript

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attended a meeting on Friday, 28 July in Wilmslow, which was attended by the lead clinician, the police and social services. You confirmed that you had talked about bleeding from the nose for approximately 1 hour and then had left. The meeting carried on without you. You were expecting to be informed of what action was being decided on i.e. if the children were to be taken from the

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father's care. You expected this would provoke a considerable reaction from Mrs M etc.

You agreed to keep me informed in respect of the Clarke case".

Just pausing there a moment, this is again Professor Southall keeping the Trust informed but keeping the Trust informed after the event of what he had done.

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Then I need not trouble you with the rest of the letter, sir, save to point out at Page 41 that it was confirmed that the suspension had to remain and that there:

"... currently are 41 outstanding complaints in respect of child health issues, 11 of which are legal. These are taking an enormous amount of time and effort at present to manage".

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Professor Southall produced his report on his outlines of concern, as he had been asked to do, on 30 August. That report and the matters that flow from it form the subject matter of Head of Charge 7. The report is at Page 42 to 45 and, sir, just on a personal note, before I read it out I wonder if I can have a short break?

THE CHAIRMAN: Yes. We were getting to the stage, anyway, where I thought it might

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be appropriate. Why don't we stop now and start again at say between 25 and 20-to-4?

MR TYSON: Yes, thank you.

THE CHAIRMAN: And then we will run through to 5 o'clock.

MR TYSON: And you intend rising at about 5?

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THE CHAIRMAN: Yes, I would not want to go beyond that if at all possible.

MR TYSON: I am grateful.

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(The Committee adjourned for a short time)

MR TYSON: As I say, Professor Southall wrote the report which we see at page 42 and it is this report and the matters that arise out of it that formed the head of charge 7 in this case. It is a report dated 30 August by Professor David P Southall of the address there given. It is entitled "Medical Report on the Clarke Family for Forshaws Solicitors":

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"On 27th April 2000 I observed a television program in the Dispatches series. I was interested in the case of Sally Clarke and her family since a proportion of my clinical and research work

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involves the sudden and unexpected deaths of infants.

I noted the following in the program:

- Two successively born infants in the family died suddenly and unexpectedly. The first Christopher died at 11 weeks and the second Harry at 8 weeks of age. I noted that there was a third living infant born following the second death of Harry.

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- Ten days before Christopher died, the family visited London and stayed in a hotel. The mother and her friend went shopping leaving Christopher alone with his father in the hotel room. The following is a transcript of a video copy of the program:

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Mr Clarke stated: I heard this strange noise behind me and I turned round, mmm and there was blood running out of both of his nostrils, not huge a huge flow but little trickles running out both his nostrils into his mouth but he was obviously choking. He was swallowing it and choking on it and finding it difficult to breathe. I was thrown into a bit of a panic as you can imagine and so I went to the bathroom and got a tissue to try and mop the blood away. He was still struggling to breathe, so then I got a glass of water and poured that over his face to try and clear and that seemed to work although he did swallow it but it really thinned the blood out and he seemed to be able to breathe a little bit better at that point and I rang down to reception and asked if there were any doctors in the hotel. They said no but they'd send up some first aiders.

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The reporter stated *And when the police investigated, they found no evidence that Steve had summoned medical help from the hotel.*

A friend who had been shopping with Sally that day, Liz Cox, gave evidence to back the story up according to the reporter. She stated on film the following: *When I got back to the hotel, we went up to the room and Steve told us that Christopher had had a nose bleed while we were out mmm and he had rung for a doctor mmm and the doctor had spoken to him over the phone. I was there. It seemed very genuine. He said while you were out he had a nosebleed and I rang the doctor.*

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According to the reporter *Eventually the Crown accepted there was a nose bleed but claimed it was the result of an earlier smothering attempt by Sally Clarke. The defence expert said the real cause could be a rare fatal lung condition."*

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- At the time Christopher was found dead, he was alone with

his mother. The father was apparently attending a Christmas party. A neighbour described how he heard a commotion and gave the Clarke's house keys he had to the ambulance men to allow them to gain access to the house. It appeared that the door was locked and that Sally could not find the key.

- The first death was initially attributed to a lower respiratory tract infection but later there were reported to be a torn frenulum and some possible bruises on his legs at the time of death. There was also reported to be fresh and old blood in Christopher's lungs. Dr Cowan attributed the torn frenulum to the resuscitation given in the casualty department of Macclesfield Hospital. Christopher was cremated.
- The second death was initially reported to be a consequence of the shaken baby syndrome with evidence of a rib fracture, possible injuries to the brain, spinal cord and eyes. Later there was a dispute about some of these findings. However, it was reported that there were 2 petechial haemorrhages on one of Harry's eyelids after death.
- When Christopher died, Mr Clarke was called from a party and drown down the motorway to the hospital in Macclesfield (which motorway?). Sally had been alone with the baby at the time he was found dead.
- I noted that Harry was on a breathing monitor at home.
- At the time of Harry's death, both parents were at home. According to Mr Clarke he had arrived home relatively early to give Harry his bath. Since there was an allegation that before Harry died there had been other injuries to him that evening (he died at around 9pm), Mr Clarke said that he had checked with the office receptionist (presumably at his workplace) that he/she had made a request for the taxi to come early in time for him to arrive home at around 5.30-6pm. Mr Clarke took the extraordinary step of getting this fact confirmed in writing by the receptionist presumably. However, the police checked with the taxi company and found that this version was incorrect and that he had arrived home much later (precise time not given). Mr Clarke was adamant that as a solicitor he would not have lied on oath.
- The reporter claimed that at the time of Harry's death Mr Clarke was about to go out. This is strange since he had only just got home as confirmed by the taxi company.
- At the time of Harry's death, Mr Clarke claimed that he had placed Harry in his bouncy chair and gone to make a drink. By the time the kettle had boiled, he heard Sally scream out. He went upstairs as fast as he could because of his crutches and tried to resuscitate the baby.

COMMENTS

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Please see attached publication in Pediatrics concerning the work of my Department on the intentional suffocation of infants and young children."

This is the third time he has given out a copy of this article.

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"1 Two sudden unexpected infant deaths in a family are extremely rare but when one is preceded by an apparent life threatening event (ALTE) with nasal or oral bleeding, intentional suffocation becomes the most likely if not an almost certain cause of the deaths.

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2 Christopher suffered an ALTE with bleeding from both nostrils ten days before he died. ALTE's which are accompanied by nasal or oral bleeding are due to intentional suffocation according to our research.

Contrary to the claim apparently made by the Crown, the process of intentional suffocation produces immediate bleeding not bleeding that is delayed. Thus, the intentional suffocation must have been undertaken by the adult with Christopher at the time of the ALTE and nose bleed, namely Mr Clarke.

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3 The police did not verify Mr Clarke's statement that he had alerted medical staff in the hotel. In my experience it would be extraordinary for a parent not to call 999 or do everything possible to obtain medical assistance if their first young baby was unable to breathe properly and had sudden bleeding from both nostrils. Extraordinary that is, unless the parent had deliberately caused the bleeding, as must, in my opinion, have been the case here.

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4 The statement of Liz Cox backs up the reality of the ALTE and that it could not have been fabricated to help clear Mrs Clarke, since her first baby was still alive.

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5 The fresh blood in Christopher's lungs after death would be typical of intention suffocation. The old blood in his lungs could have been associated with a previous episode of intentional suffocation.

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6 There are other causes of bleeding from both nostrils in an infant but they are much rarer than intentional suffocation. Other clinical indicators of a serious illness accompany the vast majority. One could would be a disorder of the clotting of the blood, such as leukaemia. Idiopathic pulmonary haemosiderosis can produce the coughing up of blood but usually this occurs through the mouth or the mouth and nose together. Infants with

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this latter condition have progressive respiratory failure and evidence of multiple haemorrhages before dying. Bilateral trickling of fresh blood, described by Mr Clarke would not be in accordance with this diagnosis. It is important to note that a doctor did not ever see Christopher prior to his death, which would be incompatible with this latter diagnosis or any other medical causes of nose bleeding except for intentional suffocation.

OTHER ISSUES

1 I note that there were two petechial haemorrhages found on Harry's eyelid after death. According to the accompanying report in Pediatrics, these are also associated with intentional suffocation.

2 I note the torn frenulum on Christopher. Much of my clinical work involves paediatric intensive care and I regularly intubate and resuscitate infants. Contrary to the view expressed by Dr Cowan, it would be extremely unusual in my experience for the frenulum to be torn as a result of resuscitation. It is most likely to have been the consequence of abuse, including intentional suffocation.

3 I find the story concerning the timing of the taxi on the night of Harry's death worrying. I was particularly concerned to see that Mr Clarke had acquired a false and apparently signed statement from the office receptionist. How did he persuade him/her to provide this?

4 I also found the description of Harry's death to contain a number of concerning features. My understanding was that Mr Clarke was on crutches for an injury. If his wife was awake when he went to make a drink, why did he not give the baby other, which might have been easier for him than placing the baby in a bouncy chair? What did Mrs Clarke say about this? Was she awake at the time? There may be satisfactory answers to these questions.

5 From my experience in studying the effects of intentional suffocation, I have observed that the baby struggles violently, although silently, even at this age, before losing consciousness 60-80 seconds later. Death then requires persist suffocation for a further unknown time period. In recordings taken during the sudden deaths of a small number of infants at home, I have noted that the heart usually continues beating for around 15 minutes and maybe longer, with intermittent gasping breaths. The short timing described by Mr Clarke with respect to the kettle boiling could be compatible with Mrs Clarke suffocating

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the baby but the timing does not easily fit with this, unless the baby was dead prior to him going down stairs, which of course according to Mr Clarke was not the case.

IN CONCLUSION"

B - I have read this, but I will read it again –

"I was stunned when watching this television programme since it appeared extremely likely if not certain to me that Mr Clarke must have suffocated Christopher in the hotel room. I felt that the police had been misled into believing that Mrs Clarke could have suffocated Christopher before she left the hotel and that the

C subsequent bleeding was a delayed consequence of this. My experience with cases of intentional suffocation, where there was nasal or oral bleeding, does not concord with this view of the expert advice given to the police. From my experience the bleeding always occurs simultaneously with the process of intentional suffocation. I was aware of a third child in the family who could be receiving care from Mr Clarke. Consequently, the next morning, I contracted the

D Child Protection Division of the Staffordshire Police to report my concerns.

I feel that every event subsequent to that in the hotel should be re-examined with this new evidence in mind.

E I remain convinced that the third child in this family is unsafe in the care of Mr Clarke.

I suggest that all of the remaining film work undertaken for the 'Dispatches' program but not shown be examined.

Tragically a considerable time has now elapsed making the task of the police in re-checking Mr Clarke's alibi for the first death very

F difficult.

I declare that the contents of this report are true and that they may be used in a court of law."

G Can I ask you, please, to look at head of charge 7 and to note the admissions? We can see from our reading of that report that head of charge 7a is made up, namely he had no access to any case papers; (ii) is made out because he had not been to see either Stephen or Sally, and 7b:

"Your report concluded that

H i. it was extremely likely if not certain that Mr Clark had suffocated Christopher in the hotel room,

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> before all the available information is available, in which case one has a professional duty to point out the very preliminary or tentative nature of one's conclusions. Where one has not met the family and one has not had the opportunity to interview those who have had care of the child, there is a special need for caution when coming to any conclusions."

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Then paragraph 64, which goes straight to the heart of head of charge 8:

> "What stands out as quite exceptional, indeed in my experience quite unique, in the context of this particular case, therefore, is that without recourse to any of the paperwork or medical or other information available in this case, indeed
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without access to one single item of the sources listed in above in paragraph 61, Professor Southall formed a very definite view that A's life is in danger because he is living with his father, the killer of his two brothers. Maybe the most striking feature of Professor Southall's contribution to the Planning Meeting and in his written report is that there is no sort of warning or note of caution to the effect that his opinions can
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only be based on the most scanty information. The main source of information available to Professor Southall was that given in a television programme, and everyone including Professor Southall (we discussed this) is aware how notoriously inaccurate, incomplete and biased is most media reporting."

Here we come to the heart of head of charge 7g, sir, which, in our submission, is
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the most serious head of charge in the case. The professor says in paragraph 65:

> On reflection, I. assumed that the lack of any caveat that Professor Southall's opinions had been formed without recourse to the data available in the case was simply an oversight. I wanted to give Professor Southall the opportunity to add a caveat of this sort if this was his wish, and
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accordingly on 10 September 2000, I sent him the following email."

Sir, can I ask you to keep a finger in page 79, because I want to now refer to that particular e-mail, and to go page 46. You may like to write beside paragraph 65 "See page 46". Page 46 is an e-mail from Tim David to David Southall, and we
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see the date was 10 September 2000:

> "Dear David,
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> Please could I put a question to you?
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> As I am sure you can imagine, there is a good deal of data about this case, both medical and circumstantial. As you know I cannot
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disclose any details at all.

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I appreciate that for all the reasons that you set out, you have great concern about the possibility that Mr Clark rather than Mrs Clark killed the children.

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My question is simple. Do you accept that it is possible that there is either medical data, or circumstantial data, or both, that could in fact largely or even completely exclude the possibility that Mr Clark killed either of his children?

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I feel I have to ask this question because nowhere in your report did you say something like 'These opinions are based on the very limited data available to me in the television programme. I have not had the opportunity to study the papers in this case, and I accept that there may be data available that negates or is inconsistent with the opinions expressed here'.

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My guess is that you did not insert a caveat like this simply because you were in a hurry to send it off, but of course it is possible that you take a much stronger view. I want to make sure that I fairly and accurately represent your opinions, and hence this email.

Kindest regards."

Going back to page 779, that e-mail is reproduced on page 79 and 80 and we pick up the story at paragraph 66:

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"Professor Southall discussed his provisional reply with me on the telephone. I reiterated that there was an enormous amount of data in the case which had involved a considerable number of experts, and I tried to hypothesise situations that could invalidate his conclusions, including a full confession from Mrs Clarke giving details that could leave no doubt that she had killed both children. Professor Southall pointed out that he had been told by the police, the guardian and the social worker that both, children were perfectly healthy, and I pointed out that they were all nonmedical and could not have a complete understanding of the complex medical issues. Nevertheless, Professor Southall was adamant that nothing other than the very remote possibility of both parents being the joint killers of the children could invalidate his conclusions that Mr Clarke had murdered both, children, and his written reply, sent by fax, was received on 15 September and was as follows."

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Perhaps you can just put "See page 47". If we go to page 47, this, in our submission, is the most serious document. It reads:

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"Dear Tim

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> I had thought through the issue of whether there might be other evidence not seen/heard by me which makes it impossible or very unlikely that Mr Clarke killed the two children. I should say and should have put into my report that I had undertaken a number of discussions with people involved with the case after seeing the video: namely Mr Gardner, the guardian and the senior social worker and had asked questions relating to other possible but extremely unlikely mechanisms for the bleeding and scenarios which would enable rejection of my opinion. I received negative answers to these questions. These were in particular whether any disease had been present in the first baby that might have caused the death that was not reported on the television program. Also any other information relating to the case that made Mr Clarke's involvement impossible. My only smallest reservation relates to an extremely unlikely prospect that both parents are implicated in the deaths. I have never seen this and therefore rejected it. Thus there can, in my opinion and beyond reasonable doubt, be no explanation for the apparent life threatening event suffered by the first baby which would account for the bleeding other than that the person with the baby at the time caused the bleeding through the process of intentional suffocation. The subsequent unexplained deaths of the babies with other injuries makes it likely beyond reasonable doubt that Mr Clarke was responsible."

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E "The subsequent unexplained deaths of the babies with other injuries makes it likely beyond reasonable doubt that Mr Clarke was responsible." Pausing there, that is to the criminal standard of proof this doctor is saying on the basis of this television programme and a few chats with unmedical people that he is of the *view that Mr Clark murdered both his children.*

F I carry on:

> "I am not used to giving opinions without all of the evidence being made available and feel vulnerable over my report. However, based on what I saw in that video alone and my discussions with the police officer, social worker and guardian, I remain of the view that other explanations cannot hold. The evidence of the family friend is particularly important."

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You will note the admission made by Professor Southall to head of charge 7g, which states:

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> "When given the opportunity to place such a caveat in your report you declined, by faxed email dated 11 September 2000, on the basis that even without all the evidence being made available

to you it was likely beyond reasonable doubt that Mr Clark was responsible for the deaths of his two other children."

Going back to page 82 – that second e-mail is set out on page 81 – picking the account up at paragraph 67 on page 82:

"I was unclear as to the meaning of the final sentence and to clarify this I spoke to Professor Southall again on 15 September 2000. He explained that this referred to the friend who went shopping in London with Mrs Clarke and who returned to the Strand Palace Hotel with Mrs Clarke. The point that Professor Southall was making was that she corroborated what Mr Clarke had said at the time - in other words, Mr Clarke could not have made up the story about the nose bleed at a later date 'in order to get them off the hook'.

Comments and conclusions

Professor Southall has provided not one item of new data or information, which is hardly surprising since he has had no access to the medical records or other documentation, or to any of the other potential sources of direct information listed above in paragraph 61. The new ingredient, which clearly the Social Services and the Guardian felt they could not ignore, coming as it did from an exceptionally senior member of the medical profession with a particular interest in abuse, was the conclusion that it was beyond all reasonable doubt (the criminal standard of proof) that Mr Clarke rather than Mrs Clarke had murdered his two sons Christopher and Harry. This conclusion, which was bound to have a most potent effect on those with the responsibility for the placement of A, was that A's life was in danger while he remained in the care of his father. This aspect was taken very seriously, and the discussion at the Planning Meeting inevitably included a careful consideration of whether or not there was a need to immediate remove A from his father, an action that was decided against.

The association between suffocation and blood from the nose was well known at the time of Mrs Clark's trial. Professor Southall's data had been published two years previously, and the topic was discussed at considered at great length by many experts including Professor Meadow, who himself has published material on suffocation, and a number of paediatric and forensic pathologists who had also done research in this area. The possibility that Mr Clarke had killed his children was certainly considered by the police, who both arrested and interviewed Mr Clarke. The possibility that Mr Clarke had caused Christopher's nose bleed was discussed in my own

Paediatricians in Child Protection: the Risks

LEONARD HP WILLIAMS
Consultant Paediatrician

In the article 'Medical Evidence in Child Abuse Cases: Problem Areas' published in April [2008] Fam Law 320, Wall LJ begins with an outline of the General Medical Council's decisions as regards Professors Sir Roy Meadow and David Southall, both of whom were found guilty by the General Medical Council (GMC) of serious professional misconduct. That article does not explore the details of the cases nor explain why a large number of child care professionals roundly disagree with the decisions of the GMC. I am grateful for the opportunity to expand on and explain the adverse effects of the GMC's decisions on the practice of child protection.

Let me first declare my interest in the cases. I have no clinical or legal involvement in either, other than having provided supportive references with regards to the clinical and research contributions to paediatrics of the two doctors at the sentencing stage of the GMC process. I have met each doctor only once, at clinical meetings some 25 years ago. I am a general paediatrician working in a district general hospital. I have been greatly impressed by the clinical and research contribution of these doctors: their work has influenced my own practice considerably. I am a member of Professionals against Child Abuse (PACA), which is a recently formed pressure group of professional people brought together by outrage over the GMC's actions. We are mainly senior paediatricians but the group includes lawyers, social workers, academics and other interested members of the public. I start by summarising the cases against each of the two doctors.

PROFESSOR DAVID SOUTHALL'S FIRST GMC CASE: AUGUST 2004

At a time when Sally Clark was in prison, having been convicted of the murder of two of her infant sons by suffocation, Professor Southall watched a TV programme in which her husband explained in his own words how his baby had suffered a nose bleed and simultaneous breathing difficulty when alone with him in a hotel room. The day after watching the programme, Professor Southall contacted the Staffordshire police child protection team stating that he was concerned for the safety of the Clark's third living child, who had been placed in his father's sole care. He also suggested that Mrs Clark's conviction was unsafe and that consideration should be given to Mr Clark's role. At that time Professor Southall was suspended by his hospital following unsubstantiated allegations from a campaign group opposed to his child protection work. He was subsequently fully exonerated. Professor Southall, as part of his suspension, agreed with his hospital not to engage in child protection work.

When Professor Southall was asked if his concerns could be passed on to the social service department responsible for the Clarks' third child, he immediately let his NHS Trust know of his involvement. At the request of social services, he provided a preliminary 'points of concern' report to the solicitor acting for the third child. At a professionals' meeting it was agreed that Professor Southall would be given all of the medical papers relevant to the case, particularly the nose bleeding event and subsequent deaths of the two babies. The family court directed that this should happen and that he should meet with the court appointed medical expert. Following further meetings with lawyers and the medical expert, Professor Southall gave a *confidential written statement to the family* court. His own research (DP Southall et al, 'Covert Video Recordings of Life-threatening Child Abuse: Lessons for Child Protection' (1997) 100 *Pediatrics* 735) supported his concerns by showing that the contemporaneous association of nose bleeds with episodes of difficulty in breathing in

young babies, termed apparent life threatening events (ALTE), strongly suggested suffocation.

The GMC's Professional Conduct Committee (PCC) as it was then called, found that Professor Southall's statement, made confidentially to the family court, was a 'false allegation', even though the evidence base he used was presented in good faith and has subsequently been confirmed to be entirely reasonable by subsequent medical publications (see N McIntosh, JYQ Mok and A Margerison, 'Epidemiology of Oronasal Hemorrhage in the First 2 years of Life: Implications for Child Protection' (2007) 120 *Pediatrics* 1074; N McIntosh, L Haines, H Baumer, 'Parents' reactions to nose bleeds and salt ingestion in infancy' (2008) 93 Arch Dis Child 449). In addition, the PCC stated that Professor Southall:

- was 'precipitate' in reporting his concerns to the police;
- did not state in his report that he had not seen the medical records;
- did not interview the parents before making the referral;
- acted when barred by his NHS Trust from doing child abuse work; and
- had put forward concerns that were 'a mere hypothesis' supported by only his own research, of which the PCC was very critical.

Professor Southall was barred from undertaking child protection work for 3 years.

COMMENTARY

As a citizen, Professor Southall had every right, in fact a duty given his special expertise, to raise his concerns, despite his agreement with the hospital's medical director not to undertake any child protection work. He explained the basis for his suspicion and supported it with published evidence. It is difficult to understand the meaning and implication of the word 'precipitate'. Surely he was doing what is recommended by the Children Act 1989 and warning in a responsible way the possible dangers to a child and possible miscarriage of justice with regard to Mrs Clark. Paediatricians often do not have all the facts at the time of making a referral or while writing a preliminary report for a meeting with a court expert or with the solicitor for the child, as opposed to when engaged as an expert for the family court. Although experts for the defence usually interview the parents, experts for the local authority frequently do not.

On the issue of his 'mere hypothesis', Professor Southall explained the basis for his suspicion and supported this with published evidence. His paper, referenced above, reported 33 covert video recordings of parents suffocating their babies. Thirteen of the 33 suffocated babies had had oral or nasal bleeding associated with an ALTE. A group of 46 babies who were being investigated for ALTE in which a medical cause, such as fits or a natural breathing disorder had been found, acted as controls. None of the control babies had suffered such bleeding. Seven of the 33 suffocated babies had siblings who had died suddenly and unexpectedly during infancy. Since this paper has received worldwide acclaim and all subsequent studies have backed up its conclusions, it should be said that his concerns were based on properly accredited evidence, rather than describing them as 'a mere hypothesis'. Subsequently, no alternative explanation for this child's nose bleed and ALTE has ever been established.

I and many colleagues have serious concerns about the way the PCC operated. The medical expert involved in the Clark case was the sole 'independent' witness employed to assist in the PPC's adjudication. The PPC chairman took a lead in cross-examination, in contravention of his role as a neutral arbiter. Much of Professor Southall's defence was based on his research which defined the relationship between nose bleeds and contemporaneous breathing difficulties. The PPC's main criticism of Professor Southall's paper was that the numbers were small and that the control group was biased but it had little or no experience in child protection on which to base those views. Professor Southall's paper documents the extensive clinical experience that led him to the conviction that such symptoms require further investigation: it is a qualitative analysis and to criticise it for not being quantitative

misses the point. His report is the largest series of recorded suffocations ever published and it is difficult to envisage any more relevant control group. Despite the views of the PCC and its chairman, most child protection workers consider the publication to be of the very highest merit and one of the truly groundbreaking pieces of research in child protection. As indicated above, Professor Southall's evidence has since been backed up by more publications in the medical literature.

Finally, there was no paediatrician, or indeed anyone with any experience of, or training in, child protection on the PCC, making the independence and expertise of the PCC's only expert even more important. It would appear essential that the members of the PCC understand that the needs of the child are paramount and take precedence over those of the parent. The panel must be well versed in the principles of child protection law. Due to the nature of child protection work, complaints are inevitable and emotions run high.

THE SECOND GMC CASE: NOVEMBER 2006 ADJOURNED UNTIL DECEMBER 2007

Professor Southall was again examined by the Fitness to Practice Panel (FPP) over events that took place in 1998 before his involvement in the Clark case. The most serious charge against him was that during an interview with a mother he had directly accused her of murdering her child. Professor Southall was appointed as an expert by the social services on behalf of the court to assess the risk of harm to a child, whose 10-year-old brother had died by hanging. The surviving child had threatened to kill himself and was on the child protection register. He had earlier been in the care of the social services department pending investigations about his safety. Professor Southall was instructed to explore whether it was safe for this child to remain at home and to try to exclude a possible diagnosis of fabricated illness. To do so, it was agreed that it would be necessary to explore the circumstances of his brother's death. There were three possible explanations for the hanging: an accident, suicide or murder. The possibility that the child had been murdered needed to be explored in order to ensure the safety of the remaining child.

The mother found the questioning offensive and later stated graphically that Professor Southall had accused her of murdering her child. Professor Southall is alleged to have said the following to the mother: 'I put it to you that you killed your son by injecting him, hanging him up, leaving him there to die and then ringing the ambulance'. Both Professor Southall, and a totally independent senior social worker who had been present throughout the interview and who had also taken contemporaneous notes, told the FPP that the mother was not so accused. The social worker stated that Professor Southall had questioned the mother professionally and with compassion and had not accused her of anything. The panel was aware that this mother had already misled them about three other matters. Yet despite this the panel still chose to disbelieve Professor Southall and the social worker and to believe the mother's story. The FPP ordered that David Southall's name be erased from the medical register, which decision he has appealed. However, the FPP panel removed Professor Southall's name immediately from the medical register. This was contrary to its own rules and the GMC have recently agreed that this suspension was unlawful Consequently, Dr Southall is currently back on the medical register, subject to the appeal against the erasure which will take place later this year.

COMMENTARY

In my opinion and that of many colleagues there are a number of worrying features about this decision. First, the implications of not believing an independent professional, who witnessed and recorded the entire interview, set a dangerous precedent. Secondly, the same medical expert who had advised the FPP in Professor Southall's first hearing both assisted the FPP in selecting the charges to be levied against him and also advised the panel the second time. Thirdly, the criminal standard of proof was required by the FPP in making its adjudication. It had to be sure that the charges were true and, for example, that Professor Southall and the social worker

were lying. It is difficult to accept that the case was proved 'beyond all reasonable doubt' when both Professor Southall and the social worker gave evidence that directly contradicted the mother's uncorroborated evidence and when their evidence was backed up by contemporaneous notes. Finally, once again, no panel member had experience of, or training in, child protection.

THE CASE OF PROFESSOR SIR ROY MEADOW

Professor Meadow was an expert witness called by the prosecution in the trial of Mrs Clark for the alleged murder of her two infants. He had stated the circumstances, and findings of past and recent injuries at autopsy and, as with all of the other experts involved in the criminal trial, stated that neither death could be attributed to sudden infant death syndrome (SIDS). Nevertheless, he was asked about the chance of two SIDS deaths occurring in a family with social indicators such as the Clark's where there were few adverse social factors. He stated that the probability was 1 in 73 million. This figure is now accepted as being misleading. The figure was taken from a draft version of the CESDI-SUDI report on sudden infant deaths (available at www.cemach.org.uk/Publications/CESDI-SUDI-Report-(1).aspx), a report commissioned by the Government for which Professor Meadow had been asked to write a preface. The lead author of the paper was in contact with Mrs Clark's defence team but this was not challenged in court (see *Meadow v General Medical Council* [2006] EWHC 146 (Admin), [2006] 1 FLR 1161, at paras [138] and [141]).

Mrs Clark was convicted. She appealed the conviction on five grounds, only one of which concerned Professor Meadow's use of statistics. The Court of Appeal unanimously dismissed the appeal, concluding that there was 'overwhelming evidence' of guilt. While it accepted that the use of this calculation was inappropriate if applied to a single specific family, the court knew Professor Meadow to be a paediatrician, not a statistician. The Court of Appeal described the effects of this statistical error to be 'of little or no relevance' (*R v Clark* [2000] EWCA Crim 54 (unreported) 2 October 2000, at paras [109] and [182]). Mrs Clark's conviction was upheld. Subsequently, at a second appeal, Mrs Clark's conviction was overturned, not because of this statistic, but because of the failure of the Home Office pathologist to disclose a growth of bacteria in cultures taken from the second child after his death.

Mrs Clark's father complained to the GMC about Professor Meadow's use of the statistic. The FPP found him guilty of serious professional misconduct and ordered that his name be erased from the medical register. Professor Meadow appealed this decision. Collins J ordered that his name remain on the medical register, ruling that the decision of the FPP 'approaches the irrational' (*Meadow*, at para [57]). The GMC appealed Collins J's judgment, still seeking to find Professor Meadow guilty of serious professional misconduct. The Court of Appeal rejected that plea and awarded costs against the GMC (*Meadow v General Medical Council (Her Majesty's Attorney-General Intervening)* [2006] EWCA Civ 1390, [2007] 1 FLR 1398).

COMMENTARY

Not only was the GMC's decision unduly harsh, but subsequently the GMC has never publicly admitted that it was wrong regarding the verdict of serious professional misconduct. Nor has it countered the statements in the media that Professor Meadow is 'the disgraced paediatrician' whose 'theory of Munchhausen Syndrome by Proxy is discredited'. As readers will know, it is now called Fabricated or Induced Illness (FII) and continues to be a real form of abuse, acknowledged and regularly reported by professionals throughout the world.

THE CAMPAIGN AGAINST PAEDIATRICIANS

There are many websites and organisations (eg, justice-for-families.org.uk/ and www.angelacanningsfoundation.co.uk/) which are highly critical of paediatricians practising in the field of child protection. One is led by a Member of Parliament (www.fassit.co.uk/john_hemming_campaign.htm) who uses Parliamentary privilege and in the year between the first and second parts of Professor Southall's GMC hearing,

compared both Professor Southall and Professor Meadow with Dr Mengele in the House of Commons (see *Hansard*, 16 November 2006). On another typical web address (www.msbp.com/) threats and offensive and derogatory remarks are made against paediatricians, particularly Professors Meadow and Southall. The media is saturated with reports describing Professor Meadow as 'disgraced' and 'discredited' and about the many cases that he is supposed to have got wrong. Both Professors Meadow and Southall have been central in developing recognition of the diagnosis of FII and as such have been the targets of orchestrated complaints, many of which are referred to the GMC.

Having 'succeeded' against Professor Southall, these groups now declare their intention of pursuing other 'targets'. Three paediatricians, one of whom is again Professor Southall, are soon due to appear before the GMC in a hearing about a medical research study led by Professor Southall into a new form of non-invasive respiratory support. Two of the doctors undergoing the next GMC hearing were involved in the covert video surveillance study. A list of professionals who are considered appropriate for criticism is listed on the website: childprotectionresource.blogspot.com/2008/04/finlay-scott-under-fire-fiction-not.html. This list includes 23 doctors, eight nurses and one psychologist.

EFFECTS OF THE ACTIONS OF THE GMC AND THE MEDIA

As a result of the actions of the GMC and the adverse publicity in the media, some paediatricians have stated that they are not now willing to undertake child protection work. Many are reluctant to take up the posts of designated and named doctors (see C Williams, 'United Kingdom General Medical Council Fails Child Protection' (2007) 119 *Pediatrics* 800). In a recent survey of nurses and doctors in primary care in Northern Ireland, many admitted that they did not always report cases of suspected child abuse (A Lazenbatt and R Freeman, 'Recognising and reporting child physical abuse: a survey of primary health care professionals' (2006) 56 J Adv Nurs 227). Senior trainees are more reluctant to accept a consultant post if that post includes child protection work.

Paediatricians receive more complaints about their work in child protection than in their other duties. In 2004 the Royal College of Paediatrics and Child Health (RCPCH) conducted a survey about complaints against senior paediatricians who did at least some child protection work (RCPCH, *Child Protection Complaints Survey* (RCPCH, 2004), available at www.Rcpch.ac.uk/ Health-Services/Child-Protection/Child-Protection-Publications). Of the 3,853 practising or recently retired paediatricians who responded, 1,032 had received complaints about their practice not concerning child protection and 533 had received complaints concerning child protection. These 533 doctors had a total of 765 complaints about their work in child protection and 86 of these complaints were referred to the GMC. Child protection is thought to encompass some 5–10% of all paediatric work.

Professors Meadow and Southall are held in the highest regard by their colleagues. It is no wonder that there is anger and dismay. Paediatricians have been so concerned about the actions of the GMC that two motions were proposed at the recent annual general meeting of the Royal College of Paediatrics and Child Health, held in York in April 2008. One motion, 'The College is saddened by the erasure of David Southall from the medical register. We wish to demonstrate our support and sympathy for David, as well as commending his overall contribution to paediatrics, particularly in the fields of sudden infant death syndrome, child protection and international aid work, for which he was awarded an OBE' was carried unanimously.

The other motion was a lengthy motion describing the points outlined in this article. It concluded with the words:

> 'For the above reasons, the College continues to have grave concerns over current GMC procedures for dealing with cases related to child protection. We call upon the GMC to review these procedures as a matter of urgency and involve in the review this College and other bodies such as the Department of

Health, Department for Children, Schools and Families, Social Services Inspectorate and National Children's Bureau, who have an understanding of the relevant legislation and practice, in order to support continued quality work by paediatricians in this field to the ultimate benefit of children and their families.'

This motion was carried by a substantial majority of the 300 or so delegates present.

CONCLUSION

The most vulnerable children in this country are those in need of the support of paediatricians because they might be undergoing abuse. Paediatricians need to be confident that they will not suffer if they report their suspicions of child abuse to the appropriate authorities. Paediatricians must act boldly, yet fairly and responsibly, with a reasonable amount of evidence to back up their suspicions. They should not fear that, if their suspicions remain unproven or even wrong, that they will be liable to sanctions by the GMC or investigations by the police. Paediatricians should not fear those who both complain that the evidence base is far from perfect and yet pursue those who conduct research in this field. If an aggrieved parent complains to the GMC about a paediatrician, the GMC must consider the paediatrician's actions from the point of view of the intended benefit to the child, not just the hurt that may unintentionally be caused to the parent. Indeed, it has been suggested that the potential interests of the child should be independently represented in any hearing. Paediatricians must act boldly to protect the child when abuse is suspected. In his report (*The Victoria Climbié inquiry: Report of an inquiry by Lord Laming* (TSO, 2003)) Lord Laming stated that, 'that those who take on the work of protecting children at risk of deliberate harm ... need a combination of professional skills and personal qualities, not least of which are persistence and courage'. It would be disastrous if the paediatrician has only one eye on the needs of the child because the other must be kept on his own safety.

C9

Letter 2: Open letter to the General Medical Council

In *Letters*, BMJ 2008;336:232 (2 February), doi:10.1136/bmj.39472.786690.BE

How many doctors are referred for child protection work?

Catto's analysis (previous letter) in response to Wheatley's open letter needs comment.1 He must accept that the GMC's decision about Meadow was incorrect. The High Court overturned the GMC's decision, stating that the GMC's judgment "approached the irrational." The Court of Appeal confirmed the High Court's action.2 Perhaps Catto would like to state that it was the GMC that erred.

Some readers may not realise that the eight paediatricians that Catto says were referred to the fitness to practise procedures were only a fraction of those actually referred to the GMC. The fitness to practise procedure is not the start of the GMC process but is a hurdle along the route. It would be useful if Catto told us exactly how many senior paediatricians had been referred to the GMC because of their work in child protection. A survey by the Royal College of Paediatrics and Child Health in 2004 reports that 86 complaints about 76 doctors were referred to the GMC, albeit over a longer time period.3

Paediatricians were shocked when Meadow was struck off. The actions against Southall have greatly increased that alarm because Southall seemed to be doing exactly what he should according to the government guidelines and indeed the GMC's own advice. Paediatricians need the support and understanding of the GMC, but the GMC must understand the difficulties and complexities of child protection and must not be a tool for understandably aggrieved parents. Its judgment must be based on the principle that the needs of the child are paramount. The GMC must be competent to understand the paediatrician's action from the point of view of the child.

by Leonard H P Williams, consultant paediatrician
Bassetlaw District General Hospital, Worksop S81 0BD

Competing interests: None declared.

References

• Wheatley R. Open letter to the General Medical Council. BMJ 2007;335:1265. (15 December.)[Free Full Text]
• Meadow v GMC [2006] EWCA Civ 1390
• Royal College of Paediatrics and Child Health. Child protection complaint survey. London: RCPCH, 2004.

Letter 3: Open letter to the General Medical Council

GMC statement does not reflect actions

Catto says that nothing could be further from the truth than the perception that the General Medical Council (GMC) is somehow determined unfairly to persecute paediatricians involved in child protection work (second letter). However, although the GMC made a similar response to the Guardian in April after our article in Pediatrics,1 2 a recent GMC panel in David Southall's case produced a perverse and erroneous determination.3 We do not consider therefore that the GMC's statement is yet reflected in its actions.

The GMC's actions have included:

A failure to acknowledge that it was wrong in stating that Meadow's "conduct was fundamentally incompatible with what is expected by the public from a registered medical practitioner," given that Mr Justice Collins considered this conclusion "approached the irrational"

A failure to recognise that Meadow's professional activity was about child protection—he was called as a witness in the criminal case because of his expertise in sudden infant death and infant suffocation, having been an internationally acclaimed expert in the recognition of fabricated and induced illness.

A determination in 2004 that Southall's confidential contact with the police over a child's safety was "precipitate," reflecting a lack of understanding of the doctor's and, indeed, the public's duty to child protection.

A determination in 2007 that the testimony of an aggrieved parent that Southall had accused her of murder was to be believed to a criminal standard of proof over the combined testimonies of Southall and the senior social worker present at the interview, despite information available to the GMC and its panel which questioned the mother's reliability as a witness.

A failure to recognise that a substantially more robust investigation by Southall's employing trust six years earlier had found no basis for this allegation (first letter)4.

Using fitness to practise panels where the members, medical experts, and legal assessors have little understanding of the Children Act or of the roles of doctors in child protection and are therefore not qualified to judge the actions of doctors working in the child protection system.

Undertaking investigations into the conduct of a number of other doctors acting in child protection cases which have been either inappropriate, unduly prolonged, or a repeat of an investigation already undertaken either by an employing authority or other agency with statutory functions in child protection

Failing to have a policy and process for dealing with vexatious complainants.

Both Meadow and Southall are internationally acclaimed experts in fabricated and induced illness who have been targeted to discredit the recognition of this form of serious child abuse. We have seen these two doctors vilified in the media while the GMC undertakes prolonged investigations to support the orchestrated complaints against them. Even some members of parliament consider fabricated and induced illness a discredited theory. Yet paediatricians and others in child protection regularly recognise and manage such cases.

Professionals Against Child Abuse (PACA) was not set up to create a perception that there is a problem with the regulatory system for doctors. It was formed only recently as a response to the problems that the GMC's actions are causing for doctors in their child protection work. Our professional duty is to ensure the effective protection of children. Although we welcome the GMC's recent 0-18 years' guidance, we do not see representation of the child's voice in the actions of the GMC against doctors who have acted in good faith on behalf of vulnerable children.

by John Bridson, chair
Professionals Against Child Abuse, Childhealth Advocacy International, Nottingham NG1 5BB

On behalf of Professionals Against Child Abuse (PACA) (www.paca.org.uk)
Competing interests: None declared.
References
• Williams C. United Kingdom General Medical Council fails child protection. Pediatrics 2007;119:800-2.[Abstract/Free Full Text]
• Boseley S. Guardian 2007 2 Apr. www.guardian.co.uk/society/2007/apr/02/childrensservices.uknews
• Wheatley R. Open letter to the General Medical Council. BMJ 2007;335:1265. (15 December.)[Free Full Text]
• Hall DMB. How to investigate complaints. bmj.com 2007. www.bmj.com/cgi/eletters/335/7632/1265#187703.

Category: External Article

C1

Case No: C1/2006/0434

Neutral Citation Number: [2006] EWCA Civ 1390
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

Thursday 26th October 2006

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE AULD
and
LORD JUSTICE THORPE

Between :

THE GENERAL MEDICAL COUNCIL	**Appellant**
- and -	
PROFESSOR SIR ROY MEADOW	**Respondent**
-with-	
HER MAJESTY'S ATTORNEY GENERAL	**Intervening**

(Transcript of the Handed Down Judgment of
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Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

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**

Judgment
As Approved by the Court

was guilty of serious professional misconduct without acting in bad faith.

96. 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

97. 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.

98. 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".

99. 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.

100. 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.

101. 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.

102. 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".

103. 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.

104. 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 at 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.

105. 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

106. 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.

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

108. 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.*

109. 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.

110. 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.

111. 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.

112. 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.

113. 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?

114. 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.

115. 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. ..."

116. 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

117. 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".

118. 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."

119. 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.

120. 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

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

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

121. 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".

122. 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 ...".

123. 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.

124. 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

125. 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".

126. 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.

127. Secondly, if there is anything in practice between the contentions of Mr Henderson and Miss Davies on this point, it 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.

128. 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

129. 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.

130. 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."

131. 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.

132. 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 has been established.

The committal proceedings

133. 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."

134. 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."

135. 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

136. 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.

137. 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

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

> 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.

138. 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 leas 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."

139. 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.

140. 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."

141. 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

142. 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 cases there was evidence of recent deliberate injury.

143. 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.)

144. 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.

145. 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".

146. 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.

147. 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.

148. 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.

149. 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."

150. 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.

151. 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.

152. 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."

153. 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."

154. 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."

155. 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."

156. 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.

157. 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. ..."

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

The first Court of Appeal

159. 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.

160. 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.

161. 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.

162. 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."

163. 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."

164. 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."

165. 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. ..."

166. 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

167. 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.*

168. 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.

169. 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.

170. 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.

171. 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."

172. 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.

173. 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.

174. 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.

175. 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

176. 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.

177. 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

3 Sch 2, para 10

pathological matters.

178. 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.

179. 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.

180. 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.

181. 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.

182. 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.

183. 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.

184. 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

185. 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."

186. 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."

187. 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."

188. 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."

189. 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.

190. 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.

191. 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."

192. 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. ..."

193. 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."

194. 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

195. 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.

196. 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

197. 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.

198. 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.

199. 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.

200. 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".

201. 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.

202. 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."

203. 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.

204. 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 Lloyds 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.

205. 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.

206. 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.

207. 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.

208. 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.

209. 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.

210. 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.

211. 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."

212. 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.

213. 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.

214. 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 under-stated 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."

215. 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

216. 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

217. 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 *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,

218. 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 ball-park 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

219. 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.

220. 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.

221. 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.

222. 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.

223. 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

4 See, in particular, *Experts in the Civil Courts*, OUP 2006

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 November 1999 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."

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

Lord Justice Thorpe:

Family Justice Background.

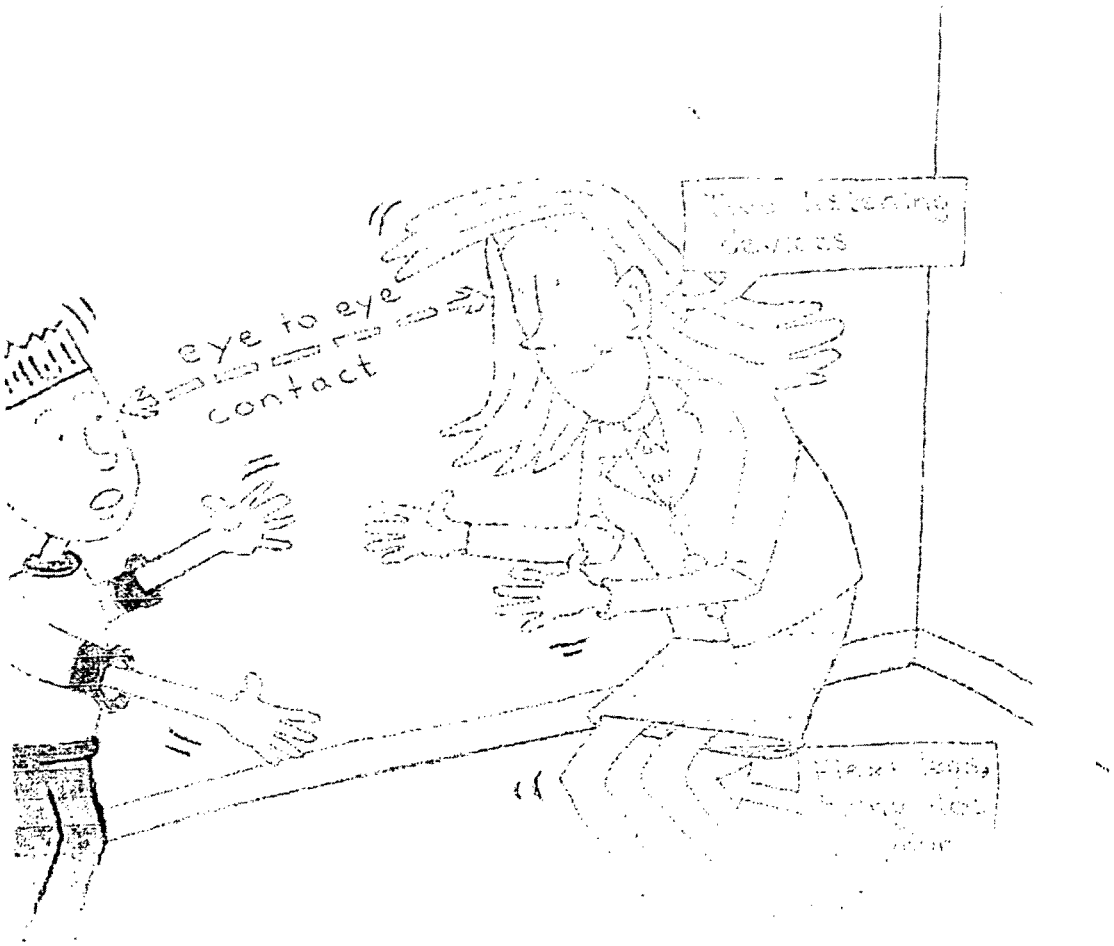
225. In his skeleton argument and in his oral submissions the Attorney General rightly emphasised the importance of the regulatory and disciplinary functions of the GMC and other like bodies. The public interest depends upon protection from those who fall below the generally accepted professional standard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

226. 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.

227. 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.

228. 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

D7



General
Medical
Council

56 Doctors play a crucial role in protecting children from abuse and neglect. You may be told or notice things that teachers and social workers, for example, may not. You may have access to confidential information that causes you to have concern for the safety or well-being of children.

57 Early identification of risks can help children and young people get the care and support they need to be healthy, safe and happy, and to achieve their potential.

58 If you work with children or young people, you should have the knowledge and skills to identify abuse and neglect.[25] You should be aware of the use of frameworks for assessing children and young people's needs, the work of Local Safeguarding Children's Boards and Child Protection Committees, and policies, procedures and organisations that work to protect children and promote their welfare.

59 Children, young people and parents may not want you to disclose information about them if they think they will be denied help, blamed or made to feel ashamed. They might have had bad experiences or fear contact with the police or social services. You should help them understand the importance and benefits of sharing information. But you must not delay sharing relevant information with an appropriate person or authority if delay would increase the risk to the child or young person or to other children or young people.

60 Confidentiality is important and information sharing should be proportionate to the risk of harm. You may share some limited information, with consent if possible, to decide if there is a risk that would justify further disclosures. A risk might only become apparent when a number of people with niggling concerns share them. If in any doubt about whether to share information, you should seek advice from an experienced colleague, a named or designated doctor for child protection, or a Caldicott Guardian. You can also seek advice from a professional body, defence organisation or the GMC. You will be able to justify raising a concern, even if it turns out to be groundless, if you have done so honestly, promptly, on the basis of reasonable belief, and through the appropriate channels.

61 Your first concern must be the safety of children and young people. You must inform an appropriate person or authority promptly of any reasonable concern that children or young people are at risk of abuse or neglect, when that is in a child's best interests or necessary to protect other children or young people.[9] You must be able to justify a decision not to share such a concern, having taken advice from a named or designated doctor for child protection or an experienced colleague, or a defence or professional body. You should record your concerns, discussions and reasons for not sharing information in these circumstances.

62 You should participate fully in child protection procedures, attend meetings whenever practical and co-operate with requests for information about child abuse and neglect. This includes Serious Case Reviews set up to identify why a child has been seriously harmed, to learn lessons from mistakes and to improve systems and services for children and their families. When the overall purpose of a review is to protect other children or young people from a risk of serious harm, you should share relevant information, even when a child or young person or their parents do not consent, or if it is not possible to ask for consent. You must be prepared to justify your decision not to share information in such cases.

63 You should make sure that there are clear and well-understood policies and procedures for sharing information with agencies you work with closely or often. You should have an understanding of the roles, policies and practices of other agencies and professionals. This includes understanding the circumstances in which they consider disclosure to be justified. Teachers, social workers, police, youth offending teams and others all have different relationships with children and young people. They also have different cultures, policies and guidance on sharing information. You should understand and respect these differences but remember the particular responsibilities you have as a doctor and the importance of trust in your relationship with your patients.

A

in the meantime there was nothing that suggested that the short term risks to A were of such an order that Social Services should consider A's removal pending the outcome of these investigations.

The meeting concluded with an agreement that Jan Ash, the social worker, would immediately arrange to see Mr Clark on the
B afternoon of 28 July, to explain the outcome of the meeting with Professor Southall and the way the Local Authority and the Guardian ad Litem intending presenting the matter to the Court on 1 August. It was also agreed that attempts would be made to get Minutes of this meeting prepared so that all parties could have sight of it".

C Sir, in the event the Court declined to give Professor Southall access to the care papers relating to the nosebleed. What the Court ordered we can see if we jump to Page 99 in your bundle. This is the Order made in August 2000, sir, and we can see it is an Order of Mr Justice Connell in the care proceedings. Paragraph 1 ordered that the child should remain in the interim care of the Local Authority and then if we can pick it up at "3", sir:

D "There be leave for Professor T J David to prepare an addendum report on the issues arising from Professor Southall contained in the Minutes of the Strategy Meeting of 28 July 2000. Such Report be prepared on a letter of joint/approved instruction via the Child's Solicitor".

And then you may have to have a pencil while I help you with the top line of the next page which has had inevitable (*Inaudible*):

E "Leave to Professor David to meet with Professor Southall on the basis that ..."

That is the best I can do and I understand, with my learned friend when we discussed this matter, that he broadly agreed that that was the probable wording and I am grateful to see him nodding:

F "Leave to Professor David to meet with Professor Southall on the basis that Professor Southall sets out in writing in advance of any such meeting the points of concern he has as a result of his interest in the case. Such meeting to be chaired by the child's
G solicitor, the points of concern to form the agenda and the minutes of the meeting to be filed and served. Leave to Professor David to discuss such issues with Professor Southall as he feels necessary arising out of the case".

Accordingly the child's solicitor, from whom you will hear, Mr Wheeler, wrote to Professor Southall on 15 August at Page 35. This is a letter from Patrick Wheeler, from
H those solicitors there mentioned, and I will pick it up at the second paragraph:

"Following representations made to the Court it has been agreed

Q Shortly after that letter that you wrote to Professor Southall, were you aware that Professor David had written around, if I can put it this way, slightly seeking to change the terms of Paragraph 3 of the Order which we read at Page 100?
A He did, yes. He contacted me, and thereafter all the other representatives on behalf of the other parties, to seek to slightly alter the terms of the Order that had just been produced and which we have referred to at Page 100.

Q I am sorry, could you keep your voice right near the microphone, or bring the microphone closer to you? Could you look, please, at Page 36 in the bundle?
A Yes.

Q And we see that that is a letter to Stephensons solicitors. Can you assist me in the Care Proceedings who were Stephensons solicitors acting for?
A Mr Clark.

Q And it is a letter from Professor David to Stephensons solicitors asking:

> "I am writing to see if I can persuade you to agree to my interviewing Professor Southall on my own rather than having Patrick Wheeler as a chaperone.
>
> My position is that I have already seen and interviewed numerous medical and nursing colleagues in this case, including some who were already involved as prosecution witnesses, but without the need for anyone to sit in, observe or take independent notes. I believe that having a third party present could actually hinder the process, which would be in no-one's interest. A further difficulty is that finding a time that will suit all 3 of us is likely to delay the whole process.
>
> My agenda for the meeting would be to confine it to one sole topic and that is Professor Southall's data on nose bleeds in infancy. The meeting would be a one-way event, ie I would be asking Professor Southall questions without at any stage providing him with any information. I understand fully that none of the papers in the case have been disclosed or will be disclosed to Professor Southall, and I certainly undertake to ensure that I myself do not disclose any items of information at all.
>
> On this basis, could I ask you to agree to my meeting Professor Southall without the presence of a third party. Mr Wheeler is aware of, and sympathetic to, my views".

Has he correctly recorded your views?
A He has.

Q And to your knowledge did such a meeting go ahead without any other person present?
A Yes.

A No.

Q You said that the way in which the consent order of August 2000 was achieved was that you wrote to the judge with a draft?
A Yes.

B Q If we look at page 101/101, just dealing with the machinery, would the machinery be that you would write to the judge on behalf of all the parties saying "All the parties are agreed that the following direction or order should be made, which I enclose, and we would be grateful, Judge, if you could make the order that we all want you to make"?
A Yes.

C Q Looking at page 99, we can see from the first line of that letter that it is a letter from the Judge's clerk to Mrs Holland saying "Attached is the draft order which has been endorsed by Mr Justice Connell"?
A Yes.

Q If you were asked to do so, could you produce to those instructing me or those instructing my learned friend the letter which accompanied that draft order to the Court?
A Yes. I would imagine that must be within my records on file.

D Q It is not in any documents that you have brought today?
A It possibly is, actually.

Q We can deal with that in a moment. You were asked about whether you knew that Professor Southall was suspended and you indicated to my learned friend that you did?
A Yes.

E Q If I put as a premise to you that Professor Southall was also forbidden from doing any child protection work, did you know that?
A No.

MR TYSON: I have no further questions.

F <u>Questioned by THE COMMITTEE</u>

MS LANGRIDGE: Good afternoon. Mr Wheeler, I am somewhat confused. If we turn to page 33, at the bottom of page 33, which are the minutes of the second part of the statutory meeting, it was quite clear that all the parties at the statutory meeting had agreed that you would be seeking leave of the Court to disclose the papers to Professor Southall?
G A Yes.

Q First of all, are decisions taken at a statutory meeting with those present?
A It was a very unusual meeting, as you can imagine probably from the discussions and the papers you have already read, at this particular hearing. The meeting was in two parts and although discussion took place there was nothing which was mandatory following that, although that would be my opinion as far as the consequences of that meeting were concerned. What also happened following the meeting was, as I have mentioned, Professor David suggested that rather than we approach the case on the basis

H

A that there was going to be a joint meeting between myself, Professor David and Professor Southall, that in fact he would deal with and discuss any relevant issues to deal with it. As a consequence, I felt it was more appropriate not to pursue that application.

Q Did you go back and check with the other people at the statutory meeting as to whether or not they concurred in that?

B A From my recollection I did, but not by way of documentation. It was discussion, I think, by telephone.

Q It seems to me that in a way it could be argued that you placed Professor Southall in a difficult position if you were unwilling to let him see just the relevant papers, and I wondered why. What was the reason for that?

C A As you may have seen from the other minutes in the meeting, I pointed out to Professor Southall that obviously, as I am sure he was aware, he could not see the documentation without there being Court permission. The difficulty in this particular case involving child A was there had already been, I think, something in excess of a dozen experts involved in the case; all of them had had access to all sorts of records and papers. This was a very narrow issue that was being debated and discussed and therefore the more appropriate approach was felt that Professor David would raise any relevant material and relevant issues with regard to the matters raised by Professor Southall rather than have full

D disclosure of papers.

Q So do you accept that could have put Professor Southall at a disadvantage?

A What I was expecting Professor Southall to say was, as he was invited to do, that any opinion he was expressing was subject to him having sight of the Court papers.

MS LANGRIDGE: Thank you.

E

THE CHAIRMAN: Mr Tyson, do you wish to come back?

MR TYSON: Apparently this letter may be in court and those who instructing me are just searching to see whether this letter is available, which may clear the query raised by your Committee member. I was wondering whether before releasing this witness it would be wise to clear up this matter/

F

THE CHAIRMAN: I am quite happy that we should take a short break.

MR TYSON: Perhaps the witness, having been given appropriate warnings, could also be given leave to go and see if it is in his files.

G

THE CHAIRMAN: Yes. *(To the witness)* You are welcome to leave the room. I just need to remind you that you are still under oath and should not discuss your evidence.

MR COONAN: Is this a formal break? I have one or two matters I would like to clarify with Professor Southall as well.

H

THE CHAIRMAN: Part of me is wondering whether we should not just take this as our afternoon break and break for 20 minutes. Then this can be cleared up and we can start again at half-past three and just run right through.