© iStockphoto/Lucy Young/REX/Shutterstock

Confronting dogma (Pt 2)

Post-*Squier*, **Chris Pamplin** reflects on the use of previous judgments in disciplinary proceedings

IN BRIEF

- In disciplinary proceedings, is it fair to allow evidence based on judgments where a professional acted as an expert witness and therefore had no opportunity to defend herself?
- A reasonable balance must be struck between probative value and prejudicial risk.
- *Squier* lays down principles for cases where professionals face disciplinary charges.

The decision to strike from the medical register Dr Waney Squier, a neuropathologist who expressed views in court questioning the existence of shaken baby syndrome, came under scrutiny last year in *Squier v General Medical Council* [2016] EWHC 2739 (Admin). The case—an appeal against the decision of the Medical Practitioner's Tribunal of the General Medical Council (GMC)—was examined in a previous issue of *NLJ* (see 'Confronting dogma', 7 April 2017, p 19). *Squier* raises many issues, notably that of using previous judgments in disciplinary proceedings.

Dr Squier's views on shaken baby syndrome are considered controversial. Time will tell whether she is a courageous individual taking on the weight of the scientific establishment when others dare not, or a maverick who has strayed outside her area of expertise and is dogmatic, inflexible and evasive.

In allowing the appeal, Mitting J found that although many of the tribunal's findings regarding Dr Squier's conduct were justified, the overall determination was flawed in some significant respects.

Previous criticism

During proceedings against Dr Squier, the tribunal heard a great deal of evidence that was based on the judgments given in previous criminal proceedings in which she had acted as an expert witness. Many of these earlier court judgments contained criticisms of Dr Squier.

> *"Dr Squier was not in a position to defend herself against any criticism the judge made of her evidence in the judgment"*

This raises an important question. As Dr Squier was not a party to these earlier cases, she was not in a position to defend herself against any criticism the judge made of her evidence in the judgment. How fair is it, then, for such criticism to feature in subsequent disciplinary proceedings?

Administration Court intervention

This question was tested in the Administration Court before the tribunal hearing began. There was a challenge to the admissibility of such evidence heard by the Administration Court by way of an intervention at the pre-hearing stage of the Fitness to Practise Panel (FTPP). The issue the court was required to decide is an interesting one, and of relevance to all expert witnesses practising in the courts of England and Wales.

Expressed simply, the argument advanced was that evidence contained in these previous judgments, much of which was critical of the doctor, should not be admissible because its value was more prejudicial than probative. Dr Squier, although involved in the cases as an expert witness, had not been a party to those proceedings and, consequently, she would not have been given the opportunity to defend herself or reply to the criticism in the same way that a claimant or defendant would. The parties calling her as an expert witness did not necessarily have any interest in protecting her reputation, or dealing with criticisms of her, nor did they necessarily have the means or expertise to do so. Although the FTPP had already agreed that some of the critical content be redacted, it was submitted that the issues that arose in the judgments were not the same as the issues in the fitness to practise case. Moreover, faced with judgments that were implicitly highly critical of Dr Squier, the burden of proof would, in practice if not in theory, be reversed. In other words, Dr Squier would need to prove her innocence rather than the GMC prove her guilt.

The FTPP had rejected submissions made on Dr Squier's behalf that it should rely on the primary evidence rather than judgments. Indeed, the panel decided that *GMC v Meadow* [2006] EWCA Civ 1390 was supportive of the propositions that:

- the facts of the case can only be understood in the context of the judgments; and
- a proper assessment as to a doctor's misconduct could only be undertaken by considering the judgments that led to the allegations of misconduct.

The court ruled on this application in *R (on the application of Squier) v GMC* [2015] EWHC 299 (Admin). Counsel for the GMC argued that it was essential that the FTPP should be able to consider the judgments that had led to the allegations of misconduct because these would provide the context and offer an essential means of understanding the case background. Without them, it was submitted, the case would be difficult or impossible to try.

Probative value outweighs prejudicial value

Considering the application and finding in favour of the GMC, Ouseley J said: 'Where a judgment is required as to whether the probative value of relevant evidence is

outweighed by any unfairness which its admission might cause, the view of the judge trying the case, here the FTPP, a specialist tribunal hearing a disciplinary case, should be given great weight. It would need to be clearly wrong, and especially at this stage, the unfairness of that balancing judgment would need to be very obvious, however the case might develop.'

Ouseley J considered the dangers that lie in a tribunal not fully understanding the context in which expert evidence is given by reference to *Meadow*. In that case, Thorpe J was clear 'that the failure to understand the full context in which Professor Meadow had given evidence meant that they never understood that his much criticised evidence ultimately went to a non-issue'.

In light of this, it was held that the FTPP had not acted unreasonably in concluding that the judgments would be relevant in providing:

- an insight into the background to the cases;
- the forensic context in which the expert prepared and gave her evidence; and
- prima facie evidence of certain facts about the circumstances of the case.

The judgments were relevant to the scope of the medical issues and to the reasons why particular factual bases needed to be considered, as well as to the potential effect on the outcome of the cases. Furthermore, the gravity and nature of the issues may be relevant to the care and precision required in understanding: what the reports say, their limitations and nuances.

It was found that the FTPP had not decided the judgments were to be admitted to prove that the doctor's evidence was not accepted or was found to be lacking in certain qualities. Instead, the issue before the panel concerned the basis upon which the doctor gave her evidence, its scope and her use of the underlying research papers.

Tribunal must make its own decisions

However, the judge made it clear that the disciplinary tribunal had to be the decision-maker on the issues and evidence before it. It should not adopt the ruling of another body, even of several judges, as a substitute for reaching its own decision on the evidence and the different issues before it. That said, the GMC is not precluded from considering prior judgments in a case in which evidence later at issue is given before the GMC.

Further, the opportunity for irrelevant or unfair use was reduced markedly by the redactions that had already been agreed. This meant there was less previous court case material available to require Dr Squier to devote her time and energy to dealing with findings from earlier litigation. Instead she could focus more on the quality or otherwise of her evidence to which the allegations related.

GMC rules permit appeals on unfair use

Reference was made to Rule 34(1) of the GMC's Fitness to Practise Rules 2004 (as amended), which provides that: 'The committee or a panel may admit any evidence which they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law.' (SI 2004/2608).

This, it was considered, provided some safeguard. If irrelevant or unfair use was made of the evidence, the decision would be appealable on that ground.

> *"The actual outcome of the trials...was not relevant to the allegations of misconduct"*

What is 'unfair'?

In considering what constituted irrelevant or unfair use, the judge was at pains to distinguish between uses of the judgments for different purposes. It was not relevant, for example, to prove that Dr Squier's evidence was not accepted or was found to be lacking in certain qualities. The issue before the tribunal was not whether Dr Squier was right or wrong (that was the issue before the original court), but concerned the basis upon which she gave her evidence, its scope and her use of the underlying research papers. That was the crucial issue for the tribunal.

The actual outcome of the trials, and any finding in, or inferred from, the redacted judgments that Dr Squier's evidence had been rejected, was not relevant to the allegations of misconduct. However, the fact that the issues before the judges and those now before the tribunal were different did not mean that the prior judgments were irrelevant. In fact, they were pertinent to the background to her giving evidence and to the forensic context in which the evidence was given, even if before the original judge that context was highly contentious.

Ouseley J considered that the balance struck by the tribunal—between the probative value of the judgments and any prejudicial effect—was reasonable. The original material was potentially relevant and the prior judgments were clearly not peripheral.

Guiding principles

Although the Administrative Court found in favour of the FTPP on its use of the previous judgments in Dr Squier's case, the decision did lay down some important principles to be followed by the courts in similar cases involving experts, doctors or other professionals facing disciplinary charges.

The distinctions made between fair and unfair use and considerations of relevancy have already been followed in subsequent decisions of the courts.

In *Enemuwe v NMC* [2015] EWHC 2081 (Admin), an agency midwife was the subject of disciplinary proceedings before the Conduct and Competence Committee of the Nursing and Midwifery Council. In reaching its decision, the Conduct and Competence Committee made use of previous findings against the midwife in supervisory investigations by a supervisor of midwives. Here there was no question, as in *Squier*, that the use of previous findings was to establish context and background to the complaint currently before the tribunal.

In *Enemuwe*, Holman J found that the committee's approach amounted to a 'serious irregularity'. He said that there was a world of difference between the Conduct and Competence Committee knowing that there had been a previous investigation and it actually paying regard to the factual outcome of that investigation in reaching its own findings and conclusions on disputed issues of fact.

He agreed that, normally, the findings of fact made at some earlier investigation by another panel or another person are not admissible in proceedings. Referring to Ouseley J's judgment in *Squier*, Holman J accepted and applied the criteria that had been established. He found that in *Enemuwe* the role and task of the committee at the fact finding stage of their hearing was identical to the role of the previous proceedings, namely to decide whether or not the appellant had said or done the various things alleged. Accordingly, he ruled that the prior findings by the supervisor of midwives were not admissible. NLJ

Dr Chris Pamplin is the editor of the UK Register of Expert Witnesses (*nlj@jspubs.com; www.jspubs.com*).