Medical expert testimony: A failure to learn lessons

Michael Nott

Australia's judicial system is failing to take heed of the injustices that have occurred in England concerning the beliefs of British kidney specialist, Professor Sir Roy Meadow. There has been a succession of injustices and wrongful convictions of infanticide based on the expert evidence of Professor Meadow, evidence that has been criticised by the UK Court of Appeal. These cases include Sally Clark, Trupti Patel, Angela Cannings and Donna Anthony. Other cases involving Meadow's evidence are being judicially reviewed. Meadow's cot death theory – one cot death is a tragedy, two is suspicious and three is murder (The ABC of Child Abuse, BMJ Publishing Group, 1997, page 29) – has been discredited. A similar cot death belief was also rejected in the Ward case in Tennessee USA (State of Tennessee v Shabree Ward No, M2002-01816-CCA-R3-CD (2003)). In the Angela Cannings judgement (R v Angela Cannings [2004] EWCA Crim. 01), the UK Court of Appeal said the cot death theory "had to stop", while in Sally Clark's case (R v Sally Clark [2003] 200203824 Y3), the judges described Meadow's medical and statistical evidence on cot deaths as "wrong", stating that such evidence "should not have been put before a jury" and "that the wisest course would have been to exclude it altogether".

Meadow was struck off by the British General Medical Council (July 2005) for serious professional misconduct relating to statistical evidence he gave at the trial of Sally Clark. At his professional misconduct hearing, Meadow's principal defence was that he had not held himself out and should not have been treated as an 'expert' witness in child abuse. However, he has written numerous articles and edited books on child abuse. He forged a substantial career as an expert witness in this area. In Australia, he has presented himself as an expert in child abuse, provided expert opinions on cases involving deaths of children and MSBP, and has liaised with many Australian professionals on the issues.

According to Stephen Clark, Sally Clark's lawyer husband, when Meadow was asked to produce the data supporting the evidence at his wife's committal hearing (and which underpinned his entire career) he initially prevaricated, then eventually admitted he was unable to do so because his secretary had "shredded it". This meant that his evidence could not be properly tested.

Clark said Meadow was found guilty of serious professional misconduct not simply because he made a one-off mistake. "It was because he gave 'misleading and erroneous evidence' outside his expertise that was 'compound ed by repetition over a considerable period of time', the British General Medical Council (GMC) found. Meadow went on to embellish it and failed to disclose evidence that provided balance."

Clark said the GMC rejected Meadow's arguments that he was not an expert and that everyone except him was to blame. "The GMC determined that Meadow had 'abused' his position as a doctor and may have seriously undermined the authority of doctors giving evidence."

Stephen Clark made the point that at Sally's second appeal hearing 12, leading British and international medical experts made statements, with varying degrees of certainty, but all to the effect that following the discovery of medical reports which had previously not been disclosed, his son Harry had died from an overwhelming bacterial septicaemia. The appeal court, Clark states, held that Meadow's statistics were "grossly misleading" and "overstated" and sufficient on their own to make Sally's conviction unsafe.

The statistical evidence that Clark is convinced resulted in the original false conviction of Sally Clark and the disbarring of Meadow has been used in a similar fashion at the committal hearings of a NSW woman who was subsequently convicted of killing her four children. The USA professional, Dr Janice Ophoven, who provided the statistical evidence for the woman's committal hearings also gave expert opinion in a similar case in Victoria.

Meadow is also responsible for the child abuse belief of MSBP, or Munchausen syndrome (factitious illness) by proxy (The Lancet, 1977) that is widely
accepted in the child protection sector, police and judiciary in Australia. The basis
of this allegation is that a parent or other carer has deliberately fabricated or
induced an illness in a child. There is no scientifically-based evidence to support
Meadow’s beliefs that were based on anecdotal comments on two of his patients.
Meadow fails to consider other reasons for a child’s death or illness. These include
vaccination damage, adverse reaction to drugs or the combination of drugs, toxic
poisoning, allergies to foods or food additives or an adverse reaction to chemicals,
genetic problems, doctor negligence or misdiagnoses and the like. Rather, when
the matters are fully investigated there are compelling evidentiary alternatives to
an unsupported belief that a mother killed her child or caused the child to be sick.
In one significant decision for the Australian judiciary, Meadow’s MSBP was
rejected by the Queensland Court of Appeal in the case of R v LM (QCA 192
[2004]). The court ruled that MSBP or factitious illness (FII) was inadmissible in
evidence and ruled out the testimony of doctors alluding to the alleged disorder.
The court stated that MSBP/FII was not a recognised medical condition, disorder
or syndrome. In the case, Justice Holmes remarked that the Crown’s use of MSBP
“explained nothing”, “the Crown’s argument...was inherently circular” and “did
nothing to prove criminal conduct”. That legal reasoning was adopted by the UK
High Court in the Family Division (A County Council v A Mother and A Father
and X, Y, Z children [2005] EWHC 31 Fam). In the case, Justice Ryder stated that
he hoped MSBP would be “consigned to the history books”.

I have previously reported (in other publications) the comments that the Direc-
tor of Public Prosecutions ACT, Richard Refshauge, made to me last year. Ref-
shauge said that the QCA decision of R v LM on MSBP is a conservative and
down-the-line law judgement. “It makes clear that if a woman is to be prosecuted
for harming her children, it is not enough to put a label on it; facts are required
to justify the case.” This, Refshauge advised me, is the normal situation in law.
“By labelling the woman in this way with Munchausen syndrome by proxy or
factitious illness by proxy you are saying the woman is guilty, as the label creates
the guilt. The problem is that labelling is not a process for determining guilt. Peo-
ple are not convicted for having a syndrome or a particular behaviour; they are
convicted for the illegal acts that they do.”

The New South Wales Director of Public Prosecutions is aware of the prob-
lems that Meadow’s beliefs and evidence have caused in the UK. Writing in the
NSW Judicial Officers Bulletin (May 2005) about wrongful convictions, the DPP
Nicholas Cowdery acknowledged the UK problems. While he referred to the
Canadian Department of Justice’s 2005 Report on the Prevention of Miscarriages
of Justice, concerning tunnel vision by police and prosecutors, he failed, in my view,
to adequately examine similar local cases to those in the UK, that involve prob-
lematic and inaccurate expert medical testimony.

Yet, the use of Meadow’s beliefs continues in Australia. NSW’s child protec-
tion agency, the Department of Community Service, still alleges MSBP in child
abuse cases. Other agencies including the office of the NSW Attorney General and
the NSW Commission for Children and Young People’s office know of the prob-
lems but suffer from inertia. The Children and Young People’s Commission
advised me the matter should be “put in perspective”. But it acknowledged that
MSBP was a “complicated and difficult diagnosis...[with] some medical experts
who support and diagnose the syndrome and those who dispute its existence”.
I have spoken to the Queensland children’s minister Mike Reynolds and other
politicians who have shown a reluctance to directly address the issue.

A succession of UK, Queensland and USA superior courts have found that
Meadow’s cot deaths and MSBP beliefs have no legal foundation – in R v LM rul-
ing the MSBP label inadmissible evidence. The British General Medical Council
and the Royal Statistical Society have criticised Meadow’s use of statistics. There-
fore, in light of this and the fact that Meadow had now been found guilty of seri-
ous professional misconduct and struck off the medical register, I question why
Meadow’s discredited beliefs are still being used in Australia as they are based on
speculation, beliefs and surmise – no substantive evidence of illegal acts.

I envisage that the continued use of Meadow’s discredited beliefs will pro-
vide a pathway for future negligence claims, particularly by the child victims of
MSBP when they become of an age to fully understand what has happened to
them. The issue for the Australian judicial system is that the injustices that have
occurred in the UK are occurring locally. Meadow’s beliefs are deep seated here.
It is only a matter of time before the UK judicial crisis happens here. In the mean-
time, the accusations and damage to families continues.

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