

GENERAL MEDICAL COUNCIL

FITNESS TO PRACTISE PANEL (PROFESSIONAL CONDUCT)

Regent's Place, 350 Euston Road, London NW1 3JN

Wednesday 21 September 2011

Chairman: Dr Jacqueline Mitton

Panel Members:

Mrs Leora Lloyd
Mr Arnold Simanowitz
Dr Abhay Vaidya

Legal Assessor: Mr Robin Grey QC

CASE OF:

SOUTHALL, David Patrick

(DAY SIXTEEN)

MR RICHARD TYSON of counsel, instructed by Messrs Field Fisher Waterhouse, solicitors, appeared on behalf of the Complainants.

MISS MARY O'ROURKE QC and MR OLIVER WILLIAMSON, of counsel, instructed by Messrs Hempsons, solicitors, appeared on behalf of Dr Southall, who was present.

(Transcript of the shorthand notes of T A Reed & Co Ltd
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A THE CHAIRMAN: Good morning. Miss O'Rourke, we are ready when you are.

MISS O'ROURKE: Thank you, madam.

Madam, you have got my document, D48, can I just make a couple of preliminary comments before I move to it? It is an overall summary of our position, which is this: as far as the Dinwiddie letter is concerned, we say that does not even amount to misconduct, let alone get into the category of serious professional misconduct, and as far as the special cases file is concerned, even on your stage 1 findings which bind us, we say there is still an issue as to whether it is misconduct, and even if it is, it certainly is not serious professional misconduct. Madam, I take that as my starting point.

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Turning to my document: in paragraph 1 I set out what the question is. I do not think there is any issue on that.

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At paragraph 2 I identify for you what the two issues are, misconduct and seriousness. Madam, I have had the advantage in seeing in draft some advice your Legal Assessor may give you, which suggests that there are three questions: is it misconduct? Is it professional? Is it serious? But he then says he understands there is no dispute on the question of professional, and he is correct. Therefore, although in theory there are three issues, there are in fact only two because if you find misconduct then it is professional because we are not seeking to say it was not in a professional context. Then you would move on to question 3, but that is why I say there are two issues although the Legal Assessor lists them as three, but on the facts of this case there are two.

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At paragraph 3 I deal with a leading case, which I say is *GMC v. Meadow* in the Court of Appeal. We have already given you some part of that case, which was marked as D27. That extract is probably not sufficient in the light of a question which was put by Mr Simanowitz to Dr Crawford about surely if something has been found to be a breach of confidentiality or an abuse of position that equals deplorable, and in the light of that question I think I probably need to look at the question of misconduct in slightly more detail. We were going to hand you a few more pages of *Meadow*, not the totality of it because it is a long decision and most of it deals with immunity of expert witnesses. I do not know whether you want to substitute it for your D27 or give it a new D number. It might be better to substitute it.

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MR TYSON: I am perfectly content with the way that Miss O'Rourke wants to deal with it.

THE CHAIRMAN: We will mark it as a new D27 document. (Same handed)

MISS O'ROURKE: Madam, this case involved a consultant paediatrician, Professor Sir Roy Meadow, giving evidence as an expert in the Sally Clark case in criminal proceedings. The case came before the Fitness to Practise Panel and you will see the first page of the new D27 deals with the FTP hearing and you will see at paragraph 178 that the Fitness to Practise Panel made findings of guilt and of serious professional misconduct in respect of use of statistical material, of which he had no expert knowledge or experience, failure to disclose to the jury that he lacked expertise or experience, mistaken reliance or use in evidence of erroneous or irrelevant material, incompetence and misunderstanding in presenting that evidence, and a foray into

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A | statistics outside his expertise. These were stage 1 finding of incompetence, mistaken reliance, failure to disclose. The case, as you see, at paragraph 179, took 16 days before the Fitness to Practise Panel. Professor Meadow, as you will see at paragraph 185, the findings in determination, was found guilty of serious professional misconduct, and at paragraph 187 you will see they concluded that in his treatment of statistics in his evidence he strayed outside the ambit of his expertise and had done so without warning the jury.

B | At paragraph 188 they concluded those findings and in the determination they found serious professional misconduct, which was aggravated by his eminence and his adherence to his case but that his conduct did not merit condemnation.

At paragraph 189 it notes the Panel went on to impose a sanction of erasure.

C | The case was appealed to the Administrative Court and the Administrative court (paragraph 191) found that the Fitness to Practise Panel had wrongly found Professor Meadow guilty of serious professional misconduct in giving his evidence in the way he did.

At paragraph 192 they dealt with wrong condemnation, wrongly interpreted or applied, and found that the finding (paragraph 194) was not justified on the evidence before it.

D | The judgment of Collins J also included a finding that in any event Professor Sir Roy Meadow enjoyed immunity from complaint. The case went to the Court of Appeal therefore on two issues, the GMC being the appellant, one as to whether there was an immunity from complaint for an expert giving evidence in court, and that was determined in the GMC's favour, secondly, whether Collins J got it wrong by saying this was not serious professional misconduct. The Court of Appeal dismissed the
E | General Medical Council's appeal by a majority verdict of two to one on the question of the serious professional misconduct. It is that which we say you should look at and take from this case.

F | If you turn to paragraph 198, to which I took you previously, you will see that Auld LJ says what constitutes serious professional misconduct, and goes on at paragraph 200 to refer to the *Roylance* case, but then more significantly, on the following page he addresses seriousness. In the last four lines he says 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’.”

G | At paragraph 201 he says:

“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”

and can I highlight those words because that is the sort of context and area you are in:

H | “... but also of incompetence or negligence of a high degree.”

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Again, that is territory you are in when you are looking at misconduct and, indeed, serious: you are looking at bad faith, moral turpitude, incompetence and negligence to a high degree:

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“It may also be professional misconduct where, as here, a medical practitioner, purporting to act or speak in such expert capacity, goes outside his expertise. Whether it can properly be regarded as ‘serious’ professional misconduct, however, must depend on the circumstances ...”

Can I highlight those words because that is where I say you are now, and it is why it was right that you heard evidence as to the circumstances in order to decide whether it can properly be regarded as serious.

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Can I particularly highlight the following words: “... including with what intention”, so therefore Dr Southall’s intention and avowed intention is highly material: “... and/or knowledge”, that is again very relevant in terms of what he knew at the time and what guidance there was at the time: “... and understanding”, so what did he understand, and the words used there are, “He strayed from his expertise” but it would be the same words adopted across, “how did he stray from what he should have done”: “... how he came to do so”, which is again why we have called the evidence we did. Can I highlight these words because they are very important, “to what possible, foreseeable affect”, that is going to be very relevant when you consider the nonsense of the M6 motorway crash because what foreseeable affect of putting these documents into a file that are not the Staffordshire main notes, when nobody would foresee these children coming back, and they did not: “... and what, if any, indication or warning he gave to those concerned at the time that he was doing so.” Again, all relevant to the circumstances and what is concerned.

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At paragraph 202 ---

MR TYSON: Madam, can I just say that I would like to come back at some time on the legal effect of paragraph 201?

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MISS O’ROURKE: Paragraph 202:

“Particular considerations thrown up by the circumstances giving rise to this appeal ... are the overlap of forensic and professional roles of an expert witness ...”

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We could adopt those words and adapt them to say “clinician” and “child protection expert”.

At paragraph 207 you get assistance in terms of how this test is now being applied to the facts of this case, and you see Auld LJ saying a medical expert should know his limits, his knowledge and instincts and his field. However, the process is not always as ordered or as considered as it should be. The issues may not always be sufficiently carefully defined, etc., etc.

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A You see him looking at the circumstances of this case, and you get some guidance and assistance, in my submission, from the thought processes he goes through.

You see it again at paragraph 210 where he says:

B “... that Professor Meadow was undoubtedly guilty of some professional misconduct. In his preparation for, and presentation of evidence at, the trial of Mrs Clark he fell below the standards required of him by his profession. Although not an expert in ... he put forward a theory ... in doing so, he relied ... on statistical [evidence] ... which had nothing to do with the probabilities. He misunderstood and, by implication ... misapplied, etc.”

C I highlight that because my submission would be that what was found at stage 1 as far as Professor Meadow was concerned is much more serious than anything that has been found against Dr Southall in the context of the Dinwiddie letter or the SC files. What was found against Professor Meadow potentially had an impact in a criminal trial, and, indeed, upon a jury, and indeed upon a multiplicity of legal proceedings, and, indeed, foreseeably so. Yet, two senior Court of Appeal judges said this does not meet the threshold for serious professional misconduct. That is why I say it was of concern that Mr Simanowitz asked the question he did. You are all experienced panellists and you all have been in cases where you have had findings of fact at stage 1 that have which I call a pejorative element to them. It is inappropriate or it is not in the best interest or it is not appropriate for a registered medical practitioner, but you have all also been involved in cases where that is found not to give rise to misconduct or serious professional misconduct within the definition because it is at a relatively low level, or there is explanation of it which puts the context rather differently and therefore you do not find misconduct.

E In the context of this case, you will see at paragraph 211 Auld LJ said:

“...[he] did not intend to mislead the trial court and that he honestly believed in the validity of his evidence when he gave it.”

F I highlight those as factors they took into account as part of the circumstances. No-one in this case has said that David Southall acted dishonestly. Nobody said in this case that David Southall acted other than believing himself to be well-meaning and well-intentioned. Nobody in this case has said he was surreptitious in hiding the Dinwiddie letter point. Nobody has said there was, as is said here, evidence of calculated or wilful failure, and he uses “best endeavours”. Nobody has actually said he has breached any particular guideline when looking at it.

G You will see Auld LJ saying at paragraph 211:

“As Collins J observed in paragraphs 55 and 56 ... in the absence of bad faith or recklessness, only a very rare case could justify a finding of serious professional misconduct ...”

H Where is the bad faith or recklessness in David Southall’s conduct which you found at stage 1?

A | You then see the quote:

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

Paragraph 212:

B | “The question, therefore, is whether such misconduct as the FPP properly found in the circumstances of this case was ‘serious’, or, if it was, sufficiently serious to justify the sanction of erasure ...”

He then comments on two strands of the evidence.

His conclusion comes at paragraph 221, after he had reviewed the material. He said:

C | “... for all those reasons, and applying whichever end of the narrow range of rival formulations of the test for Collins J of ‘wrongness’ of the FPP’s, or for this Court, of his conclusion ... I am firmly of the view that the FPP was wrong and that Collins J was right on this ground of appeal.”

That is the question of serious professional misconduct:

D | “Accordingly the question of sanction does not arise.”

He does go on to say that if it did he finds the finding completely disproportionate and not an appropriate penalty for Professor Meadow’s “uncharacteristic honest errors in this difficult case.” I would employ the same words for David Southall, uncharacteristic honest error in difficult cases, and then you see what is said by Auld LJ in terms of long and distinguished service to the profession.

E | So, madam, the situation is this, in many of the cases that you and your colleagues deal with it is easy. I think the last case Dr Vaidya and I were involved in together concerned a doctor who had indecently assaulted a co-worker at the hospital. That is easy: indecent assault, nobody is going to argue about it. We all know what happens but can I remark in passing, in that case for an indecent assault of a co-employee, it was a 12 months suspension, and here we have Mr Tyson asking for erasure.

F | The case that delayed me from coming to be with you last Monday, and therefore we had to start on Tuesday involved a doctor tampering with records, and we are talking about real tampering. She tore off part of a CTG trace and binned it, and she wrote something on a CTG trace that never happened and in so doing tried to put a midwife in the frame for having done something wrong, and she told a lie about it in the disciplinary hearing. That is real tampering with a record; that is trying to create a situation you never had; it is dishonesty, and we can all recognise that immediately. It does not take anybody to see it is serious professional misconduct. I say again in passing, that was a three month suspension with no review. That was not an erasure.

G | Those cases are easy. We all recognise them. There is not an issue. Dishonesty, indecent assault, there we go, those are incompatible with the conduct of a doctor, but what we have got here are issues of not ideal, not ideal not to name the consultant in the

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A | Dinwiddie letter; could have done better by photocopying the records and putting it in somewhere else. That is the context in which you have to look at it, and you do have to look at the very many cases as Panel members you have sat on were at least obvious. Think of the sort of cases that you have done in the last year or two years that have amounted to serious professional misconduct, put this alongside and in my submission you will not even get to the question of misconduct.

B | Paragraph 4 of my document, I say *Roycastle* and *Doughty*, which were cited to you by Mr Tyson are not in fact helpful because the focus was on the issue of “professional” and that, as if have told you, is not the issue in this case.

C | The test for seriousness, as I tell you at paragraph 5, is what would “professional brethren of good repute and competency” think and the reference there is to C23 which you had put before you by the claimant as part of the 1989 guidance that Dr Southall would have been bound by. So it is clear that it is for the medical profession to look at it and it is to be judged according to the rules written around and written governing the profession that; that it is for medical people with the knowledge and understanding of in experience paediatrics to say what they think is disgraceful, dishonourable and deplorable. As I say, the Panel, save for Dr Viadya, are not medics and it is very difficult, in many cases there is no issue. Indeed, it is one of the points they made in *Meadow* because the issue is something to do with honesty or something to do with, as

D | here, giving evidence in court, and so lay people are equally as qualified as doctors to say “We recognise that is misconduct”. Where what you are concerned with is clinical practice and how you practice in a grey area, in a complicated case where there are no guidelines and it was many years ago, it is very difficult for lay people. If we went out and asked the man on the street what is he going to know? Therefore, we have called before you evidence cognisant of that fact and what the test is. Of course we recognise that Dr Vaidya will be able to have an input, although it is unknown to us whether Dr Vaidya was in practice in the UK 21 years ago when this occurred. But that is neither here nor there. He will have some idea of what the standards were at the time of writing letters and dictating them. He asked questions of Dr Southall and Dr Dinwiddie which clearly indicate he understands how a consultant sends letters. Many of you do not have that expertise and therefore you do need to listen to the evidence and pay attention to it. Dr Vaidya, again, one would presume, will have had a secretary that he has dictated letters to, who deals with his correspondence, a busy consultant cannot be doing it himself. Those are the sorts of issues that you have to look at.

E | At paragraph 6 we say no paediatrician has said to the Panel, “This is a serious error”, the GMC, or the complainants, whatever they are, have not called any evidence to that effect. Indeed, it goes wider. We are not aware of paediatricians rushing into print to condemn David Southall. Tim David could have been called. He did not come. You have seen the letter. We invited him to come and he would not come.

G | You have to put these events in the context of now. We say in overall summary that this is a muddle of the records. Dinwiddie is an administrative issue, nothing more. It was all well-intentioned and not the stuff of misconduct, and it was a difficult, unprecedented situation to be in.

H | Paragraph 8: we say it is common to have stage 1 findings of “inappropriate,” et cetera, but not at the end of the day have either “misconduct” or “so serious”. *Meadow* is the

A very clear example of that because what happened in *Meadow*, if you were weighing that up on a scale and asking paediatricians about that compared to what David Southall did, they would say that *Meadow* is much more serious. He went to court; he got in the witness box; he did not have the expertise; he did not disclose he did not have the expertise and he gave evidence in front of a jury. It could have had an effect. It is not clear whether it did have an effect because many other issues did, but anybody looking at those two would say, “Where do they lie on a scale? *Meadow* is up *there* and David Southall is down *here* in our submission.”

Paragraph 10: “Inappropriate” and “not in the best interests”; I made the point yesterday. These can be the same things. The single act or omission is what you are looking at because misconduct is an act or, indeed, an omission when you have a duty to act, so it does not give rise to multiple findings. Mr Tyson’s suggestion that it is “three of this” and “four of that” really does not help you.

Paragraph 13: An abuse of professional position does not mean serious professional misconduct. *Meadow* tells you that. The test in the 1989 guidance tells you that and you should not misunderstand it. The question is, yes he may have abused a professional position. That means no more than that “You had the opportunity to do this or that because you were in the professional position, and you abused it. You did not do as you ought to have done. It means no more than at worst you fell below the standard.” You have to look at the standards of the time. I think that is obvious and nobody will go behind it.

Paragraph 15: you are not determining policy. It is not the failings of a system.

Paragraph 16, very important: these are not specimen charges. You may be aware of cases in the criminal courts or elsewhere where somebody gets charged for specimen charges, taking into account this has been done on many, many other occasions. This is a complaint prosecution and so you are only dealing with these two children.

Mr Tyson’s questions went wider. Professor David’s evidence at stage 1 certainly did. That is irrelevant now because, of course, he is not addressing you on seriousness. You have to be careful in borrowing some of his evidence in. It is fine that you made stage 1 findings of fact upon them but in now looking at seriousness, do not be led astray because there is a risk you could be by reference to Professor David’s evidence which is not focused on what you are dealing with at this stage, and by Mr Tyson’s questions that went way beyond your stage 1 findings. I am being accused of trying to undermine those findings. I do not, but Mr Tyson seemed to be trying to add to them by multiple questions about whether the Dinwiddie letter was an appropriate letter, or whether somebody else should have been contacted directly or whether David Southall should have acted more forcibly. None of those is part of the findings that you are now considering.

Previous findings of SPM: you did, of course, make a previous finding of SPM in a determination that has now been quashed by the Court of Appeal. You have now heard significantly more evidence since when you made that finding, particularly on breach of confidentiality, appropriateness of actions and these particular children. We say, based on how the case is now being presented, you were far better informed than when the stage 1 decision was made. The evidence that you have now received consists in putting the matter into context. This is, of course, common at stage 2. That is what happens.

A | You get an explanation for it and you get a little bit more evidence as to the underlying circumstances so that you can judge the context. You have, for example, by way of new evidence Dr Dinwiddie's evidence which puts a little bit more in context, whether the parents would have had any right to be aggrieved about community paediatricians. It adds, we say, to the question of significance.

B | You also have evidence from Dr Horridge about what went on in East Berkshire where she was not allowed to put the chronology on the mainstream clinical record so you have a bit more of an idea about an appendix 1 document and what the practice was in another trust, even for the creator of the document, where it may be said to be more than original, because she is creating it.

C | That helps you with the context. You have evidence from her about flagging systems and tagging systems and what went on, again helping you a bit more with the context of what went on at the time in respect of some of the same documents and somewhere else. You are looking, when you look at the Dinwiddie letter at something that we say Dr Williams described as not even a mistake, just that it could have been better to do it this way. It does not go wider than that and, indeed, yesterday Mr Tyson made lots of reference to David Southall saying "Non ideal, could have done better." "Non ideal" and "could have better" do not equal misconduct. It simply means somebody made an error, made a mistake, was inefficient and fell short of their own standard. It does not mean that it is misconduct.

D | The focus of your previous findings of serious professional misconduct obviously involved the *Mrs M* case, which you will rightly be advised to put out of your mind. We say, when you take that out, which of course you must, how can what is left really become serious professional misconduct. Indeed, in your determination on it before and these matters did not play a significant part to your finding of serious professional misconduct.

E | Mr Tyson refers to the SC files matters occurring over a considerable period of time. With Dr Dinwiddie, of course, it is a single instance but appendix 1 for Child H relates to a two year period. In fact, it is only six documents over that two year period. It is relatively limited. For Child D it is four years from Dr Southall's involvement. Again, it is intermittent and there are long gaps. In particular, everything goes quiet for 18 months on that file. It is not a question of saying this is repeated, persistent conduct. Apart from anything else, once you make the original mistake of saying, "I am going to file this on SC files because it is a better place to have it, because I am a CP expert," then the rest follows. You put it on the same place.

F | The Dinwiddie letter: Dr Dinwiddie highlighted in one of his letters he carbon copied to a community physician and of course, madam, you correctly asked him a question as to, "Is that not a little bit different?" It is not so different and it does go to the degree of inappropriateness of Dr Southall's actions. We say the difference is small. Why is what Dr Dinwiddie did appropriate, and Dr Southall inappropriate? You, of course, made a finding of inappropriate, and we are bound by it. We say his actions fall just on the wrong side of the line because of the slightly different role of the community paediatrician and because Dr Dinwiddie had consent. Just because it is inappropriate does not take it into the conduct/misconduct of *Meadow*.

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A | What we have done next in paragraph 29 is we have had a look through the records and not a complete trawl. We have had a look through the records to see if we can find anything else on the records that are before you for these children where somebody has cc'd in somebody else. Rather than take you to all the page references, and you have to dig them out, what we have done is, we have put the letters that we have listed as A to F there in a little clip of correspondence which we will now cause to be handed to you as D49. (Document marked D49, circulated)

B | The first one in that clip relates to Child H. It is a letter sent in 1988. You will see that the senior ENT registrar cc'd "ENT Secretary", so no named person.

The second document again is a Child H document. This is now May 1988. Again, you will see a senior ENT registrar on the second page cc's "General Surgeon" and "ENT Secretary", so it goes to an unnamed general surgeon.

C | The third letter comes from Karen Whiting, who gave evidence to you; she is now Karen Horridge. It is a two page document. It relates to Child D and it happens on 17 December 1996. Indeed, it is one of the documents that is in the SC file. You see, as far as her chronology is concerned, and who she is copying it to, she copies it to social services and does not name any individual at social services or any case manager or identify anybody else; simply to social services.

D | The fourth one again is a Child D document. Indeed, it is an SC file appendix 1 document again. This is from Dr Whiting (Dr Horridge again). You look on the second page of it; she cc's it to the "Head of Social Work" at Great Ormond Street. Again, no named individual.

E | The next one comes from a Child Protection Co-ordinator, again in respect of Child D. You will see on the second page of that document – it is numbered 37 at the bottom and then 38 is the second page – he cc's it to the "Out of Hours Team" at Wokingham and does not name any individuals.

F | Then finally in that clip of correspondence again, there is a Child H document sent by a consultant paediatric neurologist. It is Singleton Hospital in Swansea and addressed to Corinna Weaver at Cardiff, but it is cc'd to the SCMO. We think that is the Swansea Community Medical Officer, as we would understand it.

G | Those are just six examples. We could have found more if we had spent a lot of time going through the records. They are all from the records of these children. If you were to pull the records of children or adults round the country at this time in 1990, and these go before and after it, we would not be surprised to find the same sort of thing happening. The reason, as we say, at the top of the next pages, is that the standards of the time are crucial. This was a time when use of the world wide web was not commonplace; indeed in 1990 I think it barely existed. It was not possible to simply search in a computer for information. Written communication was by letter or, in some instances, fax if you had it. There was not email; obtaining information was slower, it was more difficult to process and there were no guidelines in respect of it. Again, if Dr Vaidya was in UK practice at the time he may be able to help you as to whether his understanding is what is reflected in that document. The consultants did the best they

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A | could; they were busy. They passed it over to the secretary to sort it out and they moved on to doing what was more important.

B | At the end of the day, is somebody really saying that is misconduct? The only adverse finding you have made, because you did not find proved at stage one the copying it to Corinna Weaver, was that there was no name on it and so we did not write “Dr Joe Bloggs”; you wrote “Consultant Paediatrician”. We say it was not very easy to find the name in a specific department. You have heard from Dr Williams, Dr Dinwiddie and Dr Southall. It was the usual practice for the secretary to deal with it. At worst this is an example of inefficiency, non ideal, as he said; no guidelines breached, no suggestion of improper motive. If there was, that would be misconduct, but that is not this case.

C | We say it is clear he was well intentioned and the proof of that is the same decision was made on 10 July 1991 at a case committee meeting; no named consultant at Royal Gwent was specified and, indeed, turn up those case minute meetings. It does not even say “A&E department”; it says the A&E department at Caerphilly Minors and it says, “The hospital at Royal Gwent”. We say that is relevant to whether, in fact, it is misconduct when you have a multi-agency meeting wanting to do the same and charging the social worker with doing it. Where is there a wrongdoing in it? If it was okay that the consultant had been named, then what is the offence of wrongdoing in not naming him? Can it be said there is a greater risk of a document going astray?

D | Certainly Mr Simanowitz asked Dr Dinwiddie a question to that effect, but not when it is addressed to the correct department at the hospital. You have heard David Southall’s evidence on it, and his thinking. You have also heard Leonard Williams on it, and Margaret Crawford.

E | More particularly, as we say at paragraph 34, if the position of confidentiality is explained by Dr Crawford and Dr Williams, you have heard nothing to the contrary. Any doctor and any secretary would be bound by confidentiality. Again, Dr Vaidya may be able to help you with that as someone who will have received confidential correspondence, or for somebody who had had a secretary working for him, who deals with it, who receives it within the department and is bound by confidentiality.

F | In any event, although the case of *JD v East Berkshire* – and of course D is the same Child D – is subsequent to these events, it declares the common law. The position is that the House of Lords has said there is no duty of confidentiality to the parents, only to the child and child protection cases. You may say, “We made our finding and we found a breach of confidentiality as far as the parents are concerned.” That finding, of course, cannot be overturned although it may have been different had the case been relied upon. The simple answer is this: it does actually go to whether you can rely upon it to say it is misconduct. If he had a greater duty which overrode, then simply that is the end of it. He cannot have been guilty of misconduct if the two are in conflict.

G | Paragraph 36: nobody knows, and nobody has brought any information to say that there was a huge number of consultants and a huge department and this was a problem. There is no evidence of any harm. There is no evidence the document fell into the wrong hands. We say naming the paediatrician would not have made it any less likely and difficult to say the risk is greater. You have again heard evidence that the way it works in a hospital is it goes to the secretary, who allocates. The reality is, there is no
H | evidence of harm. This has come to light and has become an issue because Mrs H saw

A | all her files, and saw this document. Of course, it was on Great Ormond Street's file, on Corrie Weaver's file and it was on the GP's file. As a result of searches for medical records she saw it and she took umbrage. She took umbrage not at the fact that a paediatrician was unnamed; she took umbrage at the fact that David Southall had written this letter and tried to involve other people because she was not happy with his suggestion. So be it. However, your finding as to what is wrong, is simply the lack of name.

B | Mr Tyson suggested Mrs H is distressed about the letter. If the paediatrician had been named she would have been equally distressed, so it really is not relevant to the quality of the act because that is what you are judging, the quality of the act. In any event, even if she is distressed, he is acting in the best interests of the child and everyone that you have heard from, including Dr Dinwiddie who was the recipient of the letter, is absolutely clear that there were justifications for doing what was done and you see it because the child protection conference the following year did the same.

C | Paragraph 39: Dr Southall was not secretive. He openly copied. If he wanted to be secretive about this and be surreptitious he could have written a separate letter or copied the letter separately, blind copied it, to the paediatricians. He did not.

D | Dr Dinwiddie had no issue or quibble with his actions. It would have been clear to him at the time what had occurred. He did not write a letter back saying "David, do not do this." He simply wrote a thank you letter. He did not feel that Dr Southall was usurping his function, something put to Dr Williams and Dr Crawford out of nowhere, and not relevant to your findings of fact. Why was Mr Tyson asking those questions? Was he asking it for prejudicial reasons, to lead you astray again, that this is somehow or other some relevant consideration? Because it is not. It does not go to your findings. We say this is barely inappropriate; indeed, it is why the experts struggle with it. It is barely a breach of confidentiality because it was done in the interests of the child, and the parents had no confidentiality when it is child protection, done in the perceived best interests of the child. That is what is relevant, because when you look at conduct and misconduct, and what it means, you have to look at what was the intention of the doer. Was he going out to be naughty? Was he going out to engage in bad conduct? Was he wilfully doing it or did he make an administrative error when a busy practitioner?

E | We say the Panel is also assisted on the deemed consent of the parents. That goes too in any event if they had given that consent to Dr Dinwiddie, that the local paediatrician, the community. The paediatricians would be involved. Where is the crime?

F | You also have Dr Dinwiddie's own evidence on why he wrote MSBP in handwriting showing, again, the sensitivity at the time of child protection issues in this type of diagnosis.

G | The correct position is that consent can be overwritten and his actions were in fact appropriate in the child's best interests although that was not the issue.

H | The Dinwiddie letter is a signing off. Dr Dinwiddie told you he never came back for advice to Dr Southall. Indeed, you see it in that the letter that he writes which is one of the Appendix 1 documents at 3390 is a thank-you letter and thereafter he never writes again.

A Special Cases Files. Again, I repeat, and it is worth repeating when you see Mr Tyson's closing, that this is a complainant prosecution and it is these two cases only. Yes, you have heard a lot of evidence from Tim David, David Southall himself at Stage 1 about policies and lots of other files. Put it out of your mind, it is irrelevant at Stage 2 because you are dealing only with the facts found proved. You are only looking at a relatively small number of documents Appendix 1, six of Child H's which would not be in the B Brompton records or indeed in North Staffordshire, and 30 of Child D's and I will come back to them, but they are only a tiny proportion of the total Special Cases Files on these, most of which specifically had social services material.

B Can I clarify that Mr Tyson yesterday asked Dr Southall some questions about well, here is the admissions you have made about documents on the SC Files. The point he ignored is a lot of the material that was on the SC files was in fact also on other files at C the hospital. What we are taking about here is a number that did not make it to the main records. That is what puts it into the misfiling category. By their nature, a lot of the letters are for information only and I will do a final trawl through them at the end.

D Dr Southall's problem, therefore, arose in large part from the fact that after discharge where was he going to put what he believed to be child protection material? That is important. He believed it to be that and he genuinely believed his role was medico-legal because he was not ongoing treating.

E As far as Child H is concerned, there are a total of seven documents that are on the Appendix 1. Two relate to the period of inpatient, five relate to the period after being an inpatient and all five of those are letters to Dr Southall, not from him. So there is somebody else sending a letter. Four of them are in the context of keeping in touch and information for child protection and one is a covering letter with some tapes from Cardiff which is such an insignificant document that one really would have to say even if you asked the man on the street about this, this is missing, he would say "So what?" It is a covering letter sending the tapes. What is important are the tapes, what is important are the results of the tapes, what is important are the reports of the tapes.

F As far as Child D is concerned, only one document relates to while he was an inpatient that has already been said to be a computerised data sheet that is of no significance and everything is in the context of child protection. In fact, when it is said that the period is four years, the first of those documents is 395 and the last of the documents is 1198. It is a period of three and a half years, but it is very intermittent over that period with a long gap between September '95 and October '96 when there is no correspondence at all. You have a year in there where it did not happen so you have possibly got, at best, two.

G The records were not married up at North Staffs but they were accessible to those who would have had any interest. Can I highlight there that is where Dr Southall has changed his position, in part because you rejected it as a defence. His case before you at the initial hearing had been well, they are all part of the one lot of records that are in two places, they are split in two, but they are all part of the records. You rejected that and said no, the SC Files were not part of the main clinical records. He is bound by that finding and it was therefore surprising yesterday to have Mr Tyson ask some of the

H

A | questions he did about resiling from his position because of course you rejected that defence. Cover note for the tapes irrelevant.

Child D. All but one were read or filed with the treating doctors and one is the computer data sheet. No evidence of any treating clinician or doctor lacking any information as a result of these the Appendix 1 documents and that is probably the most significant thing in the SC case – impact – how inappropriate, foreseeable, as said in *Meadow*. Nobody at all was impacted; nobody.

B

If you said to the man on the street he threw some correspondence into a separate file but in fact the children never came back, nobody would ever have expected them to have come back and nobody treating the child was ever missing these documents because they had their own copies because none of them were handwritten originals of any assessment, they would say what is the fuss about? That is exactly what I do say to you. What is the fuss about? It is why context is everything.

C

Paragraph 54. There is a real need to differentiate the records in issue from where they are handwritten notes relating to original clinical treatment and assessment. That is what we understand by original hospital medical records. The guy who is on the ward with the patient's file writing down the examination that he has undertaken, those notes are handwritten; they are not copy correspondence. They are there and it is what somebody observed and nobody else has seen and everybody else needs to see what was done.

D

The overwhelming majority of the documents that you have got are copy correspondence. The word is used in your charges "original copies" but what does that mean? It is copy correspondence. It is cc'd into him so it is original in that sense as opposed to he has gone away and photocopied it, but it is nonetheless copy correspondence.

E

The whole point is it is in the files of those who are treating and easily available to those who need it and it is not having any impact at all that it is not in Stoke because, get the reality of this case, the file on the Brompton for Child H and the file in Stoke sat there untouched other than David Southall, as we know yesterday, asking for the Child D file to come out so that he could look at it for the purposes of reminding himself for a case conference. They sat untouched. No other clinician ever called for it to be brought out, nobody else ever had any case to read it.

F

MR TYSON: There is no evidence to that one way or the other.

MISS O'ROURKE: That is the whole point. The burden is on the complainant to the beyond reasonable doubt and there is no evidence that anybody ever looked for it, that they ever investigated it and so therefore there is no evidence, it is as simple as that. There is no evidence that anybody touched it, requested it or acquired it and that is highly significant.

G

Correspondence by its very nature is two-way. That is why it is very important, as the experts have told you, this is correspondence. Professor David said the records support the delivery of care. If that is right, and we do not dispute that, then it is important that

H

A | Dr Southall was not delivering care at North Staffs to either of these, but nor was anybody else.

Questionnaire. That is easy. It is not collected by a clinician, it is not used in clinical treatment. Martin Samuels said it has got no clinical impact, so if you are looking at that in terms of the seriousness then that is a misfiling at worst, although it is highly debatable whether that needs to be in the clinical records. Yes, you made a finding of it at Stage 1, you did not have Martin Samuels' evidence; you are now better informed.

B

Accessibility in unified records. Remember what you are dealing with here and what your findings relate to is North Staffs records, not accessibility in anybody else's. Accessibility does in fact involve the need for someone relevant to ongoing clinical care to want to need and access the documents. Who? We do ask that question who because it goes to how appropriate an impact and can you answer it? Can you tell us who was going to need them other than David Southall himself? You have heard an abundance of evidence now that he was referred to as the international expert wearing a CP hat as an expert, directed to him from social services, not as a treating clinician, so who was going to need the access? The records were as easily accessible as most notes, but the only people likely to be involved were Dr Southall or Samuels and Dr Southall was involved in his CP way.

C

D | Doctor Crawford has explained that if you are talking about looking for records in any event and saying somebody is going to dig it out you will get it from primary care. Dr Horridge has told how she did it. It is not like somebody is going to say "By the way, we need to contact North Staffs to get the up to date information" because we have got nowhere else to get it. Again, it comes back to my who? Who was going to need it?

D

E | The UK does not in any event operate a system of unified records, but if and insofar it does the GP would be the best place. Again, you have heard Dr Horridge's evidence of it. The case really is not about who Dr Southall wrote to and did or did not copy in. It is not an issue as to who was the recipient of Child D. I have put that in for two reasons:

E

(1) Mrs Lloyd asked a question to Dr Horridge about that particular letter which is one of the Appendix 1 documents saying look, it is not copied to the GP. Dr Southall seems to have done something wrong there because he has not copied it to the GP and you said the GP is most important.

F

(2) She repeated it yesterday as a question to Dr Southall and asked him whether he thought he should have done differently. He very fairly answered and said "Gosh, yes, I should have." So what? It is not a charge. It is not one of your findings at Stage 1.

G

How does it go to the circumstances of your findings at Stage 1? The allegation here is that this particular letter at 216 should have been on the mainstream North Staffordshire notes to which we say what difference would it have made? Is it *de minimis*? Yes, it is a filing matter. But the question of whether he did or did not copy somebody in is not what you are concerned with. Put it out of your mind.

H

A Mothers of Child D and H knew the GPs and secondary specialists had the information, so if they were looking for information on their children because they wanted to put something together that is where they would go. They knew who the treating physicians were. There is no need for them to say, by the way, we need to see what is going on at Stoke because they know in both instances, Stoke or the Brompton, they were short term stays. Dr Horridge has explained difficulties when there is no unified system.

B If we then look at your findings under 11(b), your finding relates to accessibility of items to others involved in the medical care of the child at that time or in the future. That means North Staffordshire, because that is what the charge was in respect of them, and indeed in the future means North Staffordshire even for Child H.

C There is only one document in respect of Child D relates to the time he was actually under the care. That is the data sheet which is deemed inconsequential and I think Mr Tyson intervened yesterday to say that when Dr Southall said it. There are only two documents in respect of Child H which are contemporaneous to his treatment at the Brompton: the sleep survey and the Samuels manuscript. Neither of these documents for Child H or the one for Child D impacted upon care and did not in fact do so. They did not impact while they were inpatients, so therefore the question becomes in respect of your 11(b) finding at the time or in the future? Nobody was involved in the medical care in the future. As far as North Staffordshire was concerned, nobody was involved.

D It is a matter for Dr Samuels why his note is not in the main hospital record. Yes, you have now heard Dr Samuels' evidence about that. He did not write a clinical note of that consultation in the record, he wrote the piece of paper instead. He has a duty as a doctor to write a clinical note in the clinical records when he sees the patient. That is his duty. There is no vicarious liability of that for Dr Southall but in any event it is not actually the charge here. There is no charge that says you should have written this note or Dr Samuels should have or you should have caused him to write the note or supervise it. There is no vicarious liability. If he made a mistake, fine, that is his professional accountability. Yes, the parental view is not recorded in the notes. That is again a matter for Dr Samuels. Dr Southall cannot answer for it despite the fact it was raised by Mr Tyson.

E The question then becomes in terms of documents for treating doctors at the time was everything that they needed to know accessible? It might be said they did not have the summary of Dr Samuels' consultation. That is his act and if it is filed instead in the Special Cases File it did not get filed until the child was discharged and the letter was done. By then it is in the Dinwiddie letter, so where is any harm done and nobody was ongoing treating?

F It is important to have in mind that the filing of this manuscript note would have been done physically by a filing clerk or Martin Samuels, not by Southall. Of course, we respect your finding that he caused them to be so filed and in certain instances he has written SC File and that is of course accepted. Again, it goes to the question of not being David Southall misconduct and relative insignificance because it is a filling situation.

G Paragraph 70 - head of charge 11 generally, fundamental importance to the assessment of misconduct or seriousness that no one at North Staffordshire was involved,

H

A | documentation not inaccessible. Far better the documents be placed on the SC File since child protection access was required, because Dr Southall had an ongoing child protection involvement, and for Child H it was going to be easier to access than at the Brompton. You will remember he was asked a question about that yesterday, saying if he came in in the middle of the night how am I going to get access to them at the Brompton whereas I have got it here.

B | If Child H were referred back to the Brompton then he would be referred on to Dr Southall at Stoke. You heard that from Dr Dinwiddie that Dr Southall would not be the referring paediatrician because he, Dinwiddie, had suitable expertise and would be able to cope with ordinary respiratory matters. Dr Southall would be looked at from the point of view of the special equipment.

C | If the children did go to Stoke, and we say this is a nonsense the whole concept, then Dr Southall and his team would in fact be contacted in any event because if the parents are with them they will say we have been here before, we know Dr Southall, but as none of them contained any clinical information not acceptable to treating doctors, then how does it, in fact in the last line I have got in no way “relevant” to delivery of care; the better word is in no way “impacting upon”. Again, I should add in to paragraph 72 reference to what I have read to you this morning in *Meadow* and on foreseeable.

D | Expert evidence and talk of the records being sacrosanct, then yes, if they are original, meaning original handwritten hospital notes of treatment or investigation, you have to be very careful with your words here. Dr Southall said in his evidence it is primary to where the action was at the time. That is the issue, not the question of whether it is an original or a photocopy.

E | Paragraph 74, the issue arises with correspondence and the confusion is who receives it and in what capacity? In other words, what hat is he wearing? This definitely goes to the question of misconduct because if you make a genuine mistake you genuinely believe I am being instructed as a child protection expert, not as a consultant paediatrician at North Staffs, and indeed the people who instruct you, Horridge and Dinwiddie, agree. That is why they are going to you then in those circumstances. You can see how if there is no clear guidance you can think well it is as easy to put it in the SC File.

F | Expert evidence on the issue of integrity has been clear. The integrity depends on what is in the other records and how it pertains to the care of the child. Integrity relates to delivery of care and none was delivered.

G | You have, of course, found (paragraph 77) that integrity has been damaged, but in assessing whether that in fact is misconduct or serious rather than a technical breach, then our submission is that you are assisted by the test of what is in that record and how this pertained to the ongoing care of the child and by whom. It is on that basis we say there is no misconduct.

H | It is why we say you really do need to look at the nature of the material, what is in the other record, how does it pertain, and you cannot, in our submission, judge seriousness or significance without doing so. You have got to do it in the context of David Southall in any event knew where the material was and so did Martin Samuels. Therefore, the

A | question is yes, this stuff is important, important to who, has it any importance to anybody else at North Staffordshire because that is what the question of seriousness is?

We say the issue of seriousness was not actually put to the experts by Mr Tyson. Dr Williams and Dr Crawford gave unchallenged evidence on the key issues -- trivial, minor, insignificant -- Dr Williams saying it falls on a scale of nought to one. That was all unchallenged. Mr Tyson in his submissions to you says do not place any reliance on them, rely instead on Tim David. How can you? He has not come and given you any evidence on ---

B

THE CHAIRMAN: (Following a note from a Panel Member): I can tell you the note that Mrs Lloyd has passed is something of which I was going to do and that was to ask for a break at around 10.30.

C

MISS O'ROURKE: 10.30 is fine. It will allow me to finish a section.

THE CHAIRMAN: I had put a note on here to ask you when you got to the end of this topic to break.

D

MISS O'ROURKE: Mr Tyson in fact told you – day 10/54/H – and we lifted the quote directly and it was in the context of him saying you do not need to hear from the factual witnesses and he said the experts are here in particular to assist you as to seriousness. That has to mean Crawford and Williams because Tim David is not here. The experts are here to assist you as to how inappropriate it is and the like. Again recognising that is your task and it is what they are doing, and this business about the extent my learned friend goes on about on the scale of one to ten, yes, they can give that expert evidence and we have the paediatricians because they are giving an opinion.

E

Now, in the light of that very clear and unambiguous concession, that is what they are there to assist you in, it was rather strange that he left their evidence unchallenged, but that is where you have it. The complainants have adduced no evidence, or expert evidence, on that issue. We say that is because they cannot and we wonder where they would find a consultant paediatrician to tell you that this is deplorable conduct. We think it would be a very hard task.

F

As Mr Tyson has stated, you have all the material that would help you on the decision of serious professional misconduct from the experts, and that again has got to mean Margaret Crawford and Leonard Williams because there is no-one else. You have now seen the Tim David emails which we adduced yesterday that show that the solicitor who instructed him said, "Well, you were not asked to deal with serious", so there is the end of the matter.

G

The Panel have heard no expert evidence from the GMC or the complainants. Professor David did not give evidence. He did not deal with the issue. You must be careful with his evidence in any event as it was a personal view and he is not a child protection expert.

H

I know Mr Tyson objects to me saying that and says "Where's the evidence of that?" David Southall has expressed that view. Margaret Crawford was very clear in that view

A | that that was not Tim David's expertise. She thought he was a cystic fibrosis general paediatrician.

B | At paragraph 84: Professor David himself said he could not say any more than it was his own opinion. The Panel have now heard Dr Williams, Dr Crawford, Dr Samuels, Dr Horridge and Dr Dinwiddie, five consultant paediatricians, and they do not get this whole concept of clinician with concerns. Indeed, you saw Dr Horridge very taxed and vexed about the whole thing and she kept saying, "No, I was referring to him as a CP expert". It is not a universally shared view and he is not an expert in medical records, and I give you the reference there to his evidence.

C | How does Mr Tyson say a Panel, essentially of lay people and one doctor, is going to determine seriousness when there was no cross-examination on the experts' view, even by the Panel? Should I say, none of you questioned the experts so where are you going to get the evidence from? Tim David at stage 1? I do not think so. He did not address the issues which Mr Tyson says are the appropriate ones. How inappropriate on a scale of one to ten, to assist you on seriousness. It is not for Dr Southall to prove that other professionals would not criticise him or think them deplorable. It is for the complainants to adduce evidence and there is none.

D | There is no evidence that Dr Southall's actions would merit opprobrium at all, and the stage 1 findings do not address the issue. Again, it is the *Meadow* test.

E | From Dr Crawford's survey, her expert opinion and the expert evidence given by Dr Williams, Dr Southall's actions are not misconduct, let alone serious. It is clear from all the evidence which has been given, including that of the non-expert witnesses, paediatricians do not see the findings made against him giving rise to serious error. It is a muddle on the records and it is an administrative oversight.

F | Given the nature of the documents in Appendix 1, it is clear the case against him is little more than a filing and administrative shortcoming. It was put in those terms. It had no impact on anybody. Deciding where to file what he saw as essentially child protection correspondence, it is at worst a mistake on classification. He classified it as CP documentation. He decided to file it where it was most accessible to him in his ongoing CP role, when there was no guidance on it. There were no rules or guidance at the time. That goes to the question of misconduct itself, let alone seriousness.

G | Dr Williams and Dr Crawford are not only experienced and well-regarded experts with child protection experience, which is their field, they were paediatricians at the time and speak to and worked with paediatricians at the time and have done since and they have explained to you how they do not see this as serious or deplorable and I asked him those questions.

H | Dr Crawford was not just relying on her survey, rather drawing her views from extensive experience of talking to and working with paediatricians.

Standards at the time were that people did child protection documentation separately. You have got that now from Dr Horridge, and, indeed, it is proved by her survey. There were no guidelines as to what to do.

A | The Panel are, of course, not concerned with the system but they heard that Dr Crawford considered Dr Southall's system better than others.

Dr Horridge gave clear evidence about what her Trust did at the time, and that is very relevant. She explained what happened with just one of the documents that was in Appendix 1. She also confirmed that that information was of no relevance to North Staffs doctors. She is the one who initiated the correspondence to David Southall and she was doing so to get advice from him as a leading expert.

B

Guidelines from the Department of Health: Lord Laming, quoted by Professor David, is irrelevant to what was taking place at the relevant time because that comes much later. If anything, they reinforce that practices varied until the time of those guidelines and guidance was required.

C

Mr Tyson seemed to suggest that this 2008 survey showed what was done in 2008 and could not help Dr Southall, but the survey was historical, seeking to identify the systems that had been in place and what had been going on for some time. It cannot be the case that the standards were better in the 1990s and deteriorated in 2008. There is no sense in that and there is no evidence of it.

D

Surely the question is this: why do you develop later guidance unless there is some significant level of uncertainty? You heard from Dr Horridge that only two weeks ago she was at a meeting with Sir Ian Kennedy to look at doing just that.

Madam, I am coming to the next topic.

THE CHAIRMAN: I suggest that is an appropriate place to take a break before going on to the next topic. We will take a break now until 10.45.

E

(Short adjournment)

THE CHAIRMAN: Miss O'Rourke, are you ready?

MISS O'ROURKE: I will go ahead, I do not know what the others are doing.

F

Page 16 of 32, doctor/patient relationship: you will see that we say the guidelines do not apply when you look at those guidelines put to the experts in cross-examination. They all used phrases like "consultant on call", "designated doctor", "bedside", "inpatient", "handover", all of that is clearly directed at the people who are the treating clinicians because that is where the doctor/patient relationship applies, and that is what they are addressed to. These guidelines are not addressed to child protection experts.

G

An important distinction to keep in mind is the question of current patients versus former patients. A patient does not remain the doctor's patient forever. The concept of a clinician with concern when the individual is not a patient is unknown, I say, to the law of tort or to the law of duty of care, or, indeed, to the GMC in the question, "Who is my patient?" It is a concept we have not heard of before, that you can say you are a clinician with a clinical concern if you are not in fact with this patient. We give you there Dr Williams' expert evidence on this point, and I will not take you to the

H

references but you have them there.

A Repeated reference has been made to this expression “clinical concerns”, all deriving from Tim David, but in fact the treating clinicians – instead of saying “left” at the Brompton, perhaps a better word is “remaining” at the Brompton, or at North Staffs did not have any clinical concerns and were not involved clinically.

B The word “clinician” does not mean treating doctor. As Dr Southall explained, he is a clinician and always was so. That does not mean that you have got a doctor/patient relationship remaining for each patient he has ever seen. Frankly, that would be a nonsense. What is relevant is the period during which he was the investigating or treating clinician because what you are concerned with is delivery of care.

C You have clearly got to distinguish investigating or treating clinicians, and throw out of your minds this dreamed up concept of clinician with ongoing clinical concerns because there is a difference between making notes during a clinical consultation which are important and original and will not be anywhere else, and something such as correspondence on child protection issues largely for information.

As Dr Southall himself said in his evidence, the importance is the relevance to hospitals involved in ongoing care and that was certainly not North Staffs.

D After the brief initial period of sleep study he was involved with the complainants’ children’s expert because, of course, he never saw them again. He goes to case conferences but the children do not attend. Accordingly, how to file the documents and where related to his role as an expert in relation to child protection concerns, so all this about he is a clinician with ongoing concerns does not inform him as to what he does with pieces of paper.

E Dr Southall did present historical clinical findings at CP meetings. I make that point because Mr Tyson questioned one of the witnesses, and said, “Didn’t he present his clinical findings?” Do not mistake the significance of that question. It does not make him the treating doctor by then, or involved in the delivery of care. He is presenting historical findings.

F If a clinician is not the treating doctor and the patient is not coming back then it really is a minor filing issue only of the correspondence and similar documents, they cannot be filed in two places. They were not copied but that does not make it misconduct.

As Dr Southall explained, the Child D documents in Appendix 1 are important documents but they are not relevant in any way to North Staffs’ medical records, and I should add, or its clinicians. They are all records which are in the records of those actually involved in the care.

G Dr Horridge explained that Dr Southall was a national expert. She was not asking anyone in North Staffs or in Dr Southall’s team, or any other clinician to become involved. She was involving him around child protection.

H She also confirmed that she thinks she would have sought his expert opinion even if he had not been involved in care previously. We give you the reference, and it was an answer to a question from Dr Vaidya.

A

Tertiary Centre: this is absolutely crucial, the referral would be and was to Dr Southall. The whole unit moved from the Brompton so it would still be Dr Southall up in Stoke: it would not be going back to the Brompton. Who would ever treat? It was therefore better that Child H's documentation did not go on the Brompton file because he was not going to receive any treatment there. It was better than the documentation went on the special cases file where it could be kept in one place given the ongoing involvement with David Southall. He was not going to receive further treatment at the Brompton, but he also was not going to receive treatment at Stoke and there would have been no basis to open a file for him.

B

You heard from Dr Southall that Child D was an inpatient for only four days in total and was discharged indefinitely from care.

C

The last correspondence in respect of Child D was in November 1998, four years since he was seen at North Staffordshire. The last correspondence regarding Child H, according to the records, was October 1992. At that time the unit had only just moved to North Staffordshire and there were no records for Child H on which to put the letter.

It is clear that from 1995 for Child D all the appendix 1 documents relate to child protection or social services matters. For Child H, they are all post March 1990.

D

There were no hospital records for Child D as he was not at Stoke, so where is it suggested that one files the documents, and in particular it is the last document on Appendix 1? As far as Child H is concerned, the last in terms of chronological order, it is 30 October 1992. That is a letter from Dr Weaver to David Southall which is actually a thank you letter for keeping in touch: where is it suggested that should go now that David Southall is at Stoke and is dealing with this in the context of child protection?

E

There will be no hospital number. There would be no notes to file in, and that is also the point, and the Royal Gwent issue. No-one was treating at Stoke so when any correspondence is received at Stoke no-one is going to be able to call up the Child H records which were at Great Ormond Street. Yesterday, you will remember, Dr Southall was asked, I think by Dr Vaidya, if he was able to access the files for Child D before he did any further child protection letters once he was up in Stoke, he said he could not do that for Child H because the files were at the Brompton. The fact he has an SC file is a good thing because he has therefore got some material that he can relate to.

F

At paragraph 120, they were never going to bring their children back to him. You have seen the solicitors letter which was sent in fairly trenchant terms on behalf of Mrs H. The documents were of no relevance to North Staffs Hospital in general. David Southall is the one with the ongoing involvement and, indeed, that was an interesting aspect of many of Mr Tyson's questions, ongoing clinical concerns. Who had the ongoing clinical concerns, as Mr Tyson seemed to be suggesting? Well David Southall did; not North Staffs' paediatricians; not North Staffs' ENT surgeons; not North Staffs' general physicians: David Southall. Who needed access? David Southall. In what context did he need access? Child protection. For what purpose did he need access? Not to deliver care.

H

- A We say even if the manifestly unlikely M6 example arose, the documents would in fact be of little use because, as Dr Horridge explained, an up to date picture would be necessary. The documents from the local paediatrician and GP would be more relevant. In any event, if it were a genuine emergency immediate treatment would be a priority, but, of course, in this hypothetical accident are the parents not present or is somebody not present with the child to give a history? Is somebody not present to give the details of the local GP and will a call not be taken? Indeed, Dr Vaidya can help you with this:
- B the first thing you are asked when you go into hospital, as you will know from your own dealings, “What’s the name of your GP?” Turn up at accident and emergency, the first thing they say is, “Who is your GP? What’s his address? What’s his telephone number?” because they have a duty to write to your GP, so that is where they are then going to get their information, not saying, “Oh, by the way, he was here in Stoke three years ago and David Southall has been involved in CP and he has been getting some letters for information.”
- C In such an emergency there would be no break-up of bruising and it would not change the treatment, but let us get real: it never happened and it was never going to happen. In any event, remember what Dr Horridge said: hospital A down the road would actually be no better off. What happens if he has this accident 20 miles up the motorway from Stoke or 20 miles down? They will not know either because that is the medical record system we have in this country.
- D Paragraph 124: did not happen. The chances that the child would be passing and have an accident are miniscule. He is not worse a position than anywhere else. Crucially, his mother would not have caused him to be taken to North Staffs. It was never foreseeable on the *Meadow* test.
- E Dr Horridge was polite in saying she was struggling with this whole hypothetical element. It really is a nonsense scenario and it should not inform you on a decision of seriousness.
- F For Child D in any event the FII concerns were expressly noted in the main hospital records, so there was no risk in fact that information would not be available in the M6 example, and you will remember that I took Dr Horridge to the page where there was an express reference to FII.
- G Context: the factual matrix is relevant. These were complicated and serious cases and the various doctors involved with the children, and you have now heard from some of them, had real and grave concerns for their safety.
- Child H was taken into care by the Family Court. Child D was placed on the At Risk register following a case conference. They have child protection files and that in itself impacts upon parental rights.
- H You need to look at matters in the context of what Dr Southall was doing at the time.
- You have found, which we cannot go behind, that it was not in the best interests filing this documentation. You have now heard that he believed he was acting in the best interests; he thought he was acting in the best interests; as did others involved in their care. His subject of assessment and others accepting it. It is highly relevant to

A misconduct because it comes back to wilful wrongdoing. Do you deliberately go out to do wrong or do you believe that you are acting in the best interests and do you simply make a mistake?

Is there any evidence of any bad motive? The answer is no. The breaches found at stage 1 can be said in the totality of the evidence to be nothing more than results of non-ideal behaviour, inefficiency, evolving and developing systems being created.

B There is no evidence upon which to base any doubt as to the genuineness of his concerns or move. There is no evidence of bad motive. He was not cross-examined as to dishonesty, and that applies both in the first hearing on these matters, and, indeed, before you at stage 2.

C In more general terms than just the Dinwiddie letter, there is no evidence of any hidden notes. there was no intention to hide, and, indeed, you the Panel found so at stage 1 that these were not secret files.

The notes which were not on the main file were not notes which affected the delivery of care, and it was convenient, so he thought, to have his files ready (and Martin Samuels told you the same) for his continuing child protection involvement.

D Okay, on your findings, he has made a mistake, he should have asked the secretary to photocopy them and put them in both, but as you have been informed, the duty he owed was to the child, not the parent. Dr Dinwiddie, Dr Samuels and Dr Horridge shared the serious concerns in respect of these children. Dr Williams and Dr Crawford have given their expert views about the significant child protection concerns. It is clear that for both children, when the majority of this correspondence and filing was undertaken, Dr Southall was no longer the primary caring physician.

E There was no duty owed, as far as we are aware, in law by a clinician with concerns, beyond the role as a child protection expert. You heard David Southall say the Children Act obliges me to act but it also obliges teachers to act, and, indeed, anybody, so where is the duty? It is in child protection. It is to those he advises, and it is to the child.

F Bias: some suggestion has been made that the experts are biased and in some way unreliable given their declared view and Dr Southall's outcome before the GMC. The simple fact is they are not alone in their concerns. The Court of Appeal could not have quashed the previous findings unless they thought they were wrong because that is the legal test they have to apply. For bias to be established, we say, and what there is a complete absence of here, is a direct connection between the experts and Dr Southall or his case. I cite there the case of *Toth v. Jarman* and I think we have got copies of that available. (Same handed and marked as D50). Madam, we have not given you the

G whole case. It was a case that was an appeal to the Court of Appeal from the High Court sitting in Oxford, on a medical negligence claim, breach of duty, causation, and, indeed, the outcome in terms of injury. What happened was the unsuccessful claimant appealed the case to the Court of Appeal and, having lost the case fundamentally on the question of causation and on expert evidence, the High Court Judge in Oxford, preferring the evidence of the defendant's expert, who was in fact a paediatrician. It was a paediatric case, a very eminent paediatrician, Professor Sir David Hull, the

H unsuccessful claimant asked the Court of Appeal to look again at the matter and one of

A his grounds of appeal was that Professor Sir David Hull, the expert whose evidence the judge adopted, in fact had a connection with the Medical Defence Union. The Medical Defence Union were the solicitors in the case. They were the defendant doctor's indemnity insurers and the suggestion was that because Professor Sir David Hull had sat on what is called the Cases Committee of the Medical Defence Union, and indeed had sat on the Council of the Medical Defence Union, then he had a conflict of interest, and he could not have given evidence in the case, or could not have given it without disclosure of that conflict of interest which would have threatened his independence and might have made a difference as far as the judge was concerned in reaching the conclusion he did.

It is a long judgment and we therefore have not copied large parts of the judgment that deal with the question of hypoglycaemia, because that is what it was all about.

C The relevant bits for the purposes of this question start at paragraph 99. On the section that we have given you, it is inside on the first page. You will see that its title is: "Should the judgment be set aside on the ground that Professor Hull failed to disclose a conflict of interest?"

You will see at paragraph 99 it says:

D "99. As to category (ii) we now move to a different subject, namely the appellant's attack on the judge's reliance on the evidence of Professor Hull having regard to the non-disclosure ... the expert evidence played a crucial role ... To this end, Mr Pulman"

who was the appellant's counsel –

E "placed before us a proposed new ground of appeal"

and he said the judge's order should be set aside. Can I highlight, then, paragraph 100, which I have reason to believe your Legal Assessor will also in due course highlight for you.

F "100. We start with the point of principle. Does the presence of a conflict of interest automatically disqualify an expert? In our judgment, the answer to that question is no: the key question is whether the expert's opinion is independent. It is now well-established that the expert's expression of opinion must be independent of the parties and the pressures of the litigation. Authority for this can be found in..."

G what is called "the Ikarian Reefer", and summarised in *Civil Procedure*. Then he quotes:

"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation ...

H 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise ..."

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You will see some further material in paragraph 101:

“101. Moreover, CPR 35.3 sets out the overriding duty of an expert witness. His duty is to assist the court in relation to matters which fall within his expertise. The need for the expert to give an independent opinion flows also from this duty, which is stated to override any duty which the expert may owe to his client:

B

‘(1) It is the duty of an expert to help the court ...
(2) This duty overrides any obligation...’”

There is some more material as they go on to talk about that in that case. What they are concerned with is a conflict of interest, because Professor Hull had a connection and because the MDU were the instructing solicitors, they were the indemnity insurers and they were involved in deciding whether or not the case would and should be defended or should be settled.

C

You have no connection here, and it is the point I make in paragraph 137. There is a complete absence of a direct connection between the experts and his case. There is no connection between Dr Southall, Dr Crawford or Dr Williams other than that they have been engaged as experts through solicitors. Dr Southall is not a member of PACA. Yes, they are all a member of the Royal College of Paediatricians but in fact to be a consultant paediatrician in this country you need to be a member of it. That would knock out every paediatrician. Mr Tyson’s position on Dr Williams and Dr Crawford was correct, that because they were concerned by the action taken by the GMC they could not give evidence. Then it might in fact have been impossible for us to find any appropriately qualified child protection expert to act. A motion of the Royal College in support of Dr Southall was unanimous and tells you that. It is irrelevant Dr Williams may have proposed or voted for it. So did many paediatricians. Are we saying that none of them can give honest and independent opinion evidence?

D

E

Mr Simanowitz enquired of Dr Crawford, why did she not correct respondents of her survey or anyone that she spoke to about the findings of the GMC case in child protection? It was really not Dr Crawford’s job, as she said, to advocate, but the reality is you have seen the letter from Professor Terence Stephenson, the current President of the College, that the concerns have in fact been widespread. There are going to be paediatricians out there who hold that view.

F

There are documents available which demonstrate the large proportion of paediatricians who have concerns. It would be wholly inappropriate to consider an expert, biased or otherwise, not independent simply because they share that position.

G

That, of course, is the key point – paragraph 145. I think your Legal Assessor intervened at one stage to make this point. People become expert witnesses because they have an opinion and they are prepared to voice them. An expert should not have an opinion rejected just because it supports, or holds a certain view. It should only be rejected if the evidence is that it is not an honest opinion, honestly held, and formed independently. And “independently” mean independent of Dr Southall; in other words, Dr Southall has not told them to come and say this, and they have said it.

H

A | Let me give you an example perhaps a little closer to home. Mr Simanowitz, as is widely known, was the Chief Executive, and indeed a founder, for many years of an organisation called AvMA, an association for victims of medical accidents, which acts for patients, complainants against doctors, and never for doctors. It does not advise or support doctors. It is a charity to support patients.

B | Somebody might say, "Because of that he must hold opinions on the rights of individual patients, so he should not sit on the GMC Panel because there he is going to sit looking at the careers of doctors, none of whom he has ever acted for, and he has always acted for patients." I am sure Mr Simanowitz would be extremely offended if someone said that would cause him to have to recuse himself. The answer is, "Why?" He does not have a connection with the individual doctor in a case. He has promised to sit independently and form his views independently, and what he might have done in another life for an organisation he may be a member of does not affect him in carrying out his role because he is in a quasi-judicial role.

C | So too Leonard Williams and Margaret Crawford. They are people of integrity. You have heard no evidence that they are bad people, that they have any history with anybody, that they are considered liars or not good people. You have heard the eminent positions they hold. Is it really being said that when they tell you they formed their views independently, and their opinions are genuinely held and based on their experience, they are telling you a lie? That is what the Court of Appeal says. You have to decide, "Is it an honest opinion independently formed?" If it is, then you reject it. Only if you find there is a flaw in it or cannot be relied upon, they gave evidence badly; it is not that they have been supporters of David Southall. What does a "supporter" mean? They have not given him money. They have not provided him with a home. They have not given him a job. They do not have any of those connections. Yes, they have supported a motion which says, "We are very concerned," but it was unanimous.

D | In any event, it is open to complainants to call expert evidence on seriousness, if it was available.

E |

F | The conclusion on serious professional misconduct: standards of the time are crucial. As at the early 90s there is no issue or concern by members of the profession in respect of Dinwiddie or special cases. There was nothing coming forward from Dr Dinwiddie or Dr Weaver when they got that letter and were copied.

G | Mr Tyson suggests we have been trying to go over the findings. As Dr Southall has explained, he is bound by them, even if he does not agree with them, and we cannot hide that. He appealed them to the Administrative Court. He did not appeal them to the Court of Appeal because it needed a point of law of public importance to get permission from the Court of Appeal. He therefore took the case that would have a point of law of public importance, and he succeeded.

H | In fact, if anything, it is Mr Tyson who is undermining and going behind the findings. He cross-examined Dr Southall on all sorts of matters which the Panel had found against him, defensive, all this being the same records – appropriateness of sending the letter and usurping the function of the local paediatrician.

The issues that you have to decide, therefore, we set out at paragraph 152: how inappropriate? How significant a breach? This is on seriousness. Of course, our

A submission is there is no misconduct in any event. How inappropriate? How significant a breach? What is the extent of the impact of the breach in respect of integrity of the records? What is the extent and impact of the breach in terms of accessibility? How significant a departure from common and established practices at the time?

In addition to that, there would be issue as to what was a wilful wrongdoing. What is he doing?

B I understand Mr Tyson wants to make a point that my borrowing in to what Lord Justice Auld said in the *Meadow* judgment was inappropriate at paragraphs 201 and other paragraphs, dealing with someone's position as giving evidence as an expert. Indeed, they are, but I am doing what we often do in these cases, in saying, "Take out the specifics and substitute words that are apposite to the circumstances of this case, and ask the same question." I am saying that the questions are nonetheless relevant at 201. Yes, C he is talking – of course he is – about acting or speaking in expert capacity because that is what that case was about, but you can just as easily say – and indeed we say it is of more general application – whether it can properly be regarded as serious professional misconduct must depend on the circumstances, including intention, knowledge and understanding.

D Those apply to all sorts of acts. They do not have to be limited to giving expert evidence. How he came to do what he did – that applies to all acts. To what possible foreseeable effects? That applies to all acts and with what, if any, indication or warning to those that might be affected. You can change around a few words in that sentence, and the test still holds good because it is quite clear that what Lord Justice Auld is looking at is saying, in order to see whether something can be regarded as serious professional misconduct depends on the circumstances. It depends on things such as intention, knowledge, understanding, foreseeability, effect and warning, et cetera.

E Those words are equally applicable and indeed were intended to be so. We say that is the situation.

Paragraph 153: these breaches, we say, are de minimis. They are miniscule. They are not of concern to anyone who knows the full facts of what the documents were and the basis upon which they were received.

F Paragraph 154: there is no evidence that the Royal Gwent letter was ever received. There is no evidence that the letter and the confidential information was ever misused or used. In fact, it was not a referral letter. It was an information letter to a local paediatrician.

The sleep study questionnaire is of no significance. It was non-clinical, so no clinical impact.

G Paragraph 157: Dr Samuels' one page there is in any event broadly similar, indeed if not identical to the Dinwiddie letter.

Paragraph 158: this is very important. There is no evidence of any harm being caused by the SC files. That was a concession made, unless there is any issue about it we will produce the relevant notebooks, at the GMC by leading counsel in the case on behalf of

H

A | the complainants. It was accepted that there was no evidence of any harm coming from those special cases files. Of course, there are no charges.

Importantly, Mrs H and Mrs D were not the patients, and so the issue is whether there is harm resulting for the children. The fact they may have difficulties in searching for the SC files for legal or complaint reasons is irrelevant. If they tried to bring complaints for non-clinical reasons it does not relate to care. There is a question of whether records were at GOSH. In fact, records were lost at GOSH in any event, as Dr Southall has repeatedly said.

B | Can I add in that respect, I understand Mr Tyson is concerned about what I said about the case of *JD v East Berkshire* this morning. Yes, he is right, and your Legal Assessor can deal with it if necessary. You were already given a copy of the case. It was about there being no duty of care to a parent rather than no duty of confidentiality. If there is no duty of care to the parent then it is difficult to see how there would be a duty of confidentiality to the parent. The confidentiality belongs to the child because the child is the patient, not the parent. Yes, in many cases parents are asked to consent as far as their child's records are concerned because the children are not capable of consenting themselves. You have two things that override that.

C | One is the child protection guidance that allows that - the need for parental consent – to be overridden. You saw that the following year happening in the case conference at Gwent. Secondly, you have the guidance that was around at the time in respect of that particular issue where the child was involved.

D | Paragraph 160: no one said that Dr Southall's evidence is untruthful. If it had been that would be highly material to misconduct and, indeed, to seriousness. You are looking at matters a long, long time ago. You have heard no evidence other than that Dr Southall was well intentioned and that there was no guidance to tell him what files should be created and his setting up the system.

E | Paragraph 162: the evidence of Professor David is that Dr Southall could have photocopied the documents first, and he did not. That does go to the heart of seriousness because it could show little more than inefficiency not to have copied documents first and not to have told his secretary to do so.

F | The Panel are thus, we say, concerned with isolated acts in respect of the special cases files of Child D and Child H in the context of ongoing child protection involvement and overwhelmingly that is the evidence – a single act in respect of the Dinwiddie letter. Importantly, neither social service nor the courts have raised any issue in respect of Dr Southall's action. No one involved, other than the two complainants, have been critical of Dr Southall's actions and even they do not say there was effect on their children's care. The complainants ignore the role of social services and the court; indeed, they ignored that David Southall was wearing a child protection hat.

G | There is no Good Samaritan law in the UK. Other countries do have a law where, if you happen to be a registered medical practitioner then you have the duty to help the guy in the street. We have no such rule. If you choose to walk by, or when they call over the tannoy on an airplane, "Is there a doctor on board," and you choose not to reveal it, you are not breaching any duty. You are not breaching any law. A doctor does not owe a

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A duty of care without a doctor-patient relationship assuming responsibility. In other words, if there was an accident down in the street, and Dr Vaidya did go and lay his hands on the patient, then at that stage he assumes a responsibility because he is a registered medical practitioner, but if he walks by he has no responsibility. Otherwise your doctor-patient relationship comes into existence because you are working in a hospital or working as a GP and the patient comes in. Here the doctor-patient relationship had ended. It was open to Dr Southall to do nothing. If he had done nothing, there would have been no criticism.

However, acting on what he believed to be the best interests of the children, he remained in an ongoing role but as expert adviser to social services and to treating clinicians saying, "I think there is an FII concern here." He was acting under the Children Act as a safe-guarder. It was he, David Southall the individual. It was not he, David Southall, employed by North Staffs Trust. If he had done something wrong in one of those letters and misstated it, the claim would not have been against North Staffs Hospital. It would not have been that they were vicariously liable for his actions. The claim would have been against him, David Southall, the individual. We say it as a matter of law that is obvious.

What, then, is the complainant's case? The complainant ----

D MR TYSON: Can you just pause there. As a matter of fact, as one sees in the *JD* case itself, in fact, North Staffs were sued and not Southall personally in respect of these matters.

E MISS O'ROURKE: Yes, but in fact what Mr Tyson does not tell you, the *JD* case was not pursued because it was treated as a preliminary issue and therefore North Staffs were denying that they had any responsibility that David Southall was acting other than David Southall, expert. Of course, the case has never been determined because Mrs JD lost the preliminary issue. That was the outcome of the House of Lords.

F We maintain the position, the National Health Service litigation authority would not accept responsibility for that because he is not acting as a North Staffs employee; he is not seeing the child as a patient of that hospital. He is not an NHS patient in North Staffordshire. He is involved in a different context. In any event I should remind Mr Tyson that Child D was a patient at North Staffs during part of that time. Thus any claim that would have been brought could in fact relate to North Staffs in that context because he was an inpatient for a number of weeks. Of course, the case was not about the appendix 1 documents.

G What then is the complainant's case? We say their people wanted no more to do with Dr Southall. Why then do they say it is serious that correspondence to him or copied into him is not in a file at North Staffordshire Hospital? Because they say he has no role. They resent his role. They do not want him around and about their children. There is a solicitor's letter so why are they complaining about it. What is wrong?

H The answer is, they are simply seeking to get at David Southall in any way they can. They got the GMC to take up a case on this issue. However, it really is a nonsense in terms of the impact because they did not need him to have this correspondence. They did not want him to have; they did not want Staffs to have it.

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The case must now be viewed with a sense of realism. Please apply your common sense. No one else at North Staffs, other than him and his unit, needed access to those documents, and they knew where. No one has been inconvenienced, other than the parents if they seek to complain about him. It is not the issue that Child H was searched in the Brompton records as there was nothing missing from his stay there, save for the Martin Samuels' document, the sleep studies.

B

All this stuff about Mr Chapman and him not knowing there was a special cases file is frankly irrelevant because the documents that are said to be in the special cases file that are not down in the Brompton all post-date this child's inpatient stay and do not go to his treatment.

C

The documents are quite different to that, which would be completed – this is the sleep study – by clerking in doctors and there is no clinical impact.

Red Herrings: we say there are a number of them in this case in the way in which the complainants have conducted their case at stage 1 and indeed now at stage 2.

D

The merits of the diagnoses of FII in either case are frankly irrelevant to your findings. It does not need to be proved that FII was accurate. Dr Southall is not being tried for his opinions on these cases or any allegations of misdiagnosis, whether the complainants may have wanted that or not. It is not what happened and it is not what your stage 1 findings are.

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His views on the participation of social services have not been criticised or subject to a charge. We are not opening up issues as to whether he should have copied the letter and that is the point I made earlier by Mrs Lloyd's question; that is not part of what you are dealing with either.

The relevant issue is the genuine nature of the concern, and there is no evidence to the contrary.

F

The extent of Child D's allergies are frankly irrelevant. Mr Tyson spent a lot of time dealing with Professor Warner on the later pages, and whether the child was allergic or severely allergic, et cetera. Dr Southall said at the case conference he had no doubt that Child D was allergic, but what he wanted was Professor Warner to test for severity. He was not the allergy specialist, nor was his unit. The material was on the right files with Warner, the people delivering the care. It is therefore of no help at all to the Stage 1 findings you are made to speculate what Professor Warner found. No one has got his notes, no one has seen what he was told by the mother, but frankly it is simply not relevant to the findings you made on SC Files.

G

There were FII concerns on Child D notes. There were case conferences and to say the whole picture is not there or the updating letters in case he comes back into Stoke somebody finds out that Professor Warner thought that this was all genuine or anything of that sort, is frankly irrelevant because he is not coming into Stoke to be treated for his allergies. He is not coming into Stoke so that anybody needs to know the updated position. It would not be normal for you to get a further update being a tertiary referral centre. The reason Dr Southall got it was because of his child protection involvement.

H

A That is his involvement and not North Staffordshire. In any event this Professor Warner report is three years after Dr Southall's involvement.

Things move on, investigations are done, irrelevant to Dr Southall and the SC File. If the point that is being made is ah well, this is the update so put it on the hospital records so anybody treating in future will know that in fact Professor Warner has said he is severely allergic. Who is treating him for allergies in North Staffordshire? It would be relevant to somebody treating for allergies in North Staffordshire, but who is doing that? Nobody. It is a nonsense.

B What Professor Warner found in the context of the SC Files is a red herring is North Staffs were not involved and Dr Southall was involved only in terms of child protection. He was updated for that reason. Child D was in any event discharged from the At Risk register in September 1997 so if anybody comes after that letter the parents will be perfectly entitled to say this child is not on the At Risk register.

C Similarly, the mother's notes in the records seeking to challenge FII are complete red herrings. They relate to issues concerning Professor Warner. They are all irrelevant to Stage 1 findings here and the issue of impact of missing documents from North Staffs records and in any event the mother got this document put on the North Staffs notes.

D Mr Chapman at the Brompton is also a red herring. He was not delivering care. There was no care to be delivered to Child H at the Brompton. As a matter of fact, nobody was clinically disadvantaged and in any event the allegation is that it was not on the North Staffs notes. Ownership of the Brompton notes was never alleged and, frankly, is wrong in law. These letters were sent to David Southall as an individual involved in child protection. They do not belong to the Brompton.

E The Dinwiddie letter suggests that Dr Southall was usurping Dr Dinwiddie's function or transferring care to a local paediatrician or making referral, these are not charges. They are issues introduced by Mr Tyson to the experts. Presumably the purpose is to discredit Dr Southall's letter as a bad letter. Dr Dinwiddie and the experts have unanimously told you that it is a good letter.

F Dr Southall's attitude is not relevant to the question of SPM. You, of course, in a previous finding where you had wider issues said he had a deep-seated attitudinal problem. That is not relevant to the finding of SPM. It may be relevant at the stage of sanction, but at SPM the question you are asking yourself is is there misconduct applying the sort of tests that are looked at I say by Lord Justice Auld in *Meadow*. In other words, has he done a wrong and to what extent, et cetera, and serious. It is objective misconduct in evidence and we say there is not evidence of that and we rely on the *Meadow* case. The question of what his attitude is is neither here nor there.

G In relation to the *Clark* case, yet another red herring. It is not relevant to misconduct or seriousness and hence serious professional misconduct because you are judging only on the facts and circumstances here when you look at misconduct. We also say it is not relevant to sanction but we deal with that in the sanction section. Do not be misled that it can have any impact on misconduct and you can borrow across. You are not looking at his general attitude as to misconduct. You are looking at his acts and omissions in this case.

H

A

If you accept what he says about the Dinwiddie letter and it was not ideal and I could have done better, I was well-intentioned and, fine, I made a mistake, then there is no bad attitude in there or deep-seated attitudinal problem. If you accept what he says, and Tim David was not saying he was being dishonest, that I created the Special Cases Files to good effect because I was doing ongoing child protection work and indeed that there is nothing wrong with doing so and what is wrong is failing to file certain letters in the main hospital records, then again there is not anything there that says here is a deep-seated attitudinal problem or anything of the sort.

B

In relation to *Clark* I think there was a further red herring, something said to you about oh well, here is a document that might be missing off a file. That is an original investigation matter; that is nothing to do with the copy correspondence here.

C

Can I then turn to sanction and say this. We have nothing to say on sanction effectively and no submission to make to you in what is the right sanction because, putting it quite simply, we say the facts found proved do not even come close, not even close to behaviour which would justify a sanction; nowhere close to serious professional misconduct. We say for most of it it is not even misconduct, but it is certainly not serious misconduct. Now you have the full context and the evidence of the

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circumstances, the evidence of the experts. You are just not going to get anywhere close to deplorable conduct as said in the *Nandi* case, or to conduct meriting the opprobrium of the profession as said in the *Price* case, both of which are cited in the *Meadow* case. It is 21 years ago. Dr Southall has already been erased for over a year and been suspended wrongfully by this Panel for five months. He has not worked in the NHS for a considerable period. He has had a finding of no impairment in 2008 in the *Clark* review case which came after this conduct, although impairment is not the issue.

E

We say this just is not a case for any sanction because in fact it is not a case for SPM, end of story. In any event we say Mr Tyson's submission of erasure is of no assistance to you and never could be in any circumstances on any interpretation, even coming close to it, and it is unhelpful; frankly, it is ludicrous to suggest it for this you should be erasing. As I said to you at the outset, only last Monday somebody who tampered with records, tore them off and tried to put a midwife in the frame got a three-month no

F

review suspension. That is dishonesty in tampering with the records within the last two years. Are you really being asked for something that happened 21 years ago to erase this man's registration? Frankly, it is offensive. Ditto suspension, wholly disproportionate in the context of this case and where we are at.

G

Conditions. I actually agree with Mr Tyson, completely inappropriate in this case, bearing in mind your Stage 1 findings, bearing in mind his professional circumstances. It was suggested on a previous occasion, I think when Mr Tyson had opened his case in July 2010 this could be a reprimand case, and of course you do have that power because this is an Old Rules case, it pre-dates 2004, and so while there is no reprimand available under the New Rules, a reprimand would have been available under the Old Rules and there is case authority on that. We say it is not appropriate again because it is not serious professional misconduct, but in fact he would not meet the criteria for it in any event.

H

A He made concessions in his evidence and these are areas in which there was no guidance. Professor David has said there is no dishonesty, no intention to deceive, no bad motive.

The *Indicative Sanctions Guidance*, which you may be taken to, is guidance only. The conditions bank is completely inappropriate to this case and you will have no need to pull it out.

B Madam, in closing we say this. This is not SPM. In some cases it is hard to define it, some cases it is easy. In cases of dishonesty and indecent assault and matters of that sort it is easy. In this case it is also easy because it does not come anywhere close. It is not close to the line. Close to the line cases are the difficult ones where you need to put your expertise, but who is going to say it is deplorable to write “cc Royal Gwent paediatrician”? Who is going to say that is deplorable? Let’s get real. With the things that go on in hospital, the things that go on in medicine, the things that go on in child protection and say where does that fall on any scale? Having some documents that are misfiled, where does that fall?

C Madam, a final run through on that. We put in our D29. Can I just highlight that as far as Child H is concerned you are concerned with seven documents in total. The Martin Samuels manuscript, as we have repeatedly said, turns into the Dinwiddie letter. The clinical data form is done by undergraduate human biology students and cannot be relevant. The covering letter for the tapes really is a nonsense. It has no importance at all. What is important is the report on the tapes.

D The other four letters, three of them from Dr Weaver and one from Dr Dinwiddie. Dr Dinwiddie’s is a thank-you letter. The last one from Dr Weaver is also a thank-you letter. The other two are from Dr Weaver saying I want to reopen an investigation. She writes that letter at a time that she is not even the treating clinician, so it is not even a letter from a treating clinician; it is a letter from people who have got concerns talking between themselves. Frankly, in respect of Appendix A, and the fact those letters do not find their way into North Staffs when in fact this child was never a patient there in any event is a nonsense, and indeed that they do not find their way into the Brompton when the whole unit was going to up sticks and go is also a nonsense.

E As far as Child D is concerned, yes, there are many more documents. Effectively they start in 1995 but every single one of them is a piece of correspondence -- every single one -- so therefore there is another part to that correspondence. More than that, a large number of them are not directed to David Southall; they are copied into him and many of them are on at least three, if not four, other files.

F Looking down them in D29, the first one which is a David Southall letter is copied to GP, the local consultant, Professor Strobel and social services. The next one again the GP, Dr Connell, Professor Strobel, again a David Southall letter; the next one, which is to David Southall contains no clinical details but in any event is on the file of the unit which is to be the treating unit. The next one from Professor Strobel is copied to Rogers, Connell and Warner, so they are all multi-copied, the treating people all have them. I will not repeat it all, you have it on our documentation.

G The reality is this is a fuss about nothing. It came before you the previous time because you were being asked to consider a much more serious case which has now gone from

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A | your consideration. We say that after the Court of Appeal the General Medical Council, the complainant, should have done the decent thing and said we accept this can never amount to SPM. They did not. They brought us back here. We are where we are. We say you should say in no certain terms this does not even get close, deplorable opprobrium, nobody knowing the full facts of these cases could say that in respect of any of this.

B | Madam, those are my submissions.

MR TYSON: There is just one point of law which I need to raise and that is in relation to paragraph 35 of my learned friend's submissions on the *JD* case.

THE CHAIRMAN: Is it appropriate to do that now before the legal advice or to see whether it is covered, although you have seen the legal advice?

C | MR TYSON: I need to raise it now. The *JD* case had nothing to do with confidentiality. It was all to do with duties of care rather than duties of confidentiality. The confidentiality issue is dealt with in the 1989 Blue Book, and in particular the paragraphs I took you to. There is an important distinction. This was argued the last time and its relation to one of your findings of fact.

D | MRS LLOYD: Could you speak up?

MR TYSON: It is an important distinction between duty of care and duty of confidentiality and the issues of confidentiality are covered by the Blue Book guidance to which I have given you reference. The *JD* case only relates to duties of care which is not in issue in the heads of charge.

E | The heads of charge in relation to the Dinwiddie letter, particularly 9(b) from recollection, charge duty of confidentiality being breached and that is covered by the Blue Book guidance, nothing to do with *JD*. That is all I need to say.

MISS O'ROURKE: My response to that is very simple. If you do not owe the parents a duty of care you do not owe them a duty of confidentiality because the confidentiality relates to the patient and they are not the patient.

F | THE CHAIRMAN: Thank you. The next matter will be for the Panel to receive the Legal Assessor's advice. I know that work has been going on on that, but I am not fully up to date on whether the Legal Assessor is ready at this moment to give his advice in full or whether he needs a break?

G | THE LEGAL ASSESSOR: I am ready to give my advice in full, but I am not in a position to be able to let the Panel have copies of my advice. I think it would be more helpful to them if they had a copy in front of them, but I can proceed straight into it if you prefer.

THE CHAIRMAN: Can I ask the Legal Assessor how much of a delay would be involved in providing copies?

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A THE LEGAL ASSESSOR: With the help of the Panel secretary I hope I will not be too long, but if I was doing it on my own it would be something like an hour because I am not an expert with computers. I would guess it would be certainly by 12 o'clock.

THE CHAIRMAN: In that case we should see if we can get to that point.

B MR SIMANOWITZ: I wanted to ask Miss O'Rourke a question. I think we are entitled to ask questions.

THE CHAIRMAN: Yes, you want to ask a question for clarification on her submissions?

MR SIMANOWITZ: Yes. In the *Meadow* case there is reference to the *Nandi* case. I wondered whether it would not be appropriate for us to see the *Nandi* case?

C MISS O'ROURKE: I am sure we can make a copy available. I think it is generally accepted that the key part of it is the reference to deplorable conduct, but you probably should see what the conduct was in that case and we will get it. I suspect your Panel secretary will get it quicker than us because it is a GMC case. Mr Williamson can actually get. He will probably have to email it to your Panel secretary to get it printed because we are not allowed to put our little sticks into the GMC machine. We can probably email it and you can have it.

D THE CHAIRMAN: Mrs Lloyd?

E MRS LLOYD: I cannot put my hand on the right day but I remember you saying in terms of introducing the expert witnesses that they were witnesses in terms of the law. I have got the quote down somewhere. I just wonder if there is a judgment or a specific document where the criteria, you were saying in relation to the criteria for an expert witness whether you have got any documents that define that?

MISS O'ROURKE: Yes, your Legal Assessor is going to read to you that is part of what delayed because Mr Tyson invited an addition of what is the duty of the expert. In fact, I did read it to you in the *Toth v Jarman* judgment because I read you the ---

F MRS LLOYD: I appreciate that. Is that the only thing?

G MISS O'ROURKE: The answer is no. There is lots and lots written on duties of experts, there is a whole textbook of it. Mr Williamson produced to me a whole wodge of documentation upon it. There has been guidance and there have been many, many case authorities, but it is what is widely accepted as where is the duty of an expert are two things: one, a case called *The Ikarian Reefer*, which I read to you from *Toth v Jarman* this morning and a citation by the President, Sir Mark Potter, of that case. That was a decision many years ago of Mr Justice Cresswell. Secondly, that decision of Mr Justice Cresswell and the guidelines he gave were incorporated into the Civil Procedure Rules in 1999. There has since been Criminal Procedure Rules that adopt it. There have also been institutive expert witnesses that adopt it, but it is generally accepted, and it was the purpose of putting *Toth v Jarman* before you, that the duties of the expert are set out there, but yes, we could provide you with any number of places that say it.

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A | The key point, and your Legal Assessor will give advice on it, is that the duty is to give an honest opinion and to be independent. That is all you need to be troubled about for the purposes of this case.

THE CHAIRMAN: Mrs Lloyd, are you content for now?

MRS LLOYD: Yes.

B | MISS O'ROURKE: Sir, the *Nandi* case has just been emailed to you, so you should be in a position to print it off.

THE CHAIRMAN: The Panel Secretary was just indicating to me that we are still not clear about the actual mechanics for exactly the same reasons that you have explained. We are not sure about the mechanics of providing a completely up to date, written copy of the Legal Assessor's advice. However, I am suggesting that we do adjourn now for 15 or 20 minutes to see what can be achieved and how this can best be addressed.

C | MISS O'ROURKE: Otherwise, if we do have a continuing problem my understanding is that the amendments he is making as discussed with us are relatively minor. If the worst comes to the worst, perhaps they can be handwritten in or Tippexed over because substantially there is one minor change to paragraph 1, as I understand it, one addition to deal with the point of expert evidence, as Mrs Lloyd has been asking about, but that can be done on a separate page and inserted. Beyond that, there is again a few words taken out of paragraph 28, which again can be Tippexed over, so one would have thought that if the worst came to the worst and you wanted it in front of you, you could have it in its present form with handwritten annotations and print it later.

D | THE CHAIRMAN: I think you have exactly summarised what we may need to explore. Yes, I think it quite likely.

THE LEGAL ASSESSOR: I have been asked also to remind you it was the passage relating to testimonials when Mr Tyson was making his opening and he was referring to what Mr Justice Collins said in his judgment in relation to testimonials compared with solicitors and doctors.

F | What I was proposing to do – this is why I said it would be ready by 12 – is to ask the Panel secretary if she could get copies made of my original advice. The passages which are to be amended in agreement with both counsel redacted and I was also going to attach in handwriting at the moment the amendment to paragraph 14 on experts and also the additional matter I have been asked to so that the Panel will have that in front of them and they will be able to follow it very easily once those typed and manuscript documents have been copied.

G | MISS O'ROURKE: Indeed, sir, but in any event, as I think you said to us, bearing in mind the Panel is rising no later than one o'clock and will not start its consideration until tomorrow, will have the transcript, so if you were to supplement it orally the first time they would be looking at your advice would be tomorrow when they would have the transcript in any event.

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A MRS LLOYD: The problem with that is if we want to clarify anything it would be better to be done with you present. If we felt that there was further advice that we needed then you might have a view about that. I personally would prefer that we have the written advice in front of us today so that we have an opportunity to see it and listen to it and note it and then to make any comment on it which is our right to do so to make sure it is clear.

B THE CHAIRMAN: Mrs Lloyd, we are proposing that you will have something written in front of you, albeit that part of it will be in handwriting. I think the point being made about the transcript is that it will have everything set out in typing. Miss O'Rourke did say if there was anything that the Legal Assessor said orally supplementary it would be there, but of course we do have the opportunity. I would assume if there was anything supplementary oral, it would be brief, and we have the opportunity to make notes on that. We will be aware if he says anything that is not in what is front of us. Hopefully we will be able to get that advice out today. That is a reasonable way of doing it.

C THE LEGAL ASSESSOR: Can I say that Mrs Lloyd need not worry. She will have in front of her everything that I am saying she will have in front of her in writing in one respect from the transcript and in the advice itself. There will not be anything which is not before her and you will have the transcript of course tomorrow.

D THE CHAIRMAN: You have that reassurance from the Legal Assessor that everything will be in writing.

We will adjourn now for 15 or 20 minutes or however long it takes to get the copies of the written advice.

(The Panel adjourned for a short time)

E THE CHAIRMAN: I am now going to invite the Legal Assessor to give his legal advice to us.

THE LEGAL ASSESSOR: Thank you, Madam Chairman.

F 1. You are now at the final stages of a reconsideration of stage 2 of this case which is being held in accordance with the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988. The case has been resumed under Rule 28. This reconsideration by you started on 6 July 2010. It was adjourned on 14 July to 23 and 29 November 2010 and was then adjourned until 4 May 2011, when it was finally adjourned until 13 September 2011, and has continued daily since then.

G 2. This reconvening was as a result of a Court of Appeal Ruling in May 2010 quashing your findings on serious professional misconduct (hereinafter called SPM) and sanction at an original hearing in 2007.

H 3. The findings of fact you made at that stage still stand, so you proceed at stage 2 of the rules only. Three members of your Panel have been members since November 2006. One, Dr Vaidya, is a new member as from 13 September 2011.

A | The original panellists must, of course, put entirely out of their minds what happened at stage 1 and any deliberations they had on the matter.

4. Nevertheless, you proceed on the matters of fact which were found proved by you in August 2007 in relation to the Dinwiddie letter and the special case files (SC files) and cannot go behind those findings.

B | 5. I wish to make it abundantly clear that matters of judgement and discretion are entirely outside the boundaries of the advice and assistance that I am required to give to the Panel. For the avoidance of doubt, the Panel is the judge of the law. I advise on matters of law to assist the Panel in the discharge of its functions. I will advise only. I will not give directions. To do so might create in the mind of the informed observer a suspicion of improper influence. Should any hint of suspicion arise in the Panel's mind that any advice I give breaches the boundaries or exceeds the limits imposed on all legal assessors by the GMC (Legal Assessors) Rule 2004, the Panel must be equally assiduous to resist and challenge such an intrusion into what is and remains the Panel's sole domain.

C | 6. The Panel, exercising its own independent judgement, must now consider whether it judges Dr Southall to have been guilty of serious professional misconduct based on the facts found proved (Rule 29). This is an exercise in making a judgement without reference to any burden or standard of proof. Serious professional misconduct, if found here to have been committed, is an historical fact unlike the new concept in relation to impairment. Mr Tyson was right to urge you (Day 1/page 2B) not to confuse impairment with serious professional misconduct at the serious professional misconduct stage. I will deal with the position at the sanction stage, if it arises, later.

D | 7. I would emphasis therefore the need to judge Dr Southall's actions not with the wisdom of 13 to 22 years' hindsight and the advantage of modern approaches, but in the culture prevailing at the time of the events in respect of which findings have been made. Context is important because the Act requires the Panel to consider whether Dr Southall has been guilty of serious professional misconduct. His actions must be judged in context. The Panel has had the benefit of hearing a great deal of evidence and is best placed to define that context. To apply to the acts or omissions the standards of 2011 would be unfair to Dr Southall because you might be allowing the passage of time to penalise him. Evidence of system and policy at the time of the events relating to Child D and Child H is relevant, but not in relation to any other child. There is no general allegation of misconduct found proved in relation to any other child.

E | 8. Serious professional misconduct is not defined in legislation, and it is not an area in which an absolute precision can be looked for. In *Roylance v. GMC* (Privy Council, 1999) it was said that:

F | "Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standards or 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 ... The misconduct is qualified by the word 'professional' ... and by the word

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A 'serious'. It is not any professional misconduct which will qualify. The professional misconduct must be serious."

I advise you also that Miss O'Rourke correctly summarised the position stated in the case of *Meadow* (2006) EWCA Civ. 1390, and other authorities, when she stated that, "serious professional misconduct is to be 'judged according to the rules, written or unwritten, governing the profession'. Thus, it is for medical people, with a knowledge and understanding of, and experience in, paediatrics to say what it is they think is disgraceful, dishonourable, deplorable or serious."

9. That is why Miss O'Rourke has called a number of paediatricians on the subject of "seriousness".

10. Therefore, there are three stages: 1. Was it misconduct? 2. If so, was it professional misconduct, and, 3. if so, was it serious professional misconduct? It is accepted that if there is misconduct in this case it is professional misconduct so that what remains are stages 1 and 3.

11. Miss O'Rourke submits that what you have found does not even amount to misconduct, let alone serious professional misconduct, and you have heard, and will take into account those submissions. It is right that, for example, inappropriateness need not necessarily be misconduct, if, for example, it is inefficiency, or "he could have done it better", etc. You have heard a lot of evidence on that subject and submissions on both sides. You judge them. You are entitled to take into account *Good Medical Practice* in this regard.

12. That evidence goes to the question of seriousness, and you have heard several witnesses judge the conduct on a seriousness scale of 1 to 10. Those witnesses were, of course, witnesses in the medical profession, some of whom were closely involved with Child H and Child D.

13. Miss O'Rourke asks you to treat with caution any evidence given at stage 1 by Dr David because he did not deal with seriousness. Perhaps I could add, you will also remember the email and the letter which was produced.

14. This might be a good moment to advise you on expert evidence. Expert evidence presented to the Panel should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation, and an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his/her expertise.

15. On the question of bias, Miss O'Rourke has referred you to the case of *Toth v. Jarman* (2006) EWCA Civ. 2018. At paragraph 100 of his judgment Sir Mark Potter states:

"We start with the point of principle. Does the presence of a conflict of interest automatically disqualify an expert? In our judgement, the answer to that question is no: the key question is whether the expert's opinion is independent".

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A | You will remember that at some stage I intervened to give some advice on this issue and that is on the transcript.

16. I remind the Panel that its decisions must be based solely on the allegations that it has found proved. It is for the Panel to decide whether individually or collectively they do amount to serious professional misconduct. It follows that although individual findings may not in themselves amount to serious professional
B | misconduct, collectively they may do so.

17. I advise you that reasons should be given for the decisions taken. This is very important.

18. If the Panel concludes that Dr Southall is not guilty of serious professional misconduct it shall record and announce a finding to that effect. (Rule 29 (2)).
C |

18(b) If the Panel concludes that serious professional misconduct has been made out, either individually or collectively, it must decide whether it is necessary to postpone its deliberations in order to obtain further evidence of the doctor's conduct. If it decides that postponement is unnecessary, it must decide whether it is sufficient to make no direction and conclude the case. (Rule 29(1) and Rule 30).

19. If the Panel determines neither to postpone, nor that it is sufficient to conclude, they must consider the question of any sanction or direction in accordance with Rule 31. In so doing it should have in mind the GMC's *Indicative Sanctions Guidance* 2009. The guidance is, as its title indicates, a guidance and no more. It is for the Panel members to use their own judgement in reaching their decision.
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20. It is at this stage that I have to advise you as to the correct approach in a case being conducted under the Old Rules, although the *Indicative Sanctions Guidance* 2009 was brought into effect to deal with the procedure under the New Rules, which have a very different regime. You, of course, are not a Fitness to Practise Panel, whereas under the Old Rules you started as a Professional Conduct Committee.
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21. If this case was being conducted under the New Rules, before any action could be taken on the practitioner's registration not only would past misconduct have had to be proved as a result of which his fitness is impaired (i.e. currently) but if it had not been found to be so impaired no sanction could be imposed.
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22. Under the Old Rules, which you apply in this case, once serious professional misconduct is established he faces sanction so that at this stage no decision has been made as to whether current fitness to practise is impaired. (There is no impairment stage).
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23. It is agreed that the 2009 *Indicative Sanctions Guidance* applies when it comes to sanction. This would bring paragraphs 1 and 8 into play. You should note the need for "consistency", and also all the recent authorities (up to *Grant* (2011) EWHC 927 Admin in April of this year) which can assist the Panel in their approach to the task.
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A 24. It seems to me that justice would demand that an Old Rules defendant must be treated in the same way as a New Rules defendant when it comes to sentence, and, accordingly, the concept of current fitness should apply equally, in one case because the rules demand it, and, in the other because justice and common sense demands it. So that the test in both cases at sanction stage should be whether current fitness to practise is impaired, of course taking into account past conduct and then looking forward to the present, remembering that the interests of justice are paramount: after all, the Panel is called a Fitness to Practise Panel. Mr Tyson stressed (at Day 1/page 2B) that you were to put out of your mind impairment when considering serious professional misconduct, the implication being that it was only relevant to sanction and that is right.

B 25. The stark question therefore is, is he fit to practise without restriction, taking into account the past conduct and looking forward to today?

C 26. I feel bound to advise you that that is the correct approach. If you disagree you say so, but, of course, you have to give your reasons.

D 27. Mr Tyson addressed you on sanction for most of Day 2, referring to the *Indicative Sanctions Guidance*, paragraph by paragraph, to the hearing in the Sally Clark case and the eventual removal of conditions, and, in a nutshell, saying that the complainants had instructed him to seek erasure, without saying why they had taken that stance. However, what he did make clear was that the Panel would now be looking at the present position, i.e. in 2011, and not at the position 13 to 23 years ago, although that would be relevant, looking to see what Dr Southall had done since then and his present position.

E 28. Miss O'Rourke did not address you at all on sanction, though, of course, she produced a bundle of highly impressive testimonials and you have had evidence in this case that Dr Southall was well-intentioned, honest and genuinely had the interests of children at heart; that he is a dedicated and renowned paediatrician. On the question of testimonials Mr Tyson drew your attention to Collins J's judgment in the Clark case dealing with the case of *Bolton v. The Law Society*, which was a case which involved a solicitor, as applied to *Gupta v. The GMC* as follows:

F "It follows that in my view testimonials can in the case of doctors be accorded greater weight than in the case of solicitors ... thus testimonials which establish that a doctor is in the view of eminent colleagues and of nursing staff who have worked with him, one who is not only competent but whose loss to the profession and to his potential patients would be serious indeed can, in my opinion be accorded substantial weight."

G In addition, as I indicated earlier, I have been asked to add what was quoted by Mr Tyson on Day 2/14G, dealing with the *Indicative Sanctions Guidance*, page 30, which was guidance on considering references and testimonials:

"The doctor may present references and testimonials as to his/her standing in the community or profession."

H It goes on to say:

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“Panels should consider ... whether the authors are aware of the events leading to the hearing and what weight, if any, to give to those documents.”

Of course, a greater weight may be given to those who have stated that they were aware of events.

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29. If you consider that he is not currently fit to practise despite the removal of conditions under the new rules in the *Sally Clark* case, you then consider whether any action is necessary, and if so, you deal with the possible sanctions in ascending order. You are well aware what those possible sanctions are, all of course set out in the *Indicative Sanctions Guidance* and the Rules. The Panel should have in mind the duties and responsibilities of a doctor as set out in *Good Medical Practice*.

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30. The Panel should be conscious that the purpose of sanctions is not punitive but the protection of patients and the public interest. In this context the Panel may find relevant his compliance in regard to the conditions imposed on him in the *Clark* case.

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31. The public interest includes not only the protection of patients, but also the maintenance of confidence in the profession and the declaring and upholding of proper standards of conduct and behaviour. The Panel should bear in mind that if Dr Southall's opinions in this case as to propriety can be criticised, then so too can the opinions of many eminent paediatricians who agree with him. The public interest can also, of course, include the doctor's return to safe practice.

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32. In deciding which sanction, if any, to impose, the Panel must apply the principles of proportionately, weighing the interests of the public with those of the doctor.

33. Rules 30 and 31 of the old rules deal, of course, with the sanction stage.

THE CHAIRMAN: Thank you, Legal Assessor. I know both counsel did see this prior to it being given, but I must ask now whether, having heard that, you have any comments on the legal advice as given.

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MR TYSON: Just one comment in relation to paragraph 23, madam. The learned Legal Assessor referred the Panel to the case of *Grant*. It may be helpful to the Panel to have *Grant* available to the Panel as he has expressly made reference to that decision.

THE LEGAL ASSESSOR: Yes, I absolutely agree. That is why I quoted it, in fact, so that they knew where to find it.

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THE CHAIRMAN: You would simply say that we should have that made available to us.

MISS O'ROURKE: Madam, I do not disagree with that. I understand in the meantime that *Nandi* has been photocopied. I do not know if it has been given to the Panel, but it is clearly very helpful because it will give you a feel for a case where there were three patients involved, and many failings, and there was no SPM.

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- A THE CHAIRMAN: I accept that when we receive those authorities that is not additional legal advice. It is simply the basics.
- Do you have any comment on the legal advice? (No response) I now turn to the Panel to see whether they have any matters that they wish to be clarified in the legal advice? Dr Vaidya.
- B DR VAIDYA: I think it is just a factual correction in paragraph 3. I was a new member not on 13 September, but I joined in last November. I was there for the initial ---
- THE LEGAL ASSESSOR: Were you? I am so sorry.
- DR VAIDYA: It is just a factual correction.
- C THE LEGAL ASSESSOR: The date should be ---
- MR TYSON: 23 November.
- THE LEGAL ASSESSOR: No evidence was called before you, was it? That is really why I put this date in. It was my mistake; I am sorry.
- D DR VAIDYA: No. No evidence was called. Initially there was application there. I constituted the same Panel and everything. Then it went to the Court of Appeal, I think, for clarification. Then we ran short of time.
- THE CHAIRMAN: Mrs Lloyd, did you have a point for clarification?
- E MRS LLOYD: Yes. I just wanted to clarify paragraph 31 where you refer to Dr Southall's opinions in this case, "... as to propriety can be criticised, then so too can the opinions of many". Could you just expand on that a bit, please?
- F THE LEGAL ASSESSOR: If I am asked to, yes. It seems to me that this whole case depends on findings of opinion by you at this hearing – opinions of inappropriateness, or whatever it may be. When dealing with that, both counsel asked people to be careful not to undermine your previous findings. Nevertheless, it became necessary when dealing with the matters leading up to the findings, particularly the question of seriousness, to find out not only from the doctor but his witness – I have really dealt with this – what they on a scale of 1 to 10 thought of the sanctions and, indeed, to give any evidence they wanted to as to their opinion. It became absolutely clear that they shared the opinion of Dr Southall, and Dr Southall went so far as to say, because he was asked (and no one suggested he was being dishonest), "I respect and abide by your rulings but I disagree with them." Quite clearly, and this is in evidence, he is not the only person who has disagreed with them.
- G For example, perhaps the evidence in relation to his application to apply for the presidency of the Royal College of Paediatricians is relevant in this respect because it must have involved the opinions of other paediatricians, including the president himself and those who voted for him.
- H When I say – and this is what you asked about – the Panel should bear in mind that if "Dr Southall's opinion in this case as to propriety can be criticised, then so too can the opinions of many eminent paediatricians who agree with him." It must be that so far as

A | your ruling is concerned you disagreed with the opinions he expressed as to what was or was not misconduct at the particular time.

Of course, some of the evidence which is before you now which was not before you previously deals with that very point. People have come along to express opinions which, in fact, agree with the opinions of Dr Southall. It seems to me to be common sense; a criticism of his opinion must also be a criticism of their opinion if they share his opinions. That is what I was trying to say.

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THE CHAIRMAN: Does that give rise to any comment from counsel?

MISS O'ROURKE: Apart from a double negative, which I hope the shorthand writer will correct, I agree with every word the Legal Assessor has said. Indeed, it was part of the thrust of my own position on expert evidence.

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MR TYSON: I have to disagree because the evidence in this case, madam, was that it was not many eminent paediatricians agreed with Dr Southall; it was that Dr Southall told you that, having heard what paediatricians had to say, he changed his own view. Therefore he changed his account from the account that he gave you at stage 1 to the current account that he gave you at stage 2 having heard what the paediatricians say. It is the other way round. His views are affected by the views of the eminent paediatricians, not the eminent paediatricians' views are affected by his.

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THE LEGAL ASSESSOR: I am perfectly prepared to accept that is another way of saying the same thing.

THE CHAIRMAN: I do not think we can probably get any further on that. Did you have a point of clarification? I will go to you first, Mr Simanowitz.

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MR SIMANOWITZ: One is simply a matter of correction, which I think should be made on page 3 at the bottom. There is a reference to "sentence" which I think should be "sanction".

THE LEGAL ASSESSOR: You are strictly right, but in fact it was the word used in the Court of Appeal. That will show you that I share your criticism.

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MR SIMANOWITZ: The other matter is at paragraph 3 on page 1 where you say:

"The original panellists must, of course, put entirely out of their minds what happened at Stage 1 and any deliberations they had on the matter."

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Is that only in relation to the matter which has been taken out by the Court of Appeal, because I do not see how we can put out of minds what happened in relation to these matters. If you had a case which ran on straight from stage 1 to stage 2, those matters would be before the Panel.

THE LEGAL ASSESSOR: Could I refer to what the Court of Appeal said when remitting this to you? At that stage they said they were remitting it for sentence. That is why I used the word "sentence".

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MR TYSON: Before the learned Legal Assessor replies, perhaps I can assist in this matter. My understanding was that what they have to put out of their minds are any

A matters relating to *Mrs M* and the consequences. One of the reasons why it was remitted back to the original Panel rather than a new Panel was so that you could take into account, as it were, matters which you felt important or not important because that was the whole reason of giving it back to you rather than anybody else. The only matters they had to put out of their minds were the *Mrs M* matters.

B THE LEGAL ASSESSOR: I appreciate that. Of course, Dr Vaidya, to start with, was not there and had not anything to put out of his mind. What I was concerned with, because no finding of SPM was given in relation to these matters at the previous hearing although it was before them to find, was as to whether and to what extent the Panel – Dr Vaidya would not know – had discussed that and what stage they had reached. I do not know, and I was concerned – and I am still concerned and I think the Panel is – that they should put any of those matters out of their mind and consider the matter afresh. The advantage of it having been remitted to them in these particular circumstances is that they are now in a position – and I keep on bringing in Dr Vaidya but I think it is very relevant – to consider the matter afresh, which Dr Vaidya is doing in any event.

C THE CHAIRMAN: Can I just say then, it is my understanding there that what has been said is that we should dismiss any subjective discussions that we had at that time, but not the factual matrix? That is, we have the on the record redacted transcripts which have formed part of the documents which Dr Vaidya has read and that we indeed have read in preparation for this case. We are not being asked to put that out of minds. We are being asked to put out of our minds anything that happened in camera, any thoughts we had at that time about how this part of the case related to the part that has now been quashed. I think that is what is being said.

D THE LEGAL ASSESSOR: Thank you.

E MR TYSON: It might be what is being said but I do not agree with that.

F MISS O'ROURKE: I do agree with it entirely because discussions that you had in camera on the last occasion when you did have a Stage 2 and Stage 3 about these matters are now gone because you are back to the stage if you had just announced your Stage 1 findings, so you must put out of the your minds what discussions the three of you had with other people in respect of Stage 2 because we are starting at Stage 2 afresh.

G THE LEGAL ASSESSOR: Mr Tyson, I am grateful to you for raising this. I was about to say that I was advising the Panel that what the Chairman has just said is absolutely right. If you want to say something more, please do.

H MR TYSON: There was a purpose of it sending it back to the original Panel as opposed to any other panel because the original Panel had, as it were, knowledge, feelings, awareness of what happened the last time and they cannot forget any of what appeared to them to be important or what appeared to them to be unimportant, or matters which they discussed at the time because that was the whole point of sending it back to the original Panel.

I entirely accept that they cannot say this is what we talked about last time, therefore it is exactly the same now. They have to look at all the evidence which has come before them and deal with it on the basis of the evidence, both on this occasion and the last

A occasion. All I am saying is that they cannot put entirely out of their minds, as is put by the learned Legal Assessor, what happened at Stage 1 and any deliberations they had on that. That can only, in my respectful submission, refer to the Mrs M matter, not to your other discussions.

THE CHAIRMAN: I do not perceive any difference between what is being said.

B MISS O’ROURKE: If Mr Tyson is in any way inviting you, and I think I heard it slip in there that discussions that three of you had on a previous Stage 2 about these matters can in any way inform you, that is entirely wrong because you were determining Stage 2 then on entirely different evidence and it would be entirely wrong to introduce that. You go back as if you have just finished and announced Stage 1 and therefore anything that happened after Stage 1 on the previous occasion is out, and more than that, anything that happened in Stage 1 on the previous occasion touching Mrs M or playing across
C from Mrs M into this is also out.

THE CHAIRMAN: I am conscious of the fact that I have undertaken to Mr Simanowitz, who is unable to sit this afternoon, that he needed to leave at one o’clock sharp. I think we are there on that. I saw the Legal Assessor nodding about what his advice is there and I think we are completely clear on what his advice is.

D THE LEGAL ASSESSOR: There is just one point on what Mr Tyson has just said. If the three Members of the Panel who were there on the last occasion had discussions in relation to these matters in *camera* would they be entitled to reveal to Dr Vaidya, who was not a member of the Panel, what those discussions were? It seems to me that they would not, which is an added reason why they certainly should put from their minds the discussions they had in relation to this. Everything else you said, Mr Tyson, I agree with.

E THE CHAIRMAN: Do you feel you need to come back on this? I am afraid Mr Simanowitz really does have to go. We were very clear that this hearing was to end at one.

MR TYSON: Then I will say nothing.

F MRS LLOYD: I think it is important just to finish clarifying this. I would like to hear what further comment Mr Tyson has to make?

THE CHAIRMAN: I turn to Mr Simanowitz?

MISS O’ROURKE: Can Mr Tyson just say if he has a further comment to make because he just indicated that he has not?

G MR TYSON: I did not in view of the pressure of time. I do in fact have.

THE CHAIRMAN: I have made an undertaking that everybody understood.

MR SIMANOWITZ: I can stay for another five minutes. I do not know about Miss O’Rourke.

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- A MISS O’ROURKE: The NMC will have to wait for me; it is as simple as that.
- THE CHAIRMAN: I have not asked my point for clarification yet.
- MISS O’ROURKE: If Mr Tyson can make his point as quickly as possible?
- B MR TYSON: It appears to me to be unrealistic that some Members who may be able to recall what they thought about that and to inform Dr Vaidya about it if they wanted to use that as part of their reasoning on Stage 2 at this event. I put it no higher than that.
- THE CHAIRMAN: Mr Tyson has made his point which we have now heard. As I understand it, that does not change the legal advice?
- C THE LEGAL ASSESSOR: No, I agree with that. They may have formed the same opinions now as they did then but they do not have to say what they did then. They just have to say what they do now. That is the way round it. These are questions being asked to me about my advice so I hope I have now replied to all of them.
- D THE CHAIRMAN: I hope my point is very brief and that is on paragraph 28 and I think elsewhere a reference has been made to having in mind the responsibilities set out in *Good Medical Practice*. I wanted to clarify that normally we take note of the version of *Good Medical Practice* that was in force at the time of the matters complained of. I am not even sure it was called *Good Medical Practice* at that time. We have been referred to something known as the Blue Book. Can I be clear are we in this case only referring to what is called the Blue Book to which we were referred? That is really a question to the Legal Assessor for clarification.
- E THE LEGAL ASSESSOR: It depends whether you are dealing with the misconduct stage or the sanction stage. This is one of the peculiarities of this case because Stage 1 and Part 1 of Stage 2 you are dealing under the Old Rules, but Part 2 of Stage 2 you are dealing under the New Rules, but taking into account the current *Indicative Sanctions Guidance* and also dealing with the present, whereas when dealing with the misconduct you were dealing with 23 to 13 years ago past. I cannot say more than that because it seems to me that I have already dealt it.
- F MR TYSON: SPM in my submission should be done under the Blue Book. Different considerations apply to sanction.
- MISS O’ROURKE: I agree with that. I think the Legal Assessor is right. The Blue Book is the misconduct, but once you get to sanction you in fact by the *ISG* are invited to look at *Good Medical Practice*.
- G THE CHAIRMAN: Thank you. That is agreed. I hope that has now dealt with all the matters to do with the legal advice and that everyone is now content. I was doing my best to assist with getting all the questions answers and to dealing with the time constraints.
- H The Panel will now from tomorrow morning go into *camera*. I think it will be useful obviously if the Panel Secretary can know how to contact you, Mr Tyson.
- Miss O’Rourke, would it be Mr Williamson?

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MISS O'ROURKE: Yes, Mr Williamson and me. The position is I will be in the NMC tomorrow, and possibly part of Friday, but he will be available and able to contact me.

THE CHAIRMAN: Should we need to recall parties because of further legal advice we need to know who to contact and where.

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MR TYSON: I wondered, madam, whether you could say in any event you will not recall us back until, say, Monday. I personally for professional reasons would like to be out of London tomorrow and the next day. If needs be I will stay in London, but I would prefer it if you could say not back before Monday.

THE CHAIRMAN: In which case any additional legal advice that we were given in *camera* would not be put to you until Monday.

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MISS O'ROURKE: Madam, I would have no difficulty with that if you were still able to go on and deal with other issues, but if it was going to stop you and hold you up, then I am afraid I would have to say there may be a way round it because we could deal with it and I have certainly done it here in this building where we deal with the legal advice by telephone. In other words, that we join into a conference call and the Legal Assessor gives his advice and we are both on the phone and we deal with it, so Mr Tyson can go

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away and indeed that might be my own position on Monday. I have two professional commitments in Belfast in Northern Ireland. I would be able to interrupt them because they are conferences so I could come to a phone, but I could not come to the building. Mr Williamson could and he could get my views by phone but it may be that is the way to deal with it.

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THE CHAIRMAN: I think the important thing is that if there is an issue we are able to make contact and we know how to do that without expecting you to be available to come to the building.

MR TYSON: As long as the Panel understands that I will not be in London tomorrow and the next day.

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THE CHAIRMAN: I think that has been agreed satisfactorily. Just contact details so that we can make contact in case there is anything that needs to be resolved.

We are now finally adjourning until to 9.30 tomorrow morning for the Panel where we will be in *camera* and it is understood then that you are not expected to be available in person.

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(The Panel adjourned until 9.30 am on Thursday 22 September 2011)

*(Parties were released from further attendance until
Monday 26 September 2011)*

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