

### **Medical Experts in Family Proceedings.**

I am not exaggerating when I say that in our jurisdiction of England and Wales we are living through a crisis of public confidence in the integrity and responsibility of forensic experts, with a resulting rejection of outcomes of trials both in crime and in family proceedings. How has this happened?

Over the past twenty-five years the physical and sexual abuse of children either in institutions or in apparently safe families has become painfully apparent. This has led to the creation of multidisciplinary structures for child protection responsible for investigation and, if need appears, the initiation of legal proceedings.

The abuse of children may be the subject of simultaneous criminal proceedings and family proceedings. In any case in which there is substantial evidence of child abuse family proceedings will inevitably follow with an application by the Local Authority for orders that will adequately protect the children, either by removal from the dangerous environment or by supervision within the dangerous environment. However criminal proceedings will only be initiated in the clearest cases, given the high standard of proof and the difficulty of presenting a prosecution when the witnesses may be either too young to testify or too vulnerable as a consequence of their abuse.

In either criminal or family proceedings proof of past abuse is often crucially dependent upon expert evidence. In family proceedings, unlike in criminal proceedings, the court is concerned not only with what has happened to the child but equally what should happen to the child in the light of the court's findings as to past events. So in family proceedings a practice of split trials has developed: the first to resolve the disputed issue of past abuse followed, after a necessary period of further appraisal, by the disposal hearing.

These litigation developments created new demands for forensic experts. In many cases there would be a treating paediatrician to give evidence of what he or she had found. But the process became increasingly reliant upon second, and even third, opinions from forensic experts who had had no clinical involvement in the case. Equally the disposal hearings in family proceedings became increasingly reliant upon

assessment and opinion from forensic experts, usually in the fields of psychiatry or psychology.

Other medical specialties became increasingly involved forensically: for instance paediatric pathologists in infant death cases and paediatric radiologists in cases involving infant fractures. In the case of brain injury neurologists and ophthalmologists frequently gave forensic opinions.

Almost ten years ago it became apparent, particularly in the mental health field, that the reservoir of experts was not replenishing itself and was in danger of running dry. At that time the forum supporting family justice was the President's Interdisciplinary Committee, which brought together government officials and representatives of all the disciplines considerably involved in family justice. An expert working group was formed and a series of day conferences convened to seek solutions. At that stage there was on the part of government an insufficient acknowledgement of the scale of the problem and an insufficient will to tackle complex issues concerning the remuneration of expert holding National Health Service posts and working forensically.

It was against this background that the crisis developed. A rare form of child abuse leading to severe injury or death became identified as Munchausen's Syndrome by Proxy. A helpful guide to this form of abuse is available from Butterworths, written by Dr Eminson and Dr Postlethwaite and published in 2000. Some unbalanced adults seek attention by deliberately ingesting substances that render them mildly, or even acutely, ill. It was discovered that some adults sought to achieve the same end by inflicting the illness on a vulnerable child. A pioneer in the identification and diagnosis of this rare form of child abuse was Dr Roy Meadow – in due course to become Professor Sir Roy Meadow, president of the Royal College of Paediatrics and Child Health. Dr Meadow's reputation grew to the point that in any case of apparent Munchausen's Syndrome by Proxy his opinion would be sought by the Local Authority contemplating proceedings or by the Crown Prosecution Service contemplating prosecution. Consequently Dr Meadow came to give evidence in many cases in which mothers were convicted of murder and many others in which children

were freed for adoption following a finding that the birth parent represented a grave risk of future harm.

Other paediatricians took an interest in this newly developing speciality. Dr Southall developed a practice of covert video surveillance of parents and children in his care at the Brompton hospital. Although this produced critical evidence of abuse in some cases the practice aroused widespread disquiet amongst many, including nursing staff at the hospital. Parents formed an action group to protect those who were said to be innocent victims of investigations and opinions for which Dr Southall or Professor Sir Roy Meadow had been responsible. The Royal College of Paediatrics was obliged to set up a working party to evaluate scientifically the phenomenon, which they reclassified as factitious illness. Professor Southall was suspended and investigated by the General Medical Council. Ultimately he was condemned for unprofessional conduct in having expressed an opinion as to the guilt of a father on the basis of no other evidence than that in the public domain (the penalty has since been appealed by a watchdog authority on the ground that it was excessively lenient).

However it was not these skirmishes that drew the headlines. It was the appeals in the cases of *Clark, Patel and Cannings*. The judgment of the Court of Appeal Criminal Division in that last case forcefully demonstrated the flaws and errors in the evidence of Professor Sir Roy Meadow which had formed the main plank of the prosecution case. Particularly vulnerable had been his digression into statistics suggesting a degree of improbability in the order of 1: 73 million for the defendant's case. Almost overnight Sir Roy was universally stigmatised in all popular outlets as discredited or even as a charlatan. The public imagination was easily stirred by the presentation of a mother who not only had to experience the tragic death of two or more babies in sequence but then the agony of a murder conviction and life imprisonment for crimes of which she was innocent.

The resultant furore obliged the Government to reassure Parliament. The Attorney General announced that there would be a review of all past convictions in similar cases. Likewise it was said that cases in which parents had been separated from their children following a finding of factitious illness would be similarly reviewed. With the advantage of hindsight it would appear that the scale of possible injustice was by

no means as extensive as commentators had speculated in their first reaction to the judgment of the court in *Cannings*. Only two cases in family proceedings have been brought to our court. The linked appeals in *Re:B in Re:U* (2004) were both refused after full argument and careful consideration by the court. A subsequent attempt to appeal on the grounds of fresh evidence in the case of *Re:U* was also refused after full argument and careful consideration in February 2005. The judgment of the court on the second appeal has yet to be reported.

An unexpected but extremely welcome development came on the 17<sup>th</sup> June 2004 when the Minister for Children announced in Parliament “an initiative to determine how best to ensure the availability of medical expert resources to the family courts.” Effectively the minister has instructed Professor Sir Liam Donaldson, the Chief Medical Officer to report his findings and views to the Government as soon as practicable. A senior civil servant from the Department of Health has carried out extensive enquiries on behalf of the CMO and his report to the Government is anticipated within the relatively near future. This is at least an indication that the Government has grasped an essential distinction. For the criminal justice system the issue is one of accreditation in order to ensure that juries are not misled by unreliable expert evidence. For the family justice system the primary problem is not one of accreditation but one of future supply.

Let us pause for a moment to consider the disincentives to engage in forensic work. There are approximately five thousand consultant paediatricians belonging to the Royal College. For every one of them forensic work is purely optional. Young consultants have seen how great reputations have been shredded. They must ask whether forays into the courts might not lead to civil actions for damages for alleged breach of duty and complaints to the General Medical Council for misconduct. Such complaints take years, rather than months, to process and, however groundless, must lead to great anxiety and disruption, if not to suspension, during their course. In family proceedings a recurrent and unpleasant feature has become the maligned parent who, after condemnation in the family justice system for abuse, then retaliates with a malicious complaint to the General Medical Council against the expert or experts in the case. Without a screening process to eliminate such complaints the consultant works for an indefinite period under a cloud of question. Even without this

disincentives the very nature of the work is extremely uncongenial to many doctors and scientists.

All of us who work within the family justice system have an obligation not only to eradicate bad practice but equally to encourage good work. Accordingly in 1999 the President's Interdisciplinary Committee introduced a scheme which enables specialist registrars and young consultants in either psychiatry or paediatrics to spend court time with a senior judge, observing the conduct of a trial and learning something of the processes by informal before and after discussions with the judge. This service is known as the mini-pupilage scheme and has been widely appreciated by young doctors with an interest in forensic work.

A considerable opportunity to build on these foundations now presents itself. At last we have Government commitment to address practical disincentives. Furthermore the Government in 2004 recognised the need to place interdisciplinary support for the family justice system onto much firmer foundations. Accordingly the Government created the Family Justice Council, a non-departmental public body. The Council consists of approximately 20 members representative of the various professions engaged in family justice, all of whom are public appointments. Government departments and public bodies, some 8 in number, supply the additional nominated members of the council.

Since its first meeting in October 2004 the Council has recognised the problem of forensic expertise as holding the highest priority. Deterrents confronting consultants inevitably reduce the supply of available experts which in turn contributes to delay in the trial of cases. The Council has accordingly created an experts sub-committee whose first task was to map out the considerable number of current initiatives in the field. In addition to the work of the CMO and the work of the Family Justice Council there are separate initiatives to provide a system of registration and accreditation for forensic experts, particularly in crime. Additionally the Department of Constitutional Affairs has set up a working party to consider the problems in the context of delay in family proceedings. The General Medical Council is also making its contribution. It is clearly important that these various initiatives should at the very least be aware of the existence of the others, even if not formally collaborative.

Speaking only for the judges in the family justice system the responsibility that they bear is a particularly heavy one. There is no jury to take responsibility for the crucial decision. Furthermore decisions as to past fact are seldom as hard as the decision that either directs the child back to a potentially dangerous family or that severs the child's link with birth parents, probably forever. Judges do not shirk that responsibility but they appreciate, and are entitled to expect, the best possible expert opinion. The paramount consideration is always the welfare of the child. Judges certainly do not have a monopoly in discerning what is best for children. Indeed arguably the mental health professions are superior in training and experience. The collaboration between judges and mental health professionals, not principally in the determination of difficult cases but rather in the wider context of interdisciplinary work is one of the most rewarding aspects of the work of the specialist family judge. The problems of either profession are therefore common to both. This relationship of mutual respect has developed over the course of the last two decades. Long gone are the days when Chancery judges in wardship refused applications for the instruction of a consultant child psychiatrist on the ground that the ward was not mentally ill. The further development and strengthening of interdisciplinary collaboration depends to a large extent on attracting the next generation of consultants to include forensic work in their training programmes and then to take advantage of mentoring schemes offered either by senior barristers or judges in preparation for what I believe to be a fundamentally important area of medicine.