

GENERAL MEDICAL COUNCIL

FITNESS TO PRACTISE PANEL (MISCONDUCT)

On:
Saturday, 20 September 2008

Held at:
St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Case of:

DAVID PATRICK SOUTHALL MRCS 1971 Royal College of Surgeons of England
Registration No: 1491739
(Day Seven)

Panel Members:
Mr A Reid (Chairman)
Ms V Atkinson
Dr L Linton
Mrs S Breach (Legal Assessor)

MISS M O'ROURKE, Counsel, instructed by Hempsons, Solicitors, appeared on behalf of the doctor, who was present.

MR R TYSON, Counsel, instructed by Field Fisher Waterhouse, appeared on behalf of the General Medical Council.

Transcript of the shorthand notes of
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A THE CHAIRMAN: Good morning, everybody. Welcome back.

B This is a resumption of a Fitness to Practise Panel hearing in the case of Dr David Southall. All the parties here are well aware of who is here. I am not going to repeat any of that. At five o'clock this afternoon, I understand we are required to finish proceedings for the day because there are going to be interruptions to the power supply. Indeed, overnight, as I understand it, the building is going to be without power whilst various work is undertaken. I am told we should be in a position to start tomorrow as normal in the expectation that there will be power for microphones and the air conditioning system. There may be a delay before computers in the main server are able to function. Our Panel secretary has alternative arrangements for her own laptop to be used should that happen, so that should not inconvenience us. Finally, I recall that on the previous occasion, Mr Tyson, you had indicated a need to be away on Sunday, should it come to it, no later than a particular time.

C MR TYSON: I can leave after 5.00 on Sunday; I am going on holiday.

THE CHAIRMAN: That concludes the housekeeping, so far as I am concerned. Mr Tyson.

D MR TYSON: Sir, we have reached the stage of Rule 22(f). Just to remind you what 22(e) and (f) say, in particular, (e) - the last time we met, we had just finished (d), "The practitioner may present his case and may adduce evidence and call witnesses in support of it". We heard that and we have heard Miss O'Rourke's submissions under (d). Then we reach (e):

E "The FTP Panel shall receive further evidence and hear any further submissions from the parties as to whether the fitness to practise of the practitioner is impaired or whether the practitioner has failed to comply with any requirement imposed upon him as a condition of registration".

F Can I underline, please, verbally, for you, the mandatory nature, "The FTP Panel shall receive further evidence and hear any further submissions". To cut to the chase, sir, I wish and make application for, if I have to - bearing in mind that I do not see I have to because it says "shall receive further evidence" - in the course of my submissions, I am going to make reference to further evidence. I do not intend to call any live witnesses.

G In the course of my submissions, it is my intention - and again I say I do not need your leave to do this, but I am just alerting you because I anticipate my learned friend takes another view, so I want to clear the air now - to give to you a bundle of documents, extracts of which I was going to refer to you in the course of my submissions. The extract of documents which I intend to refer you to - unless I am prevented - in the course of my submissions on impairment are the transcripts of a few days of the 2004 hearing, to which I intend to make reference to the odd page and the odd passage.

H Secondly, also in this bundle is the old C1 bundle of 2004, of which, at the moment, we have largely had to rely on odd transcript passages of the documents. I considered it would assist the Panel to see the documents itself, rather than mere extracts that we have in various transcripts, so you can actually see the documents to which I am referring.

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If you are daunted by the size of this bundle, I am perfectly content to fillet it to show the exact pages to which I intend to refer in my closing submissions. There are, at a rough guess, say, 20 pages to which I intend to make specific reference to in my closing submissions.

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The documents are relevant for two principle purposes. The principle purpose relevant is on the issue of seriousness, which is the issue underlying the concept of impairment. As I develop my submissions, it should cause you no surprise to say that my essential case is that this case, whilst serious in 2004, is still serious now for the same reasons, that nothing has materially changed in terms of seriousness between 2004 and 2008. Principally, matters such as the paediatric knowledge relating to nosebleeds and the like, has there been any material differences to that; has the duties of a doctor to report child protection concerns, et cetera, materially changed? I say no.

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The documents that I seek to bring in to you, in my right, you shall receive further evidence, this is further evidence that I intend to call that goes to the issue of seriousness. I will seek to extract how serious it was then on the basis of my prime submission that seriousness then can be equated with seriousness now. Of course, I will also deal in my submissions with Dr Southall's evidence and the like, but as an essential pattern and part of my submissions and in order to make this case fair, not only for the doctor but also for the Council, I submit that to the Panel and to my learned friend. I accept this is a large document. I put in whole transcripts of particular days, merely trying to be fair, but I can fillet it out and put in only the key ones I actually want to refer. The documents are evidence.

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Secondly, they are relevant to the issue as to seriousness for the reasons that I have outlined. Thirdly, they are also documents which have been in the hands of my learned friend's solicitors since before 2004. I understand that my learned friend has seen all of the transcripts in the case. The question of unfairness, in my submission, does not really arise, because the documents in the old C1 bundle are largely referred to, in particular, in the opening that I gave to the PCC in 2004. They are set out there at length, because I read all the documents into the record in order to prevent when the witness was called and him having to go through the documents, as it were, which was approved of at the time. There should be nothing in there that should cause my learned friend any surprise, because the nature of all the documents to which I seek to refer were in the transcripts of the last occasion, and I understand that when my learned friend was briefed on this matter, she was given all the transcripts of the last occasion.

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Sir, I am not seeking to go behind and to delve into the facts found proved on the last occasion and wish to deal with this matter - I must correct myself on that. There is one aspect that will go behind, and that is to deal with the issue that has been raised by my learned friend as to the role of Professor David and her misconception on the basis of the timings of the nature of his involvement at any particular time and when it was, as it were, that he intervened to alter the court order, and I can show that by reference to dates of documents as to what influence he had at any given time on that procedure, for which he has been heavily criticised.

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Save as to that, the reasons that I want to refer you to this evidence is simply to deal with

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and underline the issue of seriousness, which is central to your consideration of impairment. It is not going behind - which I know everyone has been anxious to do, including me in my submissions on an earlier occasion - the findings of fact. It is to illustrate just how serious this matter was and was regarded by the witnesses at that time.

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In my submission, it will not add anything to the overall length of the hearing. I am not calling live witnesses, which I would also be entitled to under 22(e). I am merely making an order to fortify my submissions on seriousness reference to various documents that were available at the time in 2004 and at all material times have been available to my learned friend since.

C

As I say, the central tenet of my submissions to you will be that seriousness is not altered over time and it is important that I establish the base for saying that by reference to the documents that I intend to do in the course of my submissions. I have to say, without that reference, I will be crippled in the way that I wish to make my submissions on behalf of the Council. Bearing in mind the mandatory nature of 22(e) that you “shall receive further evidence”, I, for myself, have difficulty in seeing why I am not entitled to adopt and have the comfort of that rule, “shall receive further evidence”.

THE CHAIRMAN: Thank you for raising that matter in advance. Miss O’Rourke.

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MISS O’ROURKE: Sir, it is five weeks since we last were here. We have heard nothing from my learned friend’s instructing solicitors in those five weeks. We have not had any indication that they wish to adduce an additional bundle of evidence. We have not had any indication that they intended to adduce further evidence under 22(e).

E

You may remember I said to my learned friend on the last occasion that we of course had a right to adduce further evidence and I told him should we decide to do so, we would give them due notice. We in fact did give them notice a week ago that Dr Williams had written a letter to us which he was very clear he wished to be put before the Panel, because he was mindful of the duties of an expert, that if they learned of something new or changed their mind that they should inform the court accordingly. We provided that to my learned friend’s instructing solicitors, I think eight days ago. We had no response from them. In due course, I would intend to put it before the Panel, with your leave, on the basis that Dr Williams had had some further thoughts and felt it important they be communicated.

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As far as Field Fisher Waterhouse, my learned friend’s instructing solicitors, are concerned, not a word in five weeks. I therefore arrived here this morning anticipating, as I guess you probably did, that Mr Tyson was going to be true to the words he told us on the previous Saturday that he be less than an hour. Indeed, you remember he was encouraging you to hear him, hear me and get it all done on that day and was very unhappy about the fact that I might want to go off and think about my submissions, et cetera. I think I indicated it was highly unlikely I would call any other evidence, but that I wanted to split my submissions into two parts, as I was entitled to under the rules, in case I did decide to call further evidence on impairment.

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At 20-past nine this morning, I was handed this bundle by my learned friend. Now, this is not a bundle that was prepared at ten-past nine this morning. This is a bundle that, at the very least, was prepared yesterday and was thought about; if not yesterday, a few days

A before or in the previous five weeks. Yet, we did not have the courtesy of even an e-mail, a telephone call or anything to tell us this was coming, so I saw it at 20-past nine.

B I have done a rough count and it is 300 pages. Five sections of it, about 220 pages, are transcripts. It is not all of the transcripts of the previous hearing. It is a lot of the transcript of day 2, day 3, day 4, bits of day 5, bits of day 6, so selected transcripts. In addition, there is what was apparently, and I say apparently because I do not know - I was not there and I have never seen it before - the bundle of documents for the original hearing in 2004. In other words, what was C1 in that hearing, and that bundle is some 80 pages.

C Sir, the position is this, as far as I am concerned: when I was first instructed in this aspect of Dr Southall's GMC matters, I was given the transcripts of the original hearing in 2004 and I read them. I estimate that is probably about three months ago that I was given those to read and I did not reread them all before we started the hearing five weeks ago. I have put highlighter pen on some parts of them and I have looked through them and I read them once only. I have not reread them in the last five weeks. I have had no reason to do so because they were not introduced by Mr Tyson at the moment that he was entitled to introduce them.

D Can I, sir, take you in that context to the Rules? Rule 22(c), which is where he started his case, under (ii), says, "The Presenting Officer" - that is him - "shall direct the attention of the FTP Panel to any relevant evidence, including transcripts of previous hearings". That is the stage at which he should have been referring to the documents that are now in sections 1 to 5 of this bundle he handed me this morning. The Rules expressly provide for it. He did refer you to bits of transcript; he put little sections in and he referred you to the determination of the previous hearing. That is the stage at which he was allowed to do it, "and may adduce evidence and call witnesses in relation to the practitioner's to fitness to practise" or failure to comply with any condition. The reason that it goes there is because I am then entitled afterwards to present my case, adduce evidence and call witnesses in support of it, so if he is taking you to specific passages in transcripts, then I can with my witnesses, because you heard my experts all say they had all had the transcripts of the original hearing and they had all read them. They could then refer to them and give evidence and respond to passages that he might have raised and, indeed, Dr Southall could have himself in giving his evidence.

F So, sir, my first submission to you is this - he had his opportunity to produce those transcripts under 22(c)(ii). He has closed his case under that heading and so it is now too late.

G The second point, sir, I make is 22(e) is where we are now at, which is that you receive further evidence and submissions as to whether his fitness to practise is impaired. That means fitness to practise is impaired today in 2008, not fitness to practise was impaired in 2004, because that is not a material question for you. The position is, it helps you not a jot to hear what the evidence was in 2004, because you have to make your own judgment, and we had this before, sir. If you were simply rubber-stamping what the previous Panel said, then you are not discharging your duty to judge it today in 2008 and on the basis of the evidence you have heard. Therefore, what he is entitled to do at 22(e) is to produce evidence, now having heard our evidence, because that is why it is in that sequence. We,

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A under 22(d), adduce our evidence and he then produces his evidence in reply. That means he calls people to say, well, now, fitness to practise is impaired because he has done this, that or the other, or to respond to David Southall's own evidence on remorse or insight, or to respond to something that Dr Williams has said, or Mr Spicer, or somebody else on remorse insight, or how the world has moved on and the GMC's 0 to 17, or whatever. That is the next point.

B The next point is this - he is seeking to put before you a bundle that is not agreed. We had an agreed bundle for this hearing, served in advance. It was dealt with in the usual way. We said no, we do not agree to that document. You will remember, sir, that documents had to be filleted out on day one because they put documents in about the other case; you made a ruling on it; your legal assessor gave you advice; and the bundle got filleted. What ultimately went before you was an agreed bundle. This is not. We have been given no opportunity to agree it.

C Now, sir, the position is I have never seen C1. My learned friend says, well, I have read all the transcripts - yes, a bit of a while ago. He says he referred to a lot of these documents in the transcript. I am afraid, I am sorry, he did not. There is a report in here that is some 26 pages from Professor David about the particular child - sorry, I am wrong; I am underestimating, it is 40 pages - and the words in the report that actually went to court. I was shown one paragraph of it by Mr Tyson, you will remember, when I had to exit the room and he made a point about Professor David. I have never read it. There were a few passages of it referred to in the transcripts previously, but I have not seen that report.

D Sir, the position is this - if he now wants to adduce this evidence, I am going to have to say to you, "I need an adjournment to read these 300 pages". I am going to have to read with care the 80 pages I have never seen before, but I am also going to have to read the transcripts that he has put there. It is not good enough for him to say, "I can fillet it down and give you 20 pages only of transcripts", because how do I know he is not cherry-picking? I would have to say, "No, I need to read it in context, and I need to see there is not a passage on the previous page or the following page". More than that, sir, he has not given you all of the transcripts. I would want to do my duty properly to my client, to go and read the whole lot again to see that he has not, even in the bits he has chosen here, left out other bits that would help me. Probably more than that, I would need to see the other exhibits. This is C1. I understand there was C2, C3, C4, C5, C6, and there was also D1, D2, D3, D4, D5 and D6. If that is the investigation we are going into, in other words, we opening up the old hearing and looking at all the documents, then in fairness to my client, I need to go and do those, too.

E Now, why are we here now doing this when he told us he would be an hour and he had no further documents to put in? I do not know and he has not explained it to us. Is it a thought that came to him yesterday? Is it a thought that came to him a week ago? Is it a thought that came to him two weeks ago? If it came to him two weeks ago, why were we not given notice of it, so that we could then say, right, Mary O'Rourke will have to find herself a day to read that and I will demand of my solicitors the various documents and whatever, and you give us the bundle.

F If he says it is a thought that only came to him yesterday, why is it a thought that came to

A him yesterday? He has had five weeks to think of this case. More than that, he actually had the benefit - and you will remember I pointed this out and you, the Panel, said yes - of hearing my first load of submissions. We could have done it if we had done it the way he did it, of me not splitting it into two, him making his submissions and then me coming after him, but he has had that advantage of hearing my hour and a half worth and reading the transcript of it. I do not know when he got the transcripts, but I got them two and a half weeks ago. He should, at the very least, have been rethinking about this case coming back on two and a half weeks ago, sorry, but it is not good enough this morning, at 20-past nine, to hand this to me and to then say I will not be disadvantaged because, after all, I have had the transcripts. I can assure you, and I hope he is not going to again say it, and I am aware of my professional obligations to the Panel, I have not read those transcripts in the last five weeks since we were here and I have not read bundle C1.

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C My position is this - he has missed his chance. He could have done it at 22(c)(2). He could have referred to transcripts of evidence if he had given it to us beforehand and he could have put C1 in. He did not do it; he closed his case. We then called our evidence under 22(d). We are now at 22(e). The evidence he is entitled to call for you now is on impairment of fitness to practise in 2008 and it is not going to help you one jot to have Professor David's 40 pages-worth of reports on this particular child or anything of that sort.

D Secondly, in any event, even if you are against me on that, he has given no notice and should not be allowed to put it in. He has led us all to believe that we were going to have an hour's worth of him. You then would have had 45 minutes worth of me, you would have had some legal advice and you would have been out on 22(f). He has now thrown that timetable into jeopardy in terms of that. I can tell you, sir, even if you have to let this in and you do not give me an adjournment and I just have to deal with it on the hop, or on the hoof, or you give me an hour to read it or whatever, we are probably not going to finish tomorrow. If you are going to do it properly and let it in, then the simple matter is that I am going to need an adjournment to read the 300 pages, not in the pressure of a room in there and I am also going to need to say to my instructing solicitor, "I better have a list of what were the other C and D exhibits". I better have a chance to trawl through them. I have never been sent them. I never asked for them; I never needed them because there was no indication they were ever going to rely on it. It was a very limited bundle of documents. You know it and you have got it.

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F So, sir, the position is we would be adjourning off today and putting this matter off again, and we already know the complications and difficulties we had to be here today and we have all given up a Saturday and Sunday in order to do it. He cannot do it at 20-past nine. He has given us no explanation as to how this has happened at 20-past nine this morning.

G Your Legal Assessor was not provided with a copy of the bundle. I think I spoke to her at 28 minutes past nine and she was completely unaware that this was even coming, so he did not even have the courtesy to raise it at that stage in time. Sir, he had his opportunity. He cannot do this. He talks about fairness. This is a fundamentally unfair position that he is trying to take. Frankly, he misled us all when he told us he was going to be an hour and had nothing new to put in.

H THE CHAIRMAN: Mr Tyson, before you respond to that, or while you respond to that,

A could I ask you also to consider the transcripts in these proceedings, D6/76H, in which you indicated if you decided to call evidence on impairment, you would let everyone know in good time. Thank you.

B MR TYSON: That matter is still under consideration. We will let you know as soon as we can, at H, bottom of 76 and top of 77. Sir, there are two aspects here. One, my entitlement to call that evidence; secondly, how much calling that evidence will inconvenience my learned friend.

As to my entitlement to call that evidence, nothing she said, in my submission, went behind my 22(e) entitlement - "the Panel shall receive further evidence". I accept that I had the right to call evidence under 22(c), relating to his fitness to practise, and the issue now is different. Now is the issue as to impairment.

C Secondly, my learned friend said, and I noted down what she said, that I had my right to call evidence under (d) and my learned friend is entitled to give evidence in reply under (e). I said there were two limbs why I was calling evidence. One is, to an extent, to deal with matters in reply to (d), which, even my learned friend indicated that I was entitled to, and secondly, to deal with the issues of seriousness under impairment.

D All other things being equal, I am entitled to call, or you are entitled to receive, or indeed, you shall receive, looking at the wording - "shall receive" - this evidence, which, as I say, I was going to deal with by way of referring to several documents.

E There is the other issue about which my learned friend takes issue - indeed, you, sir, reminded me of the passage on the last occasion - is as to notice. I absolutely confess and avoid - certainly can do the confessing, I will do the avoiding later - absolutely agree that not sufficient notice has been given. I apologise for that. There are mechanical reasons for that. To be honest, the holidays of my instructing solicitor and myself being in series, rather than parallel, if I can put it that way, and at the time for consideration of where we are now going and us to consider the evidence has not been as early as either of us would have wanted. I confess that. That is why I was unable, as I said that I would if we decided to call evidence on impairment, let everyone know in good time to deal with the dates. That is important when it says to deal with the dates. The evidence then anticipated was whether live witnesses were going to come along, again which would cause - let us say if I called a doctor to deal with some of the issues my learned friend dealt with, that is why it would put the matter out as to dates. My anticipation was that my reference in the course of my closing submissions to a number of documents was not going to affect the dates, bearing in mind that the matters in the documents are matters in the transcripts which my learned friend has had and, indeed, all her expert witnesses has had, as she has told us.

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G So keep apart the two issues: one, my entitlement that you shall receive evidence, which I am strong on; secondly, the inconvenience that my entitlement has caused. If my learned friend wants to read more or to take further instructions upon various matters in documents that should not surprise her, because they were all there, then, of course, I am not in a position to stop her having that entitlement. This is a fair trial. Both sides have rights.

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The fundamental point is, in my respectful submission, that even if it is inconvenient and even if my learned friend wants further time, which was basically the gravamen of what she was saying in her closing submissions, then, yes, she should have the further time but, no, that should not stop me or you receiving further evidence. Those are my submissions.

B

MISS O'ROURKE: Sir, can I just make two points? I know he is going to object to it, but I have to say I want to hear his explanation still. He tells you that he and his solicitors have been having their holidays in sequence. I saw my learned friend in The Temple on Monday evening, so he was clearly around and at work this week, or I presume he was - in was in his working suit, he was in the precincts of the Inns of Court. I saw his instructing solicitor in the lift here on Wednesday and Thursday, so she has been working this week as well. We had brief conversations. I do not understand why I got this bundle of documents at 9.20 this morning. I still say that you, at the very least, should hear that.

C

Sir, I am sorry if he understood that the gravamen of my complaint was that I had been taken by surprise; it is not. The gravamen of my complaint is his right to introduce the transcripts was under 22(c)(ii), then I would have dealt with it with my witnesses who were called. That is my major point. The least of my points is that he has taken me by surprise and I would need an adjournment, and an adjournment would mean me going away, not just reading this, but going through all the other transcripts. My primary point, so you understand it, is the matter of law. 22(c)(ii) is where he was entitled to do it. He chose not to introduce those transcripts and he does not do it at 22(e).

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THE CHAIRMAN: We will hear from our Legal Assessor. Mrs Breach, you have some advice for the Panel.

E

THE LEGAL ASSESSOR: Thank you, sir. As you know, Mr Tyson has applied to submit a further bundle containing transcripts of the original hearing in 2004 and some exhibits. He has told you that he will only refer to short passages and that he only expects you to refer to them. As you have heard, Miss O'Rourke has objected and you have heard her reasons, and I do not propose to repeat them.

F

As you know, the bundle runs to approximately 300 pages. Although Mr Tyson is referring to small passages from the transcripts, I know you will quite properly want to read all the documents in their entirety in order to put the passages into context, and you may want to read all the transcripts from the hearing for that same reason.

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I remind you that you are tasked to determine whether Dr Southall's fitness to practise is impaired today in 2008. It is for you to determine whether you consider Dr Southall to be impaired on the evidence you have heard and read in the hearing.

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The evidence Mr Tyson wishes to put before you relates to evidence presented at the original hearing. You have determined previously in this hearing that you will not seek to go behind the original decision, but rather, to hold a review of the order of conditions.

As part of this review, you have to determine whether the doctor's fitness to practise is still impaired today, and you will have to take a view on the seriousness of the conduct in 2000, whether it is still sufficiently serious in 2008 as to require Dr Southall's registration

A to remain subject to conditions.

B You have heard a large amount of evidence on paediatric procedure and you have also heard Dr Southall's evidence. Mr Tyson has referred you previously to transcripts and the fitness to practise decision in 2004 when he was exercising his rights under Rule 22(c)(ii). You are entitled, under Rule 34, to admit only evidence which is fair and relevant to your task today. You may well ask yourselves whether this is relevant to impairment now. Mr Tyson had an opportunity to direct you to any relevant evidence at the stage of the proceedings at Rule 22(c)(ii). I know it has already been read to you, but I will read it as part of my advice. It reads:

C "The Presenting Officer shall direct the attention of the [Fitness to Practise] Panel to any relevant evidence, including transcripts of previous hearings, and may adduce evidence and call witnesses in relation to the practitioner's fitness to practise or his failure to comply with any requirement imposed upon him as a condition of registration".

I therefore advise you that this evidence should have been adduced at this stage and not now. You have a duty to act fairly to both parties and in accordance with the rules. Therefore, my advice to you is to reject the application.

D THE CHAIRMAN: Thank you very much, Legal Assessor. The Panel will now go into camera to consider its decisions. I think this would be a good opportunity for the parties to get a coffee. Would all strangers please withdraw.

STRANGERS THEN, BY DIRECTION FROM THE CHAIR, WITHDREW
AND THE PANEL DELIBERATED IN CAMERA

E STRANGERS HAVING BEEN READMITTED

D E T E R M I N A T I O N

F THE CHAIRMAN: Welcome back, everyone. Mr Tyson, you have made an application to adduce further documentary evidence during the course of your submissions on impairment. This evidence includes extracts from the transcripts from the Professional Conduct Committee (PCC) hearing in 2004 and also the bundle C1 from the 2004 PCC hearing exhibits. You stated that you are entitled to produce this evidence under Rule 22(e) of the General Medical Council (GMC) (Fitness to Practise) Rules 2004. You further submitted that the evidence is relevant and you are not seeking to go behind the original findings of fact, but wish to illustrate the seriousness of Dr Southall's conduct in 2004. You maintained that it is still serious now and for the same reasons as there have been no material changes since 2004.

G Miss O'Rourke has objected to your application on four grounds: 1. You have missed the correct stage to adduce this evidence, which was under Rule 22(c)(ii). Further, had you adduced it at that stage, she would have had the opportunity to question her witnesses on it, which she will not be able to do today; 2. Proceedings have reached the 22(e) stage which concerns impairment today in 2008, not 2004; 3. Miss O'Rourke has been given no notice of your intention to call this evidence. She only received it at 9.20 this morning

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A and has been given no opportunity to read it. It is not agreed evidence; 4. Miss O'Rourke has never seen C1. She stated that if you seek to adduce it, she will need to request an adjournment. She stated that the bundle does not include all the transcripts from the PCC hearing in 2004, but that she would want to read them all again, as well as the exhibits from that hearing. Miss O'Rourke would then need to take instructions and possibly call further evidence.

B The Legal Assessor, in her advice to the Panel, stated that you had the opportunity to adduce this evidence at the Rule 22(c)(ii) stage of proceedings. It was then you should have adduced it and not now. She concluded by advising the Panel to reject your application.

C The Panel has considered your submissions on behalf of the GMC, those of Miss O'Rourke on behalf of Dr Southall and the advice of the Legal Assessor.

D The Panel considered that, if it were to accede to your request to admit this documentation, then, in the interests of fairness, it too would wish to read all the transcripts and exhibits from the PCC hearing in 2004. The Panel has previously determined it should not receive any evidence that goes behind the findings of the PCC. The Panel takes the view that reading all transcripts and exhibits would have the effect of taking it behind the findings of the PCC. The Panel also considered that if any new evidence were to come to light in this documentation regarding seriousness, it might then be necessary for it to hear further evidence from the five experts already called in this case.

Taking into account all the circumstances in this case, the Panel has determined to accept the advice of the Legal Assessor, and so it rejects your application.

E Are you in a position to proceed now, Mr Tyson?

MR TYSON: I need some advice from you and I would need some time to recast my opening. The advice from you is this - that I put my application on two grounds. Ground one was I needed to adduce this in relation to seriousness; ground two was that I needed to do it to correct some of the matters that were dealt with under 22(e) when my learned friend dealt with background and context.

F My learned friend, in the course of her submissions indicated - rightly in my view, and I quoted her words to you - that I was entitled to evidence in reply to her 22(d) submissions. I still wish to give evidence in reply to her 22(d) submissions. As I said, I wanted this material on two grounds. One is seriousness, which you have rejected, and I loyally will follow that.

G With respect, you have not dealt with the second aspect of the second limb why I wanted to introduce one or two things, which was to correct some of the impressions you may have been given in my learned friend's speech under 22(d). As she said, I could call evidence in rebuttal to that, in effect, and I still wish to do so. That is my first point.

H My second point is, whatever your decision on seriousness, which you have made, and the decision on trying to correct some of the impressions which you have not made, I will

A need some time, but not very much time, to recast my opening in the light of that. Essentially, I am asking to you deal with my second limb of my application which, with respect, you did not deal with.

B MISS O'ROURKE: Sir, can I say in respect to that, if I have got something wrong, and that is entirely possible, I am only human and I, of course, was not involved in the original hearing and so do not know this case as well as my learned friend knows it. If I have got something wrong and I said something that was incorrect and it can be corrected by pointing out to me that it was a fact, or as a fact something was said, then my learned friend and I can deal with that. He can simply indicate to me which things it is that he says I got wrong as a matter of misstatement and I can say to him, "Show me the bit". If he shows it to me, I can say, "Yes, I agree". I will stand up and say to the Panel, "When I said this to you, as a matter of fact, I was wrong". That is very easily dealt with. That does not require anybody to start admitting bits of transcripts.

C My learned friend has not given me any notice of anything that I got wrong. On the other hand, on the last occasion, he jumped up when I was making submissions to say I got something wrong about Tim David being a witness in the criminal trial. I freely said, "Well, if I have got it wrong, I apologise". He did interrupt at the time. In fact, as I understand it, he has now come back this morning and told my instructing solicitors that he is prepared to concede in fact I got that right, because indeed I have got the transcripts of the criminal trial now and I can show he was indeed a witness.

D If that is what he is complaining about - there are things that I have said that are wrong - then we can deal with that between ourselves and, if necessary, get the Legal Assessor in. You do not need to start reading transcripts. If it is not that it is a clear question of fact, in other words, it is somebody's opinion or inference drawn from it, that is another matter. If it is going back to referring to transcripts, that really is making submissions to you on the evidence of witnesses you have not heard, and so that would be something different. I think we need to know what it is, or how much it is. Is it one or two points? He did jump up on the last occasion and interrupt me. We knew what the one or two points were. If there are some more, then why does he not give me the opportunity to tell me what they are and we can see, if by pointing to the transcripts, I can say, yes, I agree I got it wrong.

E **F** THE CHAIRMAN: Mr Tyson?

G MR TYSON: My learned friend said that I was entitled to call evidence in reply, which is what her wording was - evidence in reply - to her submissions under 22(e). I wish to call evidence in reply to her submissions under 22(d). That will be evidence of correction and illustration of correction, in particular, and I make no secret of it now, in respect of matters she maintained about Professor David's role in this matter and in relation to the heavy criticisms of Professor David, and by showing you documents, I can show by reason of timing when his intervention was and when his intervention was not. That is important evidence, because I have two roles, first of all, to deal with any misconceptions that have been made under 22(d) and to deal with fitness to practise of this practitioner, one way or the other. That is why I repeat my urgings, that you deal with the second half of my submission. I loyally accept your ruling as to seriousness.

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A MISS O'ROURKE: Sir, can I respond and say this - I think my learned friend is misquoting me. What I said is evidence in reply not to my submissions, but evidence in reply to the evidence I called under 22(d). In other words, the five experts I called and Dr Southall himself. That is what he can call evidence in reply to. Submissions are submissions. You deal with that by responding in submissions and challenging them.

B Secondly, if what he is talking about is material in respect of Professor David, then he had the answer and indeed I think I told him after we adjourned on the last occasion - he calls Professor David. If he wants to say that documents are wrong or things that have been said are wrong about his role, he does not try to put in documents that have not been put in the agreed bundle before you and are probably not agreed evidence and may likely not be admissible under the strict criminal rules of evidence. He calls Professor David. I would relish the opportunity to ask Professor David questions about it and indeed his

C role, bearing in mind the letter of instruction we have seen from Forshaws Solicitors, and indeed I suspect the Panel may well feel there would be some benefit from hearing from him. He does not do it by the back door by pointing to documentation which you have ruled is not now going to be admitted because there was no notice to me and because it is not relevant to the question of impairment of fitness to practise in 2008. Sir, if he is saying to you you have not dealt with the second half of his submissions, I am afraid I, on hearing your determination - obviously I have not had a chance to read it separately -

D I feel you have dealt with it fully, cogently and clearly and you have dealt with both aspects as indeed the Legal Assessor gave you advice on both aspects of it. Nothing more is to be said.

I renew my offer to him. I am happy, if I have made a misstatement in anything that I have said to you, I have got something factually wrong, that he points to me in the transcript or somewhere else where I have made a statement and I will be only too happy to correct it, if that is the case. Instead, if it is some sort of interpretation or inference, that is another matter. If he wants to point to dates of documents or whatever else, then he brings Professor David and we ask him.

E MR TYSON: I rise merely to observe that the normal course of these things is I make my application, my learned friend responds and then I close. Again, my learned friend has sought her second bite of the cherry, as she is repeatedly permitted to and, in my idea, impermissibly in this hearing.

F THE CHAIRMAN: There we are. I did permit it and you have an opportunity to respond to anything that she has said under that permit. Do you have anything you wish to say in response to that?

G MR TYSON: No.

THE CHAIRMAN: Thank you very much. I will turn to our Legal Assessor for assistance.

THE LEGAL ASSESSOR: I can be very brief. Just referring to the wording of Rule 22(e), it clearly states:

H "The [Fitness to Practise] Panel shall receive further evidence and hear any

A further submissions from the parties as to whether the fitness to practise of the practitioner is impaired”.

B That is the purpose of submissions at this stage in your proceedings; it is not the appropriate point to deal with inaccuracies made by Miss O’Rourke in submissions. I suggest the parties should discuss the areas which are challenged so that factual areas can be corrected and that this is not a point where Mr Tyson should be introducing further evidence on that point.

C THE CHAIRMAN: Mr Tyson, we have heard your arguments and those of Miss O’Rourke and we have had the benefit of the advice of our Legal Assessor. We are going to accept that advice. We will give you the time that you need to prepare to address us, and perhaps part of that time might be used in considering whether or not you would accept the invitation of Miss O’Rourke to discuss with her any matters of incorrect statements of fact that could be corrected by agreement.

D We, as a Panel, are extremely concerned that we have now effectively used the morning. The amount of time that is left to us is decreasing. At this stage, I would hope we are still of the view it will be possible to complete matters in the time that we had allotted. In an effort to make that more likely, members of the Panel have indicated they would be willing to take a shorter break than normal. I am wondering how the parties feel about that.

MR TYSON: I was rising to my feet to suggest just that. If one, as it were, took an early lunch and I started at quarter past one, then we could run straight through.

E THE CHAIRMAN: May I suggest one o’clock? That gives us 35 minutes. Is everybody happy with that? Very well, ladies and gentlemen, we will break now and return at one o’clock.

(The Panel adjourned for lunch)

THE CHAIRMAN: Welcome back, everyone. Mr Tyson, your estimates for the time needed were better than mine.

F MR TYSON: I had a discussion, as suggested by the learned Legal Assessor, between my learned friend and I about various matters of clarification. We were not able to clarify the matters, and there it is. I will say what I seek to say and if my learned friend seeks to object in any course of my submissions, then we will see what happens.

G Sir, can I say right away that impairment is a matter for you as a Panel to decide. It is a judgment call for you. The Council may suggest that various matters should be taken into account when considering this question, but, at the end of the day, it is your decision.

H We have reached the Rule 22(e) stage. I do not think I need read it to you yet again, because we know where we are on that. I accept that the test is: is he impaired now? The learning following *Cohen* - I hope the learning I give will be unexceptional. You cannot take into account at this stage his good character or otherwise and you cannot take into account testimonials or otherwise that go to evidence of his conduct before and after

A the events. You can take into account whether his misconduct has been remedied or indeed is capable of being remedied, but you may think that the concept of this kind of misconduct does not easily fit into the concept of remedy. It is not the kind of case where a doctor can go on a course to improve clinical skills and the like. The question, you may think: is it capable of remedy or has it in fact been remedied is not an area which you need to consider.

B I also accept from the Indicative Sanctions Guidance, which I took you through in opening, and I do not want to go through it, - the guidance at S1-2, paragraph 11, where it says, "...it is clear that the GMC's role in relation to fitness to practise is to consider concerns which are not so serious as to raise the question whether the doctor concerned should practice either with restrictions", or without. Particular emphasis, and I need not go through this again, is placed by the Council on S1-7, which is the paragraph at 32.

C Paragraph 32, this is dealing with review hearings:

"It is important that no doctor should be allowed to resume unrestricted practise following a period of conditional registration or suspension unless the panel can be certain"

D - can I ask you mentally to underline the word "certain" in paragraph 32 -

"...no doctor should be allowed to resume unrestricted practise following a period of registration unless the panel can be certain that he or she is safe to do so".

E Certainty is an extremely high test, in my respectful submission. Missing out the next sentence and picking it up:

"In most cases, however, where a period of suspension is imposed and in all cases where conditions have been imposed the panel will need to be reassured that the doctor is fit to resume practice either unrestricted or with conditions or further conditions. The panel will also need to satisfy itself"

F - again, that is important; you have to satisfy yourselves -

"that the doctor has fully appreciated the gravity of the offence"

- we would say no -

G "has not reoffended, and has maintained his or her skills and knowledge and patients will not be placed at risk by the resumption of practice or by the imposition of conditional registration".

H Again, it is a point I made before and I will make again: the concentration is on what has happened to the doctor, not what has happened to the world in the meanwhile. However, we would submit that even if you were able to take into account what has happened to the world, as it were, since 2004, in fact, very little, if anything, has in fact changed. We would submit that the experts broadly agree that the world has not in fact significantly

A changed since 2004 and the situation as given in the Panel's determination, which you will be familiar with in or around C3 and 6 to 7.

B Firstly, I give five reasons why the world has not changed. Firstly, doctors have always had a duty to report concerns about child protection to the appropriate body. Same then, same now. Secondly, doctors have always had to act in a child's best interests. Same then, same now. Thirdly, doctors are not decision-makers in the area of child protection. The two decision-makers are the local authority who examine the factual jigsaw and decide whether or not to institute proceedings in the Family Court. That is their decision, whether or not to institute proceedings, and secondly thereafter, it is the judges or the magistrates who have to decide whether or not to accept the local authority's plans for the child, or whether there has been significant harm, to use the technical expression. That was the same in 2004 and it is the same now. Fourthly, people who write reports, which they anticipate might go to the court or will go to the court, have duties which are not the gold standard duties, but duties imposed by the rules and case law and the duties referred to in the determination of the 2004 PCC. That is the same in 2000, in 2004 and now. Fifthly, bleeding from the nose and mouth in a young baby without a natural cause in 2000 justified concern, 2004 it justified concern and now it justifies concern.

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D I ask you to accept that when assessing the appropriate standard for seriousness in 2000, 2004 and today, the standard must be much the same because the factual matrix is much the same in the five ways that I have outlined. In fact, the only significant change you may think is Edmund Hey's paper, which indicates that oronasal bleeding is not 100 per cent instantaneous with any restriction such as suffocation, which only goes to show, as one of your Panel members pointed out, that you can never be certain about anything in the world, especially in the world of medicine.

E The experts called on behalf of Dr Southall are relevant, in my submission, for two principal reasons. Firstly, to show, as I submit they did show, essentially in the five areas that I have set out above, nothing much has changed in paediatric practice in relation to child prevention and this kind of area, and that is the matter which, from memory, was the first aspect that you were interested in in your determination on expert evidence, the background evidence as to paediatric practice in child protection, and I would say the background practice is the same now and it was the same then.

F The second and more subtle but in my submission an extremely important aspect of the expert evidence called is this - my learned friend asked the expert witnesses to assess the seriousness of the PCC's findings in 2004 in 2008 terms. You have read, for the purposes of your determination, what the report said. You will have noted that all the experts to a greater or lesser degree challenged the original findings of fact and the fact that it was serious professional misconduct, with the honourable exception, you may think, of Dr Williams. Thus on the scale which my learned friend sought to introduce of nought to ten, they all started, you may think, with a nought or possibly a one in the first place in, as it were, 2004 terms, so it is hardly surprising, you may think, that they ended up with a nought or a one now, because they never accepted many of the findings of the PCC in the first place.

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H If one adds to that that little has changed in the essentials of paediatric practice in relation either to child protection or as to nosebleeds, if I can use that shorthand, in the

A intervening period, you may think that the experts' assessment of the minimum nature of the seriousness in this case carries very little weight indeed, because they started thinking it was not serious in the first place.

B Sir, I anticipate that my learned friend will pray in aid in her submissions the judgment of Auld LJ in the Court of Appeal case of *Meadow v The General Medical Council* which was reported in October 2006. To assist the Panel, can I indicate that Auld LJ's judgment in that case has been photocopied for you. I do not know what passages my learned friend wants. The actual judgment is about 100-odd pages, but what has been extracted is Auld LJ's judgment. Perhaps I can hand that around to the Panel. (*Same handed to the Panel*)

C MISS O'ROURKE: Sir, I have no problem with my learned friend putting everything in front of you. He mentioned it to me earlier and I said to him I thought you only needed paragraphs 197 to 202. That is all I was going to take you to. You are probably by now well familiar with it. The key paragraphs are 198, 200 and 201. If he wants to give you more of it, there is no problem. I have got the whole of it, should the Panel wish to have the whole of it. I am sure your Legal Assessor has probably got the whole of it as well.

MR TYSON: Perhaps it can be introduced as the next C number.

D THE CHAIRMAN: That is C11, Mr Tyson. We will mark it accordingly.

MR TYSON: Sir, the first thing you ought to be aware about the case of *Meadow*, which you doubtless are, is that it is an old rules case. The discussion by Auld LJ relates to serious professional misconduct as opposed to any view on seriousness as opposed to impairment. Secondly, if one picks it up at paragraph 198, he deals with what constitutes serious professional conduct:

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“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”.

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I can take you to paragraph 200:

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“As Lord Clyde noted in *Roylance v General Medical Council* ‘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

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it must be serious. As to seriousness, Collins J, in *Nandi v General Medical Council*, 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’”.

B

In relation to that passage in paragraph 200, I say two things. Firstly, as I have already made it clear, it relates to seriousness as in serious professional misconduct and, secondly, the fellow practitioners that we heard give evidence in August did not regard the actions, you may think, of Dr Southall as deplorable in 2004 when it was found that there was serious professional misconduct. In my submission, thus you cannot rely on those experts as considering it deplorable in 2008, if they have always regarded it as deplorable, notwithstanding the findings of the PCC in 2004, then the fact they regard what happened now as deplorable, in my respectful submission, is of no weight and no consequence, bearing in mind where they started from.

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Perhaps the most relevant part of the judgment of Auld LJ, that I doubt my learned friend is going to draw your attention to, is paragraph 98, where he introduces the background to the case. It says:

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“In 1998 Professor Meadow was instructed by the Cheshire Constabulary to provide a medical opinion on the causes of successive deaths of each of 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”.

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You may think that that one sentence shows the central and devastating fault in Dr Southall’s theory that he advanced so trenchantly. The central and devastating fault is that it does not match the facts. Each death occurred in the absence of Mr Clark, so I ask rhetorically, and any other ways, how could he be the killer, whatever theory or view Dr Southall had? Even if my learned friend struggles with the issue of alibi or otherwise, the fact remains it was stated as a fact by the Court of Appeal in a reserved judgment that the deaths of both these children occurred in the absence of their father.

F

It follows, in my respectful submission, that you can and should look at seriousness in much the same way as the original PCC did and Collins J looked at it for the medical and legal aspects of child protection, and the effects of nosebleeds are much the same now as they were then. We would invite the Panel in considering the issues of seriousness to look at it in that context.

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If one looks at the heads of charge, and I would invite you, please, to go to bundle C3 at pages 2 and 3, where the heads of charge are set out, firstly at page 2, head of charge 3 stated:

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“As a result of information gleaned during your watching of the programme, on the next day you contacted the Child Protection Unit of the Staffordshire Police to voice your concerns about how the abuse to Christopher and Harry Clark had in fact occurred”.

A That, as one can see from head of charge 6(a) was found to be precipitate. I accept that this was not the most serious charge that the doctor faced. Indeed, in my submission, the charges got more serious as you went up through the heads of charge.

B Dr Chipping found it astonishing that Dr Southall had not felt able to contact her beforehand, and it was not as though there was an emergency happening that night before Dr Southall's eyes. He was just watching a television programme in April 2000 and Sally Clark had by then been in prison for something like five months.

My learned friend seeks to portray this and minimise this, as it were, as a slight breach of an employment provision. The fact is, we would say, that it is indicative that Dr Southall broke his word. He made an agreement with the Trust not to carry out any child protection work without prior permission of the acting medical director, and he did not.

C Then we move on in time when, as we see in head of charge 4, about six weeks later, Dr Southall was contacted by and had a meeting with Detective Inspector Gardner of the Cheshire Constabulary and we see that he told him as a result of watching the programme, and that is an important matter, because it was agreed, as it were, admitted as a charge as a result of watching the programme that:

D “(a) Stephen Clark, [Sally Clark's husband], had deliberately suffocated his son Christopher Clark at a hotel...

(b) Stephen Clark was thus implicated in the deaths of both Christopher and Harry Clark;

(c) there was thus concern over Stephen Clark's access to and the safety of the Clarks' third child”.

E Important is the stem of head of charge 5, namely, at the time of meeting Detective Inspector Gardner, head of charge 5 sets out, as it were, the state of knowledge that Dr Southall had at the time he made the statements that he did in head of charge 4. You will recall that in terms of head of charge 5, the Panel found these matters to be both precipitate at 6(a) and irresponsible at 6(b).

F The precipitate aspect, you may think, comes from the fact that Dr Southall had still not contacted or sought permission from the acting medical director before taking this further significant step of having the meeting with the detective inspector some six weeks on and that we see in head of charge 5(b).

G The irresponsible aspect, you may think, comes with the finding of head of charge 5(f), which was admitted and found proved, namely that he relied on the contents of the television programme as the principal factual source of the concerns and the finding which was initially denied and found proved by the Panel at head of charge 5(g):

“[That you] had a theory about the case, as set out in Head 4 above, that you presented as fact as underpinned by your own research”.

H So the seriousness of that is that you may think he had no proper evidential

A background to support his academic knowledge about nosebleeds. As the PCC put it at C3 at page 6:

“The Committee are extremely concerned that you came to this view without ever meeting or interviewing Mr or Mrs Clark, without seeing any of the medical reports, post-mortem reports and without knowledge of the discussions between the experts or witnesses involved in the Sally Clark case”.

B Then there are the two important sentences, you may think, in terms of the finding of the PCC at C3, page 6:

“You did not put yourself in a position to give a meaningful explanation”.

C That is, he simply did not have the necessary evidential background to come to the trenchant views that he did. Then second important sentence:

“Your view was a theory, which was however not presented as a theory but as a near certainty”.

D That is where the seriousness then comes in: that his academic theory did not match the actual facts but that did not stop him coming to the trenchant views that he did at this stage, which are set out in head of charge 4(a), (b) and (c), so one of the factors you may wish to take into account when considering seriousness is that one of the things that drives Dr Southall is zeal. Once he gets an idea or a view into his head, he pursues it vigorously. We can see that illustrated in the papers before you in two passages from the judgment of Collins J in this case, and perhaps I can take you to C3, at page 26.

E First is the passage at the top of the page of Collins J where he is outlining what Dr Chipping, the acting medical director, said:

“While Dr Chipping accepted that it would not be possible for the Trust to control what private work Professor Southall chose to do outside his working hours, she was anxious, if possible, not to lose his ‘very considerable contribution to general paediatric work’. She recognised that, as one of the eminent doctors who had written testimonials had said, Professor Southall was ‘unprepared to view things as a spectator if he considers that certain aspects have failed to receive the attention they deserve’”.

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G The second example, again taken from one of the testimonials that was received in this case comes in paragraph 33. We will pick it up at the bottom of 27, top of page 28. One of the testimonials is the beginning of paragraph 33, about seven lines up from the bottom of page 27:

“One of the testimonials came from Professor Sir David Hall, the immediate past president of the Royal College of Paediatrics and Child Health. As such, he was aware of and advised the Trust on and saw all the reports relating to the investigation into the allegations which had been made against Professor Southall and which had led to his suspension by the Trust. Sir David was satisfied, after considering the rigorous investigation which had been carried

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out in the allegations, that ‘notwithstanding the image he presents of a single-minded enthusiasm for his research and for the protection of children, no major criticism could be levelled at him in any area of his practice’. He concluded thus: ‘David Southall is an unusual man, single-minded and totally committed to what he wants to achieve. In an area where many paediatricians are extremely reluctant to get involved in child abuse cases, or to stand out against the tide of opinion, for fear of complaints against them, he will do what he believes to be right without counting the cost to himself’.

B

This is double-sided. It is an admirable quality to be single-minded and to not care about criticism and do what he thinks is right, but on the other hand, you may think that when he gets a bee in his bonnet, then he takes it, as the Committee found on the last occasion, far too far, and he does not stop, as he - he told us in August - should have stopped at a much earlier stage. He told us that on reflection he should have stopped with just saying, “I have got a theory”, and taken it no further, but he carried on and on and on, and each time ratcheted up these concerns. He had this view or theory based on his research that Mr Clark was implicated in the death of his two children and thus the youngest child’s safety was at risk.

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At first Dr Southall could see the difficulties in that he did not know enough about the case. He pointed out those difficulties when he first saw Detective Inspector Gardner in the time when he saw him, which we see in head of charge 4 was in June of 2000. Looking at the transcripts of the hearing before you, sir, can I ask you, please, to look at D5/74, which I anticipate is in the middle of my cross-examination of Dr Southall. This is in the context of seeing that there were difficulties in what he did not have at an earlier stage. Can I pick it up, please, at the bottom of page 74G.

E

“Q Is it right that you had this meeting with Detective Inspector Gardner and he produced a note?

A He did, yes.

Q It is also right that in the course of the hearing you and I went through the contents of the note? Indeed, you went through the contents of the note with leading counsel for you. The only quibble you had, if I can put it this way, is that he do not recall you challenging the alibi.

F

A Yes, I remember that.

Q That was the only quibble, but otherwise you accepted the content of the note?

A Yes. Yes, I did.

G

Q Having laid the trail, can I just read out that one passage, ‘However, Dr Southall was not aware of the full facts and did state that he would need to know exactly how Christopher had suffered, difficulty in breathing, amount of blood, necessity to resuscitate, visual observations and what records were made.’

A That is correct.

H

Q Do you accept that that was the information you were seeking in

A order to assist you coming to a conclusion about the case?

A Yes.”

I indicated to him that those were the sorts of pieces of information if they had actually been kept. There he was saying in June this is what he required in order to come to, as it were, a proper view. Then there was a strategy meeting at a later time.

B The strategy meeting was the one that decided, as we have heard it, to make an application to the court. That was in July. At a subsequent strategy meeting, he sought, as it were, the full facts, from the court at that time. We can see reference to that in this case two pages back at D5/73F and G. You see the answer between F and G:

C “A I know what you are really trying to say, is that it would have been better to see the original post-mortem reports.

Q Correct.

A I accept it would have been. In fact, at the strategy planning meeting, I asked for this, if I could have these reports to deal with issues around the bleeding incident. It was agreed when I left the strategy planning meeting that they would seek leave from the court to obtain that material for me.”

D So we have two occasions, in June before Detective Inspector Gardner and in July at the strategy meeting, where Dr Southall is being clear that he lacks full information to assist. As we know, sir, he did not obtain the full facts or, indeed, any further information at all, yet without that further information, the kind of information he considered he needed, he was able, in his report, which is a document that we have at C10, to use words like “extremely likely if not certain” which is at head of charge 7(b)(i) and (ii):

E “Your report concluded it was extremely likely if not certain that Mr Clark had suffocated Christopher in the hotel room”; (ii) “You remained convinced that the third of the family was unsafe in the hands of Mr Clark”.

F He ratcheted it up further by the time he came to write his e-mail, which we have at C5, and I will come to in a minute, that he took an even stronger view in that he was satisfied to the criminal standard of proof. Pausing there a moment, this doctor knows the importance of the words. He is an experienced medico-legal expert and fully knows, you may think, the difference between the balance of probabilities and beyond reasonable doubt. He was satisfied to the criminal standard of proof that Mr Clark had killed his two children.

G In terms of seriousness, the Panel may well feel that to go from a stance of requiring medical information before he could form a view to a situation where without any such information he was convinced that Mr Clark was the murderer of his two children, you may think that you could consider that very serious indeed.

H One goes to the report, which is a document you do have at C10. You will have plenty of opportunities to look at that report, and the way it is laid out and the fact that it is entitled, as it were, “Medical Report”. It is topped with the idea it is from Professor David

A Southall. It is signed off by Professor David P Southall, Professor of Paediatrics. Above his signature, it declares the contents of this report true and that they may be used -
B pausing there, as he anticipated - in a court of law. It does, as those who are familiar with medical reports and, in particular, medico-legal reports, follows down the familiar and authorised pattern. It sets out the history, sets out the comments, sets out other issues, sets out a conclusion, sets out the expert witness declaration, and gives his signature and his rank at the end. Thus, you may think, it was right, looking in terms of seriousness
C now as well as seriousness then, that when the PCC took the view that it was, in a sense, a medico-legal report, and to which the medico-legal report guidance of Wall J, as he then was, applied is entirely right, merely by looking at the nature, layout and content of this document.

C Looking at head of charge 7 and 8, these are, as I submitted earlier, the most serious of all of the charges. Crucial, you may think, is 7(a)(i). You may think that for a professor of paediatrics to produce a document entitled "Medical Report" without any access to the matters set out in head of charge 7(a)(i) is extremely serious. He has produced a medical report without access to any of the primary medical documents set out in 7(a)(i). He did not have access to the case papers, including any medical reports, laboratory investigations, post-mortem records, medical reports or X-rays. All he had as his factual background, bearing in mind that it is admitted that he relied on the contents of the
D Dispatches television programme as his principle factual source at 5(f). He had what is seen on a television programme, so you may think and your fellow Panel members may think that it is a matter of common knowledge that television programmes, or indeed any press matters, are notoriously unreliable in terms of what can be cut, what can be edited, what can be put in and what can be put out. Perhaps all of us have had experience of matters with which we personally have knowledge and see reporting of it either on the television or in the press and sometimes it is difficult to imagine that the reporter and oneself were at the same event.

E In addition, at this stage, Dr Southall had talked to three lay people, as he said: the police officer, a social worker, and the guardian. He told us, for the first time, at the hearing that he had had a series of unreported and unrecorded telephone conversations about the programme with professors Meadow and Green. I want to make sure I am not seeking to mislead anybody here. I accept, and it is clear from the note with Detective Inspector
F Gardner that he told Detective Inspector Gardner that he had discussed the trial with Professor Meadow and Professor Green, but that was in the context of what was going on at or about the time of the trial. He did not discuss and did not tell Detective Inspector Gardner that he discussed the television programme with those gentlemen, so he had no primary medical or factual material at all to work on to produce, not a bullet point points of concern document, but a full blown, we would say, medico-legal report.

G You have seen the conclusions in 7(b) and (c) that the doctor felt able to come to as a result of having no primary medical matters and no knowledge factually of what went on, save what was seen in a television programme. He was able, on that scant and flimsy basis, which is an aspect you may wish to take into account of seriousness, that it was extremely likely if not certain that Mr Clark had suffocated Christopher in the hotel room and that he remained convinced that the third child was unsafe.

H As to 7(d), this is also crucial. You may think - indeed the PCC, in terms, said so - that it

A was unacceptable that the leap based on such scanty material from an academic theory about a nosebleed to the fact of near certainty that this meant that Mr Clark was a double murderer. In fact, as we have seen, as I pointed out C3/36, the Panel said they were extremely concerned about it, for the reason which I pointed out, that he did not put himself in a position to give a meaningful explanation. He had a scanty factual matrix and had no access to any primary medical document.

B Turning, if I may, to head of charge 7(e) and the seriousness in relation to what 7(e) says, which is, I remind you, "Your report declared that its contents were true and may be used in a court of law". It is the second part, "Whereas it contained matters the truth of which you could not have known or did not know".

C You may recall that I was slightly flummoxed when asked to give, as it were, further and better particulars, if I can use a legal phrase, of an illustration of what 7(e) referred to. If I can just indicate in highlighted terms the kind of things from that report that the PCC found that contained matters the truth of which you could not have known and did not know. Before I go there, it is not that they were necessarily right or wrong, which is the issue that my learned friend, when she was going through this report in her closing speech last time, that was not what was alleged. What was alleged and was found proved was that it contained matters the truth of which he could not have known and did not know.

D The kind of matters were actually whether there were any details about the petechial haemorrhages. What kind were they; where were they; what is the significance of them. He did not have access to the post-mortem report from that. The matter relating to the torn fraenulum, which is the bit under the tongue, if I can put it that way, and the difficulty on intubation, when he directly contradicted in his report that which the doctor who was there, Dr Cowan, he said in C10 Dr Cowan attributed the torn fraenulum to the resuscitation given in the casualty department of the hospital, and the comment about that, which is under other issues, number 2, where he says, "Contrary to the view expressed by Dr Cowan, it would be extremely unusual in my experience for the fraenulum to be torn as a result of resuscitation". That was other issues, number 2. An issue relating to that is, of course, to use the phrase it contains matters, the truth of which he could not have known and did not know, was that this resuscitation was, as it were, on a stiff baby. The issue, thirdly, of matters the truth of which he could not know and did not know was the question of old blood in the lungs. He did not know and could not know that this was a matter of considerable debate at the criminal trial.

F The question, for instance, where he says, in one of his bullet points - second page, second bullet point: the first death was initially attributed to a lower respiratory tract infection. Again, apart from what he saw on the television programme, he had no access to the notes as to whether that was right or not, and then it said later it was reported to be a torn fraenulum, and some possible bruises on his legs at the time of death. One of the things that Professor Southall did not know the truth of, he could not know and did not know, is the issue of bruises, and my understanding is that there were no bruises at the time of death, but there were bruises after the resuscitation process. That is just an illustration of the kind of things that this doctor was relying on. There were no bruises at the time of death.

H MISS O'ROURKE: Sir, I am concerned about my learned friend saying "my understanding". He has to be very careful he is not giving evidence. He did not put this

A to Dr Southall. Of course, if he put it to any of the doctors, they would tell you that often bruises appear afterwards because, of course, they are consistent with death and it takes time. I would invite my learned friend to be very careful what he is doing. I am afraid I think he is straying into the business of giving evidence.

B Sir, I just cite a second warning, having now listened for over an hour. An awful lot of this sounds to me exactly what he said in opening, going through the charges one by one. In fact, if we pulled out our transcripts, we would all find that he has dealt with this under 22(c). It may be, bearing in mind we are all very conscious about the effect of time, that he addresses impairment and not give us a regurgitation of his opening.

THE CHAIRMAN: Certainly I think we should be extremely careful for all advocates to avoid any possibility that it may be thought they are giving evidence.

C MR TYSON: I accept that.

THE CHAIRMAN: Secondly, so far as time is concerned, I am sure it is well within your ---

D MR TYSON: I accept that. We all know it is a weekend and we all know there are other things we could be doing otherwise than being here.

THE CHAIRMAN: It is not so much that, Mr Tyson, as hoping to work with what little time resource we have left efficiently so we are indeed able to complete within the time scale.

E MR TYSON: I have underlined the aspects of seriousness, bearing in mind my prime submission to you that there is no difference between seriousness now and seriousness then.

One other issue dealt with under the bullet point that the doctor could not have known and did not know was the question of the breathing monitor that he says that the child was on. The question of that breathing monitor was not something that he could have known.

F Can I say something about Professor David here? My learned friend will listen carefully to every word I say, and I anticipate the possible jack-in-the-box reflex. Let us see how far I can go. Professor David did have a number of hats in this case. He was the joint expert in the child care proceedings that were running in parallel with the criminal proceedings instructed by the child, the parents, the local authority and the guardian.

G Contrary to my regret, what I said earlier, he did give evidence at Sally Clark's criminal trial. I hope you will enable me, by reference to the transcript, explain how that was, and Professor David said at D4/6, question by leading counsel for Dr Southall:

“Q Professor David, I do not want us to get involved in satellite matters unduly, but if you thought that the data supporting the link between bleeding and suffocation was tenuous, you would have told the defence team.

H A I think one has to remember I was not instructed by the defence. That question implies that in some way I was working with the defence team,

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which I was not. I was not instructed by the defence. The position was I had no involvement with the criminal process at all until I received an order to attend to give evidence, so there was no question of my assisting the defence or the prosecution. I was actually keen to remain completely independent of the criminal process. I think there is a sort of underlying confusion about the question. The fact that I was called by the defence does not mean that I was actually instructed by them, worked with them or produced a report for them, which I did not”.

B

I apologise if I interrupted my learned friend to say he did not appear in the criminal trial. He did; he was so subpoenaed so to appear.

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Another of Professor David’s hats was that he was instructed by the General Medical Council to give expert evidence before the PCC.

THE CHAIRMAN: Mr Tyson, I apologise for interrupting you. I am receiving increasing feedback, both non-verbal and now written, on the principle that this is submissions on impairment. Whilst I know that you have that fully in your mind, it is not at all times now apparent to us that that is where the focus is, and if you could focus on that, we would be much obliged.

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MR TYSON: Can I leave it like this - if and insofar as my learned friend, when dealing with her submissions, seeks to undermine the credibility of Professor David and his role in this case, if and insofar she does that, I would seek to deal with the matter by way of rebuttal.

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MISS O’ROURKE: Sir, can I make my position clear so that my learned friend understands it before he finishes with Professor David? Professor David is completely irrelevant to the question of impairment in 2008, which is what we are now addressing. My learned friend could have made submissions and indeed did talk about Professor David in his 22(c)(i) and (ii) presentation, as indeed I did in my 22(d) presentation in response. We are now at 22(e) and we are considering the question of impairment. Professor David has not come as a witness, has not told us in 2008 if he considers the conduct to be - and I use the word your Legal Assessor used earlier, and I agree 100 per cent with her - sufficiently serious in 2008 to equal impairment. Tim David has given no view in this case for four years. We are four years on. My opening submission to you, written on my notepad, is we are eight years on since the conduct in question and four years since the Panel determination. That is a long time in anyone’s view and Tim David is irrelevant.

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THE CHAIRMAN: Thank you for that.

H

MR TYSON: Extremely grateful for that. Then, of course, when looking at seriousness, one has got to look at the invitation to apply a caveat and the failure to provide such a caveat as, in my respectful submission, serious then and serious now. You will see, because the exchange of e-mails is in C5. If you want to read them, they are there and I would ask you to say that is an open invitation to do what - to elaborate or otherwise, he chose not to put anything. He ratcheted it up. It was serious, it was misleading in terms there was no reference to the two doctors in that. We would submit that that was serious,

A indeed.

B Sir, I am not going to repeat my full submissions on impairment where you had my eight bullet points at my opening. You may well feel, as here, there has been no substantial change, thus you can rely, in terms of seriousness now, in terms of what the PCC found and Collins J's comments. They are serious in themselves then and serious in themselves now. There were a number of findings of precipitateness, irresponsibility, being misleading and abusing his professional positions. You can look at - and I would ask you to do so - C5 to 7, which is the PCC findings. You can look at what Collins J said about it at C3/10 onwards, and I would ask you in relation to seriousness now and seriousness then. You can make a note of paragraphs 4, 17, 18, 20, 29, 30, 33, 35 and 36.

C Probably the most important matter is what you make of Dr Southall's evidence given on day 5. Prima facie, it would appear that the conditions have worked and that Dr Southall now has the appropriate humility, insight and remorse and has learned the respected lessons that the imposition of conditions is designed to impose. Whether or not you accept that evidence is a matter for you. The GMC would ask you to consider whether, when assessing that evidence, as just how genuine the remorse and claimed insight is, for we know that Dr Southall prepared for this case, wanting to fight all the adverse findings, not only of fact, but also SPN against him.

D A most important document, you may think, is C6. I would ask you to look at that. This is the letter of instruction given by my learned friend's instructing solicitors, doubtless on instructions of Dr Southall, to the various experts. We heard that this was an example of the letter to Dr Mok. This is important, because it shows, we would say, what Dr Southall's state of mind and state of insight and state of remorse and state of humility was on 11 July, just a few days before the hearing. I would ask you to look at the second paragraph.

E "Since the adverse finding, David has tirelessly gathered information and has produced the enclosed document that he has headed 'Leave for Appeal Argument of the Appellant'".

We have heard about that and that it was a document of some 60 pages long.

F "He has also gathered a file of literature relating to oro/nasal bleeding which existed at the time of giving his opinion and further publications that have come into existence and I suspect that you may well be aware of most, if not all, of these publications".

G Another important matter, not only has he enclosed a 60-page document setting out why he rejects the findings of the Panel or the PCC, and as he said in cross-examination to me, this was designed as an appeal document, for application for leave to appeal out of time, so his state of mind on 11 July, you may think, was he wanted to challenge anything, and he makes that clear by looking at the second page of C6 when, three lines from the top, it is stated:

H "Furthermore, we will say we that we do not accept the decision of the earlier Panel because, as a consequence of information that has subsequently come to

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light, David was entitled to express the very firm views that he did”.

There, on 11 July, his state of mind is that he does not accept the position, or does not accept the findings of the Panel.

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Then we come to the start of the August hearing on the second day, where Miss O’Rourke told us about false remorse, and how there was not going to be any remorse here and, just for the sake of your note, knowing the time, perhaps you can look at D2/49G. I am not asking you to look at it now, you can look at it when you retire. The important passage is by my learned friend how there was not going to be any remorse shown here because false remorse is no remorse at all, or words to that effect. D2/49G, D2/52D and D2/52E.

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Miss O’Rourke also told us you are not bound by the findings of fact of the PCC. For your notes, and I would ask you to read this when you retire, when we were told that you are not bound by the findings of fact, that was on D2/41D, D2/42A, D2/43C.

Thirdly, we were told at the start of the hearing by counsel for Dr Southall that the finding of SPN and sanction were also challenged as binding, and that was on D3/21E.

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When assessing the evidence you were given by Dr Southall on day 5, you have to take into account not only his state of mind as shown through his solicitors on 11 July where the decision of the Panel was not accepted, but, also, the words of his counsel on day 2 and day 3 of this hearing, where it was being alleged that you were not bound by the findings, therefore they could be left behind, and you are not bound not only of fact, but also SPN, not only of SPN but also of facts, that was the stance that we were faced with here, a full-front assault, you may think, was going to be launched on the findings of the Panel, or the PCC in 2004, both in terms of the underlying facts and in terms of the findings of precipitateness, responsibility and the like.

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We have a position where, after, you may think, some wise observations of Dr Williams, and if I may say so, some acute questions by you, the Panel, of Dr Williams, just before Dr Southall is called, extra time is asked for by my learned friend to take into account the evidence of Dr Williams and all the challenges to the PCC’s findings essentially evaporate for the first time, notwithstanding the anticipated challenge to them all.

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In lawyer’s jargon, you may think that what Dr Southall has done is confessed and avoided. In other words, he accepts, more or less, the findings of the PCC but seeks to avoid the consequences of being found impaired by pointing to lessons learned, or the like.

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One matter the GMC would ask you to do when considering whether lessons have been learned or whether there is in fact insight here, is to ask yourself what brought about this apparent Damascene or Pauline conversion? And ask yourself, in Miss O’Rourke’s phrase: is this false remorse not worth anything?

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The second area which you were concerned about was - to use the jargon - was he ring-rusty. It is clear, we would submit, from Dr Southall’s own evidence that were you to find him not impaired today, he could go out and practice child protection matters on

A Monday, without support. There are two bits of evidence that are material here. Firstly, Dr Southall's own evidence at D5/62D. When he was asked about this matter between C and D:

B "You said something about you have kept up to date with what was going on. If the restrictions were off tomorrow, the concern might be that you are ring-rusty. How could you go back to doing child protection work, because you have had to pass cases over the in the last number of years. What would your response to that?"

C **A** I think the most important part of child protection is to recognise the possibility. I have not a problem with that, because I have been doing that up to last year. The management side, I have kept in touch with the progress of the children matters, so on the advice given. I have been teaching on child protection, because that is what was allowed by the previous Panel. However, I do not think it would be straightforward to go back to child protection work. I think, as Dr Williams said, I would need some support from another senior colleague if that happened. I am being honest with you, I am not sure I will go back to paediatrics".

D The doctor himself is recognising that, in my submission, to go out, as it were, unsupported, into the world of child protection would carry risks.

I would also ask you to note the letter of Dr Chipping, which you have in bundle C3 at page 36. This is a letter written by Dr Chipping at the last time these conditions were looked at by the Panel in 2007. This is a letter from Dr Chipping, who was the medical director, not acting at that time, dated 29 May 2007. I take you to the third paragraph:

E "Dr Southall is undertaking a general Paediatric take and it is of course somewhat difficult for him to do this when unable to undertake any Child Protection work but nevertheless the system has worked well and whilst I am sure that Dr Southall would wish the suspension on his Child Protection practise to be lifted, I do not believe that he should be undertaking specialist Child Protection work at this stage since he has not been involved in this field now for the last 8 years".

F If we add on to that one year, therefore nine years. As it were, he has not been doing this work for nine years, and the view of the medical director at the time was, that is right, he should not be doing specialist child protection work at this stage.

G You may think, if for no other reason, because this doctor, in his confession of needing some support, and in relation to his medical director saying he should not be doing child protection work, when considering your duties about safety when looking at the wording precisely of paragraph 32 and the certainty that is required in that, if, for no other reason, this is a matter where this doctor is currently impaired in this area and still needs a condition, if we get there, presumably I would readily accept less stringent than the conditions he is currently under, but needing conditions for the safety and protection of the public, and if that requires a finding of impairment, thus, we would submit, that there are grounds for you finding impairment.

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A You will note, in the course of my submissions, I have not said to you that the General Medical Council submits there is impairment here. That is not my brief. My brief is to bring to you, as I have sought to bring to you, factors which you can take into account when assessing seriousness and when assessing impairment. I hope - albeit some people in the room think I have been too long about it - that is what I have sought to do and those are the end of my submissions.

B THE CHAIRMAN: Mr Tyson, it is usual for counsel in your position to give a clear indication to the Panel as to what the expectation of the General Medical Council is and, for the avoidance of doubt in the light of your last words, is it therefore that the GMC has no view either way as to impairment?

MR TYSON: That is right.

C THE CHAIRMAN: I am grateful. Thank you very much for that clarification.

MR TYSON: They are neutral, but they want me to bring in factors that you can take into account, and I have so. That is how I topped and tailed my submissions.

D THE CHAIRMAN: Very well. I am most grateful for that. Thank you. It is 20 to three. Mr Tyson has been on his feet for some time. I think the Panel, at any rate, would appreciate a break at this time. Miss O'Rourke, perhaps that would enable you an opportunity to get your thoughts in order as a result of anything Mr Tyson may have said. Three o'clock, ladies and gentlemen.

E MISS O'ROURKE: Sir, before we do take that break, before I make my submissions I was intending to do two things: one, make my submissions; and two, adduce a further piece of evidence, as I indicated to you earlier this morning. I received a letter from Mr Williams, very mindful of his duties as an expert witness and concern, that as a result of material he had seen he should give the Panel his further views. He put it in a letter dated 4 September, addressed to my instructing solicitor, but marked for my attention. Indeed, the title opens, "Dear Miss O'Rourke". It was served on Field Fisher Waterhouse. We did tell them we intended to adduce it at this stage. We have had nothing to indicate they have any objection. I would be very surprised if they did object. Of course, if an expert has a further view, it is only appropriate that he does share that view and not leave a Panel under misconception when he has given evidence. It is a two-page letter. I wonder whether, in fact, what we should do is let the Panel have it now so you have an opportunity to read it so I can then start my submissions at three o'clock with that letter already before you and we can go much quicker as a consequence.

F THE CHAIRMAN: Mr Tyson.

G MR TYSON: I do object to the letter. The doctor has given his evidence. He has been cross-examined on his evidence. He has had some further thoughts. They largely go to the denigration of Professor David and it is completely irrelevant and one step I would suggest is that that draft letter be shown to your Legal Assessor. My current stance is that it is both irrelevant and inadmissible.

H THE CHAIRMAN: We are dealing with your clients on the status of ---

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MISS O'ROURKE: Sir, I am stunned for two reasons. It was sent to my learned friend's instructing solicitors nine days ago and they were expressly asked to comment upon it because Dr Williams made it very clear. Indeed, he emailed me and said if I refused to put it in or my instructing solicitor refused to put it in, he would have to consider the implications of it because it was shutting him out when he had a duty, independently of us, to the Panel. For that reason, I said to my instructing solicitor, "Can you make sure it is sent to Field Fisher Waterhouse". Complete silence, including today. My learned friend has known what the position was and has chosen not to say anything to indicate there was any objection to it.

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That is my first concern and as to why it is raised now. My second concern is this - Dr Williams is writing - albeit an expert called on our behalf, someone you saw and heard him give evidence. He was independent and has his own views and is mindful of the duties of an expert witness, which was abundantly clear in giving his evidence. I am certainly very happy for your legal assessor to see it. I really did think there was no issue about it and that is why I stood up and raised it when I did, so you would have a chance to read the few pages and we could start straightaway at three o'clock.

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THE CHAIRMAN: Let's deal with this in stages then. Can we accept your ---

MR TYSON: Can I make my point: I am perfectly content for the Legal Assessor to read it and for her determination, whether it is in or out to be final. I do not want to make a big issue of it and expand it any more. If, over the short adjournment, the Legal Assessor can read it and if she thinks you ought to read it, I will abide by that loyally.

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MISS O'ROURKE: Sir, it cannot be her determination. You know, of course, all she can do is give you advice. You have to read it to decide whether you accept it, at least on the *de bene esse* basis and get advice on it. There is no other way around it. The determination can be yours and yours alone.

MR TYSON: There is a way around it, in that if the Legal Assessor advises me it should go in, I withdraw my objection.

F

THE CHAIRMAN: Likewise, surely there are occasions when a Legal Assessor will advise a Panel that it is not appropriate for them to read something.

G

MISS O'ROURKE: Sir, I can accept that. My difficulty is this - I got an e-mail direct from Dr Williams in the strongest of terms. I therefore have to satisfy the duty to somebody who is an independent expert and who does not have his own voice and his own counsel here and who has made it clear that because he has become aware of something additional and he does not want the Panel to be misled in respect of something that he has already said, so, at the very least, have to say to him that I did what he requested and invited the Panel to see it and, therefore, that is inviting the Panel, not the Legal Assessor.

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THE CHAIRMAN: We will take it in stages, and let the Legal Assessor look at it first and will go from there when we return at three o'clock.

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(The Panel adjourned for a short time)

THE CHAIRMAN: Welcome back, everyone. Miss O'Rourke, I understand that in the time we have been apart, you had an opportunity to discuss matters and that the document in question, you no longer seek to put before us.

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MISS O'ROURKE: Sir, I do not think that is strictly right. I hope to properly state the position as I did beforehand.

THE CHAIRMAN: Please do.

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MISS O'ROURKE: Your Legal Assessor has indicated that her advice to the Panel would be that she thinks it adds nothing and is largely irrelevant to the determination you have to make at this stage. I have reluctantly agreed with her that is probably correct and indicated to her there was maybe one passage I thought was relevant to your determination. She indicated that that passage is something that I already have in evidence and I agreed with that.

D

Sir, it is not a question of me withdrawing it. As I have indicated to you, I had a very strongly worded e-mail from Dr Williams that made it clear if myself or my instructing solicitor sought to block it, he would view that matter very seriously, because he takes very seriously his duty as an independent expert. Therefore, sir, it is not a question of me withdrawing it. I was never seeking to do it on behalf of Professor Southall. I was seeking to do it because I had a witness we had called who had expressed the view he would like the Panel to have the benefit of his further thoughts.

E

I have accepted that your Legal Assessor would advise you that that which he has to add is not relevant to the determination you are making at this stage and therefore in the face of an objection, I will not push it, but I would wish to be able to say to Dr Williams that I did ask the Panel to look at it; it was objected to by Field Fisher Waterhouse, so that in due course, if he takes the view they were wrong to do so, he can take it up with them or indeed take it up with the General Medical Council. It may well be he wishes to do so.

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Sir, I do make that point, because I am surprised that there is an objection. I cannot see, even though it is irrelevant it would do you any harm to see it, let's put it that way. You are an experienced professional Panel and you can put it out of your mind, but I am conscious of the time, and I am conscious we do not want another argument, and we do not more time for a determination. I am simply saddened that when an independent objective expert - particularly one who gave evidence in the way Dr Williams did - asks that it gets put before a Panel, it is regrettable that we are not told that will not be the case and it is regrettable that an objection is made, because Mr Tyson could very easily have addressed you that this is irrelevant and you do not need to consider it, and it would have taken five minutes to read it. It is now going to be a matter, I believe, between Dr Williams and Field Fisher Waterhouse.

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THE CHAIRMAN: Thank you.

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MISS O'ROURKE: Sir, can I now take you to where you are now. Can I start with this - it is a surprise that I have to take you to the statutory definition of impairment, but sadly

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I do, as a result of the last couple of submissions made by Mr Tyson, which, I have to say, I find simply stunning. The suggestion to you that because you might find this man is not ready to go out and work unfettered, and therefore you might have to put conditions on, and because of duties of safety or something to the public and you find he needed conditions, then you would have to find impairment. Sir, can I make it plain at the start, that is a very serious error of law and you must put it right out of your mind.

B

Can I, sir, take you to the Act. I am afraid my learned friend - maybe it is a long day - but he has got himself twisted around somewhat seriously. Can you turn it up in the Medical Act, or you might find it easier to have it in the Indicative Sanctions Guidance, S1-2. You will find set out there, if you look at paragraph 8 of the Indicative Sanctions Guidance, section 35C(2) of the Medical Act. It may be well you have got the Medical Act itself. What it reads is this:

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“A person’s fitness to practise shall be regarded as ‘impaired’ for the purposes of this Act by reason only of

- (a) misconduct;
- (b) deficient professional performance;
- (c) a conviction;
- (d) adverse medical or physical health; or
- (e) a determination by a body in the United Kingdom”.

D

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We can strike out (e) because there is no determination by any other body in the United Kingdom. We can strike out (d); there is no allegation and never has been any allegation against Dr Southall that he has got adverse physical or mental health. We can strike out (c); there is no question of any conviction of any criminal offence in England or anywhere else that is relevant. We can strike out (b); there is no allegation of any deficient professional performance.

F

Therefore, sir, at this stage which you are at, Rule 22(f) determination, you will only be able to find impairment of his fitness to practise by reason of misconduct. You do not find impairment of fitness to practise because you might think that he has given evidence or somebody else has given evidence that he is ring-rusty and therefore he might need conditions before he can go back to practise. That is the wrong way around.

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The question of whether or not you impose conditions can only follow when you get to Rule 22(g), in circumstances where you then, having found impairment, have to, in the circumstances, decide what is the sanction. Rule 22(g), the Panel may receive further evidence, hear further submissions as to whether to make a direction under section 35D and then you take it into account. Put out of your mind altogether what he said to you in the last ten minutes of his submissions. Put out of your mind what he said to you about Dr Chipping. That is not relevant at this stage. In any event, sir, can I answer it very simply by saying Dr Chipping is a haematologist. What would she know, with the greatest of respect and due deference to her, about what a paediatrician would be able to

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A do in respect of child protection work? She has had no discussion with him. She is not his medical director any more. The letter was written in 2007. It was not challenged, because in 2007 it was agreed on behalf of Dr Southall, given everything else that was going on, conditions should maintain.

B If you need to look at whether he is ring-rusty and what he can do, you rely instead on what the paediatricians told you. Dr Williams gave you evidence on it, Dr Mok gave you evidence on it and Dr Crawford gave you evidence on it. In any event, sir, you should ignore what Mr Tyson said to you because you heard the evidence of this doctor himself. Indeed, he quoted you from it. You can see immediately he is not going to do that work without support. He has got no job. He is a lot wiser as a result of his GMC experiences. He recognises limitations. He indeed indicated he would go and seek advice. He was not going to go out and support it, and he plainly demonstrated insight.

C In any event, sir, it is not an issue for you at this stage. It would not be an issue to find just because he had not done the work that equals impairment. The law could not be clearer: you cannot find impairment unless, in the context of section 35C(2) you have found misconduct. That is the only basis on which you can do it and you should not mix up the two stages.

D Can I then come to the question of impairment and what is you are now doing? It is your judgment and your judgment alone. Nobody else usurps your judgment. Rule 22(f) confines it to you, not to Collins J, who looked at matters three and a half or four years ago, who never heard Dr Southall give evidence, who never heard any of the witnesses give evidence, who was not examining the substantive matters in the case, because this was a Council for the Regulation of Healthcare Excellence appeal. It was not an appeal by Dr Southall, it was not an appeal against the findings of fact, it was not an appeal against serious professional misconduct. It was an appeal only on the question of sanction. Collins J had a very limited and very narrow brief, in any event, three and a half years ago, and not having heard any evidence and, in particular, not having heard Dr Southall. You make your judgment on the basis of what you have heard in 2008. That includes hearing the doctor, it includes hearing five other witnesses that Collins J did not have the benefit of hearing, and it includes knowing what has happened in the interim in terms of views of the profession and all the other material you have in front of you.

F In the same way that you do not get bound by what Collins J said, you do not get bound by what the PCC said. Sir, I maintain my position that you are not bound by their finding of serious professional misconduct. You cannot be, because you are expressly required under the Act and under the rules to decide whether there is impairment by reason of misconduct. If you were bound by what they said, you and we would have been wasting our time for the last six, seven days, because if you were bound by their finding of misconduct in 2004, then what are we all doing here and why are we wasting time and money? You have a review hearing and you are looking at it and you are making your own decision. It is on your task and it is on the evidence you have received and you have had very different evidence to them.

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H The third point I make, sir, is this - we are eight years on since the conduct in question. It was the summer of 2000. We are now at the end of the summer of 2008. We are four

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years on since the Panel determination of the PCC. That was 2004.

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If you were to take the line that it appeared Mr Tyson was running - and I have to say appeared, because it was with some surprise I heard him at the end saying effectively he was neutral on impairment - if you have reread his opening, that was not his position, and indeed we challenged the GMC in correspondence before the case began, were they saying his fitness to practise was impaired and, if so, on what basis. The first time I had any appreciation they were neutral on it was at 20 to three today. Indeed, I have to express some surprise it was said to be neutral after having listened to an hour and a half of the submissions that I did, not to mention the two-hour opening on day one of the case.

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The position, quite simply, is this - you are determining it today in 2008 and what the Panel thought four years ago may be relevant in terms of the findings of fact, but it is not relevant in terms of the determination because they heard different evidence.

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The next point is this - you can only be finding it by reason of misconduct because there is no health or performance issue in this case. Now, if Mr Tyson was right that this is very serious misconduct and it was serious misconduct in 2004 and it was serious when the conduct was performed in 2000, we would in fact have the situation as to why bother with review cases and misconduct cases. Because if you have done it once, then it is with you for the rest of your life, and there you are. It is serious misconduct, it remains serious misconduct and it does not become less serious over time, so what on earth is the point of having a review hearing and what on earth is the point in having Rule 22(f), or indeed 22(c) or (d)?

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That cannot possibly be right. It is not right, because of course the courts looking at this and indeed commentators commenting on it have said the concept of impairment of fitness to practise is now and going forward: "Is his fitness to practise tomorrow impaired by reason of..."? Well, it has to be a reason of, in this case, past misconduct, and the past misconduct is eight years old. The question then becomes how long does the misconduct keep operating for? Do we say it operates for 20 years, 30 years, in which case, you are going to be impaired for the rest of your career if your misconduct happens to be ten or 15 years ago, or do we in fact say, well, there comes a point in time when the past misconduct is now no longer affecting you, because you have learned lessons, or because it is time-limited in the way we have concepts in the criminal law jurisdiction of rehabilitation of offenders: you have learned your lesson; you have served your sentence; your time is done, and therefore, we say, in the circumstances, we are not going to keep punishing you for that. In my submission, that has to be sensibly how it is. Otherwise, the whole regime of reviews in misconduct cases would, frankly, be a nonsense and there can be no other way of saying, why do you look at impairment and, indeed, it would be consistent with the approach of Silber J in the *Cohen* case.

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The question is, therefore, in my submission, as your Legal Assessor put to you when considering what documentation: is that misconduct still sufficiently serious in 2008 to indicate an impairment of fitness to practise or because eight years have passed and four years since the Panel hearing are we entitled to say time has now run? He has served his sentence, he has done his time, he has had his conditions and he has moved forward, and that is going to be the question. Really, it is: is it so serious that it should still give rise to concerns eight years on from the events in question?

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Sir, I say you judge that seriousness in the light of all the evidence and that includes and must include the evidence that you have heard in this hearing, because the rules specifically provide under 22(d) that I am entitled to call evidence and under 22(f) that I am entitled to call evidence. It could not possibly provide for that and give it unrestricted ambit. If you were then to ignore it and say we are just going back to what the PCC heard in 2004. You must focus on that evidence, because that is the primary evidence before you. You are not hearing the evidence that was before the Panel in 2004, and so you must judge the question of impairment on that evidence. You are not finding facts. That is the difference between the Panel then.

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Sir, therefore, for that limited purpose, I concede that we do not go behind the facts found. I make it clear, I concede it in front of you, if I get my chance in the Administrative Court or the Court of Appeal, that concession will not be made and I put it on the record now, but for the purposes of you, I say there is a lack of clarity in the rules because it does not say, as I pointed out to you, unlike Rule 17(2)(j) where it is said that you find impairment based on the facts found proved. There is no equal provision in Rule 22, so elsewhere I may have that chance and I make, therefore, the concession only in front of you. Sir, I say that you are entitled to judge seriousness in light of all the evidence and that includes the evidence I have called.

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Can I take you very quickly to the case of *Meadow* and to Auld J and the test of seriousness and briefly address you on that. You have it in C11. You have the paragraphs I wish to refer you to. Can I take you first to 198. You will see Auld LJ says:

E

“As to what constitutes ‘serious professional misconduct’, there is no need for any elaborate rehearsal by the Court of what, on existing jurisprudence, was capable of justifying [it] under the 1983 Act before its 2003 amendment. And, given the retention in the Act of 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’

- these are the key words, so can I ask you to note and highlight them -

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“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”.

G

That is another submission that I am afraid, with regret, Mr Tyson got wrong. He said Roy Meadow was a case under the old rules and therefore there was a distinction. There is no distinction because serious professional misconduct, now misconduct, Auld LJ expressly addressed section 35C, which is the section you are now addressing, and he used the words it is inconceivable that it would signify a lower threshold for disciplinary intervention. That paragraph has been accepted, since it was handed out, by every Fitness to Practise Panel that I am aware of that has had to look at the issue and to give judgment and it is why the Meadow case is put before them, to say it equals the old SPN. It is no lowering of the threshold just because it uses the word “misconduct” and not “serious”.

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Therefore, what you are looking at and the guidance that you get on the question of is it

A misconduct for section 35C, which is the question you are now looking at, is that everything that follows in 199, 200, 201 and 202 applies equally, even though this is an old rules case. Of course, apart from anything else, it applies because Dr Southall was an old rules case as well. This is a review of an old rules case.

Can I take you, sir, to paragraph 200. You will see he says:

B “‘Serious professional misconduct’ is not statutorily defined and is not capable of precise description or delimitation”.

Then he goes on to say it can cover other work. Then, can I take you to the key words:

C “As Lord Clyde might have encapsulated...it must be linked to the practise of medicine or conduct otherwise brings the profession into disrepute,”

- can I highlight that -

“and it must be serious”

- and can I highlight the word “serious” -

D “As to seriousness,”

- and that is obviously the issue you are now concerned with in this case -

“Collins J, in *Nandi v General Medical Council* rightly emphasised,”

E - can I highlight that -

“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’”.

F Sir, can I highlight that? You have heard evidence from fellow practitioners. You have heard evidence from four of them. You have heard evidence as well from Mr Spicer, but he is not a paediatrician. You have heard from four paediatricians. They have not regarded it as deplorable today in 2008. They were asked to concentrate on today in 2008. More than that, several of them told you, and you had it put in front of you, in any event, there was a meeting at the Royal College where there was virtually unanimous support for Dr Southall. There were 350 senior paediatricians at that meeting. There have been letters to the BMJ and letters to the papers, and every indication, from the evidence you have heard, is that fellow paediatricians do not consider it to be deplorable in 2008.

G It does not matter what happened in 2004, and it does not matter they did not come forward, other people did not come forward in 2004, but what you have before you is four very senior members of the profession who have come forward, have given you evidence and have made it clear they do not regard it as deplorable.

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A Where is the evidence to the contrary? There is none. My learned friend has not called a single paediatrician and it was open to him to do so, either in this 22(c) presentation or indeed today on the question of impairment. He could have called Tim David. I wish he had, so does my client. He could have called any other paediatrician. Our submission or surmise is he could not get them, because they would not come and say it, because the profession has reacted as Dr William told you without rage at the suggestion of what

B David Southall did was deplorable.

MR TYSON: Surmise has got no basis in fact.

C MISS O'ROURKE: I agree with that. I make it just as submission. I throw it down as the rhetorical question that you can ask yourself. If there was evidence that it was deplorable conduct from the profession, one would have presumed that the General Medical Council, of all people, could have called it. You are entitled to comment on the absence of any evidence, and that is what I am doing. I am saying the only evidence that you have from the profession today in 2008 as to how this is viewed is the evidence of the four paediatricians that you have heard and it all goes the one way.

Sir, can I then take you to the other comments made by Auld LJ, paragraph 201:

D “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. See *Preiss*. It may also be professional misconduct where...he 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”.

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That gives you a very wide leeway in terms of all the facts and circumstances you can look at. In Dr Southall’s case, looking at the circumstances will include bearing in mind the two real allegations against him are: one, precipitate; and, two, what he wrote in his report, which is your C10. That allows you to look at that document C10 and to decide what intention, what knowledge, what understanding, what he did and what were the foreseeable effects, and I will be inviting you in due course to go away and look at that document carefully. I am not going to address you again on it, because I did so at some length on the last occasion, and I invite you simply to reread what I said then, but also to reread the letter itself.

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G There was one other paragraph I would want to refer to in the Meadow case and it is under Thorpe LJ. I have not copied it for you, but I can get the page copied. It is very short indeed. I hope I can read it to you, and I am sure you have heard it read before. It is, for my learned friend’s benefit, paragraph 279. It is Thorpe LJ simply saying, and I think your legal assessor will know the paragraph well: (*Document not provided*)

H “Privy Council authorities have established what is meant by serious professional misconduct. In *Preiss v The General Dental Council* it was defined in the following terms”

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- and this a direct quote from the *Preiss* case in 2001 -

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

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Sir, I say that is the other key paragraph. It is deplorable conduct as viewed by the profession, but it is also something that would merit opprobrium that would go with a disciplinary offence. Again, I say you are assisted by the evidence of the four paediatricians that you have heard in respect of that. You are put in the position that I say you have the reasonable paediatrician before you. You have got a range of them. They came from different backgrounds and different positions on this matter. You have to judge the seriousness as of today because that is the point of it in terms of impairment of fitness to practise being a concept going forward.

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That means you entitled to look at the fact these events took place eight years ago in a different world and possibly in an emotionally charged situation, particularly in 2004 and with the concerns that the PCC had at that stage. You have got to look today in terms of child protection and the seriousness of the issue. I say that, sir, in circumstances where some of you may have seen, even this last week in the papers there has been a trial at the Old Bailey in respect of the death of a child who was seen by a consultant paediatrician not two days before where the paediatrician is now under scrutiny and, indeed, in this building on Monday morning that paediatrician will be here and there will be questions being asked. Sir, we know the context now and you are entitled to take that sort of situation into account.

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I say as well one of the key aspects you take into account and Auld LJ described it there, the circumstances. What was his role? You have the instruction letter, D9. I am not going to take you through it again because I took you through it the last time, but I invite you to consider, when you retire, two of the most important documents in the case are D9 and C10: the letter and what his role was and the response he wrote because, of course, you must remember, as Mr Tyson himself has said, no-one is challenging in this case his right to go to the authorities and that he went to the right authorities. He did not go to The Daily Mail or Evening Standard. He went to the child protection authorities. When you read D9 and C10, specifically D9, you will appreciate he was not being instructed as an expert in a Family Court case. That is absolutely fundamental to the context. You are entitled, therefore, to examine what his role was and indeed, what was going to go forward, if at all, to a judge, and you will see in D9 that there was a filter there, and the filter there was the actual expert in the case.

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The next point that you will see when you are taking into account the circumstances is there was never a doctor/patient relationship here with anyone. He was not in fact acting as a doctor in the context of patient care or clinical care. He was acting effectively as a very experienced, very knowledgeable informant.

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You will also take into account, therefore, the role he fulfilled in this case was very rare,

A if not indeed unprecedented, and I think one of the experts used that phrase and said this is not a normal role. You will also take into account, as you and your colleagues will know from all sorts of cases you have sat on and indeed from your own personal and professional lives, that differences of opinion between colleagues are two a penny and you have got to take that into context. The relevance of that and the only relevance, therefore, of Tim David is this - Tim David was on one side of an opinion, he was on the other side of an opinion and you have to then raise questions as to whether, in the

B circumstances where there are differences of opinion, one can really be said to trump the other and his views should prevail.

You are also entitled to take into account, and you had the document put before you, the GMC's guidance 0-18 published in 2007. I say that is new and it is relevant and it does actually put the context on child protection work. You are also entitled to take into

C account lessons learned by 2008. You saw Dr Southall give evidence. You know he has been through not just this Clark case in 2004. You know you were told about a case in December 2007, and you know you were told because you were told by me, and Mr Tyson raised a point about it. He was involved in a 40-day case this year as well, so this is a man who has learned lessons.

You saw him give evidence and Mr Tyson, in his submissions, was trying to suggest it is for you to judge the genuineness of his evidence but was then raising whether it was

D genuine or not. You had an opportunity to assess him, Collins J did not. You have also had an opportunity to see him sit here next to me throughout seven days of hearing, and you also have read enough about him to know if there is one thing that David Southall is, it is blatantly honest. If anything, the word blatant is probably the key to it - too honest for his own good. It is for you obviously to decide on the basis of the evidence you have heard. It is for you to decide whether he has developed some insight. My submission is he has. It is for you to decide is there some remorse there, not just remorse because he was landed in trouble, but is there some genuine remorse there? Yes, I stand by what he said. He will not show false remorse, because that is not the man and nobody would want him to do so. Again, that is an indication of the genuine honest person he is. He will not get up and say something just because it is going to get him out of trouble and he will not get up and say, "I accept all the findings of the PCC; they got it right", because he does not believe that and I do not believe that, but that is not the issue in front of you now

E today because you are making your own judgment under Rule 22.

F In terms what of the PCC found, sir, I do not go behind their findings of fact, much though I do not like them and my client does not like them either. I do say because you are forming your own judgment on the question of seriousness, which you must do in order to satisfy section 35C, misconduct and impairment, you do not have to be bound by what they found as to how serious it is.

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Sir, can I take you briefly to the determination, only there from the question of serious professional misconduct. I do not look at anything they said on the facts. I look at what they said on serious professional misconduct. I just want to highlight four aspects. I say they looked at matters they should not look at. It does not matter, they did, and we are stuck with it. On the other hand, you should not take those into account in judging seriousness in 2008 because they are not relevant considerations. It is page 6 of C3. It is the second paragraph:

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“The Committee are extremely concerned that you came to this view without ever meeting or interviewing Mr or Mrs Clark, without seeing any of the medical reports, post mortem reports and without knowledge of the discussions between the experts or witnesses involved with the Sally Clark case”.

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Sir, that is not a factor you should be taking into account in judging seriousness because it is not a material factor. There was no opportunity to meet Mr or Mrs Clark. Mrs Clark was imprisoned for a double homicide. Mr Clark - there was no offer that he should be interviewed. You have heard three or four of the expert witnesses all saying it would be inappropriate. Paediatricians are not trained to do so. They all disagree with Tim David when he said he did. You will remember Dr Mok and Dr Crawford specifically saying Tim David wrote to one of the journals about it and they all wrote in in protest and said, “This is not our role”. The Panel appears to have relied on this because it only ever heard from Tim David. It did not hear that he used the rest of the profession. It is not a factor you should take into account.

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The comment about post-mortem reports, he spoke to the pathologist who undertook it. Again, you heard Dr Mok say in the straightest of terms, “Sorry, we rely on our professional colleagues. I phoned the pathologist”. Indeed, I think she gave an example of the very day before she had phoned the pathologist, had not waited for the post-mortem in writing, because she needed to know because child protection had to move quickly. You are entitled to trust your colleagues, particularly someone like Professor Mike Green, who is an eminent Home Office pathologist with a very considerable reputation at the time. If he told them something, he is entitled to rely on that. Why should he disbelieve him?

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In looking at seriousness, that is not a factor that should count against Dr Southall and it is not one you should be taking into account. You have heard evidence that he would have had no opportunity to speak to Mr Clark or Mrs Clark, that it would be inappropriate in views of the average paediatrician and the majority of paediatricians and that it is more than good enough to rely on your professional colleagues like the pathologist.

The next point is the next paragraph on page 6:

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“The committee have been directed to the guidance entitled ‘Expert Witnesses in Children Act Cases’ produced by Mr Justice Wall, which you have acknowledged as good guidance. However, it appears that you did not follow this guidance...very cautious when advising a judge”.

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His report was not going to a judge. You have got document D9. He was told that it was an agenda. It was going to lead and inform a discussion with Professor David and he was told that Professor David’s report was going to the judge and would be going by a deadline of October. He was not going to be the expert witness in the case. He was never paid for any role in this case, as he told you. He never took on any formal role as an expert. He was an informant only with specialist knowledge. That paragraph and that guidance would have been inappropriate to him. The person that it was inappropriate to was Professor Tim David. There may well be questions whether Tim David complied with that guidance. That is not a matter for you. In the circumstances, the Panel using

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A that to judge seriousness, you should not fall into the same mistake. You should not be relying on that, because you have document D9 and you know what his role was.

The next point is on the next page, page 7. It is the third paragraph that starts on that page. The Panel make reference to the GMC's guidance Good Medical Practice - four lines from the top of that paragraph. It states:

B ““Good clinical care must include an adequate assessment of the patient's condition, based on the history, clinical signs and if necessary an appropriate examination'. In providing care you must 'recognise and work within the limits of professional competence'”.

Then they go on to say:

C “You did not adhere to this guidance when you involved yourself in this case”.

D That is a very serious error, in fact, by that Panel. You should not fall into that error. He was providing no clinical care to anyone. This child was never his patient. There was no doctor/patient relationship. He was given no opportunity to assess anybody and take a history. How could he? The child was dead and indeed had been cremated. There was nothing for him to examine. It was completely inappropriate guidance that they were looking at. It was nothing that would inform the seriousness. It did not relate to the facts of this case. It was a mistake and you are not going to fall into the same mistake when you judge seriousness.

E Finally, sir, in the same paragraph, they talked about responding constructively to assessments and appraisals of your professional competence and performance and if things go wrong:

“If a patient under your care suffers serious harm you should offer an apology”.

That is completely inappropriate to the circumstances of this case. No patient under his care suffered harm. There was no-one to whom he should offer an apology.

F They go back to say that you did not take reasonable steps to apologise to Mr Clark. I pray in aid what Dr Williams said to you: this Panel seemed to lose sight of the fact that the duty was to the child not to the parent. You have got to be very careful in child protection issues, an overzealousness to worry about what some individual might think and how he might be upset does not deter you from going forward in the context of the individual child.

G Sir, can I say this - Mr Clark had other remedies. He could have brought an action for defamation if he had wanted to. The real question is who was speaking for the child? I adopt what Dr Williams said: the GMC Panel should have been looking at that and you as a Panel should be looking at that. Apart from anything else, the GMC's own guidance, 0-18, from November 2007 say that.

H The next and final point I make on what the Panel said is they completely misunderstood the difference between fact and opinion. That is why I advise you to read very carefully document C10 and see how much of it is opinion as opposed to fact. They make

A criticisms that say they make it more serious, but nobody has suggested, even now to today, what it is that he should change or rewrite. Nobody suggested any piece of factual evidence out there that prove him wrong.

B Sir, can I say this in terms of the context and seriousness when you do reread C10: high up the list of differential diagnosis in this case, as you have heard from the expert evidence, when there is a second death and there is someone in prison, and the Home Office pathologist is saying homicide and the jury has found it, and when there is a child that had no subsequent problems, and when you had all the history and the post-mortem must be that this was an intentional suffocation. Yes, he may have extrapolated forward, but you have got to put into the context that there was a second death in this case at the time he gave his opinion and that there had been a finding of homicide. You have the expert evidence from the five experts who helped you on the question of seriousness.

C You also have the fact that when he wrote this report, it preceded a meeting between him and Professor David and Professor David made no complaints about it or concerns at the time.

Finally, in the context of looking at seriousness, these are my points, and I will come in a minute to answer Mr Tyson's. A lot was made about the trust, whether it was precipitate. It is not clear that the Panel have considered that as part of the serious professional misconduct. It seems that seriousness was felt more to be the report and Mr Clark's feelings. As far as the Trust is concerned, you have seen the letter from the Trust chief executive indicating a Trust could not possibly deny someone the right to express an opinion. Article 10 of the European Convention on Human Rights would guarantee it. Frankly, even if it had and he was precipitate, you have heard evidence you cannot delay in child protection matters. In any event, it is a matter of contract. It was an agreement he gave. Maybe he broke his word, but I am sorry, that is not the stuff of serious professional misconduct and it is not the stuff of impairment of fitness to practise. You have to allow paediatricians and doctors to express opinion without fear, otherwise you end up with a situation that they do not call in the authorities and you have a dead child. You had three or four examples of that. Dr Williams told you of one he had and Dr Crawford told you of one she had. You have been reading in the papers this week and you will be reading again next week of another one which is ongoing at the moment and is causing a lot of public disquiet.

F Can I turn then to deal with some points in reply to Mr Tyson. He said to you you cannot take into account testimonials, et cetera, and character evidence. He is correct in that, in the sense that you cannot where a number of my witnesses went on to deal with matters that would arise at the next stage, stage 2, but you can take into account testimonials to the extent that they go to the question of whether it has been remedied or what his reputation is now in the profession. The *Cohen* case says you are entitled to look at. Is it remediable, has it been remediated and is it highly unlikely to occur. You have heard evidence from these people who do know him and say lessons have been learned and indeed lessons have been learned in the profession.

H Next, you were told that you had to be certain it was safe to return him to unrestricted practice. That might be what it says in the Indicative Sanctions Guidance. I am not aware of any judge endorsing it. It certainly does not appear anywhere in the rules or in the Medical Act. It is a matter that defence lawyers, like me, regularly argue about and

A say well, Paul, Phillip, or whoever, can write the Indicative Sanctions Guidance in whatever way they want, but until I see it as a matter of law and have a judge endorse it, why is the burden put on the doctor? I am not aware of anyone saying the burden is on the doctor. On the question of impairment, I am aware of the case of *Biswas*, in which I was counsel, and which is said it is a matter of judgment for the Panel. There is no burden either way. Indeed, that is why that case was overturned, because the Legal

B Assessor had potentially inferred that the burden somehow or other was on the GMC. Sir, I say it is burden neutral. It is not for me to prove anything, it is not for Mr Tyson to prove anything. It is a matter of judgment for you. The suggestion in the Indicative Sanctions Guidance that somehow or other I have got to satisfy you, Dr Southall has got to satisfy you - until somebody shows me it written in a law or a High Court judge or Court of Appeal saying it, I am afraid I do not accept it. My submission to you is it is a matter of judgment.

C MR TYSON: Just to assist my learned friend here, it is not in the indicative sanctions that the question of burden of proof arises it is in the Guidance to Chairman.

MISS O'ROURKE: There we go, even less so, because the indicative sanctions, we know, has had some judicial approval. The Guidance to Chairman, as far as I am aware, has had none. The position remains the same. Until I see it in the rules itself or in the

D Medical Act or until I see a High Court judge say it, then I say that all the case authorities suggest that it is burden neutral. In other words, because it is a matter of judgment ---

MR TYSON: And I agree with my learned friend on that point.

MISS O'ROURKE: Can I then, on impairment - because you are allowed to look at what is the position today and of course this is the evidence the GMC has put before you on impairment - simply remind you of document C2. You have some material that goes to the question of impairment. You have got, firstly, the letter at 7 to 10 from John Bridson, and I just highlight a few passages in respect of that, because, of course, you are looking at it now in 2008, so you are getting some up-to-date information from people who know him. You will see John Bridson talks about working with him until 2007. Third

E paragraph on page 7, about PACA and the group's coordinator and Dr Southall's exceptional strength of character. Then on page 8, you will see he describes Dr Southall:

F "a man of the highest integrity, honesty and ability. His clinical skills are of the highest order are as his communication skills with patients".

Then he goes on to comment about what he has done with the charity, his international

G work, what he has done in Pakistan.

MR TYSON: She is falling into the *Cohen* error here. This is a matter, in my respectful submission, if we get to the next stage.

MISS O'ROURKE: Sir, with respect, it is not. It goes to the question of impairment, has he remediated any conduct, is it remedial and is it unlikely to recur? Is he, therefore, somebody who is taking himself forward and learning in the practice of his medicine.

H Sir, I say it is in fact relevant. He says he was advised by Mr Haywood, he could

A comment on the misconduct in question and his behaviour since the last review, and his behaviour since the last review is relevant to fitness to practise. Is his fitness to practise impaired; is his judgment bad, as it was said to be bad in 2004, or how is his judgment? It is not character evidence. It goes to his conduct as a doctor. Is he fit to practise? He goes forward and deals with that.

B Sir, I leave it to you. You are an experienced Panel. You know what you can rely on and not rely on. He deals with standard of his conduct and he deals with, for example, on page 10, a case that he has been involved in of a mother trying to kill her child and therefore that gives you some context again of the seriousness and how quickly you need to act.

C You have also got something from Pat Chipping on 12 to 14 which is written this year, dealing with how he has cooperated with matters and how he has worked to a high standard. Again, that goes to the question of remediable and remediated and question of judgment.

You have got something on page 15 to 16 from Simon Parke, again, talking about his more recent material and what he has been doing. Sir, I say it is admissible at this stage, otherwise why did the GMC go seek it? This is their evidence, not ours.

D MR TYSON: Again, it was names that were provided by your solicitors for us to approach.

MISS O'ROURKE: It was the GMC's request that he provides for the purpose of this hearing the first stage of which is impairment, and you do not get to a second stage unless it happens. The GMC put it in its bundle C3 and it put it before you at the outset ---

E MR TYSON: Acting fairly, but we asked him what his referees were, and those are the answers.

MISS O'ROURKE: Sir, it is the GMC evidence. It is in bundle C3. It was agreed evidence. It went before you and it went before you at this stage, not at the next stage. You will make of it what you will.

F The next point in terms of document D9. Indeed, Mr Tyson, criticising Dr Southall's report, there was no anticipation of going to court. Mr Tyson made a lot in a number of flurry submissions about he would know this was a case going to court, the expert evidence and the way in which it was drafted. There was no anticipation he was going to court. D9 makes it absolutely clear. Tim David was going to be expert, you are going to feed an agenda in and he is going to decide what to include in your report.

G The next point I make it this - you have got to look, as Dr Williams effectively said, and if I can summarise it, what Dr Southall was doing here went to the benefits of the child, not any unintended hurt caused to a parent. That cannot be his focus as a consultant paediatrician.

H Reference was made by Mr Tyson and he claimed it was the most important paragraph in the Meadow judgment, paragraph 98, where the Court of Appeal said in the absence of

A her husband - sorry, her husband was in the house at the time of the second death. I had understood that was not in dispute. Mr Clark was present. It has never been proven whether he was in the house at the time or shortly before the death of the first child because the alibi has never been checked.

B The transcript of the *Meadow* case is not the appropriate one. If you want to look at what the facts are, the transcript of the Court of Appeal in Sally Clark is the appropriate one. Paragraph 98 means nothing. Auld LJ was summing up very quickly a brief background before he got on to the crux of the case.

C The next point is this - much was made by Mr Tyson that David Southall should not be undertaking child protection work. When he phoned the authorities, he was not. At the best, it was potential child protection work, but in fact, all he was was an informant. He never took on any such work and he took no such payment. Therefore, I invite you to reread C10 and see what it was that in fact he was doing and what he understood he was doing. As I say, sir, I will not repeat my submissions.

The next point I think I have made, that he has made reference to Collins J and he has invited you to read certain paragraphs of his judgment. I cannot possibly see the relevance to you today in 2008. Collins never heard David Southall and you have.

D Next, my learned friend took you to D5/74G, when he was questioning Dr Southall in this case and talked about what information he had when he saw the police. You know that after he saw the police officer he had discussions with Tim David, he had discussions with the social worker, he was present at the strategy meeting, he had dealings, so, really, my learned friend's point is a very poorly taken point.

E Essentially the charges that the PCC were considering and you are looking at relate to C10 and the key documents, therefore, are C10 and D9. My learned friend said C10 included a witness declaration. Well, I must be going blind, because I cannot see it. There is no witness expert declaration. There is no list of what he read. There is no expert witness declaration within either the CPR or anything else. All there is at the end is, "I confirm the contents are true" and I am happy for a court to see it. That is not an expert witness declaration.

F The various points my learned friend made must again be rethoughts because he did not cross-examine Dr Southall on them. In particular, these points about what happened, what was true or not true. Indeed, sir, you invited him to put to him and he could not give any examples other than the petechial haemorrhage.

G Can I say in respect of those, Dr Southall did in fact answer it. You can look again at his evidence. He told you and Mr Tyson, in no uncertain terms, that he had talked to Green and to Meadow and that he had that information from them. As Dr Mok told you, you are entitled to rely on colleagues, particularly pathologists.

H A suggestion he did not know that they were resuscitating a stiff baby - the evidence was all out there in the programme how long it took to summon help and to rush down the motorway to the hospital. Any paediatrician would know you would be resuscitating a stiff baby in those circumstances, and he did know it.

A

Question of fresh flood. He in fact answered it. It was a question put in evidence. You will find it in his evidence that he knew it because Professor Mike Green had told him.

The breathing monitor was actually dealt with on the TV programme. Much was made of the fact that the second child had a breathing monitor.

B

Tim David. He has read you about Tim David, that he was subpoenaed. Tim David, as I said, was a defence witness in that trial. That trial was back in 1999/2000, before this TV programme and before the misconduct in this case, and much more particularly before the PCC Panel hearing, so Tim David came here to give expert evidence and factual evidence in circumstances where he had been a defence witness in the Sally Clark case. That is the point I was making. Otherwise, as I said in response to Mr Tyson, Tim David is in fact irrelevant to your consideration in 2008. Had he come here and expressed the view this was deplorable conduct, then he might have been relevant, but I would have had some fun cross-examining him on that and whether he stood alone.

C

Mr Tyson then said, when judging Dr Southall's evidence: you have got to look at what I said at the opening of the case, that you are not bound by the findings of fact and then somehow or other whether this was some sort of cynical attempt to curry favour or to allow David Southall to express some remorse.

D

As I have made clear, you are not going to go behind them. I accepted that from day 1 or day 2. As I said a few minutes ago, if somehow or other this case ends up on appeal or a jury review, I will not be bound by that concession.

E

I do maintain my position on the question of serious professional misconduct and sanction. Under Rule 22, you were not bound - in fact, you were expressly told you have to find your own finding of impairment and it is only if you make such a finding that you would then go on to sanction. The sanction imposed by the previous Panel is irrelevant if unless and until you get to the next stage. My challenge is to the PCC findings of fact have not evaporated and I would not want Mr Tyson, Field Fisher Waterhouse, the GMC or the general public to think that they have.

F

I took you through C10 on the last occasion. I am not going to waste your time doing it again. I expressed wonderment and surprise as to why the Panel made the findings that they did. I do not resile from that. I am not going to take you through it again. I have taken you through pages 6 to 8 where they made findings of serious professional misconduct. I made it clear I thought they got it wrong on that. For the avoidance of any doubt for press, public or anybody else, we do think the Panel got it wrong in 2004. It was not appealed. We think they misread C10. We think they misunderstood D9 and they misunderstood his role, but you are entitled to judge against findings of fact made, whether they are sufficiently serious in 2008 to affect impairment. Sir, my submission to you, you cannot get any more close to it. Those are my submissions, unless there is anything I have omitted and you would like clarified.

G

THE CHAIRMAN: Thank you Miss O'Rourke. Mr Tyson?

H

MR TYSON: One error of fact and one error of law. I am certainly entitled to put the

A error of law to you. My learned friend said - and it is a very minor bit - that Mr Clark could have sued for defamation. He could not have sued for defamation because the circumstances in which Dr Southall had his views were covered by absolute privilege because it was within an anticipated or indeed actual court proceedings, so he would be covered. *X v Bedfordsire*, and the like, shows that absolute privilege.

B As a matter of fact, my learned friend said there was no anticipation that the medical report would go to the court. There is evidence to the contrary on the record in the transcript that Dr Southall anticipated the report of itself would go to the court. That is in the last hearing at D6/12C.

C MISS O'ROURKE: Sir, if I can respond to that? The answer of that is no, he did not have available to him the letter of instruction. Indeed, I think I made it clear in my submissions on the last occasion that that was not something accepted and it was not put to him this time around, and I was making it clear that when he now looked back on it, that is not the situation. He in fact reminded himself of the letter of instruction.

D The contents of the report itself also show that. You know that it was prepared and sent for the purpose of a meeting. At the time contemporaneously in 2000, he could not have thought that. It may well be in 2004 in the context of the hearing when cross-examined he could not remember any more. At the time of 2000, given the closeness in proximity of the instruction letter, his reply and the meeting with Tim David, he could not have thought that. It was very clear to him that Tim David was the expert and he was feeding in an agenda.

THE CHAIRMAN: Thank you, both. Legal Assessor, what advice do you have for the Panel?

E THE LEGAL ASSESSOR: I will be repeating some things that have been said by counsel, and I do this because it is important that I give you independent advice.

F Dr Southall has been found guilty of serious professional misconduct. His case is today to be decided under your current rules introduced in 2004, therefore, under Rule 22(f). You first have to determine whether Dr Southall's fitness to practise is impaired today or whether he has failed to comply with any of the conditions imposed by the previous Panel. No evidence has been adduced that there has been non-compliance, so I advise you that you can determine that easily and shortly. However, you do have to consider whether Dr Southall's fitness to practise is impaired today.

G There is no statutory definition of what fitness to practise means, but there is now some judicial guidance which I shall come to later. I would advise you that fitness to practise means not only a capacity or ability to practise in the sense of having the requisite knowledge, experience and technical skill, but also suitability to practise by reference to the health, character and conduct of the doctor as demonstrated by the findings made of the facts alleged against him. Thus a doctor's fitness to practise may be found to be impaired, even though that doctor is highly skilled, if he has behaved in such a way that, in the judgment of the Panel, his conduct is such as to call into question his suitability to provide medical services, either with restrictions or at all.

H

A In the case of *Harry v GMC*, Goldring J stated that:

“In deciding whether there has been misconduct, it was not possible to ignore the public interest in the wider sense”.

B As has already been referred to, Auld LJ, in the Court of Appeal in the *Meadow* case, a case which was decided under the old rules and serious professional misconduct, gave guidance on the meaning of misconduct under the new rules and indicated that, in his view, misconduct, in section 35C of the Act, had the same meaning as serious professional misconduct. He also stated that misconduct may include not only misconduct by a doctor in his clinical practice, but misconduct in the exercise of his medical calling in another context.

C Also, in the case of *Calhaem v GMC* in 2007, a case decided under the new rules, Jackson J confirmed despite the recent changes in the statutory regime, the earlier authorities are still relevant. The word “misconduct”, in section 35C(2)(a), in his view, does not mean any breach of duty owed by a doctor to his patient. It connotes a serious breach which indicates that the doctor’s fitness to practise is impaired.

D Lord Clyde in *Roylance v General Medical Council* noted that serious professional misconduct is not statutorily defined and that it is inappropriate to attempt any exhaustive definition. Lord Clyde defined misconduct as follows:

“Misconduct is a word of general effect involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances”.

E “Serious” has been defined as conduct which would be regarded as deplorable by fellow practitioners. This has been accepted by Collins J in the case of *Nandi* in 2004 and approved by Auld LJ.

F The Indicative Sanctions Guidance also gives guidance on the meaning of fitness to practise. At S1-2, paragraph 11, it states, and this is a quote I am sure you are well familiar with:

“The GMC’s role in relation to fitness to practise is to consider concerns which are so serious as to raise the question whether the doctor concerned should continue to practise either with restrictions on registration or at all”.

G S1-3, paragraph 13, there is set out the public interest elements in fitness to practise, namely the protection of patients, the maintenance of public confidence in the profession and the declaring and upholding of proper standards of conduct and behaviour.

H In the case of *Cohen* in 2008, Silber J considered impairment and gave guidance. He noted that impairment must take into account the public interest and that it is highly relevant to consider whether the conduct which led to the charge is easily remediable, whether it has been remedied and whether or not there is a likelihood that the conduct

A would be repeated.

I remind you that testimonial evidence is not relevant at this stage. You are an experienced Panel and able to decide which evidence that you have heard is relevant to impairment and which should be left to be considered at the sanction stage.

B It is for you to apply such standards as you consider appropriate to accept for the profession and, in doing so, you may be assisted by the references I have given you. The general tenor of this guidance is that misconduct should only be considered to impair a doctor's fitness to practise if it is regarded by you as being a serious departure from the standards expected of a doctor with the status and level of experience of the doctor in question.

C You should also consider the matter in the light of the facts of the case and I remind you that there is no burden of standard of proof on either party in finding impairment. It is a matter for your professional judgment.

D At S1-7, paragraph 32, the Indicative Sanctions Guidance states at a review hearing, a fitness to practise panel would need to be reassured that the doctor is safe to return to practise and fit to resume practice either unrestricted or with conditions or further conditions. You will also need to satisfy yourself the doctor has fully appreciated the gravity of the misconduct, has not repeated it and has maintained his skills and knowledge so that patients will not be put at risk by the resumption of unrestricted practice.

E I therefore advise you that in determining whether Dr Southall's fitness to practise is impaired today, you should have regard to the finding of serious professional misconduct in August 2004, the submissions of counsel, the evidence given by the expert witnesses, as well as Dr Southall's evidence, and whether you find Dr Southall's fitness to practise is impaired or not is a matter for you to decide, applying your professional judgment to the facts of this case and the evidence you have heard. Thank you.

THE CHAIRMAN: Thank you very much, Legal Assessor. Do either counsel have any observations to make on that advice proffered?

F **MISS O'ROURKE:** Sir, just one. That is, the passage that was read at the end to you, saying you would need to be satisfied that he is fit to return to practise and the quotation. It is simply to make the point your Legal Assessor has not said, as I have said to you or is not confirmed to you that that passage has not been the subject of any judicial approval. It does not appear in the rules and does not appear in the Medical Act. Therefore, it is guidance that somebody from within the GMC, and therefore on one side - we know not even who and indeed who wrote it. We do not know whether it had any legal input into it and sir I would ask your Legal Assessor to confirm to you it has no statutory force. It is guidance. The courts have repeatedly over the years expressed views, for example, on Home Office guidance and otherwise and have said it is not binding.

G **H** **THE LEGAL ASSESSOR:** I confirm that there is no statutory authority for this, however, I would advise the Panel that it would be an exercise that the Panel would do, following the guidance.

A

MISS O'ROURKE: Save to say that, because when it uses words you need to be satisfied or certain that he is fit to return to practise, that does in fact impose a burden on the practitioner, and your Legal Assessor has rightly said to you it is burden neutral. It is a matter for judgment and so it does not sit well with the decision of Jackson J in the *Biswas* case.

B

THE LEGAL ASSESSOR: I did not say that the Panel had to be certain. I said it should satisfy itself.

MISS O'ROURKE: With respect, it is not far different if you have got to satisfy yourself. Sir, I have made the point. I will not rehearse again. I agree with everything else the Legal Assessor has said.

C

THE CHAIRMAN: Thank you, Miss O'Rourke. Mr Tyson?

MR TYSON: No comments.

D

THE CHAIRMAN: It is ten-past four. As I think everybody is now aware, the power is going down at five, and we are required to leave at that time. We shall certainly begin our exercise *in camera*. I see, in the circumstances, no reason whatsoever for parties to remain today. We will recommence tomorrow morning, electricians willing, at 9.30. Whilst, again, there clearly will be no need for the parties to be present at that time, there is always the possibility that whilst in camera discussions, we run into difficulty and require legal advice, in which case, we need to be able to contact the parties. If you could, as is normal practice, leave telephone numbers or contact numbers with the Panel secretary, so that in the event we do need to call you in early tomorrow, we can do so.

E

Otherwise, at this stage, I would say I would not anticipate our being in a position to have anything for you much before midday, and that around that time our Panel Secretary will contact you on the numbers given to update you as to whereabouts we feel we are.

F

MR TYSON: On one matter of housekeeping - we have had transcripts in relation to the previous days. I was wondering if we could be assured that we have transcripts, and we are into the transcript roll, as it were - whether we can get transcripts for these two days. I am not asking for them overnight, but in due course.

G

THE CHAIRMAN: Mr Tyson, if you really need to obtain the transcripts, judicious words in the right administrative ears will ultimately produce them. It does appear from what our shorthand writer tells us, in the normal course of events, in the event that the doctor were to be found not impaired, there would not be a transcript. If he were found to be impaired, there would be. I do not think we can take it any further today.

H

MR TYSON: I merely raise it and I will take it up with other channels.

THE CHAIRMAN: Thank you, ladies and gentlemen. Would all strangers, please withdraw.

STRANGERS THEN, BY DIRECTION FROM THE CHAIR, WITHDREW
AND THE PANEL DELIBERATED IN CAMERA

A

*(The Panel later adjourned until 9.30 a.m.
on Sunday, 22 September 2008)*

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GENERAL MEDICAL COUNCIL

FITNESS TO PRACTISE PANEL (MISCONDUCT)

On:
Sunday, 21 September 2008

Held at:
St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Case of:

DAVID PATRICK SOUTHALL MRCS 1971 Royal College of Surgeons of England
Registration No: 1491739
(Day Eight)

Panel Members:
Mr A Reid (Chairman)
Ms V Atkinson
Dr L Linton
Mrs S Breach (Legal Assessor)

MISS M O'ROURKE, Counsel, instructed by Hempsons, Solicitors, appeared on behalf of the doctor, who was present.

MR R TYSON, Counsel, instructed by Field Fisher Waterhouse, appeared on behalf of the General Medical Council.

Transcript of the shorthand notes of
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FITNESS TO PRACTISE

DETERMINATION

1

A

(The Panel continued to deliberate in camera)

STRANGERS HAVING BEEN READMITTED

D E T E R M I N A T I O N

B

THE CHAIRMAN: Dr Southall, at your hearing before the Professional Conduct Committee on 6 August 2004, the Committee found that in November 1999, Sally Clark was convicted of the murder of two of her children, Christopher and Harry. On or about 27 April 2000, you watched the Dispatches programme about the Sally Clark case, and, as a result, contacted the Child Protection Unit of the Staffordshire Police to voice concerns about how the abuse of Christopher and Harry Clark had occurred.

C

D

On 2 June 2000, you met Detective Inspector Gardner of the Cheshire Constabulary, the senior investigating officer into the deaths of Christopher and Harry, and told him that you considered that Stephen Clark, Sally Clark's husband, had deliberately suffocated Christopher prior to his eventual death and was implicated in the death of Harry. You raised concerns about Stephen Clark's access to, and the safety of, the third child, Child A.

E

F

At that time, you were not connected with the case but made it clear that you were a consultant paediatrician with considerable experience of life-threatening child abuse and that you were suspended from your duties by your employers, the North Staffordshire Hospital NHS Trust.

G

H

You relied on the contents of the television programme, Dispatches, as the principal factual source for your concerns and you presented as fact a theory about the case, underpinned by your own research. The PCC found your actions in doing so were

A precipitate and irresponsible.

On 30 August 2000, you produced a report at the request of Forshaws Solicitors,
B representing Child A. At the time, you did not have any access to the case papers,
medical records, laboratory investigations, post-mortem records, medical reports or
X-rays. You had not interviewed either Stephen or Sally Clark. Your report concluded
C that it was extremely likely, if not certain, that Stephen Clark had suffocated Christopher,
and you remained convinced that Child A was unsafe in the hands of Stephen Clark.
Further, your report implied that Stephen Clark was responsible for the deaths of
Christopher and Harry Clark. It contained no caveat to the effect that its conclusions
D were based upon the limited information about the case known to you. You declined
such an invitation to place such a caveat on your report, stating that it was likely beyond
reasonable doubt that Stephen Clark was responsible for the deaths of Christopher and
Harry Clark.

E
The PCC found that your actions were individually and or collectively inappropriate,
irresponsible, misleading and an abuse of your professional position. The PCC found you
F guilty of serious professional misconduct and determined to impose one condition on
your registration for a period of three years. The condition imposed was that you must
not engage in any aspect of child protection work, either within the NHS (Category I) or
G outside it (Category II).

The Council for the Regulation and Health Care Professionals (CRHP) appealed the
decision of the PCC and, on 14 April 2005, the High Court allowed the appeal to a
H limited extent. Collins J ruled that the PCC's decision to impose conditions on your

A registration was not unduly lenient. However, the PCC was unduly lenient in failing to
direct that a resumed hearing would take place at the end of three years. In addition,
B Collins J ruled that the condition imposed was not tightly enough drawn to prevent any
involvement by you in child protection work. An order, which was agreed between the
parties, was substituted for the PCC's original decision. The principle terms were that the
PCC's condition would remain in force from 7 September 2004 for a period of three
years. In addition, you were to report any concerns on child protection issues whether
C within or outside the NHS and whether clinical research-based or otherwise to the most
senior child protection doctor working for your employer/the relevant Primary Care Trust
as soon as possible. You were not to take any further steps or have any involvement
D whatsoever in relation to such concerns or initiate any communications with or seek to
influence in any way that child protection doctor/other person/body in relation to such
concerns. You were required every six months to provide the GMC details of any cases
where you had reported your concerns. You were also required to inform any employer
E of the existence and terms of the conditions. It was directed that your case should be
resumed at the end of the three-year period of conditional registration.

F On 23 July 2007, a Fitness to Practise Panel, applying the GMC's PPC and PCC
(Procedure) Rules of 1998 resumed and determined that the period of conditional
registration should be extended for a period of 12 months. This Panel has
G comprehensively reviewed your case under the GMC Fitness to Practise Rules of 2004. It
has recognised that this is a review hearing and not a rehearing of the original case.

H The Panel has considered under Rule 22(f) of the Fitness to Practise Rules 2004 whether
your fitness to practise is impaired by reason of misconduct and whether you have failed

A to comply with any requirement imposed on you as a condition of registration.

Mr Tyson, on behalf of the GMC, has stated that you have complied with all of the conditions imposed on your registration. Having received no evidence to the contrary,

B the Panel has determined that you have complied with all of the conditions imposed.

In reaching its decision on impairment, the Panel has considered all the evidence before it, including your own evidence. The Panel has had the benefit of hearing evidence from

C five expert witnesses in the field of child protection called on your behalf. This was Mr David Spicer, the assistant head of legal services with Nottingham Shire County Council; Dr Paul Davis, a consultant paediatrician; Dr Leonard Williams, a consultant

D paediatrician; Dr Jacqueline Mok, a consultant paediatrician; and Dr Margaret Crawford, a consultant paediatrician.

The Panel has also taken into account the submissions made by Mr Tyson and those made

E by Miss O'Rourke on your behalf.

Mr Tyson submitted that the seriousness of your conduct has not changed since 2004, and that the Panel should take this into account when considering impairment. At the end of

F his submissions, however, he stated that the GMC is neutral on the issue of impairment and reminded the Panel that this decision is entirely a matter for the Panel exercising its

G own professional judgment.

Miss O'Rourke submitted that your fitness to practise is not impaired, that eight years have elapsed since the events in question occurred and four years since the findings of the

H PCC, and the developments in paediatric practice since that time have changed

A perceptions of the seriousness of your actions in 2000.

B The Panel has heard that, since the last review, you have resigned from your NHS locum consultant paediatrician post. You have continued to undertake some teaching in the field of child protection. You are now the Honorary Medical Director of Child Health Advocacy International, where you work full time. Half of your time is spent in this country and half the time in other countries such as Pakistan, The Gambia and Zambia.

C Your work includes writing programmes and developing aid programmes for maternity, neonatal and child emergencies, and you are an advanced life support group instructor in paediatrics. You told the Panel in future you hope to work in a supernumerary capacity doing maternity work in an NHS hospital to learn skills to help with your international work.

D

E The Panel has considered the GMC's Indicative Sanctions Guidance of April 2005, in particular, in section 1, paragraph 11, it states:

F “Neither the Act nor the Rules define what is meant by impaired fitness to practise but for the reasons explained below, it is clear that GMC's role in relation to fitness to practise is to consider concerns which are so serious as to raise the question whether the doctor concerned should continue to practise either with restrictions on registration or at all”.

G Further at paragraph 32 it states:

H “It is important that no doctor should be allowed to resume unrestricted practice following a period of conditional registration or suspension unless the Panel can be certain that he or she is safe to do so. ...in all cases where conditions have been imposed the panel will need to be reassured that the doctor is fit to resume practice either unrestricted or with conditions or further conditions. The panel would also need to satisfy itself that the doctor has fully appreciated the gravity of the offence, has not reoffended and has maintained his or her skills and knowledge and that patients will not be placed at risk by resumption of practice or by the imposition of conditional registration”.

A

The Panel has also considered the case of Cohen v GMC in 2008 in which Silber J stated:

“It must be highly relevant in determining if a doctor’s fitness to practise is impaired that, first, his or her conduct which led to the charge is easily remediable; second, that it has been remedied; and, third, that it is highly unlikely to be repeated”.

B

The Panel endorsed the statement of the PCC in 2004 that there is a duty of care to raise child protection concerns in order to ensure the protection of children. In the context of 2008, this duty has been strengthened, as Mr Spicer stated, referring to the case of JD, the current opinion of the Law Lords is:

C

“...paediatricians and other professionals should not be inhibited from expressing their opinions and putting forward information by some fear that they are going to suffer some complaint by an aggrieved parent”.

D

The current GMC guidance, 0-18 years: guidance for all doctors (2007), addressed this issue, and states:

E

“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. Your first concern must be the safety of children and young people. ...you must be able to justify a decision not to share such a concern”.

F

The PCC in 2004 were critical of you for not interviewing Mr and Mrs Clark before submitting your report. They had heard the view of Professor Tim David that it was important to do so. This Panel has heard from four consultant paediatricians who say that this is not current practice. Dr Mok stated:

G

“I see it as normal practice that you do not interview parents”.

Dr Crawford stated:

H

“It would be extremely rare to interview the parents where there are child protection concerns. ...it is just not something that is done and indeed do I believe should be done. ...it is for the investigation authorities, that is the police and social services, to do the interviews”.

A The Panel, therefore, accepts that your actions in this regard should not now be criticised.

B The Panel found your evidence to be clear, cogent and reliable. You have acknowledged that you should have contacted your employer to inform her of your intentions and in future you would also speak to colleagues before reporting your concerns.

C The Panel has accepted your evidence that whilst you were entitled to express your concerns and report your views, the language you used was “inappropriate”, “injudicious” and “too strong”; that you were wrong to present your report in the format you did; that you were wrong to use phrases such as “almost certain” and “beyond reasonable doubt”; that you should have made clear the information on which your report was based; and should have indicated your lack of access to certain information. The Panel has noted your recognition that use of injudicious language can damage the message a paediatrician is trying to put across and your concern and regret that this is what happened in this case. You have also told the Panel that you went further than you should have in reporting your concerns. You stated that, in similar circumstances, you would now raise your concerns and stop at that.

D You have made various other expressions of regret, but have not resiled from your view that the events in the hotel room could have indicated non-accidental injury. The expert witnesses before this Panel have shared that view. Dr Williams stated:

“I would have thought very, very strongly that this must be looked into very carefully indeed”.

E You have acknowledged that you have learned a lot from these proceedings and that it

A will impact on all the work you do. You have expressed regret for the impact the PCC findings have had on the profession, and remorse that your actions have contributed to the fear that now exists among paediatricians involved in child protection work. The Panel
B considers that you have demonstrated considerable insight into your previous failings.

The Panel is mindful that four years have elapsed since the PCC hearing in July 2004 and that eight years have passed since the events occurred. The Panel has determined that
C although the PCC considered your actions serious in 2004, the Panel today, in the light of the evidence given to it by eminent paediatricians and your expressions of regret and remorse, considers that a finding of impairment is not justified.

D The Panel is satisfied that you have kept up to date in the field of child protection.

The Panel has determined that your fitness to practise is not impaired.

E The present conditions on your registration will expire on 16 December 2008. In the light of the Panel's findings and the submissions made by both counsel before the hearing
F adjourned in August, the Panel has determined to revoke the conditions currently imposed on your registration with immediate effect.

G That concludes this case. Miss O'Rourke, Mr Tyson, thank you very much indeed for your assistance.

H