

Minutes of the Derby Medical Society, Tuesday 23rd October 2018  
Derby Medical School Lecture Theatre  
'Gross negligence, manslaughter and fitness to practice'

**Apologies**

Dr Helen Lever  
Dr Tony Henry  
Dr Ian Shand

**Speaker**

Ros Foster, Partner at Browne Jacobson LLP

**Introduction**

All members were welcomed by Miss Hewitt. There were no new members to introduce. The minutes of last meeting were read out and Miss Hewitt introduced tonight's speaker.

Ros Foster specialises in regulatory law and became a partner at Browne Jacobson in May 2013. She also has experience in local government and has acted on a variety of threatened judicial reviews against the Parliamentary and Health Service Ombudsman and the Local Government Ombudsman. She advises NHS England in relation to judicial review, consultation and performers list matters.

**'Dr Bawa-Garba – An overview of the case and a discussion of the issues arising from it'**

There has been intense interest in this case by medical professionals, as well as a high level of general media coverage. Issues that this case demonstrated will remain relevant for a long time to come, there therefore remains a lot of interest surrounding the case and the accompanying procedures. Ros Foster acted for the professional standards authority, an overall regulatory body.

**The Facts of the Criminal Court Case**

Dr Bawa-Garba was an ST6 and the most senior doctor on duty at the LRI Children's Assessment Unit (CAU). On the day in question she was working a 14 hour shift, covering 4 floors and was just back from maternity leave.

Jack Adcock had a complex medical history including Down Syndrome and a Cardiac history. He was however generally a very well boy. He was sent into CAU by his GP and was seen by Dr Bawa-Garba. She diagnosed Gastroenteritis and treated accordingly. The courts heard that at this stage of his admission there was clear evidence of sepsis, which Dr Bawa-Garba missed. This was from a medical expert called to give a specialist opinion to the jury.

She ordered a variety of investigations and reviewed the results of tests later. This was partly due to IT problems and the need to cover other patients. During the court case there was considered to be a 'Golden thread' of Dr Bawa-Garba underestimating the seriousness of Jack's condition. This then led to her not chasing the results promptly and not specifically asking her Consultant to review Jack when in handover.

Dr Bawa-Garba had decided that Jack should not receive his usual dose of Enalapril, but did not communicate that decision to any other member of the clinical team and did not document this in the notes. Jack subsequently received it.

Later in the shift, Jack Adcock suffered a cardiac arrest. Dr Bawa-Garba responded to the arrest call but there was then a case of mistaken identity. She assumed it was another child and stopped the CPR attempt. This was restarted once this mistake was realised.

All of these failings were deemed 'extraordinary' in court. She was found to have made negligent failings, which were deemed to have significantly contributed to Jack's death.

There had been a Serious Incident Review by the trust, which identified a number of systemic failings. The CPS had originally decided not to prosecute, but this decision was overturned at inquest. It was not just Dr Bawa-Garba who was prosecuted; there were also two nurses involved. One nurse was acquitted and the second nurse was convicted on a unanimous verdict.

It took over two days for the jury to reach a majority verdict of gross negligence manslaughter for Dr Bawa-Garba. The jury had to answer certain questions in order to reach this verdict. Firstly, 'Were her failings negligent?' And if so, then were they 'Grossly so'? They also had to be classed as so significant that they caused him to die sooner than he would have otherwise have done. A jury's duty is to decide beyond all reasonable doubt.

The legal test can be summarised by asking 'Were failings truly exceptionally bad, causing Jack to die?'

She was found guilty of gross negligence manslaughter. Her sentence was 24 months prison, the maximum amount of time that can be given as a suspended sentence.

### **Mitigating circumstances**

There were many mitigating factors involved in the care of Jack Adcock that day. These were discussed in court and were taken into consideration when deciding her sentence.

The CAU was a busy ward, the intake of which could not be limited. It was agreed Dr Bawa-Garba was neither lazy nor selfish and that she had been falsely reassured by an improvement in Jack's condition. There was also her family circumstances and recent return from maternity leave.

### **Following conviction**

On conviction Dr Bawa-Garba lost her job. She subsequently appealed against conviction, to High Court and the Court of Appeal. In order for a case to be heard there is a need to show manifest procedural failings in the previous court. This is a very high bar and both courts refused permission to hear the appeal. Due to the conviction she will remain on the DBS register, but her prison sentence will remain unspent.

Fitness to practice proceedings were brought by the GMC to the Medical Practitioner's Tribunal (MPT) in February and June 2017. They found Dr Bawa-Garba's fitness to practice was impaired on the basis of public confidence, not actually due to clinical failings. The GMC therefore fought for her erasure from the general medical register. Their argument was that there cannot be a doctor on the register convicted of gross negligence manslaughter. The MPT had to decide between suspension from the register or complete erasure.

The MPT took into account the mitigating factors, including the fact that she had practised safely for 4 years since the death of Jack Adcock and that her Consultants and supervisors described her as an excellent doctor. She also had references describing her good character and her unblemished record before and after the events of this case. They also felt that she had not been reckless.

There were also factors that were described to be 'aggravating', namely that this was a vulnerable child, there was no well-timed reassessment and there was no evidence of an apology to the family. She was given a 12 month suspension from the GMC register. MPT found erasure would be disproportionate and that public confidence would not be undermined by a suspension.

The GMC appealed and referred it to the High Court. The appeal was allowed by the Divisional Court, the reason being they found the MPT had not respected the findings of the jury of 'truly exceptionally bad' and found this should not have been diminished by the lack of the safety net.

This verdict caused extreme concern amongst the profession. GMC argued only erasure would do, with the prosecutor arguing that the jury knew about the mitigating factors and still convicted her. The High Court erased her from the register. This caused a worldwide explosion of publicity and hundreds of thousands of pounds were crowd funded, mostly from other doctors.

Due to the publicity and widespread concern, the Secretary of Health at the time, Jeremy Hunt, commissioned the Williams review. This report recommended revised guidance for future similar cases. It was outlined that this should be an exceptionally rare case and that systemic failings must be considered when reviewing similar cases. Following on from this review the GMC are losing the right to appeal future MPT decisions.

### **Court of appeal**

At the Court of appeal there was a very senior bench. The BMA attended, as did the British Association of Physicians of Indian Origin. They gave written statements about the over representation of prosecutions and convictions amongst Black and Ethnic Minority groups.

The Court of Appeal had questions to answer – was the decision of MPT wrong? Was it reasonable? Ultimately the Court of Appeal agreed with the MPT's original decision, stating that it was an experienced and specialised tribunal, which had balanced the mitigating factors fairly. The judgement was passed to not interfere the MPT's original ruling. Dr Bawa-Garba therefore won the appeal.

She will have a review at end of her 12 month suspension, with conditions of practice likely to be imposed. Realistically she is unlikely to work in paediatrics again. Due to all of this she has lost training number, DBS checks will always show it and there will be the inevitable difficulty of finding a job due to the surrounding difficult reputation.

### **Take home messages**

The Court of Appeal reaffirmed the authority of the MPT. Even though there are no real winners in this scenario, there are positive outcomes from Williams review. There is now also new guidance on reflective practice from the Royal Colleges and the GMC.

Ros Foster expanded upon this point, explaining that it is a myth that Dr Bawa-Garba's eportfolio was used against her. Actually her reflection was used by defence to prove insight. The GMC have stated they will not sift through eportfolios and the Williams Review reinforced the need for good reflective practice, to improve clinical practice and for revalidation.

## Questions

The talk ended and questions were asked from the audience:

Why did the judge give a suspended sentence? The jury gave the guilty verdict and the judge gave the suspended sentence. It would seem that the judge was respecting the verdict but did not wish to send her to prison. Juries can be instinctive, not medical. There is therefore an argument that medical cases have no place being tried in criminal court.

Is there a case for a charge of corporate manslaughter against the LRI? Not currently. The threshold for this charge is extremely high and no NHS trust has ever been prosecuted for this before.

Why did the consultant in charge not face similar prosecution? He did not face proceedings and is now off the GMC register. He is working in Ireland and is therefore outside the jurisdiction of English courts and the GMC. It is unknown what information was passed to the new regulatory body.

There was then a discussion about BAME doctors being disproportionately prosecuted. There may be many factors, including institutional, referral or supervision differences. The GMC set the PLAB exam to try and match clinical practice, so maybe there is an element of cultural differences. All agreed more needs to be done to research this.

The formal meeting was drawn to a close and all were invited for drinks and nibbles outside.

Total attendance = 83

Full Members – 19

Associate Members – 4

Junior Doctors – 5

Medical Students - 55