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WHISTLEBLOWING AND THE ABUSE OF LIBEL LAW: A VIEW FROM FRANCE

by Gérard Dubois and Alain Brailon

E NGLAND IS NOT the only country whose libel laws can be abused to silence scientific debate. In 2006, medical researcher Pierre Méneton became the first French healthcare professional to be sued for libel.¹ Méneton had been trying to implement national recommendations for dietary salt intake in line with worldwide guidelines. The Comité de Salines, France’s agent for the salt industry, sued the researcher over his claims that consumers were being misinformed by salt industry publicity.

Méneton triumphed—in early 2008 the court dismissed the case, pointing out that a critical opinion proposed by a scientist is not a libel. However Méneton was not actively protected by his employers (INSERM, France’s national institute for health and medical research). His country’s equivalents of the General Medical Council, the Department of Health and the healthcare watchdog (Haute Autorité de Santé or HAS) also remained silent. Fortunately he received help and funds for the suit from *Prescrire*, France’s famous independent drug bulletin.

The second French healthcare professional to be sued for libel is, as far as we are aware, Gérard Dubois, professor of public health at Amiens University Hospital and a 2008 recipient of the Legion d’Honneur, France’s highest civil and military honour. Dubois was sued in autumn 2009 by the Confédération des Buralistes (the French tobacconists’ union) after he stated on French TV² that cigarettes kill two smokers a year for every tobacconist. He won but the case has gone to appeal. The irony is that in June 2009 Professor Dubois re-

ceived a “Knowledge for the World” award in the US from the Johns Hopkins Alumni Association for making the very same claims.³ Dubois’ efforts to protect the French public from the dangers of tobacco are well known. In 1991, Dubois and four colleagues (collectively dubbed “the Five Wise Men”) drafted a report that resulted in France’s first major anti-tobacco law, named the Loi Evin, of 1991. Among other measures, Evin’s Law regulated tobacco advertising, smoking in public places, and excluded tobacco from the retail price index. Dubois’ 2003 book, *Le Rideau de Fumée* (The Smoke Screen),⁴ exposed tobacco industry documents. He secured a two-phase regulation which banned smoking in the workplace in 2007 and, the following year, in all public places. Now the professor is fighting his libel case with help from the Comité National Contre le Tabagisme (the National Committee Against Smoking, an NGO). His university, however, remains silent.

In France, very few people can translate the term “whistleblowing” into their own language, and even fewer can name someone who has

successfully drawn the authorities' attention to a practice over which they had concerns. The Conseil d'État, France's highest administrative court, judges that servants must remain silent ("duty of confidentiality"), implying that whistleblowing is an offence.

In the minds of French medics, the journal *Prescrire* stands out as being one of the few organisations prepared to push its head above the parapet. The following example is one among many: since 2005 it was making yearly calls^{5,6} for the banning in France of benfluorex, a derivative of fenfluramine marketed for diabetes and weight loss (fenfluramine and most of its derivatives were withdrawn from the US and many other markets worldwide in 1997). Indeed, after the withdrawal of benfluorex's marketing authorization in April 2003

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in Spain for serious adverse effects (valvular heart disease) the ban rapidly spread among European countries. But not to France. Despite international isolation, the French National Health Scheme was still reimbursing the cost of benfluorex in 2006, as noted in a formal evaluation by the "Transparency Committee" of the HAS' drug assessment committee. What's more, in 2009 two generics of the same drug appeared on the market. This was the same year that the European Medicines Agency recommended revoking marketing authorisations for medicines containing benfluorex from all EU markets because of poor efficacy and links to heart valve disease.⁷ It was not until 30th November 2009 that the withdrawal of benfluorex in France was finally implemented.

In the UK, in contrast, whistleblowing is an important part of an organisation's safety culture, and those who raise concerns in the public interest are protected in law from dismissal and victimisation by the Public Interest Disclosure Act of 1998.⁸ Introducing new guidance for National Health Service employees issued in June 2010, the UK's secretary of state for health stated, "It is vital that staff in the NHS feel empowered and expected to speak up whenever patient safety may be compromised or errors occur."⁹ The British Medical Association's own guidance on whistleblowing,¹⁰ issued last year, advises, "Every doctor has an obligation to protect fellow colleagues, patients and themselves from unprofessional conduct or acts of clinical negligence. Speaking up is an act of conscience, knowing that inaction, while an easier option, may lead to harm to others."

THIS IS IN sharp contrast to the experience of Dr Alain Braillon. He had, since 2005, been a senior tenured consultant in Professor Dubois' unit at Amiens, until his surprise sacking last December when his position, as head of the regional body for the assessment of professional practice, was abolished by a vote of the hospital board. Known as a "high profile expert on public health",¹¹ Braillon had been in charge of several regional programmes (e.g., hepatitis B prevention, smoking cessation in pregnancy, suicide prevention) which were subsequently terminated. (François Bourdillon, chairman of Société Française de Santé Publique, the French Public Health society, later told the *BMJ* "This is the first case of the sacking of a public health expert that I have heard of."¹¹) France's National Management Centre (the counterpart of the UK's Department of Health) investigated only after the event to confirm Braillon's sacking, and did so without hearing evidence from him. A large majority of the members of the National Statutory Committee objected to the sacking, however the National Management Centre overturned the advice. Both facts are unusual, accordingly their coincidence is exceptional.

The French General Medical Council remain silent but many professionals, leaders and organizations from various specialities are publicly supporting Braillon in the French media. Denise Silber, the CEO of the healthcare IT company Basile Strategy, was one of the

first to blog in support of Braillon.¹²

Health care administrators have the impossible task of extracting more from less. French public hospitals now have to comply with "tariff by activity" (or T2A)—they receive funding per activity carried out. Time-consuming public health programmes, which can be expensive to run and with benefits only seen in the long term, are hard to justify. The shift of decision-making from doctors to administrators makes this a serious concern in France as in many countries. Sadly, the three most frequent avoidable causes of death and illness have strong links with industry (tobacco, alcohol, bad diet). There is a fear that financial interests could lead to the downplaying of health and safety concerns. Braillon has taken a high profile stand on several public health issues, criticising a law passed in July which allowed the advertising of alcohol on the internet, and taking the French Association for Urology to task for promoting the prostate specific antigen screening test for prostate cancer, despite professionals outside France questioning its usefulness.¹³ His ex-employers deny that this activity has any bearing on his sacking.

The considered response to the problems of industrial and health-care lobbies must be principled, concerted, evidence-based and Europe-wide. Very few countries have experiences of whistleblowing that are as positive and constructive as in the UK, where a "safety culture" is growing within a comprehensive framework. Will Europe grasp the nettle? The British have a long tradition of being cynical about Europe's barminess and meddling (not without reason—EEC No 1677/88 set up an "extra class" for cucumbers having a bend of 10mm per 10cm of length). But on the matter of whistleblowing, it may be down to the UK to lead the way in contributing to directives that can have a meaningful effect on public health and those who strive to protect it.

Alain Braillon and Gérard Dubois
Amiens, France

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