THREE DOCTORS AND THE GMC

Following the collapse of a GMC case involving neonatal research that took 15 years to come to a hearing, **Jonathan Gornall** has uncovered a trail of incompetence and maladministration

MARTIN RICKETT/PA ARCHIVE/PA

On 8 May this year, 15 years after the conclusion of what has become one of the most exhaustively scrutinised trials in the history of paediatric research,[1] and 11 years after the General Medical Council first received complaints about it, a fitness to practise panel finally sat to hear charges against three of the doctors involved. Almost two months later, on 4 July, the case was thrown out by the panel, which accepted half-time submissions by the doctors' lawyers that they had no case to answer.

The cloud that since 1997 had hung over the heads of David Southall, Martin Samuels, and Andrew Spencer and, by association, everyone at the two centres that had participated in the trial of continuous negative extrathoracic pressure (CNEP) as a treatment for neonatal respiratory failure, had been lifted.

After a decade of investigation the hearing had begun with a delay. The counsel for the GMC and the complainants applied for a five day adjournment in the light of an expert's report they had commissioned only 10 days earlier. The report, by Jane Hutton, professor in medical statistics at the University of Warwick, was at odds with the evidence of the prosecution's main expert witness, on which the bulk of the charges had been based.[1]

Independent experts?

In its determination the panel accepted the defence submission that Richard Nicholson, editor and owner of the *Bulletin of Medical Ethics*, was neither an expert nor independent.[2] No reasonable panel, said the chairman, David Kyle, former chief crown prosecutor, "could safely rely on his opinion evidence, firstly because of considerable reservations whether he qualified as an expert due to the limited expertise he can demonstrate." There were also "considerable reservations about his independence and objectivity"; he had "conducted himself as a supporter" of the complainants and, in articles in his own journal and in interviews with the media, had shown "a deep animosity towards Dr Southall."[2]

The CNEP hearing had proceeded despite a series of earlier investigations by the police, NHS, and other bodies having found no fault with the research trial.[3-5] For many paediatricians and others, it was the latest episode in what they saw as the GMC's misguided pursuit of Dr Southall, a key target of a campaign against doctors working in child protection.[6-12]

Earlier cases

In two previous cases against Dr Southall, the GMC had also been accused of relying on the evidence of an expert witness whose appropriateness to give such evidence was open to question.

In August 2004 a professional conduct committee found Dr Southall guilty of serious professional misconduct for having raised concerns for the safety of Sally Clark's surviving child, in the care of its father while its mother was in prison, having been found guilty in 1999 of the murder of her two baby sons. Dr Southall was banned from child protection work for three years.[13] The GMC hearing was later criticised for "a series of flaws and conflicts of interest that casts doubt on the GMC's disciplinary procedures."[14 15] An article published in *Pediatrics*, signed by 53 paediatricians, accused the GMC of harming child protection in the UK and failing "to recognise the conflict of interest that could have affected the views of its only expert witness," Tim David, a professor at Manchester University.[7]

Despite the concerns that were raised

Journalists and camera crews greeting David Southall after he was found guilty of serious professional misconduct by the GMC in 2004

about the reliance on Professor David as an expert witness at the Clark hearing, the GMC relied on him again in its second case against Dr Southall. On 4 December 2007, a GMC panel upheld a complaint of serious professional misconduct against Dr Southall based on the uncorroborated evidence of a woman who claimed that in a 1998 child protection interview Dr Southall had accused her of murdering her child, notwithstanding evidence to the contrary from a senior social worker who had been present at the interview.[16] Dr Southall was removed from the register. He is appealing against the decision.[17] Both the verdict and the punishment were greeted with dismay.[18-21] The message the GMC had sent, wrote one doctor, was "loud and clear: challenge parents at your peril, you will have no conceivable defence."[9]

By the time the second case against Dr Southall had come to a hearing, concerns about the GMC's proposed reliance once again on Professor David as an expert witness had been raised directly with

The true extent of the campaign against paediatricians and how the GMC has gone about dealing with it has remained shrouded in mystery

Graeme Catto, president of the GMC. On 1 September 2006, two months before the hearing started, Wendy Savage, a gynaecologist and obstetrician who had retired from the GMC in 2005 after 16 years of service, wrote to Sir Graeme saying that she "found it hard to believe" that Professor David was involved with the case.[4] Dr Savage noted that she had previously raised concerns with Sir Graeme about the use of Professor David as an expert witness in the Clark case, whereupon she had been informed that the GMC "had taken legal advice to the effect that there was no conflict."

She described the GMC's decision to rely on Professor David in the Clark case as one "I still find hard to accept . . . I think that as he had prior to the case been antagonistic towards David Southall's work that he is not the right person to be doing this. Did you have difficulty in getting another UK paediatrician to do this review?" Sir Graeme replied to Dr Savage, but merely to indicate that he could not comment on the case because it was "still live."

Current case

Clues to the unsuitability of Dr Nicholson as an expert witness against Dr Southall in the CNEP case had been in the public domain for years. Well before the hearing, Dr Nicholson had aligned himself with campaigners against the trial. For the past decade, Carl and Deborah Henshall have made many serious and unsubstantiated allegations against the researchers in the trial, accusing them in the media and in complaints to members of parliament, the police, and the GMC of scientific fraud, monetary fraud, forgery of consent forms, actual bodily harm, and even murder—a litany of charges scrutinised and demolished at the hearing during the cross examination of Mrs Henshall.[6 22]

In a letter to the *BMJ* published in September 1998, Dr Nicholson referred to the Henshalls, albeit without naming them, and a dossier they had assembled which "consists of nearly 1000 pages of evidence supporting their complaint that one of their children died, and another was left severely brain damaged, as a result of being used without their consent in a research project."[23] Under cross examination at the hearing almost a decade later, Dr Nicholson admitted that he had not studied the contents of this dossier before submitting his letter for publication. Dr Southall's counsel, Mary O'Rourke, asked Dr Nicholson what had "entitled you or caused you to say in a reputable journal going out to most of the medical profession that that dossier contained evidence which supported those two contentions?" Dr Nicholson replied: "I suspect I took their word for it."

The GMC has repeatedly rejected claims that it has treated Dr Southall and others unfairly, both in the way it has handled the campaign against them and in the way it has appointed expert witnesses.[24] In February 2008, Sir Graeme replied robustly to an open letter in the *BMJ* critical of the GMC's performance in the first two Southall cases by accusing paediatricians of "fuelling a perception that the GMC is somehow bent on unfairly persecuting paediatricians involved in child protection work."[10 24]

GMC handling of complaints

The true extent of the campaign against paediatricians and how the GMC has gone about dealing with it has remained shrouded in mystery. When contacted, the GMC declined to disclose how many complaints it had received (personal communication).

However, an internal GMC list of ongoing cases dated 1 February 2006 records no fewer than 11 complaints against Dr Southall, from 1999 to 2005, made by a single complainant whose children had never been treated by Dr Southall. Among other documents obtained under the Freedom of Information Act is a second internal GMC email, dated 14 March 2003, which suggests that the same person also made complaints about several other doctors. Furthermore, an email distributed internally by a caseworker at the GMC on 13 September 2005 recorded: "I have about 12 or so boxes of papers on Professor Southall, but there are many more in storage . . . FPD [Fitness to Practise Directorate] lists around 40 different cases in all."

Concern has been expressed about the relationship between certain GMC officers and complainants. In 2002, after Harvey Marcovitch, the former editor of the *Archives of Disease in Childhood*, and 17 other doctors had been reported to the GMC "by the same small group of people," they wrote a letter to the *BMJ* demanding that the GMC "recognise and deal with vexatious complainants

"Presumably, the GMC has thought about objectivity in the choice of experts and whether to go overseas for opinions."

Liam Donaldson wrote to the GMC

fast." The letter recorded that one of the 18 doctors had applied under the Freedom of Information Act to see material about him held by the GMC "and was disturbed to find that members of the council's staff and a regular complainant were on first name terms."[25]

Another internal GMC email sent to Finlay Scott, chief executive of the GMC, and others on 28 November 2003, offers an insight into how the GMC had responded to the morass of complaints against Dr Southall:

"You will recall that 'Southall' is the horribly complicated mess which the original caseworker mishandled, and where we made a commitment to look at the entire case again," the email's author wrote. A key factor in the GMC's slow progress was said to be "the constant stream of letters, emails, telephone calls and new allegations that have continually come out of the woodwork."

The extent to which this original caseworker mishandled the complaints against Dr Southall has now become clear. The caseworker had responsibility for the "numerous complaints" about Dr Southall and the "mountain of correspondence" arising out of them from the end of 1999 until he left the GMC in April 2002. His replacement wrote to colleagues on 21 May 2002: "I am concerned the case is handled properly from here on in, " she said. "Unfortunately we appear to have got off to a very bad start and the purpose of writing the attached document is … to offer a suggestion as to how we might reclaim our position/reputation."

On 31 January 2001, the GMC screeners who would eventually recommend that the Clark complaint be referred to a preliminary proceedings committee received a less than objective briefing email from the original caseworker. "Stephen Clark's complaint," he wrote, "reflects the maverick and almost God like belief Professor Southall has of his own infallibility." The same caseworker drafted the charges against Dr Southall in the Clark case, which the preliminary proceedings committee decided to refer to a full GMC hearing, as he had recommended.

Significantly, the decision to refer the Clark case was made not in isolation but after consideration at the same time of two other sets of child protection allegations against Dr Southall. The committee considered that "a pattern of inappropriate behaviour was revealed by the allegations in these three cases in that Professor Southall allowed his belief in his own expertise to cloud his professional judgment." The committee referred all three cases to full hearings.

However, one of the three cases that served to inform the committee's view was that of a woman who claimed that Dr Southall had accused her during a child protection interview of murdering her own child. Although it noted that there was the "possibility" of further evidence from a guardian ad litem who had been present, the committee referred the case.

It was not until a year later, however, that the GMC interviewed the guardian, who provided evidence contradicting the complainant's allegations.

There had, in other words, been no "pattern of inappropriate behaviour." Nevertheless, the Clark case, which had proceeded to a hearing in 2004 on the basis that there had been, had been allowed to continue.

Selection of experts

The minutes of a meeting held at the GMC on 21 June 2002 show how the council decided to go about reclaiming its reputation after the caseworker's departure: "All problematic Southall related cases" were being reviewed and plans were afoot to access the caseworker's computer hard drive and email account. Less than a week after that meeting Paul Philip, director of fitness to practise at the GMC, wrote to Dr Southall explaining that a review of child protection cases already closed by the GMC had identified "a number of errors in the way some of these cases have been handled . . . We have therefore decided to re-open those cases where maladministration has been identified."

An exchange of correspondence between the chief medical officer, Liam Donaldson, and the GMC in 2000 that has recently come to light raises further questions about the organisation's selection of expert witnesses. In October 2000, the month after the publication of a damning critique of the Griffiths inquiry into the conduct of the trial of continuous negative extrathoracic pressure,[26] Liam Donaldson wrote "in strict confidence" to Finlay Scott, chief executive of the GMC: "Emotions are running high in support of Professor Southall in the child health world . . . Presumably, the GMC has thought about objectivity in the choice of experts and whether to go overseas for opinions."

The reply, sent on 9 October in the absence of Mr Scott by Isabel Nisbet, director of fitness to practise, showed the GMC was not unreceptive to such external interference. "We are aware of the strength of feeling about this case in the child health world and of the exchanges in the *BMJ*," she wrote. The GMC's lawyers, she said, were about to approach Kate Costeloe, professor of paediatrics at the Homerton Hospital. However, she added, "if you know of any reason why we should not use Prof Costello [*sic*], or if you have any other suggestions of objective sources of expert advice in this country, please do not hesitate to let us know privately."

ANDY PARADISE/REX FEATURES

A spokesman for the Department of Health declined to say whether the chief medical officer responded to this invitation. What is certain, however, is that Professor Costeloe was not the expert finally chosen—it was Dr Nicholson; nor was she ever approached.

Weak case

In the wake of the collapse of the CNEP hearing, it remains unclear why the GMC proceeded with its case against the three doctors. As long ago as February 1998, an email from a caseworker to medical and lay screeners described the allegations as "long on speculation . . . but short on evidence," but noted also that the key complainants were "aggressively mobilising the media, including Channel 4 News, and MPs."

The writer added: "I am not optimistic about the prospects of proving anything concrete against individual doctors. However . . . in view of the serious nature of the allegations, we should respond to the campaign being orchestrated . . . by asking FFW

[Field Fisher Waterhouse, GMC solicitors] to undertake an investigation."

In 2002 and 2004, preliminary proceedings committees of the GMC twice considered and rejected Mr and Mrs Henshall's complaints. The Henshalls appealed and, in December 2005, the Court of Appeal ordered that their case be "remitted to a reconstituted PPC for reconsideration."[27]

A committee was duly convened in 2007 to consider their complaint again. This time it chose to refer the case to a full hearing. Nevertheless, it was not the case, as Mr Scott seemed to imply in an article in the *Observer* published shortly before the hearing began, that the GMC had been left with no choice.[28]

In the end, a prosecution of three doctors which had dragged out over a decade collapsed because it had no sound evidence to support it. In the words of the panel, summarising the submission of Martin Forde, QC for Dr Spencer, the GMC had presented evidence that was "inherently weak, inconsistent, unreliable and implausible."

Edmund Hey, a paediatrician who in 2000 coauthored a paper in defence of the research trial, commissioned by the Medical Defence Union,[26] says that Professor Hutton's last minute report had given "the science behind this paper and the handling of the statistics a completely clean bill of health.

Sir Liam Donaldson, the chief medical officer, wrote to the GMC to ask about their selection of expert witnesses

"If the GMC had obtained such an opinion 11 years ago it would have saved both sides in this long drawn-out saga a vast sum of money, to say nothing of the quite unnecessary damage that the scandalous mishandling of this case has inflicted on the medical reputation of three senior paediatricians."

Furthermore, the GMC's mishandling of the affair has, according to Dr Hey, had other costs: "to the families of the professionals affected, to the faith that the local community has felt able to place in the care of children in Stoke, to neonatal research across all the UK for at least six years, and to the faith that doctors, and paediatricians in particular, now have as to the competence with which the GMC currently handles allegations of misconduct."

A spokesperson for the GMC said: "We do not comment on individual cases, in particular those which have recently concluded and which are still subject to appeal. This case is no exception."

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ACTING AS AN EXPERT WITNESS

The General Medical Council has published guidance on acting as an expert witness. **Graeme Catto**, the council's president, explains the background

The GMC has produced new guidance for doctors, on Acting as an Expert Witness.[1] As well as being a source of guidance for doctors, we hope that it will help to clarify, for the legal profession, the boundaries within which medical experts operate.

Society needs doctors to act as expert witnesses; they are essential to our judicial and tribunal systems and help resolve disputes that require specialist medical knowledge. In recent years, however, there have been several high profile cases where medical expert witnesses have attracted criticism—for example, for giving evidence that was misleading or failing to disclose relevant information.

In light of the resulting debate, which included the chief medical officer's report *Bearing Good Witness*,[2] the GMC welcomed the call for clarification of its guidance for expert witnesses. *Acting as an Expert Witness* has been developed after extensive consultation and written with these recommendations in mind.

The GMC believes it is important that doctors who take on the role of medical expert can do so with confidence, knowing what is expected of them. This includes recognising that the expert's overriding duty is to the court and to the administration of justice. Doctors do not want to be reported to the GMC for alleged failings in their role as an expert witness, and the courts need to be able to rely on the balanced evidence of expert witnesses.

When doctors act as expert witnesses, they take on a different role from that of a doctor providing treatment or advice to patients but remain bound by the principles of good practice laid down in the GMC's core guidance, *Good Medical Practice*.[3] The new guidance expands on these principles and clarifies how doctors would behave when giving expert evidence in court or tribunal cases.[1] The guidance emphasises that medical expert witnesses must:

Recognise their overriding duty to the court and to the administration of justice—The role of expert witnesses is to assist the court on specialist or technical matters within their expertise. The doctor's duty to the court overrides any obligation to the person who is instructing or paying him or her. This means that doctors have a duty to act independently and not be influenced by the party who retains them.

Give opinion and evidence within the limits of professional competence—Doctors should stay within their area of expertise. If a particular question or issue falls outside their area of expertise, they should make this clear. In the event that they are ordered by the court to answer a question, regardless of their expertise, they should answer to the best of their ability but make clear that they consider the matter to be outside of their competence. Doctors should be aware of the standards and nature of practice at the time of the incident under proceedings.

Keep up to date in their specialist area of practice—Doctors must keep up to date in their specialist area of practice. They must also ensure that they understand, and adhere to, the laws and codes of practice that affect their work as an expert witness. In particular, doctors should make sure that they understand:

- How to construct a court compliant report
- How to give oral evidence
- The specific framework of law and procedure within which they are working.

Explain when there is a range of views—Doctors acting as expert witnesses must give a balanced opinion and be able to state the facts or assumptions on which it is based. If there is a range of opinion on the question upon which they have been asked to comment, they should summarise the range of opinion and explain how they arrived at their own view. If they do not have enough information on which to reach a conclusion on a particular point, or their opinion is otherwise qualified, they must make this clear.

Protect confidential information—If doctors have reason to believe that appropriate consent for disclosure of information has not been obtained (from the patient or client, or from any third party to whom the medical records refer) they should return the information to the person instructing them and seek clarification. Medical experts should not disclose confidential information other than to the parties to proceedings unless:

- The subject consents (and there are no other restrictions or prohibitions on disclosure)
- They are obliged to do so by law
- They are ordered to do so by a court or tribunal
- Their overriding duty to the court and the administration of justice demands that they disclose information.

The guidance is not exhaustive but provides a framework and information source to work from. Adherence to the principles in the guidance will ensure that doctors are confident in fulfilling the important role of medical expert.

Doctors should be aware of the standards and nature of practice at the time of the incident under proceedings.
Graeme Catto

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DOCTORS IN COURT

Will the General Medical Council's new guidelines help allay paediatricians' fears about acting as expert witnesses? **Clare Dyer** reports

GRAEME ROBERTSON/GETTYIMAGES

Roy Meadow arrives at the GMC hearing charged with serious professional misconduct in 2005

Roy Meadow must rue the day he agreed to give evidence at the trial of Sally Clark, the solicitor charged with murdering her two baby sons. In his 60s, and at the culmination of a long and distinguished career, the eminent professor of paediatrics was a former president of the Royal College of Paediatrics and Child Health and had been knighted for his contribution to the cause of children's health. Five years on from Mrs Clark's successful appeal, his reputation among the wider public is in tatters, his name rarely appearing in print without the epithet "discredited."

Mrs Clark's convictions were quashed only partly because of Professor Meadow's misleading statistical evidence. (The main reason was the failure of the Home Office pathologist, Alan Williams, to disclose the results of microbiological results on tissue from one of the babies, which showed widespread *Staphylococcus aureus* infection.)

Still, Professor Meadow was found guilty of serious professional misconduct and ordered to be struck off the medical register, despite the recognition that he, like Dr Williams, had acted in good faith. It took a trip to the high court to reverse that finding. His exoneration was upheld by the court of appeal by a 2:1 majority, and the high court has declared in a separate case that it was only his statistical evidence that was discredited. But his public reputation has never fully recovered.

No wonder, then, that paediatricians are loath to accept briefs to appear as expert witnesses in cases where parents are accused of injuring or killing their babies. UK prosecutors are now often forced to look abroad, particularly to the US, for experts to testify in controversial cases such as those involving shaken baby syndrome.

Yet the failing which brought Professor Meadow down is not one which most doctors should find it difficult to guard against if they give any real thought to the requirements of the expert role: he succumbed to the temptation to speak about matters outside his core area of expertise. It was his weakness in statistics that failed him; in a case with a jury, he should never have ventured his interpretation of the significance of figures from a then unpublished study on sudden infant deaths.

What makes a good witness?

Staying within your area of expertise is one of the key rules highlighted this week in a new GMC guide for expert witnesses.[1] Another pitfall it warns against is being too partisan and too wedded to pet theories. The expert is there to guide the court, not to produce the best result for the party who retains him. He must not only put forward his own views but where there is a range of opinion on a subject, he must outline this and explain how he reached his own views.

It was that rule which Colin Paterson, another expert witness to fall foul of the GMC, failed to heed. But because he was seen as supportive of parents, his failings brought him little or no public opprobrium. He was struck off by the GMC in 2004 for promoting his pet theory that fractures to some babies' bones were caused by "temporary brittle bone disease" and ignoring clinical evidence in individual cases that was at variance with his theory.[2] He repeatedly gave this "expert" evidence through the 1990s in Britain and the US despite mounting criticism from judges, until the then president of the family division, Dame Elizabeth Butler-Sloss, finally reported him to the GMC.

The GMC points out that as well as sticking to their own expert area and recognising their overriding duty to the court, experts must keep up to date in their area of expertise, protect confidential information, and, if they change their minds, make sure the parties to the case are made aware of the change.

Confidence in the system

The expert witness is one of the most vital roles in the court process. Without truly expert evidence the family and criminal justice systems will cease to work properly and the most vulnerable children will go unprotected. It is crucial, therefore, that doctors' fears that they will be made convenient scapegoats if the system veers off track are allayed. The whole system failed in the Sally Clark case, but only the expert witnesses were called to account. Despite paediatricians' concerns, however, it is still rare for a doctor to be hauled up before the GMC over expert testimony given in court.

Before the Clark case, relatively little attention was paid to the role of the expert in court and many witnesses were untrained. Expertise in their professional capacity was assumed to be enough. Since then, training for expert witnesses has proliferated. The BMA produced detailed guidance for expert and professional witnesses in October 2007.[3] A 2006 report from the chief medical officer for England, Liam Donaldson, recommended an overhaul of the system for providing expert evidence in family cases, with multidisciplinary teams in the NHS taking over much of the work.[4] Its recommendations are to be piloted soon.

But, as the summary of responses to that report shows, the fear of vexatious complaints to the GMC remains an important factor in the shortage of doctors willing to act as expert witnesses in family cases, and the recommendations do little to allay the fears. The council's new guidance is brief but to the point and should provide some reassurance by signposting the main pitfalls to avoid when experts go into the witness box.

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Listen to Dr Stephanie Bown, director of communications and policy at the Medical Protection Society, explain the GMC's guidance and the role of expert witnesses