

BATTLE OF THE EXPERT

A Forensic Pathologist Successfully Fights Criminal Charges Stemming From His Testimony in a Shaken Baby Case

BY MARK HANSEN

District attorney Michael Dugan says his office has but one agenda: to hold accountable those it has probable cause to believe have violated the law.

But a controversial defense expert says Dugan's office in Deschutes County, Ore., may have been pursuing another, less noble, agenda when it prosecuted him on charges of lying under oath.

He claims the effort, which followed a hard-fought loss, smacks of payback that may have been designed to put him out of business for good, if not behind bars.

The expert in question is Dr. John Plunkett, a 58-year-old forensic pathologist from Hastings, Minn., who has become a leading critic of shaken baby syndrome and a thorn in the side of child abuse prosecutors.

It's not hard to see why. Plunkett is a compelling witness who has testified in more than 100 shaken baby cases and has consulted in about 400 others. He is also the author of a widely cited 2001 scientific article on short-distance falls that called into question the whole theory behind shaken baby syndrome.

Plunkett was tried—and acquitted—earlier this year in Deschutes County on two counts of false swearing stemming from his testimony at the 2001 trial of a licensed day care worker accused of shaking to death a 14-month-old boy in her care. The caretaker had also been acquitted.

Plunkett had considered a civil lawsuit against Dugan and other state and county officials, filing a tort claim notice in 2003 for alleged violation of his civil rights, defamation and other claims. But Plunkett says he opted not to pursue it. "It's not worth it," he says. "I decided to put it behind me and just get on with my life."

Dugan refused to be interviewed at length for this story, saying it sounded to him as though the reporter had already made up his mind about what he intended to write. He also said he didn't have time to detail the charges against Plunkett, suggesting instead that the reporter file a public records request for the case file. He also said he was under the impression that Plunkett had a pending lawsuit against certain public officials, so it wouldn't be prudent for him to comment.

"The only agenda [we have] is when we have probable cause to believe somebody violated the law, they should be held accountable," Dugan says. "That's our agenda."

But Plunkett and his lawyers think otherwise.

"They wanted to take me out because I've been very vocal in the area of correctly understanding the mechanics of infant head injuries," Plunkett alleges. "They knew if they took me out, they could take out anybody."

Walter Todd, a criminal defense lawyer in Salem, Ore., who represented Plunkett at trial, says he believes Plunkett was innocent and was wrongfully prosecuted. "When I think about what a bunch of crap this trial

was, ... I get all fired up about it," he says. "It makes me crazy."

"I think he was selectively prosecuted to eliminate him as an expert witness," Todd says. "I believe if [Plunkett] said words that turned out later to be factually untrue, then it was an accident or a mistake, certainly not a criminal act."

MOTIVES IN QUESTION

If Plunkett is right about the prosecutor's motives, this case may be a first, says Stetson University law professor Carol Henderson, director of the National Clearinghouse for Science, Technology and the Law.

Henderson says she knows of instances in which expert witnesses have been sued for malpractice for allegedly misrepresenting their credentials or violating professional standards of care. But she says she has never before heard of an expert being prosecuted criminally in connection with apparent good-faith testimony on a subject about which the scientific community is deeply divided.

"It would be a grave injustice if prosecutors attempted to silence an expert who has a theory and studies that are contrary to theirs," she says. "Medicine and science are constantly evolving. A healthy discourse and differing views are what propel science forward."

Plunkett is not the only expert who is feeling intimidated. Dr. Jan Leestma, a Chicago neuropathologist who occasionally testifies as a defense expert in shaken baby cases, says what happened to Plunkett has caused him to question whether he should continue to do so.

"It's scary," he says. "And there comes a point where you start to ask yourself, 'Do I want to keep on doing this?'"

The term "shaken baby syndrome" dates back to the early 1970s, when a British professor of neurosurgery published a study associating a violent shaking with a characteristic set of injuries in infants: swelling of the brain, bleeding between the brain and the skull, and bleeding in the retinas of the eyes.

For nearly two decades, the theory behind shaken baby syndrome went virtually unchallenged in the medical community. And police and prosecutors soon began to rely on the theory to explain how a seriously abused child could die without exhibiting any outward signs of physical injury.

By the mid-1990s, however, a number of forensic experts, including Plunkett, began to question the assumptions upon which the shaken baby diagnosis is based. They suggest that scientific evidence is lacking that infant brain injury can occur from shaking alone. They also contend that the injuries most often attributed to shaking could just as easily be due to other causes, such as a short-distance fall or a pre-existing medical condition.

In 1997, the controversy over shaken baby syndrome exploded into the public consciousness. That was the year that a Massachusetts jury convicted British au pair Louise Woodward of second-degree murder in the shaking death of 8-month-old Matthew Eappen. But the judge, in a rare repudiation of a shaken baby conviction, reduced Woodward's conviction to involuntary manslaughter and sentenced her to time served.

Plunkett's own legal troubles began in May 2001, when he testified as a defense expert at the trial of Lisa Stickney, a licensed day care worker and mother of two from Bend, Ore. Stickney was on trial for felony murder and first-degree manslaughter in the June 2000 death of a 14-month-old boy.

Prosecutors called six local doctors and a nationally known shaken-baby expert on rebuttal. Each of the state's experts, including an emergency room doctor, a pediatrician, an ophthalmologist, a neurosurgeon

and a deputy state medical examiner, claimed that the “constellation” of injuries the boy suffered could be the result of nothing but shaken baby syndrome.

The defense contended that the boy, who was just learning to walk, had managed to climb upon and fall from an unstable three-legged dining room chair and hit his head on the carpeted floor. The defense also introduced the child’s pediatric records in an attempt to show he had some failure-to-thrive issues. They also presented the testimony of a woman who said she saw the boy run into a wall and bump his head at a church nursery two days before the incident at Stickney’s home.

Stickney herself testified that she was in the kitchen making a snack when she heard a thump and the boy crying in the next room. She said she found the child unconscious on the carpeted floor with blood on his face next to an overturned dining room chair.

“It’s perfectly obvious what happened, unless you believe in this shaken baby stuff,” Plunkett says of the incident. “The kid fell and hit his head.”

The jury deliberated less than six hours before acquitting Stickney. But the case didn’t end there—at least not for Plunkett or another defense expert.

The day after he testified for Stickney, the other defense expert, Klamath Falls, Ore., pathologist Dr. John Antonius, was the subject of an anonymous complaint to the state board of medical examiners, according to Stickney’s lawyer, Seana McMann Ash. The complaint alleged that he had testified about matters about which he was not qualified.

Antonius, who could not be reached for comment, was eventually cleared of any wrongdoing but spent many hours over a seven-month period responding to the anonymous complaint, Ash says.

Plunkett’s ordeal, on the other hand, was to last for another three years.

He says he first heard he was under criminal investigation in Oregon from two people who attended a shaken baby conference in San Diego in the fall of 2002. Plunkett then called Ash, who confirmed that he was indeed being investigated for his testimony in the Stickney case and who agreed to represent him. So Plunkett decided to take the offensive, hiring a civil lawyer and filing a tort claim notice against Dugan, deputy state medical examiner Clifford Nelson (who had performed the autopsy on the baby in the Stickney case), former deputy district attorney Cliff Lu and two other prosecutors in Dugan’s office. It alleged slander, defamation, conspiracy and violation of his civil rights.

The January 2003 notice said Plunkett’s ability to testify as an expert had been severely compromised by what it described as “what appears to be vindictive and malicious behavior” on the part of certain state and county employees. The notice alleged the behavior included contacting other prosecutors elsewhere and informing them that Plunkett was being investigated for perjury. Such action, it said, was a “blatant attempt to discredit Dr. Plunkett to prevent him from testifying for the defense.”

In the notice, Plunkett’s lawyers demanded that Dugan’s office and Nelson contact all of the people and agencies they had previously contacted and retract the allegations they had made about Plunkett. The lawyers also asked the district attorney’s office to make it clear that it was not considering perjury charges against Plunkett.

“Should the district attorney’s office pursue perjury charges or the above-named persons fail to correct their misconduct, we will proceed with a lawsuit which may well include a malicious prosecution cause of action,” the notice said.

Plunkett and his lawyers say they got no response. But Plunkett suspects that the filing of the tort claim

notice precipitated the decision, less than two months later, to file the criminal charges against him.

"I think they did it to cover their asses," Plunkett says.

Former deputy district attorney Lu denies any improper motive. Lu, who filed the charges against Plunkett, says the decision to prosecute was his and his alone. "Nobody pressured me to do anything," he says. Lu says he filed the charges after reviewing the transcript of Plunkett's testimony in the Stickney case, probably at the request of one of the two prosecutors in the case. "I'm not going to open a closed file on my own," he says.

But once he did go over the transcript, Lu says, he was persuaded that Plunkett wasn't telling the truth about certain points relating to his background.

Nelson, citing the tort claim notice, refused to say much about Plunkett except to say that Plunkett is on one side of the debate over shaken baby syndrome—the minority point of view—while he is on the other. "Personally, I don't have any ax to grind with him," Nelson says.

Nelson says he had nothing to do with the prosecution of Plunkett on the false swearing charges except to provide some information to the district attorney's office about some of the "surprising" or "inaccurate" things he heard Plunkett say during his testimony.

Nelson says he never contacted anybody to inform them that Plunkett was being investigated, as alleged in the tort claim notice, although he acknowledged confirming the existence of such an investigation to a couple of prosecutors who had called him and asked about it.

Nelson also says he has no strong feelings one way or the other about the outcome of the case against Plunkett. "That's between him and the court," he says. "I got no dog in that fight."

CHARGES OF FALSE SWEARING

Plunkett originally was charged with four counts of false swearing, each a misdemeanor then punishable by up to one year in jail and a \$5,000 fine. One count alleged he had testified falsely that he had been asked to rewrite a chapter in a book about child abuse and head trauma. Another count alleged that he had testified falsely about why he had been asked to rewrite that chapter of the book. The third count alleged that he had falsely denied ever testifying in the same case as prosecution-oriented expert Dr. Mary Case, chief medical examiner of St. Louis County. The last count alleged that he had falsely testified about the amount of money another doctor had made from the creation and sale of a computer-animated video depiction of shaken baby syndrome.

Perjury, which is a felony, is defined under Oregon law as knowingly making a false statement under oath about a material issue. False swearing, on the other hand, which is a misdemeanor, is defined as knowingly making a false statement under oath.

Two of the charges were dropped prior to trial. The two remaining charges alleged that Plunkett misrepresented his role in the book project, and that he failed to acknowledge that he and Case had been involved in two previous cases together.

Although both counts were misdemeanors, a conviction on either count could be ruinous for someone in Plunkett's position. Besides the possibility of a jail sentence and a fine, Plunkett stood to lose his medical license if he were convicted. And he would never be able to testify as an expert again.

Lu defends the charges. Despite the acquittal, Lu believes the evidence warranted prosecution. He says he has no regrets about the case. "Guilty people go free every day. I don't lose any sleep over it," he

says.

Anybody who knows anything about shaken baby syndrome would know that Plunkett would never have been asked to help write a chapter in a book that is considered the bible among medical examiners, Lu says.

"[He made it sound as if he's] the guy the experts in this area go to when they need help," Lu says.

Lu also says it's hard to believe Plunkett couldn't remember having appeared in a trial in which Case, one of his harshest critics, had also appeared.

"She's been quoted in print as basically calling him a quack," Lu says. "And the bottom line is, you're going to remember somebody who calls you a quack."

Lu, who left the district attorney's office at the end of 2004 to become the general manager of a golf club, says that he doesn't know why two of the four charges were dropped. Those decisions were made long after he was no longer involved in the case, he says.

Ash, who is now semiretired and living in Mexico, says she was shocked to hear that Plunkett was being prosecuted for his testimony on behalf of Stickney. "If it had not been so serious, I would have laughed, because the charges were so stupid and ridiculous," she says.

It's also ironic, Ash says, because Plunkett's testimony wasn't even that critical to her client's case. "He was more or less an educational witness," she says, to explain to the jury other theories of what could have happened to the boy.

At one point, according to Plunkett and Ash, prosecutors offered Plunkett a deal: Enter a plea to two of the four counts in exchange for 20 days in jail, a \$500 fine and probation.

But Plunkett turned it down.

"You can tell them where to put that," Plunkett told Ash to tell prosecutors.

In July 2004, Ash filed a motion to dismiss the case, contending that the prosecution was vindictive and selective. Ash also issued subpoenas to Dugan and some of his assistants for their correspondence in an effort to show they had a personal agenda in prosecuting Plunkett. Dugan concluded that he and his staff might be potential witnesses, and he withdrew from the case. The state attorney general's office took over the prosecution.

Assistant State Attorney General Erik Wasmann, who tried the case, could not be reached for comment.

The nonjury trial, which took place last February, lasted two days. A week later, Deschutes County Circuit Judge Barbara Haslinger, in a 13-page opinion, acquitted Plunkett on both counts.

Addressing the second count first, the judge noted that the state was required to show not only that Plunkett and forensic pathologist Case had testified as experts in the same case, but also that Plunkett had recalled that and had knowingly lied. The state had met its first requirement, the judge said. The record showed that Plunkett and Case had previously testified in two cases together, he in person and she in a videotaped deposition. And, in both instances, Plunkett was asked about Case's videotaped testimony.

The state had argued that Case was one witness Plunkett was not likely to forget. Case not only has

views that are in direct opposition to Plunkett's, prosecutors pointed out, but she has also been very vocal in her belief that his views are not only wrong but irresponsible. The state also introduced evidence that Plunkett is regularly cross-examined in court with questions about Case's lectures and published works.

A NUANCED DECISION

In her decision, the judge said she had no doubt that Plunkett is aware of Case and her opposition to his views. She also said she was convinced that Plunkett is regularly questioned about Case's views and publications.

But she said the evidence didn't show that Plunkett necessarily recalled that he and Case previously testified in the same cases. In fact, she said, the effect of the state's evidence established just the opposite.

"Because Dr. Plunkett is routinely cross-examined and challenged by questions about Dr. Case's views, I think it is just as likely that Dr. Plunkett would not distinguish between a case in which Dr. Case testified as a witness and one in which she did not testify but in which her teachings and conclusions were relied upon to challenge his testimony," she wrote.

As to the first count, the state contended that Plunkett knew when he testified that he had not been asked to help write or rewrite a chapter of a book on the subject of child abuse and head trauma, but had claimed otherwise in an effort to inflate his qualifications.

At Stickney's trial, Plunkett testified that Dr. Marvin Platt, another forensic pathologist, had asked for his help in writing a chapter on child abuse and head trauma for a new edition of a medical textbook. When asked why Platt had sought his help, Plunkett testified that Platt had told him he wanted to make sure he got that part of the book right. However, Platt later told prosecutors that he never asked Plunkett for help writing the book. He said he had only asked him to "review and comment" on some of the material he had written that dealt with the views held by Plunkett and others that the types of injuries usually ascribed to shaking could be due to short-distance falls.

In her decision, the judge said she was persuaded by Platt's testimony, during which he claimed that in his first conversation with Plunkett, he told Plunkett he only wanted him to review and comment on the materials he was sending him. But she also said she was not persuaded that Plunkett understood his role to be so limited "that he knowingly misrepresented his expected contribution to the revision" of the textbook in question at the time he testified in the Stickney case.

"I believe that Dr. Plunkett's testimony was reasonably accurate," she wrote. "When taken as a whole, I also conclude that Dr. Plunkett believed his testimony to be accurate."

Platt, who is now retired and living in West Lebanon, N.H., said he has no opinion on the Plunkett case. Pressed further, he said it was a busy time for him and the reporter should try contacting him again in 30 days.

Dr. Dan Davis, a forensic pathologist from Minneapolis, also declined to comment on Plunkett or his own role in the case against him. Davis created the shaken baby video at the heart of one of the dropped charges against Plunkett, according to court documents.

"That's old news. It's best just left where it finished up," Davis said. Asked to elaborate, he said, "I think I'm just going to stay clear of it. Sorry."

But Case, the St. Louis County medical examiner, says she wanted nothing to do with the prosecution of

Plunkett.

"I don't want to be critical of people for doing their job, but I felt it was kind of a petty charge and I didn't want to be involved," she says.

When a prosecutor first called her and told her about Plunkett's testimony, Case says, she was kind of amused. But when she realized the district attorney's office was going to pursue criminal charges against Plunkett, she says, she was horrified.

"It would be different if John Plunkett had tried to hurt somebody," she says. "But this is something that didn't arouse my sense of injustice. In this case, his liberty or his livelihood could be lost for saying something slightly incorrect."

Even though she and Plunkett have diametrically opposed views on the issue of child head injuries, Case says, "I could not in good conscience be involved in sending a man to prison and losing his livelihood because he didn't remember us being in a case together."

Case ventures a reason why the district attorney went after Plunkett. "Something happened in that case [Stickney] that angered the prosecutor," she says.

But if a prosecutor used the power of office to go after somebody who has made him angry, it's wrong, she says. "John Plunkett is not somebody I admire or my buddy," she says. "But I was not able to go into a courtroom and help try to destroy that man."

Plunkett says he had more than 50 prospective witnesses—doctors, lawyers, judges and laypeople—who were willing to testify on his behalf at their own expense, but the defense had to limit its number of witnesses to five. Among the five were Oakland County, Mich., chief medical examiner Dr. Ljubisa Dragovic and Minnesota District Court Judge Karen Asphaug.

Plunkett says he has since given up any notion he once had of suing those responsible for prosecuting him. Oregon has a \$100,000 cap on compensatory damages against public officials acting within the scope of their employment or duties, and he says pursuing such a suit could easily cost more than the amount of damages he conceivably could have recovered.

Now that it's all over, Plunkett says he was never all that concerned about the outcome of the case. "I knew what I said, I knew what the truth was, and I didn't think the judge would have a very difficult time deciding it," he says. "Still, it's a crapshoot."

FIGHTING A MEDICAL COMPLAINT

This wasn't the first time that Plunkett's testimony in a shaken baby case had come back to haunt him.

In 1999, a Wisconsin couple filed a complaint against Plunkett with the Minnesota Board of Medical Practice after Plunkett testified on behalf of a baby sitter who was subsequently acquitted on charges of violently shaking their 14-month-old son. The complaint was eventually dismissed, but not without causing Plunkett some anxious moments.

Prosecutors alleged that the boy, who was left permanently brain damaged and nearly blind after suffering a seizure at the baby sitter's home in 1997, exhibited the unequivocal signs of shaken baby syndrome. But Plunkett testified that he saw no evidence that the boy's injuries were due to shaking or any type of inflicted trauma.

In their complaint, the boy's parents accused Plunkett of offering a "remarkably unprofessional, scientifically inaccurate distortion" of the medical facts of the case.

But Madison, Wis., lawyer Jack M. Priester, who represented the baby sitter, has nothing but praise for Plunkett, whom he describes as one of those rare people who are unselfish and courageous enough to come forward, without expectation of compensation and in the face of popular presumption, to say what they really believe.

"To me, John Plunkett is a saint," Priester says.

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