Confronting dogma

Chris Pamplin looks for the lessons to draw from an expert witness who spoke against perceived wisdom & got into deep water

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Publicly confronting dogma is a risky business that can have long-lasting consequences. Galileo was found guilty of heresy in 1615 for claiming the Earth moved around the sun. He was finally exonerated by the Catholic Church in 1992. Thankfully, Waney Squier didn't have to wait quite as long.

Challenging professional dogma

Dr Squier, a consultant at the Radcliffe Infirmary in Oxford and lecturer at Oxford University, has practised as a neuropathologist since the 1970s, and in the late 1980s she developed a medico-legal practice. Her work included cases involving babies who had died from suspected non-accidental head injuries (NAHI). The balance of medical opinion at that time was that the so-called triad of injuries (subdural hematoma, retinal haemorrhage and encephalopathy) was itself indicative of a non-accidental head injury. However, by 2003, Squier came to doubt the majority view and the reliability of previous medical evidence (including her own) in cases of shaken baby syndrome. It seems this was due, at least in part, to research carried out by Dr Jennian Geddes which had cast considerable doubt on the then prevailing professional view. Consequently, Squier appeared as an expert witness for the defence in a number of cases where NAHI caused by shaking was alleged.

A complaint was made to the General Medical Council (GMC) about reports she had provided and evidence she had given between 2007 and 2010 in relation to six babies. The charges she faced were that she had failed to discharge her duties as an expert by failing to work within the limits of her competence, failing to be objective and unbiased, and failing to pay due regard to other experts' views.

> *"The case raises some issues of profound concern for experts who go against the grain to challenge established professional doctrine"*

As many as five witnesses were called in support of Squier, including Dr Geddes, who described her as "an outstanding academic neuropathologist" and "a woman of great integrity". However, the tribunal held that Squier was dogmatic, inflexible, evasive and unreceptive, and that her determination to pursue her own opinion led her to make "outrageous and untruthful assertions".

Following the decision, Michael Birnbaum QC, who appeared for Squier, said that in his 43 years of practice at the Bar he had "rarely read a judgment of an English Court or Tribunal so deeply flawed and unfair as this". Fears were expressed that, if the decision was allowed to stand, it would have consequences for the wider justice system and would discourage experts from challenging any established dogmas in the light of new findings and new research. Louise Shorter, of the group Inside Justice, said that the decision would "only serve to silence experts who ought to be applauded for sharing their knowledge and understanding. And if that situation is allowed to remain, that is a serious threat to us all".

Clearly the case raises some issues of profound concern for experts who go against the grain to challenge established professional doctrine.

On appeal

Dr Squier appealed. In a lengthy judgment (*Squier v General Medical Council* [2016] EWHC 2739 (Admin), issued in November 2016, Mitting J found that although many of the tribunal's findings regarding Squier's conduct in the six cases were justified, the overall determination was flawed in some significant respects. The court held that on occasion Squier had strayed outside her area of expertise. In other instances, she had cited medical papers and research that did not necessarily support her conclusions, and this should have been made clearer in her evidence.

Guidance on citing the research of others

Mitting J gave guidance on the way other research should be cited in an expert report. He said that the duties of an expert when citing the work of others are not controversial; it is axiomatic, and so does not need to be spelt out in a rule. However, an expert must not cite the work of others as supporting his or her view when it does not. If another's work is capable of being supportive, but only with significant qualification, that must be stated clearly.

Counsel for Squier had suggested that, in a field such as NAHI in babies, the number of experts able to give relevant evidence is small, and those who are willing to do so is smaller still. Counsel argued that when dealing with such a small group of experts, it is sufficient for an expert to cite the research paper by name and date and to leave it to others to point out the respects in which the paper does not support the view. The judge did not accept that proposition.

He said that one of the overriding duties of an expert is not to mislead. Baldly

stating, without qualification, that a research paper is a proper foundation for the proposition the expert is seeking to advance is justified if that is the conclusion of the research paper; but if it is not, it should not be cited, without qualification, as supportive. From a detailed analysis of Squier's practice in relation to citing research, it seems that she often cited a paper, not for its conclusion (which did not support her opinion), but for some nugget within it that she thought did. It was the court's view that when she took that approach, she was not fulfilling her duty as an expert witness.

GMC's "disturbing lack of understanding"

However, the judge was quite clear in his view that many of the findings of the tribunal had been deeply flawed and unjustified. Whatever the limitations created by Dr Squier's approach to citations, she had not been untruthful and neither had she intended to mislead the court or manipulate the evidence.

Allowing the appeal, the court found that some of the tribunal's errors revealed a disturbing lack of understanding and overstatement about what had occurred. Several of the sub-charges should not have been found proven, and the flaws included the tribunal:

i. finding that Squier had strayed outside her expertise when she'd been pressed to do so in cross-examination and had twice stated that she was not an expert in the field;
ii. mis-stating expectations as to the citation of research papers;
iii. finding that Squier had failed to pay due regard to the views of other witnesses, when she had not;
iv. finding aspects of Squier's evidence misleading, when it was not;
v. making inappropriate findings about dishonesty and deliberateness; and
vi. inaccurately summarising Squier's reasoning.

It may be relevant that the GMC's tribunal panel was composed of a retired RAF wing commander (chair), a retired senior policeman and a retired geriatric psychiatrist. Following the decision of the tribunal, the accusation was levelled that this panel had simply been insufficiently competent to understand and make a proper assessment of the complex issues in the case. Michael Birnbaum went further and said that "the tribunal appeared to be strongly biased against Dr Squier, not only because it omitted most of the defence case, but because of its outrageous treatment of the five expert witnesses who gave evidence on her behalf". In a letter to *The Guardian*, Michael Mansfield QC and Clive Stafford Smith said that it was "a sad day for science when a 21st century inquisition denies one doctor the freedom to question 'mainstream' beliefs".

Responding to these criticisms, Niall Dickson of the GMC said that the GMC did not try to be, and had no intention of being, the arbiter of scientific opinion. He said that the allegations brought against Squier did not rest on the validity of her scientific theory, but upon her competence and conduct in presenting her evidence to the courts. He said that the GMC recognised that scientific advance is achieved by challenging, as well as developing, existing theories, and expressed the view that neither the GMC nor the courts are the place where such scientific disputes can be resolved.

> *"It simply isn't safe to ignore the majority position just because you think it is flawed"*

It appears, however, that the appeal court did have real concerns over the constitution of the tribunal and the manner of its deliberations. Concluding his judgment, Mitting J said that, from the perspective of both case management and understanding the context in which expert evidence was given in civil, family and criminal proceedings, it would have been desirable for the tribunal to have been chaired by a lawyer with judicial experience. Under the General Medical Council (Constitution of Panels, Tribunals and Investigation Committee) Rules 2015 (SI 2015/1965), the tribunal was obliged to maintain a list of tribunal members, including lay members. Under r 6(4), it was also obliged to maintain a list of persons eligible to serve as tribunal chair, including "lay" members. A lawyer with judicial experience fell within the definition of a "lay member". There was nothing in the rules to prevent a lawyer with judicial experience from being appointed to chair a complex case, and it would have been better if such a power had been exercised in this case.

Pot calling the kettle black?

So one might expect a little eating of humble pie from the GMC. Not a bit of it. On 3 November the GMC's website said the court "has confirmed that this case was not about scientific debate and the rights and wrongs of the scientific evidence, but the manner in which Dr Squier gave evidence". It goes on: "The ruling makes clear that she acted irresponsibly in her role as an expert witness on several occasions, acted beyond her expertise and lacked objectivity, and sought to cherry-pick research which it was clear did not support her opinions."

The use by the GMC of the phrase "cherry picking" is interesting. In seeking to defend its own position, the GMC has chosen to steer clear of comment by the ourt on the errors and woeful inadequacies of the GMC's tribunal, the selective way it dealt with the witness evidence, the fact that it got most of its decisions plain wrong and the judge's comment regarding its constitution. The words "pot" and "kettle" spring to mind!

Lessons for experts challenging dogma

However, a major concern from this case is the chilling effect it could have on the supply of experts willing to stand up in court and confront professional dogma. Whatever the GMC thinks about the proper place to challenge dogma, it should be recognised that shaken baby syndrome, and the triad of supposedly diagnostic injuries, is a forensic diagnosis. It is not a diagnosis that seeks to help the child, but rather one to point a finger of blame.

Based on the court's judgment, Dr Squier's expert witness practice opened her to some justified criticism, but that should not distract from her entirely legitimate attempts to call into question current dogma. For her to risk losing her professional reputation as she confronts dogma that she doesn't support is troubling.

If you are about to set out to challenge a piece of professional dogma, what lessons can you take from this case? First, experts are under a duty to present the range of opinions that exist in a field. It simply isn't safe to ignore the majority position just because you think it is flawed. Second, when challenging the majority, you can expect to face strong resistance, and one easy way to neutralise your challenge is for the other side to "play the man, not the ball". Your expert witness practice, the way you write reports and how you give evidence must be exemplary if you wish to avoid giving others easy sticks with which to beat you. **NLJ**

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