

GENERAL MEDICAL COUNCIL

PROFESSIONAL CONDUCT COMMITTEE

Wednesday 3 September 2003

44 Hallam Street, London W1

Chairman – Professor Peter Richards

Panel Members:

Dr Nihal Gunasekera
Mr Neville Harrison
Mrs Muktesh Kakar
Dr Charles Winstanley

Legal Assessor: Mr Douglas Readings

Case of:

EASTGATE, John William

(DAY THREE – PM PROCEEDINGS)

MISS JOANNA GLYNN QC, and MR A HURST, instructed by Messrs Withers,
solicitors, appeared on behalf of the Complainant.

MR JAMES TURNER, of counsel, instructed by Messrs RadcliffesLeBrasseur,
solicitors, appeared on behalf of Dr Eastgate, who was present.

(Transcript of the shorthand notes of T. A. Reed & Co
Tel No: 01992 465900)

INDEX

Page No

LEGAL SUBMISSION

By MR TURNER	53
By MISS GLYNN	65
Reply by MR TURNER	71
ADVICE BY LEGAL ASSESSOR	73
DECISION	77

A THE CHAIRMAN: Mr Turner?

MR TURNER: Sir, I make this submission at this stage under rule 27(e) of the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee Procedure Rules.

B THE CHAIRMAN: Rule 27(1)(e)(i) and (ii), is it, or either (i) or (ii)?

MR TURNER: It is essentially under (ii), although to some extent an amalgamated submission under the two.

C In essence, my submission is that the facts or the evidence, I should say, as it stands at the moment would in any event be insufficient to found a finding of serious professional misconduct, which is the charge against this doctor. We submit that, even taken at its highest, looking at the matter in a broad brush, common sense way, as we suggest the Committee must ultimately consider it, the allegations made do not actually amount to serious professional misconduct in the context and background of this case, which is common ground. That is even if the criticisms are well founded, and at the moment to be taken at their highest, although even at this stage we do say the Committee is entitled to say, comparing Professor Zeitlin's evidence with the guidance that is available from the literature, and the reasonable interpretation that a doctor could place on that guidance, that even if it can be said that Dr Eastgate, on the evidence as it stands at the moment, did not follow best practice, the Committee would not be entitled to find that his conduct was unacceptable.

D THE LEGAL ASSESSOR: Excuse me, Chairman, could I just ask Mr Turner to identify what, if any, facts are alleged at this stage not to be supported by any evidence under 27(1)(e)(i), so that we can identify what is being said under (i) and what is being said under (ii).

E MR TURNER: If you will bear with me, what I had intended to do was to go very briefly through each of the heads and identify what I say in relation to, first of all, the facts, and then the question of, even if there is evidence of the facts of those matters, can it ever amount to serious professional misconduct, either singularly or cumulatively.

F The rule that we are looking at, rule 27(i)(e), is designed to ensure that further unnecessary time, expense, and importantly, emotional trauma on all sides, are avoided if, without even hearing the substantive defence case, the charge of serious professional misconduct can be seen to be doomed to failure ultimately. If that is the case, it is not appropriate to continue.

G In drawing attention to that may I make this point in passing, that Dr Eastgate has already had this matter hanging over his head, we submit, for far too long, and if it is doomed to failure then the sooner it be brought to an end, the better. One bears in mind that under Article 6 of the European Convention on Human Rights there is a right to trial within a reasonable time. As was made clear by the Privy Council in *Silver*, Article 6 applies to proceedings before this Committee. There is, then, a right to trial within a reasonable time.

H

A The GMC's own rules, irrespective of European jurisprudence, are designed to achieve the same end. In particular, rule 17(i) requires that:

“As soon as may be after a case has been referred to the Committee for inquiry...”

B in effect, a Notice of Inquiry shall be served, and with a date fixed for hearing. As a matter of record, the complaint in the present case was made by a letter dated 12 June 1998. We are talking about events that happened in 1996.

C THE LEGAL ASSESSOR: Mr Turner, I am sure the Committee would not want to stop you telling them anything that was relevant, but unless you are making a submission that the matter should be dismissed because it is not being heard within a reasonable time, at the moment I am unable to see how the Committee could consider Article 6.

D MR TURNER: All that I am seeking to do is to buttress the importance of stopping a case as soon as possible if it is clear that it is doomed to failure. On the one hand, it can be said there is an interest in the whole of the material being aired, in hearing the defence side as well, but I submit that that is not what is required under the Rules. In particular, it is buttressed by the fact that a doctor, subject to a complaint such as this, is entitled to a trial of it, and a determination, within as soon a time as possible, effectively. That has not happened already. There is an even greater importance in this case, if it is doomed to failure, for it to be stopped as soon as possible.

E So just very briefly on the chronology, the events we are concerned with occurred in July 1996, the complaint made by a letter dated 12 June. Then, after various to-ings and fro-ings the effective referral to this Committee was eventually made on 18 October 2001. But it was not until November 2002, that is, over a year after the referral, that even a draft proposed Notice of Inquiry was served. That, we submit, is hardly “as soon as may be”, and then it was not until January 2003 that the formal Notice was served in the form that we now have it.

F It is against that background that I submit it is particularly important to stop this case in its tracks. I return to the test under rule 27(i)(e). Putting the test another way, if the case were to stop now, without more evidence, could the Committee properly find that the charge was proved? I accept the question is not: ‘Would the Committee inevitably find the charge proved?’ but simply: ‘Would the Committee be entitled to, on the evidence as it stands at the moment?’ My submission is that the Committee would not be entitled to, for a number of reasons.

G A charge of serious professional misconduct is an extremely grave matter, as all will appreciate. It is necessary first to ask: Is there sufficient evidence as things stand (the first stage) to justify a conclusion that Dr Eastgate may have made one or more errors of judgement of the sort alleged, or to have fallen below the standard properly to be expected in one or more of the ways alleged? A simple conclusion that, as things stand, yes, there is a case on which one could properly find that he had done that, that he had fallen below the acceptable standard or that he had made one or more of the errors of judgement alleged, would not in itself necessarily justify a finding of serious professional misconduct. The Committee would have to go on then to ask itself

H

A whether those matters amounted to more than a mere error of judgement or a failing to adopt best practices, or acceptable practices, but whether they actually amounted to misconduct.

We have already seen in one of the cases we looked at yesterday, the case in the Court of Appeal with Lady Justice Butler-Sloss giving the judgment, in relation to Dr Jones. That is page 830. Her Ladyship said:

B

“Dr Jones is a distinguished child psychiatrist who is particularly experienced in the interviewing of children. That does not mean that he may not stray outside the principles of good practice which guide the experts in this difficult and delicate area of interviewing young children.”

C

One can find the same point made in many Court of Appeal, indeed House of Lords, authorities, that as Professor Zeitlin very fairly accepted, we can all be guilty of errors in our professional lives from time to time.

Indeed, one finds exactly the same said in the *Silver* case. There is a quotation from another House of Lords, I think, or Privy Council authority there, at paragraph 19 of that case. So errors of judgement, falling below acceptable standards in relation to one matter, do not necessarily amount to serious professional misconduct.

D

The Committee must then ask itself, I submit, even if there is, on the face of it as it stands at the moment, evidence of professional misconduct, is that sufficient as things stand at the moment to justify a conclusion of serious professional misconduct, with all the opprobrium that a finding of that gravity would hold for a practitioner in the public eye? In reality, taken at its highest, is the conduct complained of in this case, in so far as it is made out at the moment on the evidence, sufficient to attract that sort of label that is explained more fully in the opinion of Sir Philip Otton in the Privy Council in *Silver*? Those distinctions between the different points was emphasised in that opinion and I pray them in aid. It is not simply enough to show negligence, for example. It has got to be serious professional misconduct.

E

With that introduction, may I just turn briefly to the individual Heads of Charge. Head 1 is the factual background, undisputed, that takes us no further on the question of whether the Committee would be entitled to find serious professional misconduct. Head 2, again, is simply factual background that takes us nowhere in terms of deciding whether there is evidence that is capable of amounting to serious professional misconduct.

F

The meat of the matter starts with Heads 3 and 4, and the matters alleged under those two Heads relate to the appropriateness of the form that the interview took with Miss A on the morning (that is Head 3) and the afternoon (that is Head 4) of 9 July 1996.

G

In a sense those two criticisms of the form of the interview, as Professor Zeitlin said, with head 5, where it is alleged that no sufficient record was kept at the time of those interviews, I could submit that if it is not known what form the interviews took one could never properly be satisfied that they took an inappropriate form and, therefore, the complaint must be limited, if at all, to head 5. In a sense the complainants cannot

H

A have their cake and eat it. They cannot say, “We do not know exactly what was said, therefore we are entitled to assume that the wrong things were said”.

I do not seek to deal with it like that at this stage. I seek to meet that allegation head on. If one looks at the recorded form of the interview it does not actually quite bear out the details put in head 3. Let us deal with head 3 to start with. One must look at what was going on in context there. What was Dr Eastgate doing at that time? It is common ground that he was engaged in a therapeutic session with a patient trying to get to the bottom of her problem in the hope that one could then remove or alleviate those problems by finding the cause. It was certainly not an investigative role at that stage on the morning of 9 July.

B
C THE LEGAL ASSESSOR: Could I ask Mr Turner, please, to say now whether what he is doing is attacking 3(i), 3(ii) or 3(iii) with a view to suggesting that it is not proved on the facts, or there were no facts capable of proving it; or whether he is accepting that those three facts are supported by some evidence sufficient to prove it and is merely concerned with 3(b)(i) or (ii), and really, therefore, this is a submission just made under (ii) rather than (i) in rule 27(1)(e)?

D MR TURNER: It is the latter of those points. It is 3(b)(i) and (ii), because I accept that one might be entitled to draw inferences from the form of the note that has been made in relation to the morning of 9 July that words to that effect, if not those precise words, were used in questioning. I accept that, *prima facie*, there is evidence that would justify the Committee finding that words to that effect were used.

E THE LEGAL ASSESSOR: Are you submitting, Mr Turner, that there is no evidence which would support a finding that those questions and comments were either inappropriate or unprofessional?

MR TURNER: I am.

THE LEGAL ASSESSOR: So that is a submission under (i) ---

MR TURNER: Yes.

F THE LEGAL ASSESSOR: --- that there is no evidence upon which the Committee might find that doing those things was inappropriate or unprofessional. Taking 3 as being perhaps the highest just for the purposes of an example, “asked Miss A ‘when she first felt uncomfortable’”, is there not evidence from Professor Zeitlin that that was not appropriate and was an unprofessional question?

G MR TURNER: Yes, but one does not have to accept unquestioningly the evidence. If one bears in mind the criminal analogies of half-time submissions in criminal cases, cases such as *Shippey*, then one cannot “pick out all the plums and ignore the duff”, as Mr Justice Turner (no relation) said. One has to take a realistic view of all of the evidence to date, comparing the evidence from Professor Zeitlin with what is in the guidance which he purports to base himself on to justify that.

H THE LEGAL ASSESSOR: I think that is very helpful, Mr Turner. For the benefit of the Committee what you are saying about these allegations made at 3(b)(i) and (ii) is

A that, although there is evidence from Professor Zeitlin to establish that doing those things which are mentioned above was inappropriate and was unprofessional, you would invite the Committee to say that that evidence cannot carry much weight in the light of the passages from various documents that you have drawn attention to?

MR TURNER: And indeed in the light of the admitted context in which the interview was going on still on the morning of 9 July.

B THE LEGAL ASSESSOR: That is the therapeutic against investigative argument which has been aired at some length?

MR TURNER: Yes, at some length. I am not going to go through the toings and froings. The Committee will have those points well on board.

C THE LEGAL ASSESSOR: Thank you.

MR TURNER: I say, taking a common sense stance towards that, can it realistically be said that there was anything wrong from a professional point of view with a clinical therapist probing the matters in the way he did that morning, bearing in mind what had gone before in previous discussions with this young lady, bearing in mind she was disturbed, bearing in mind she was saying she felt let down by someone? An investigation of who had let her down and how might help therapeutically in solving her problems. What on earth can be said to be wrong with the enquiries at that stage?

D

It is interesting to note, if one looks at head 5, that there is no criticism made in head 5 of the fact that there is not a full note kept of the morning session on 9 July. The point seems to be accepted there that it was a different form, or it could be properly said to be a different form of session.

E We submit that, first of all, the Committee could not properly find that what went on on the morning of 9 July was either inappropriate – we would say wholly appropriate – or indeed unprofessional. Even if it could be said that in some way that interview fell below the appropriate standards, or the proper professional standards for the role that Dr Eastgate was carrying out at that time, how on earth can that sort of error in that sort of context amount to professional misconduct, as opposed to an error of judgment, let alone serious professional misconduct? That head, standing alone, even if there is evidence upon which the Committee would be entitled to find that what Dr Eastgate did was unprofessional and inappropriate, in the context could not seriously be said ever to amount to misconduct as opposed to an error of judgment, or falling to some extent below the best standards. I appreciate, of course, that one does not just say, “Well, look at that alone” when deciding whether there was serious professional misconduct. Ultimately one has got to look at all of the allegations together to decide whether the combined effect of any that are made out would amount to serious professional misconduct. I say that, taken in stages, that alone certainly would not amount to serious professional misconduct, even if there is the evidence to make out the factual allegation.

F

G

H So what about the afternoon session? Professor Zeitlin rightly said things moved on to some extent in that. There was no reason for suspecting, I suggest, allegations of sexual abuse in the morning when things were left. It was still trying to find out who

A had let down this young lady, as she was putting it. Then in the afternoon session that moved on to a discussion of how she had been let down, as is clear from the answers that are recorded.

B Bearing in mind still that that was a therapeutic interview at the outset, and bearing in mind the difficulties that are faced when unexpectedly some form of allegation is made – as Professor Zeitlin again fairly pointed out it is not usual, it is quite unusual, for that sort of revelation to occur in a therapeutic interview. It is not the normal run of the mill thing to happen.

What is recorded in the note is that Miss A made assertions ---

THE LEGAL ASSESSOR: You are looking at?

C MR TURNER: I am looking at page 8 of tab 2 of the Committee bundle, I am sorry, I should have said. What is recorded is that Miss A had made assertions of things which, looked at from an adult point of view, would clearly be wrong. Again, from a common sense point of view, having made those allegations and knowing as one does – Professor Zeitlin himself told us – that from time to time unfortunately one does come across doctors working with children who behave improperly, of course
D Dr Eastgate was entitled to be concerned and entitled to be concerned that this might present a danger to other children. As a matter of simple common sense, on the basis of what she had alleged, was he not entitled to say to her words to the effect of, “If that is what happened it sounds wrong to me”. That is a matter of fact, if that is what happened it would be wrong. It would rightly sound wrong to the doctor. Why on earth should he not be entitled to say that?

E THE LEGAL ASSESSOR: I am sorry to interrupt again, Mr Turner, but if we look at 4(a)(i) the allegation there is not that Dr Eastgate said that if what Miss A told him was right that Professor X had done something wrong, it is an allegation that he told Miss A that what Professor X had done sounded to him to be wrong.

MR TURNER: You are absolutely right, sir.

F THE LEGAL ASSESSOR: I need to know in order to advise the Committee, do I not, whether you are suggesting that there is insufficient evidence to support that finding as alleged?

MR TURNER: I certainly do submit that.

G THE LEGAL ASSESSOR: You are up against the note made by Dr Eastgate, are you not, which does not make it clear that the question was put on the hypothetical basis that if what she was saying about what Professor X had done was true ---

MR TURNER: I suggest, respectfully, that I am not up against it. I suggest that the note supports my contention. If one reads into the word “not”, as I think Miss Glynn did, as one has to to make sense of the note – clearly there is a word “not” been left out – it reads:

H

A “She was surprised when I suggested that not only did it sound wrong to me but I was worried that he may have done it to other children as well.”

That is not telling Miss A that what Professor X had done sounded wrong but simply commenting – it has got to be read sensibly in the context of what she is recorded as having said, “She says he did this, this and this”, the response is, “Well, that sounds wrong”. It is a factually accurate response, “If that is what you tell me and you have just told me that, that sounds wrong”. How can that be an inappropriate comment?

B What one might criticise is if there was evidence – even an allegation and there is not an allegation – that Dr Eastgate had said to the girl, “Did he touch your breasts?” because that would be, as it were, an invitation to take up the idea, “Yes, well perhaps that is what I should say he did”. There is no allegation in head 4 that he did that, simply that on the basis of what Dr Eastgate had heard from the girl he commented that what Professor X had done sounded wrong. One has got to sensibly imply into that an understanding, as the girl or anyone hearing it must have understood, “Well, on the basis of what you have told me he has done wrong”.

C As for head 4(ii) – told Miss A that he was worried that Professor X may have done it to other children as well – there is no dispute that words to that effect were used, so the factual assertion is made out there but, when one comes to b(i) and (ii), in relation to both of those matters, in so far as (ii) it was clearly said; and in so far as (i), where one reads it without the implication that I suggest must properly be read into it, “if what you have said is true”, that is what would have to be understood by anyone hearing those words. It is not just Dr Eastgate out of the blue volunteering, “Professor X has done wrong”. It has to be heard in the context of the person saying, “Professor X did this to me,” and the comment, “That sounds wrong”.

D Let us assume it was understood in a different way. Those words again, looking at it sensibly, were not inappropriate in the context of this unexpected revelation, nor unprofessional, and indeed they were wholly appropriate because Dr Eastgate had a duty to investigate whether a fellow professional had behaved improperly and, even more importantly, whether he presented a risk to children for the future.

E THE LEGAL ASSESSOR: Just for clarification again, if I may. Are you saying, as I think you are, in respect of 4(b), the same as you said in respect of 3(b)? Namely that yes, Professor Zeitlin’s evidence does provide information, evidence upon which the Committee might find those comments to have been inappropriate or unprofessional, but they are watered down by other matters to such an extent that the Committee could not properly act upon Professor Zeitlin’s evidence?

F MR TURNER: Yes. I am saying, they have to be read in the context of the supposed justification for them. Professor Zeitlin says, “This is my view because of what is said in all the literature and the guidance.” There is nothing, I suggest, in that guidance which says that if a doctor hears from a patient during a therapeutic interview an allegation which, on the face of it, sounds like abuse that he should not comment to the effect that, “That would be very wrong,” or “If that is what he has done is wrong, I need to make sure that he does not do it to other people”. It has to be done. If a doctor just ignores it and it was subsequently to transpire that he had ignored it, he would certainly be in front of this Committee then. He would be accused: “Members of the profession sticking together; cover-ups.”

G H

A I suggest that in those particular circumstances it could not conceivably be said that those sort of remarks were inappropriate or unprofessional. Even if prima facie it could be said they were, then I move on to my other point – does that amount to professional misconduct as opposed to an error of judgment? Perhaps with the benefit of hindsight – the wonderful benefit of hindsight – here is Dr Eastgate at the coal face, unexpected disclosures having been made. He does not have the luxury of sitting
B back in an academic sense, nit-picking through and thinking carefully, “What should I say here in this rather unexpected situation?”, analysing in great detail the words that have just been spoken and setting out and carefully drafting his response to them. He behaves in a common-sense way even if, with the benefit of hindsight, it could be said that that in some way fell below the appropriate standards did it really, or could it ever, be said to amount to serious professional misconduct?

C Head 5: this is the allegation on which, as the evidence stands at the moment, I suppose Dr Eastgate is most open to criticism, if only for failing to watch his own back. Of course, he has laid himself open to criticism at this point by not keeping a fuller record of precisely what was said. I say “at the moment,” because you have heard the evidence of Professor Zeitlin that there is a duty to keep full records – contemporaneous records in his view, once a disclosure has been made. You have heard me put to him that that is a little bit artificial if the practitioner is still continuing
D in the therapeutic environment. You have seen what the Cleveland Inquiry, in particular Lady Justice Butler-Sloss, subsequently said about the difficulties that can arise if one is, in a sense, not clear about the purpose of the interview – whether the interview has suddenly become an investigative interview rather than a therapeutic interview. So although with the benefit of hindsight there may be some legitimate criticism of the fact that a more detailed record of those subsequent conversations was not kept, when one looks at it in terms of, “Could that amount to serious professional
E misconduct” as opposed to an error of judgment or confusion arising from a misunderstanding as to the role which was being played at this time – because until 16 July after the strategy meeting clearly Dr Eastgate regarded himself as being the investigator.

F THE LEGAL ASSESSOR: Are the Committee dealing here with sub-sub-sub-rule (i) or sub-sub-sub-rule (ii) here?

MR TURNER: We are dealing with sub-sub-rule (ii) here.

THE LEGAL ASSESSOR: You are not suggesting that there is insufficient evidence to support the allegations at 5 (a) through to (g)?

G MR TURNER: No, I am not suggesting that.

THE LEGAL ASSESSOR: That is helpful. Thank you. So you must make your submission under (ii), upon the basis that although he failed to do something that he ought to have done in keeping a verbatim record on these bases ---

MR TURNER: Well ---

H THE LEGAL ASSESSOR: That is the hypothetical basis on which you have to

A make ---

MR TURNER: I would not necessarily accept that he ought to have done that. I accept that factually he did fail to, but it depends on the implication or the inference one attaches to the word “fail”.

B THE LEGAL ASSESSOR: I asked the question advisedly because the word “failed” was discussed at the very beginning of this hearing.

MR TURNER: Absolutely.

THE LEGAL ASSESSOR: I think you accepted that the word “failed” implied an obligation which had not been discharged.

C MR TURNER: I think I can cut through this, because I accept that there is evidence at the moment on which the Committee would be entitled to find there was a failure. So ---

THE LEGAL ASSESSOR: An obligation.

D MR TURNER: That matter is probably agreed to, so I am actually addressing (ii) in rule 27(e).

Assuming, or accepting, that that was a failure and fell below the appropriate standard, and that it would have been more proper to keep fuller notes on those subsequent days leading up to the strategy meeting, then can it really be said either individually or cumulatively, even if the other matters are not made out factually, to amount to serious professional misconduct with the opprobrium that such a finding would attract? Even if proved to the hilt does it amount to more than, “You played this one wrong, Dr Eastgate, in dealing with this girl between the 9 and 16 July”. Just as Dr Silver had got it wrong in dealing with a particular patient that he and his practice were dealing with over a period of time in that case. The Privy Council note that it would be a rare professional who goes through his life without finding one case where everything, particularly if looked at with the benefit of hindsight, has gone wrong? Was the extent of the going wrong really serious professional misconduct?

F I say that bearing in mind that if what had been done had been done in bad faith, or if there was any suggestion that it had been done in bad faith with a motive of improperly pursuing or harassing Professor X because of some personal vendetta, or even if pursuing some personal crusade, that particular sorts of children with particular problems such as eating disorders would inevitably have suffered from sexual abuse.

G If there is something of that sort available, then one can see that it might be possible to find serious professional misconduct in such a case, but there is no suggestion here that Dr Eastgate has a particular crusade that he follows in relation to submissions of child abuse, or that he was out looking for child abuse allegations as opposed to it just coming up unexpectedly 9 July. There is no suggestion that he had a particular vendetta or indeed even knew Professor X and other witnesses. I say this advisedly and very fairly – Mrs A was able to tell you that her own personal view, much as she

H clearly has animosity towards Dr Eastgate, she accepted that she could not say that

A she thought what he had done was done with malice or in bad faith, or any way other than in her daughter's best interests as he perceived them to be, rightly or wrongly as he perceived them to be.

B Both yesterday and today Professor Zeitlin said much the same. So does it go beyond one of those cases in one's career, an otherwise unblemished career, in which everything seems to have gone wrong with the benefit of hindsight, or can it possibly be said to amount to serious professional misconduct?

C Finally, then, head 6, the causing the referral to the child abuse team. Was it done prematurely and/or should the concerns have been shared with the parents first of all? Now, on both of those points 6(a)(i) and (ii) there is evidence from Professor Zeitlin which, if taken at face value, would justify a finding that Dr Eastgate had not taken reasonable steps to verify the truth of what was said and it is common ground that he did not share the concerns with the parents of Miss A before he made reference to those and others in the child protection team. But one has to look at that first of all against the background of what the written guidance says.

THE LEGAL ASSESSOR: Again, I am sorry, Mr Turner, but does that mean – what you have just said – that this is a submission ---

D MR TURNER: On 6(i) I suggest that there is no evidence on which the tribunal can properly find that the factual basis is made out.

THE LEGAL ASSESSOR: --- without first having taken reasonable steps to verify their truth?

E MR TURNER: Yes. On 6(ii), the factual basis is admitted.

THE LEGAL ASSESSOR: I appreciate that.

F MR TURNER: What steps then would be reasonable steps to take before contacting any other member of the child support team? The evidence shows that Dr Eastgate did. What he did was contact a professional with experience of child abuse matters in another discipline and thus the matter came to be formally referred on to the team. Was that an unreasonable step as is alleged?

G There has been a lot of debate between me and Professor Zeitlin as to the level of suspicion or belief that must exist before concerns are shared in that way. Professor Zeitlin has suggested that there are other things that should be done here before a sufficiently high level of suspicion, belief – call it what one will – had been arrived at. I say that realistically it is a wholly artificial division to say, “Moderate suspicion”, which even Professor Zeitlin accepts existed here, given the whole background circumstances, does not justify the steps that Dr Eastgate admitted he took, whereas a higher level of suspicion would. Where does one draw the borderline between levels of suspicion? We see that it was a matter that was expressly left open in the recommendations of the Cleveland Inquiries. It is a difficult point, on which Professor Zeitlin accepts there is little written guidance anywhere other than the paper he has referred to which he is an author of himself, so one would not expect that to take any different view from the view he has expressed to the Committee.

H

A

But as far as the ordinary child and adolescent psychiatrist going about his business, what should he do in these circumstances? We only have to look at the guidance available openly in the DHSS guidance in tab 3 of the literature bundle at page 8, and paragraph 9 on page 10. Importantly paragraph 9 on page 10. We have looked at it several times. This is really the crux of our case.

B

“9.1 Once any doctor suspects”

- and that is the word, whatever gloss Professor Zeitlin seeks to put on it. That is the guidance that is given. Can it be said that it is unreasonable for the ordinary practitioner plying his trade in Wiltshire to take that at face value?

C

“Once any doctor suspects ...”

And there was ample ground for suspicion at the very least here; a girl who had been self-harming, had expressed dislike of Professor X for some time, who was disturbed, was having difficulties with eating – all matters that would be entirely consistent with what she was saying, and those are the common ground matters, leaving aside the question of what further steps he may or may not have taken to investigate the layout of rules and so on and so forth:

D

“Once any doctor suspects that child sexual abuse may have occurred, prompt discussion in confidence with a colleague in the same or another discipline is essential to decide the next step.”

Is that not exactly what he did? So how could it be said that as a matter of fact he did not take reasonable steps?

E

We have also seen from the *Working Together* guidance, although we have not looked at it recently, it is to be found in the Wiltshire guidelines that it is crucially important that professionals in the various disciplines should not be deterred if they have suspicions from bringing those suspicions forward for inter-disciplinary consideration.

F

How, as a matter of common sense, could it be said – and I move on to the second limb of the argument – even if it is established that there were steps that should reasonably have been taken before Dr Eastgate did what he actually did, how can it be said that that is inappropriate and unprofessional, let alone being serious professional misconduct, in the context of a system which has been set up since the Cleveland Inquiry to ensure on the one hand that allegations made by children are not dismissed out of hand, that they are fully and properly considered by professionals if possible on a multi-disciplinary or inter-disciplinary basis, and that if then appropriate they are investigated in a sensitive manner? How can it be said to be serious professional misconduct to refer on to a body, the very existence of which is designed to ensure that pre-emptive actions are not taken and, indeed, were not taken in this case. The proof of the pudding, I suggest, is in the eating. After due consideration, and such investigations as were thought appropriate at that time, it was not felt even necessary to trouble Professor X with the matter.

H

A So Dr Eastgate has done his duty. He has paid proper attention to what his patient has said. He has had proper regard for the potential risk to other children and no unduly pre-emptive action has been taken. Professor X has not even been troubled with it. The matter would never have gone further had there not been other matters that then blew up about which this Committee is not concerned. We have not found it necessary to go into it.

B That could not conceivably be said, we submit, on any view of things proved to the highest factually to amount to serious professional misconduct.

C I should have mentioned the lack of involvement of the parents. I know we are dealing with that as a specific point. Yes, there are indications in the literature that parents should be involved as much as possible. Clearly parents should be involved once there has been a strategy meeting. It is questionable – it is open to question – on the literature, I submit, as to whether there is actual necessity to involve the parents before the decision is taken for a strategy meeting. Should not one of the questions to be debated at the strategy, as some parts of the Cleveland Report suggest, be to decide when and how to involve the parents, before the decision is taken for a strategy meeting. Should not one of the questions to be debated on the strategy – as some parts of the Cleveland report suggest – be to decide when and how to involve the parents. Is that not an important matter of strategy, when and how to involve the parents?

D But of course this is in the context of the case not where there is concern about this particular child being abused further at that stage, but concern about other children, so perhaps the concern in relation to this child seems rather less important than it might in other cases.

E But be that as it may, even if it be said “Well, this was an error of judgement, you should have involved the parents before you spoke to Mr Evans rather than shortly after you had spoken to Mr Evans”, even if it is ultimately said that that is the sort of conduct that should attract the opprobrium, together with the other matters all standing alone, of serious professional misconduct, taken at its highest, even if one accepts all of the criticisms made by Professor Zeitlin, these were not actions carried out in bad faith; they were not actions which anyone is suggesting were designed to do anything other than promote the best interests of his own patient, and to protect other children.

F Even if there was an error or errors of judgement – and sometimes one error of judgement does have a knock-on effect of leading to other errors, and some of these alleged errors are inter-related in any event – does that any more amount to serious professional misconduct, or could it, even at its highest, given that the Privy Council found that the allegations against Dr Silver could, even if taken at their highest, not amount to serious professional misconduct? So in those circumstances I submit that this case should be stopped in its tracks now and the load lifted from Dr Eastgate’s shoulders.

G THE CHAIRMAN: Thank you. Miss Glynn?

H

A MISS GLYNN: Sir, may I deal with legal matters to begin with. My first submission is that any points made by the defence relating to the chronology in this case are wholly irrelevant to your considerations now. There has not and is not now what is sometimes called an 'abuse of the process argument' based on delay. Article 6, in my respectful submission, is wholly irrelevant. The relevant considerations for this Committee now are in relation to each head of charge whether there is sufficient evidence – to use the wording in regulation 27(e)(i) – whether the complainant has adduced sufficient evidence; and before you could dismiss a specific head of charge you would have to find that there was no sufficient evidence adduced on which the Committee could find that fact proved.

B
C So in relation to (e)(i) one looks at each separate head of charge. In relation to (e)(ii) one looks at the charge, which is serious professional misconduct, which is all the heads taken together. So if it meets with your approval what I would like to do is to address you first of all on the specific heads of charge which are relevant to the submissions made by Mr Turner under (e)(i), and then go on to consider the submissions made under (e)(ii).

D In my respectful submission many of the points that have been made by Mr Turner just now are far more suitable for final submissions on the facts, because they are, if I may put it this way, argumentative; they are points which have been put to Professor Zeitlin but which, if I may say so, have been dealt with by Professor Zeitlin in each and every case. The question as I have submitted to you is: is there any sufficient evidence on the facts? I state, as I stated in the opening, that the complainants rely for the heads of charge on the evidence of Professor Zeitlin. He is the source of the evidence, although background material has been provided by two other witnesses.

E If I may take matters briefly, you have been provided with transcripts of the evidence as we have gone through the case, and Professor Zeitlin has, as you, Chairman, observed this morning, given a great deal of evidence, sometimes repetitiously, on each of the relevant points in the case. May I simply do this, I hope to assist you, to direct you to where you will find the material evidence provided by Professor Zeitlin on each of the heads of charge. You will find the relevant material provided by Professor Zeitlin on head of charge 3 at Day 2/17-20. Unless the Committee wishes me to do so I am not going to read it to you, because it is all there in the transcript, and I simply highlight where you will find that.

F THE LEGAL ASSESSOR: That was head of charge 2, was it?

G MISS GLYNN: That is head of charge 3. There were then some passages about the literature in the case, which you will find at Day 2/21; and in relation to each of the pieces of literature that have been produced by the complainants, Professor Zeitlin has explained that these are not esoteric documents that were not widely known; in fact, to the contrary, they were well-known documents setting out not best practice, but good practice; and this is relevant to points that have been sought to be made by the defence concerning counsel of perfection. Professor Zeitlin's evidence has been that this is not counsel of perfection, this is not best practice; this is simply areas of good practice contained in the required reading the Committee has seen, that would have been well known to any person practising in the field.

H

A I should perhaps emphasise that the Committee is not dealing here with a general practitioner; the Committee is dealing with a consultant child and adolescent psychiatrist – in other words a specialist in this field, somebody who would be expected to know his way round these documents and indeed apply good practice.

B You will find further evidence from Professor Zeitlin in relation to heads 3 and 4 – namely the heads relating to 9 July – at Day 2/23-27. Then you will find evidence relating to head of charge 5, the record keeping head, at Day 2/27-29. Head of charge 6, which is the referral head, you will find the evidence from Professor Zeitlin there at Day 2/29 through to the end of his evidence at page 38. But I will divide this up, if I may, into the sub-divisions of head of charge 6. The precipitate referral is page 29-33; then the fact of the referral in the absence of contacting and referring to the parents prior to the referral is pages 33-36. Then the consequences of such a referral – potential consequences – and by that of course I mean negative consequences of a precipitate referral – is at pages 37-38. In those references you will find Professor Zeitlin referring to the literature we rely on.

C I am not going to undertake the same exercise in relation to the cross-examination, because in my respectful submission when the points that are relied on in argument by the defence just now were put to Professor Zeitlin, he was unshakeable on the evidence that he gave, namely that there were serious errors – and I will deal with that more specifically in relation to the seriousness of these matters in a moment – but there were serious errors, and no comfort can be derived by the defence from the contents of the literature, that he has very much taken into account the literature, both when he was compiling his reports and when he gave evidence to you.

D Sir, unless you specifically wish me to deal with the detail of the heads of charge, that is the extent of my submissions on them for the time being, because in view of your comments this morning about the clarity to the Committee of the evidence, it is probably not going to assist you if I were to go through all the material over again, highlighting relevant passages. If you wish me to on any specific point, then of course I can do.

THE CHAIRMAN: I do not think that will be necessary.

E
F MISS GLYNN: Then, sir, may I in those circumstances turn to seriousness, because it has been submitted to you under regulation 27(e)(ii) that, taken at its highest, these are not matters which, if found proved, could support a finding of serious professional misconduct. As I say, assuming for the purposes of my argument that you find there is sufficient evidence on all the heads of charge, the complainant's case is that there is clearly evidence there which may amount to serious professional misconduct. Of course you are not determining the issue of serious professional misconduct now; you are simply ascertaining whether that evidence may be insufficient to support a finding of serious professional misconduct – and of course there is an important distinction there.

G
H You have been referred to the case of *Silver* and it has been highlighted to the Committee – and I am sure the Committee is well familiar with this case now, as it has attracted a lot of attention – that in the case of *Silver* the Privy Council was

A | considering a case against one practitioner and the case of one patient treated by that practitioner.

B | It seems that within that case, if one looks at the facts, Dr Silver repeated – he was a general practitioner and he repeated the same error several times in relation to that one patient – in other words he failed to undertake domiciliary visits. It seems that he was a single-handed general practitioner working in a deprived part of London, and it was determined by the Privy Council that in such circumstances it was not reasonable to have determined that he was guilty of serious professional misconduct.

C | In my respectful submission there are several points that need to be made in relation to that case. First of all, there are distinctions between that case and this. This was not the same error repeated on a number of occasions by a very busy, overworked perhaps, general practitioner. It makes no difference, we submit, whether this case faced by Dr Eastgate concerned one patient or several patients. We could have been looking at a case concerning Miss A in which there had been inappropriate facilitation of allegations of abuse; a case concerning Miss B, where no notes were made in relation to what took place; and a case in relation to a different person altogether involving precipitate referral and failure to contact the parents. It makes no difference about the number of patients. What is important here is the number of different, we say, errors – the number of different types of misconduct.

D | In this particular case there is no suggestion of specific extenuating circumstances, as there were in *Silver*.

THE CHAIRMAN: There could be. We just do not know at this stage, do we?

E | MISS GLYNN: No, we do not; that is quite right, sir; but there is no evidence before the Committee.

THE CHAIRMAN: There would not normally be at this stage.

F | MISS GLYNN: That is right. But nevertheless that was an important feature for the Privy Council when they were looking at the case of *Silver*, and it does seem here that there is no element of grave risk or emergency in this particular child's case, no evidence of a short-staffed hospital – it appears to have been a number of normal days so far as this practitioner was concerned. So those are distinctions.

G | In my respectful submission the important point to be extracted here is that each case turns on its own facts, and therefore the Committee may wish to put on one side *Silver* and simply look at the facts of this case in relation to whether or not there is evidence of serious professional misconduct.

H | The first point here – and I may already have alluded to this – is that here we are dealing with a consultant child and adolescent psychiatrist, so therefore an expert in handling this type of situation, on the face of it; and as such, somebody who at the time would have been well aware of the serious potential consequences of mishandling situations such as this; well aware of the extreme vulnerability of both the adolescent and the family to the mishandling of such a situation; and of course well aware of the reason for and the contents of the various documents we have been

A | looking at in this case, designed specifically to ensure that mistakes like this are not made – to protect both the child from the abuser, and indeed to protect the child from the consequences of false allegations being made.

B | One looks at these heads of charge collectively, but may I for the moment look at them individually before I do so. Heads 3 and 4: the seriousness of those heads – and these are the ones relating to 9 July – is that here the practitioner was dealing with an especially vulnerable adolescent, and the allegations, if found, involve leading her in all the circumstances that have been explored in this case, and transmitting his own opinion, in all the circumstances you have heard about. The allegations go to the root of his area of expertise, we submit, and to the root of what has gone on in so many of the unfortunate cases that have given rise to the documentation that we have looked at.

C | We submit that the effect of what happened on 9 July is that the diagnostic process was irrevocably compromised, and that is the essence of what Professor Zeitlin has said. We do not know what the other consequences may have been; but Professor Zeitlin has said several times during his questioning that there were serious consequences flowing from 9 July – in other words, that by the 11th this was “an abused child”, in inverted commas, taking on the role of an abused child. You only have to look at the evidence of Mrs A relating to 12 July, when she describes the meeting with Dr Eastgate, during which she is told by Dr Eastgate, in the presence of Miss A, sitting on the floor, that Dr Eastgate is “98 per cent sure that this act by Professor X is criminal”. The fact that the diagnostic process was irrevocably compromised, we say, is extremely important, because the prime objective at this stage was to get this child better. As Professor Zeitlin has said, it muddied the waters thereafter.

E | The failure to record head of charge, Mr Turner has suggested, was important, if for no other reason, to protect his own back. We say absolutely not; it was important for very much more fundamental reasons than that. Accurate, full note taking in circumstances such as these, after the events on the 9th in the morning that unfolded, was extremely important in the context of the treatment of the patient thereafter, in the context of perhaps at a later date the protection of others, and the prosecution of the guilty.

F | So there were extremely important consequences, and it seems that Dr Eastgate was aware, certainly on 16th when he made that note in his file, about the necessity for verbatim recording of what took place. It may be worth simply refreshing the Committee’s memory about the content of that note because on the 16th, at the bottom of page 10 of tab 2 – and this would appear to be after the strategy meeting has taken place – it reads:

G | “But at the same time it is important that all discussions whether with nursing staff or other clinical staff, are written down as nearly verbatim as possible, and that no leading questions are used to try to elicit information.”

H | What is interesting here is that you will note the Head of Charge goes on to make an allegation about failing to record on or about 19th July. So even having made that

A note, he fails to comply with it himself, on the face of it. We say that that is another serious matter.

B Head of Charge 6, the premature referral, very serious. Perhaps for common sense reasons I do not need to go into in very much detail. You have heard from Mrs A herself about their concerns about the consequences of the police becoming involved in circumstances where she was quite satisfied nothing had happened, because she was there on four out of the five occasions, and her primary concern was to facilitate her daughter becoming better. She was extremely concerned, given the amount of time that such investigations would take, and the strain on her daughter, about this having been done without her knowledge and, indeed, consent.

C It goes without saying that sometimes these investigations and giving evidence in court and being interviewed, and so on, may be worth it, but on other occasions, particularly where the quality of the evidence is extremely poor, it does a great deal of damage, you may think, to the child. We say that the possible consequences as alluded to in the literature, in *Working Together*, paragraph 5.11.3 at page 27, and at 5.14.10, page 30, are important. The absence of parental involvement, the second part of that Head of Charge, again is extremely important.

D It may be instructive, and I do not know – of course, the Committee may not find this helpful at all – to try to draw an analogy. Where, for example, one might have a child admitted to hospital with extremely serious stomach problems, if there is a situation in which the medical practitioners looking after the child discover that, for example, the child had been poisoned, it would be quite extraordinary, the Committee may think, for the parents not to be told for three days that there was that suspicion, confirmed, perhaps, by testing. We would submit that is wholly unjustifiable in the circumstances. Professor Zeitlin’s evidence is that it is wholly unjustifiable. There was no reason, you may think, for the parents not to be contacted on the evening of the 9th, during any part of the 10th, or indeed any part of the 11th, by which time this matter was being referred to as abuse in the notes. There was no reason whatsoever. We say that this is a very serious omission and one that had, we submit, very serious consequences, because the parents may well have been able to assist as to the likelihood of the index of suspicion, if the Committee likes.

F Professor Zeitlin has given evidence about the seriousness of these matters. He has used words such as “hazardous” in the context of the interviewing (Heads 3 and 4). At Day 2, page 28G, he said:

“...in going through the accounts that I looked at, the errors which I am describing are actually serious ones...”

G and that was in the context of him explaining to you why it is that he took his task seriously. In relation to the referral, Day 2, page 37D:

“...I have to advise that it was not sound clinical judgement and was contrary to guidelines that were extant at the time.”

H Regarding the errors generally (this is this morning’s evidence) he said there were a series of very serious errors.

A There may be some confusion, I know not, in the Committee's mind about the importance and relevance of consequences in such cases. In this case, as was established at the outset, we are not able to make a causal link between the serious, we submit, errors made at the Professor X stage, if I can call it, and what happened thereafter, and we do not seek to do so. Professor Zeitlin has explained that. But when one is looking at seriousness, it is appropriate, in my submission, to look at the potential in the same way as the courts do – again, I hope this is a useful analogy, I know not – when they look at people charged with dangerous driving.

B Dangerous driving some people may regard as not a very serious matter, going through red lights, going over roundabouts perhaps, nobody injured, no damage done to car or property. In my submission, the courts take those matters very seriously because of the potential for serious injury, for the potential for death. Of course, there is a separate offence of causing death by dangerous driving, but dangerous driving itself is a very serious matter because of the potential. We submit that that is analogous in this case. We cannot prove consequences, but the potential was enormous and this was a specialist involved in specialist work.

C For that reason we say that when the Committee is considering rule 27(e)(ii) and is asked by the defence to determine that there is insufficient evidence to support a finding of serious professional misconduct, that is not the case in this matter.

D Unless there are any specific matters I can help the Committee with, those are my submissions.

THE CHAIRMAN: Legal Assessor?

E THE LEGAL ASSESSOR: Just this, Miss Glynn. The Committee have to consider whether it is possible that, at the end of the day, the matters of which there is evidence could amount to serious professional misconduct; but, at the end of the day they would be considering it upon what is generally called the criminal standard of proof, that is to say, satisfied so that they are sure. So should they be advised in the negative, as it were, that they should now look at what they are satisfied there is evidence of and consider whether it is possible that, applying that test, they could ever find serious professional misconduct?

F MISS GLYNN: Sir, with respect, I submit that the concept of standard of proof at this stage is not helpful because what the Committee is doing, if you like, is applying a *Galbraith* test to rule 27(e)(i) in relation to the facts, and having done that, once they have determined that there is sufficient evidence, then they have to go on to consider whether there is insufficient evidence to support a finding of serious professional misconduct. So the first stage is to determine whether or not there is sufficient evidence, not that it is proved, but whether there is sufficient evidence on the specific Heads of Charge.

G THE LEGAL ASSESSOR: I am with you entirely on the first part. It is on the second part that I raise the query.

H MISS GLYNN: I see. I am sorry, could I ask you, sir, to explain?

A THE LEGAL ASSESSOR: I will try to. When they come to consider whether serious professional misconduct could be proved on the facts, rule 27(1)(e)(ii) tells them to consider whether the facts of which evidence has been adduced or which have been admitted are insufficient to support such a finding. Should they be asking themselves whether it is insufficient to support such a finding upon the standard of proof that would eventually be required? If it helps, I think the answer is probably
B “yes”, although it is a long way down the line of proof and causation.

MISS GLYNN: Yes. I can see the point you are making, sir, and yes, I would respectfully submit that that is the correct approach. I would also submit that it is not going to make very much difference at the end of the day because they will have made a determination, first of all, as to whether or not there is sufficient evidence on a
C *Galbraith* approach, if I may put it that way, on the Heads of Charge, and then they will have to go on to consider whether there is insufficient evidence to support a finding of serious professional misconduct. The standard of proof is not going to be directly relevant at that stage, I would submit.

THE LEGAL ASSESSOR: It is highly unlikely they would actually have to think about it, but I shall ask the Chairman whether he would like Mr Turner to mention that or say anything about it.
D

THE CHAIRMAN: I was going to invite Mr Turner in any event, if he wished to add to his submission.

MR TURNER: May I respond briefly? On that last point, first of all, I entirely accept that very seldom do cases turn on standards of proof, but if and in so far as in its
E considerations this afternoon the Committee should find itself in that grey area of having ascertained the facts that could properly be established on the evidence that stands at the moment, but is in a grey area as to whether they are sure beyond reasonable doubt that those facts would amount to serious professional misconduct, the benefit of the doubt goes to the doctor, in those circumstances.

On the question of the disputed facts, I entirely accept what Miss Glynn has said, that the Committee must take the facts, as it were, at the highest in so far as they are
F established, but I do invite the Assessor to draw the attention of the Committee to what was said in the case of *Shippey*, which one will find in chapter 4 of *Archbold* in the *Galbraith* section. I am sorry, I have not brought my *Archbold* with me and although I actually write the section, I cannot remember precisely what the paragraph number is.

THE LEGAL ASSESSOR: I am going to suggest that Mr Turner might like to look in the edition that is here. That can be passed down to him. (Same handed)
G

MR TURNER: Thank you.

THE LEGAL ASSESSOR: You will find that is the 2002 edition, but I do not think it makes any difference.

H MR TURNER: It is the same. It has not changed.

A

THE LEGAL ASSESSOR: We all know it is about plum duff and not taking the plums and refusing the duff.

B

MR TURNER: Yes, 4-294 and 4-295. Thank you. By that I repeat what I said before, that one cannot just take at face value what Professor Zeitlin said without looking at the underlying material on which he purports to rely. So when he says: “Oh well, it is clear that there has to be a level of belief based on whatever it is, facts at a high level”, one is entitled in fact to look at the DSS guidance, for example, and that is not the only place where one finds the use of the word “suspicion”. One finds it all over the place in the guidance. How that can be expanded to amount to the sort of level of belief or concern that Professor Zeitlin suggests is difficult to imagine. Those who complain in this case cannot say: “Well, we can take all the best points but we can ignore the other bits in the material that do not really support our case.”

C

As far as *Silver* is concerned, of course I accept that all cases have different facts and each case turns on its own facts. My reference to *Silver* is not so much because of any asserted direct analogy between the facts, but primarily to extract two matters of principle. The first matter of principle that is clear, and which the Privy Council felt it necessary to emphasise yet again, is that errors of judgement, even errors of judgement which amount to negligence that could result in damages in an action in the civil courts, do not necessarily amount to serious professional misconduct. There must be that added degree of opprobrium concerned in that.

D

E

The Privy Council also dealt, I submit, with the point Miss Glynn made about looking at the consequences. She suggested that if the error of judgement has potentially serious consequences, then that in itself is enough in some way to justify a finding of serious professional misconduct. What I submit is that there are very few errors of judgement that do not have the potential for serious consequences. She took the example of dangerous driving. I take the example of driving without due care and attention. It carries a modest fine and some penalty points the last time I looked. That can have dramatic consequences. The most minor fall from perfection in driving can have as serious consequences as deliberate racing with other cars on the road.

F

What one is primarily looking at in this sort of case, when deciding whether the degree of opprobrium that is appropriate for serious professional misconduct applies, is not the question of: ‘Could the consequences have been dramatic and serious?’, but: ‘How does one judge the actual behaviour of this doctor?’ For example, was he acting in bad faith or maliciously? Was he acting in a reckless, devil-may-care? “Oh well, yes, if I stopped to think about it, perhaps I might do it differently, but I have got an appointment down at the pub which is more important than dealing properly with this case”? Those are the sort of factors which may justify a finding of serious professional misconduct.

G

H

Let us be realistic about it. Does the label, the word “misconduct”, let alone serious professional misconduct, readily spring to one’s lips even if one accepts all of the criticisms that Professor Zeitlin makes of what Dr Eastgate did and did not do in this case? If one looks at *Silver*, at paragraph 15, it can be seen the argument that was being put forward by my learned friend Miss Glynn was put forward by Miss Vaughan-Jones acting for the Council in that case, who highlighted the fact that if the

A family had not taken the patient to hospital, total disaster would probably have resulted, as indeed it would: the patient would be dead, in all likelihood.

What could be worse than that? Yet that was not sufficient to persuade the Privy Council that just because the consequences could have been disastrous the actions or inactions of the doctor could properly be described as serious professional misconduct.

B I invite the Committee to ask themselves, if they accept that, *prima facie*, there is evidence of errors of judgment, what is the context of those errors? How easily could it have happened? Yes, it should not have happened, it should have been done differently, but if you can see without too much difficulty how it did come about and that this was one of those sorts of case that is described in paragraph 19 of *Silver*:

C “That for every professional man whose career spans, as this appellant’s has, many years and many clients, there is likely to be at least one case in which for reasons good and bad everything goes wrong’ ...”

– a series of perhaps related things going wrong in one case. There is no suggestion that it was in any way representative of his otherwise unblemished record.

D I submit that, taken at its highest, the Committee could not properly say, “Well, this amounts to serious professional misconduct”. I am starting to repeat myself so I will sit down.

THE CHAIRMAN: I will ask the Legal Assessor if he has advice for the Committee?

E THE LEGAL ASSESSOR: Chairman, the application which is made now is an application on behalf of the doctor that the matter should stop now, or at any rate some parts of it should stop, on the basis that rule 27(1)(e) applies. It is, first, very important that I should say that, of course, you are not being asked now to decide either whether the facts that have been alleged against the doctor are actually proved, or whether serious professional misconduct has in fact been committed. You are being asked to make an interim decision upon a hypothetical basis which can be seen best by looking at rule 27, which I think you all have in your blue folders and therefore I would like the Committee to make sure they have all looked at rule 27(1)(e), and it may be best to look at it together now. It reads:

“At the close of the case against him ...”

– and you have heard Miss Glynn say she closed her case –

G “... the practitioner may make either or both of the following submissions, namely:-

- (i) in respect of any or all of the facts alleged and not admitted in the charge or charges, that no sufficient evidence has been adduced upon which the Committee could find those facts proved ...”

H

A Stopping there, if you look at what is called the “heads of charge” a number of the fact have been admitted, and I am sure you marked your charge sheets accordingly with which ones were admitted and therefore we are concerned with the ones that are not admitted, and in respect of those:

“... that no sufficient evidence has been adduced upon which the Committee could find those facts proved.”

B Nowhere is it suggested now by Mr Turner that there is no evidence at all upon which any of those matters could be found proved, but what he is suggesting is that although Professor Zeitlin has spoken upon each of them, and has said in respect of each of them that they are proved, there are other matters which have been put to him in cross-examination, which you have heard at length, and there are matters to which you have been referred in the literature bundle and other places which undermine that evidence. That is the reason why Mr Turner has asked me specifically ---

C THE CHAIRMAN: Can I ask whether they undermine or are said to undermine?

D THE LEGAL ASSESSOR: Are said to undermine is what I mean, of course. That is Mr Turner’s argument. That is why Mr Turner specifically asked me to refer you to *Shippey*, and you were kind enough to pass the book up and I will do so. You do not just look to see whether there is any evidence at all upon which those not admitted facts are proved, or could be proved, you look at whether the evidence is good enough to this extent. In the case of *Shippey* Mr Justice Turner held that:

E “The requirement to take the prosecution evidence at its highest did not mean picking out all the plums and leaving the duff behind. The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self-contradictory and out of reason and all common sense then such evidence was tenuous and suffered from inherent weakness.”

F So in this case it is suggested that the various matters which have been put to Professor Zeitlin have so weakened his evidence that you would not feel able to act upon it and therefore there is insufficient evidence to prove the various matters that are not admitted.

Against that you have heard Miss Glynn say that he, in cross-examination, defended each of the points that were put to him and it is, of course, for the Committee to form an opinion upon those matters, it is not for me to tell you at all how to find the weight or value of the evidence.

G I broke off in reading to you in reading rule 27(1)(e) because the next part is:

“(ii) in respect of any charge, that the facts of which evidence has been adduced or which have been admitted are insufficient to support a finding of serious professional misconduct.”

H The first thing to note here is that there is only one charge against the doctor. Although you have a number of heads of charge, which are given numbers and letters to break them down for convenience, when it comes to considering this you have to

A consider whether all the facts of which evidence has been adduced, or which are admitted, are insufficient to support a finding of serious professional misconduct taking them together.

B What is serious professional misconduct? Committees are customarily referred to the cases of *Doughty* and *Preiss*, the relevant parts of both of which are conveniently set out in the report of *Silver* that you happen to have been handed earlier anyway. So it may be convenient if I refer you to the relevant passages. If you have got the report of *Silver* please could you go to paragraph 18 which begins with a reference to *Roylance v. General Medical Council* at the top of the page. Then about half way down it goes to what Lord Mackay of Clashfern said in *Doughty v. General Dental Council*. Let me say immediately that although that case concerned a dentist and the Dental Council it applies just the same to a doctor and the Medical Council and all you have to do is to substitute the word “doctor” for “dentist” in here:

C “In the light of these considerations in their Lordships’ view what is now required is that the General Dental Council should establish conduct connected with his profession in which the dentist concerned has fallen short, by omission or commission, of the standards of conduct expected among dentists and that such falling short as is established should be serious. On an appeal to this Board, the Board has the responsibility of deciding whether the

D Committee were entitled to take the view that the evidence established that there had been a falling short of these standards and also entitled to take the view that such falling short as was established was serious.”

So it is a falling short coupled with it being serious.

E Then below that at paragraph 19 in the same report you see *Preiss v. General Dental Council* – I am sorry it is a dentist again:

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

G and at paragraph 29:

‘That for every professional man whose career spans, as this appellant’s has, many years and many clients, there is likely to be at least one case in which for reasons good and bad everything goes wrong – and this was his, with no suggestion that it was in any way representative of his otherwise unblemished record.’”

H As you know, because mention has been made of *Silver* at some length, that was a case in which a doctor had, I think, 40 years of good service in the medical profession and fell below the accepted standards in respect of one patient in one way, although several times.

A Each case is different, as you have been told, and if you find it helpful to look at that then no doubt you will, but each case, as I say, turns on its own facts. You have to judge whether it is possible that in this case, if you were dealing with the matter upon the facts as they are in front of you now, it is possible that you could make a finding of serious professional misconduct on the basis that you were satisfied so that you were sure of it. If you find that you could not make such a finding now then you would have to stop the case under rule 27(1)(e)(ii).

B I must tell you to decide the matter only upon the evidence that you have actually heard, that you must consider, when you are going through it and looking at the facts, in respect of each one separately whether you are satisfied that there is evidence sufficient to prove it. However, when it comes to considering the second part of the submission in respect of serious professional misconduct you should look at all those facts together.

C Chairman, that is my advice is to the Committee.

D MR TURNER: Mr Chairman, I wonder if I could just raise with the Legal Assessor to see if he felt it right that one further matter of advice was given in relation to the *Shippey* case. The Legal Assessor has correctly said that one should look to see whether there are any inherent weaknesses and he mentioned in that context my cross-examination. I am not entitled to rely on my cross-examination as evidence because it is not evidence. I am just putting matters to the witness and he may either accept them or reject them. The inherent weaknesses that I rely on are not so much my assertions but my contention that what the witness said is, to some extent at least, incompatible with some of the literature on which he purports to rely and which is, in itself, part of the evidence in the case. An example I have given is the DSS guidelines. I hope that is helpful.

E THE LEGAL ASSESSOR: Not only is that helpful, but it reminds me of something else which Mr Turner mentioned earlier. The Committee should properly consider what Mr Turner has now just said, but you will recall that he was also making the point, and invites you to consider it, that the doctor was acting in a therapeutic capacity rather than an investigative capacity and if that appears to you to be of such importance that it does, in fact, undermine the evidence given by Professor Zeitlin then that is an argument that you should consider.

F THE CHAIRMAN: Thank you. Mr Turner used a word that actually often helps, or sometimes helps, the Committee. He referred to the facts being capable of proof on the evidence which has been put before us. It may be that that is a helpful concept sometimes.

G THE LEGAL ASSESSOR: Yes, Chairman.

THE CHAIRMAN: Thank you, the Committee will now consider in private.

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

H STRANGERS HAVING BEEN READMITTED:

A

THE CHAIRMAN: Mr Turner, the Committee have given detailed consideration to your submission that there is insufficient evidence upon which the outstanding allegations of fact could be proved; and that such facts, of which evidence has been adduced or which have been admitted, are insufficient to amount to a finding of serious professional misconduct, pursuant to rule 27(1)(e)(i) and (ii) of the Committee's Procedure Rules.

B

C

They have considered all the evidence that has been placed before them, in particular the evidence of Professor Zeitlin and the documents which have been produced, the submissions made by both counsel and the advice of the Legal Assessor.

D

The Committee have decided that sufficient evidence has been adduced upon which the Committee could find the facts alleged in all the remaining heads of charge which have not been admitted may be proved to the requisite standard and they therefore do not accede to your submission under rule 27(1)(e)(i).

E

The Committee then went on to consider your submission under rule 27(1)(e)(ii). The Committee have determined that the facts of which evidence has been adduced and of which admissions have been made would not be insufficient to support a finding of serious professional misconduct and they therefore do not accede to your submission under rule 27(1)(e)(ii).

F

The hour is late and I think it would be better for you to open your case tomorrow, if that is convenient, but we do need to talk about timetable.

G

MR TURNER: I am going to call my client and I shall do that tomorrow. I have another witness about whom there is no secret. It is Mr Evans who needs to be away tomorrow because he is off abroad on holiday the day after tomorrow.

I then have, as far as substantial evidence is concerned, one and potentially two expert witnesses to call; and character evidence, some of which may be live but it will be very brief, some of which I shall show to my learned friend and if it can reasonably be put before the Committee in testimonial form in the usual way that is how it can be done.

H

Tomorrow will clearly be taken up with evidence from Dr Eastgate and this other witness. Friday morning, I think we have a problem as far as experts are concerned, but we can probably the character evidence on Friday morning. On Friday afternoon

A we would be start on our expert evidence. It is very difficult to judge how long that is going to take, including cross-examination.

THE CHAIRMAN: It is usual but not invariable for the character witnesses to come in part 2, if there is a part 2. Is it impossible for either of the expert witnesses to come on Friday morning?

B MR TURNER: I am told that it is. One of them, Dr Hall, who has been here this week, as things happen, the very worst day of the week for her with her other commitments is Friday morning, which would be the most useful time to call her as things work out. I understand from her that it would be very, very difficult and create problems with other patients who have very pressing needs for her to be here on Friday morning.

C THE CHAIRMAN: I am really looking to whether we are going to finish on Monday?

MR TURNER: I could not guarantee that, I am afraid, is the honest answer.

D THE CHAIRMAN: I do not know how members of the Committee are placed if we were to run over to Tuesday. I know I am meant to be at an industrial tribunal in Bury St Edmunds on Tuesday afternoon. I think we need to do some homework overnight.

MR TURNER: The possibilities are threefold, I suppose, if we are destined to go beyond Monday. Either the sitting on Tuesday, or having a longer break than that which obviously is the least satisfactory method, or sitting at some stage over the weekend. I know that in exceptional circumstances sometimes Committees do that. But those appear to be the three possibilities. There is a question of the hours the Committee sits as well is another factor, although I do not suppose sitting an hour here or there will make much of a difference.

E THE CHAIRMAN: The great problem is the two experts on Friday afternoon when the expert evidence is ---

MR TURNER: Is crucial.

F THE CHAIRMAN: --- clearly very, very important in this case. There is no question of intending to or actually rushing it. It must have as long as it needs.

THE LEGAL ASSESSOR: Can I inquire whether the expert evidence is likely to be given orally in extenso, as we have had it, or whether we are going to have the report which the Committee can read to themselves? That might shorten proceedings.

G MR TURNER: I can certainly talk to my learned friend about that but of course evidence tends to have more impact if it is delivered orally.

THE CHAIRMAN: The Doctor's evidence is clearly important too, but is there any prospect of one of your experts giving evidence tomorrow?

H MR TURNER: When you say "giving evidence tomorrow"?

A

THE CHAIRMAN: Tomorrow afternoon.

MR TURNER: I see. You mean interposing one of the experts?

THE CHAIRMAN: Not necessarily, because I was not clear whether the character witnesses were part 1 or part 2?

B

MR TURNER: I had intended to call them in this case as part 1.

THE CHAIRMAN: And whether you had any flexibility? I do not have any feel for whether the Doctor and Mr Evans will take all of tomorrow or not.

C

MR TURNER: My guess is that between them they will probably take all of tomorrow.

THE CHAIRMAN: Miss Glynn, do you have any view? I know they are not your witnesses.

D

MISS GLYNN: Sir, it is impossible for me to say anything useful on timing, apart from this. I am not criticising for the moment at all, but I do not have a second expert report. I have no idea of what the second expert might say. Although I have had an opportunity in the last few days to take instructions from Professor Zeitlin on Dr Hall's report, as I have no idea what the other report is going to say, I may well require time – it depends when it is going to be served – to take proper instructions on that if it is to be called. I do not know whether a final decision has been taken or even if the report is available yet. It may not be appropriate for Mr Turner to deal with that yet. That is a possibility – that I am going to require some time to deal with the second expert's report.

E

THE CHAIRMAN: I think probably I am straying on territory which is not for me. Maybe I could ask the Legal Assessor just to confer with both counsel, to see if we can find a programme which gives us every possible hope of finishing on Monday. I do think that clearly we are looking to whether the Committee, at least, is available on Tuesday morning, but I do think it is in the Doctor's interest to have this completed.

F

With that, we will now adjourn and we could start at nine o'clock tomorrow if the Committee are able. If you are worried about Mr Evans running over ---

MR TURNER: That would be extremely helpful, sir.

G

THE CHAIRMAN: Shall we do that? We will reconvene at nine o'clock tomorrow morning. Thank you.

(The Committee adjourned until 9.00 am on Thursday, 4 September 2003)

H