Professor Sir Norman Williams Rapid Review on Gross Negligence Manslaughter in Healthcare

HCSA submission of evidence

April 2018

Dear Professor Sir Norman Williams,

The impact of the Hadiza Bawa-Garba judgement on January 24th has been felt across the profession, and has created a crisis of confidence which requires a practical and urgent response.

The judgement sent a worrying message to Hospital Doctors, in particular Doctors in Training, who find themselves working in demanding and under-resourced settings – that despite such clear mitigating factors they could in effect be held entirely responsible for any shortcomings and medical errors and will be shown no quarter.

We fear that this will leave Junior Doctors uneasy and uncertain about the potential medico-legal risks they face in discharging their duty to the health service, in turn eroding confidence and hampering development, and generating a culture of 'blame' and 'fear' with the heath profession.

We are deeply disturbed that the GMC fought through the courts to apply a ruling harsher than that intended by the MPTS. This bears the hallmarks of an emerging adversarial and punitive approach rather than one based on seeking informed balance and justice. This is a development that HCSA and the profession cannot accept.

We need to ensure balance and justice in the regulatory adjudication processes, and restore confidence in the system of reflective learning and appraisal of doctors which has been eroded by the access and use of self-produced memoires and learning notes in the prosecution of this case.

Junior Doctors, and others who may find themselves in a similar situation in future, need to be reassured that they will encounter just treatment that sensitively recognises the extremely difficult circumstances in which Hospital Doctors so often work.

Therefore, we are pleased that the Secretary of State has acknowledged the deep concern within the profession around the Bawa-Garba case and has acted swiftly to order a rapid review led by Sir Norman Williams. Clarity is needed urgently to end the current crisis of confidence among Hospital Doctors around reflective practice and to ensure the fair treatment of those who become embroiled in medical manslaughter cases.

We are pleased to have the opportunity to engage with the review and hopefully help to develop and secure sufficient protections and peace of mind for HCSA members. Below you will find our recommendations and full evidence. If you require any additional information, please do get in touch. We are also happy to present our evidence in person.

Yours sincerely,

Ross Welch

President, Hospital Consultants and Specialists Association

HCSA recommendations

- Allegations of Medical Gross Negligence Manslaughter should be investigated by a specially trained police team and only after consultation with, and under the supervision of, the Attorney General for England and Wales.
- An automatic test which sees the anonymised findings of any Healthcare Safety Investigation Branch investigation trigger a process whereby the validity of corporate manslaughter charges against the employing Trust are considered.
- A reversal of the GMC's right to force doctors to disclose information such as personal reflections. The GMC's verbal guarantee not to use this power is insufficient and should be reflected in law.
- The GMC's right to appeal the decisions of the MPTS should be removed. The MPTS should be the body granted the sole power to decide on the professional competence of a doctor, with the Professional Standards Authority the sole body with the right of appeal.
- A review of the MPTS should take place to ensure that it is able to act effectively as the independent arbiter of professional fitness to practice.
- All reflections made by Doctors in Training or their supervisors should be given protected legal status so that they are inadmissible as evidence.
- A process of consultation should take place with Doctors in Training to establish their concerns and listen and act on their current experiences of reflection, in order to underpin new guidelines and ensure that the techniques and processes used are fit for purpose and are not overly bureaucratic. This would assist in re-engaging parts of the profession currently alienated from these processes.
- Doctors in Training should be protected from prosecution until the full facts about not just the specific incident but the wider learning culture within an institution are established.
- Introduction of a comprehensive, centrally defined and mandatory induction process to ensure that trainees and locums are appropriately introduced to the distinct systems and process at play in their place of work.
- Ringfenced allocation of sufficient time for necessary supervision of junior doctors by Consultants to take place.
- Acknowledgment of the concerns over existing law on Medical Gross Negligence Manslaughter, and a call for further consideration into reforming the law.

HCSA's Full Evidence and Recommendations

1. Improving Investigations

HCSA shares the concerns of others, including the Medical Protection Society, over the need to ensure that allegations of Medical Gross Negligence Manslaughter (MGNM) are investigated by a specially trained police team and only after consultation with, and under the supervisor of the Attorney General of England and Wales.

The nuances of the medical setting are such that to properly establish the facts it is essential that there is a body with a specific understanding of the issues at play.

The current situation, where local police investigators with more generalised training take on this role, acts as a brake on the investigatory process, needlessly prolonging the distress of both the accused and the bereaved.

HCSA would therefore advocate the establishment of such a team, under the supervision of the Attorney General, which could be called upon by police forces to undertake investigations into MGNM in their areas.

We also firmly believe that the context and systemic issues surrounding such cases should form part of any investigation by the Healthcare Safety Investigation Branch and by police, to establish the full facts and whether there is a possibility of culpability for Corporate Manslaughter.

Many Hospital Doctors feel that in previous cases of MGNM individual healthcare workers have been singled out for investigation and prosecution while wider issues, which are the responsibility of lines of management, are overlooked.

This is manifestly unjust. Therefore, HCSA recommends that while legal protection should be given to individuals making disclosures to the HSIB to present such information being passed to a third party, there should be an automatic test which sees the anonymised findings of any HSIB investigation trigger a process whereby the validity of Corporate Manslaughter charges against the employing Trust are considered.

2. The Role of Reflective Learning and Protecting a Learning Culture

Safeguarding the integrity of reflective learning is vital. The ability of medical professionals to self-reflect openly and without fear of recrimination is essential for doctors to be able to improve and learn. Despite the GMC's repeated assurance that Dr Bawa-Garba's e-portfolio was not pertinent to her conviction, this does not tally with the recollection of one of the court participants and educational supervisor.

The success of this system is based on trust – the trust that doctors can be open in reflecting on failures or areas of improvement without prejudicing themselves in the process.

However, the current system is now widely seen by hospital doctors to have lost its integrity. This has naturally led some doctors, fearing the prospect that their reflections may be used against them in a disciplinary or criminal setting, to move away from the level of openness required.

The current system is unfortunately now seen by some Doctors in Training as a negative, bureaucratic process which is there to appraise and "catch out" individuals. It is therefore now urgent to establish a sense of fairness and proportion to the reflective system.

While the General Medical Council has made non-binding commitments that it will not use its powers to compel doctors to disclose information that could incriminate them, this is no long-term guarantee.

We recognise that the Secretary of State has publicly stated on multiple occasions his belief in the need for openness and safe spaces for medical professionals to be able to raise concerns. Indeed, this rapid review is a product of that sentiment.

HCSA therefore argues for a reversal of the GMC's right to force doctors to disclose information such as personal reflections. The GMC's verbal guarantee is not sufficient and should be reflected in law.

HCSA additionally believes that all reflections made by Doctors in Training or their supervisors should be given protected legal status so that they are inadmissible as evidence.

HCSA also believes that a process of consultation should take place with Doctors in Training to establish their concerns and listen and act on their current experiences of reflection, in order to underpin new guidelines and ensure that the techniques and processes used are fit for purpose and are not overly bureaucratic. This would assist in re-engaging parts of the profession currently alienated from these processes.

3. Lessons for the General Medical Council

Ensuring the Authority and Independence of the Medical Practitioners Tribunal Service

One striking aspect of the recent Dr Bawa-Garba case and others is the General Medical Council's repeated insistence on pursuing court action to overturn the decisions of the Medical Practitioners Tribunal Service (MPTS). The fact that the GMC itself has declared 'successful' reversals of MPTS decisions on multiple occasions since it won this right of appeal in 2015 points to an inherent instability in the arrangement whereby the GMC refers cases to the MPTS but then can use legalistic processes to overturn the decision reached if it does not like the result.

While the relatively new power may have been 'successfully' exercised in the courts, it has had a serious negative impact on the medical profession's confidence in the GMC, and fundamentally undermined the integrity of the MPTS process. It has created multiple jeopardies for an individual doctor as well as duplication of powers, as the Professional Standards Authority, as it does with other healthcare professions, also has separate rights of appeal.

MPTS tribunals involve a panel composed of both lay members and individuals with medical expertise. This was deliberately to achieve an appropriate balance not in assessing criminal guilt and punishment – the role of the courts - but weighing up public interest and the professional fitness to practice of individuals in each case it hears. The court and tribunal processes are two quite different things. One focuses on culpability and punishment, the other on the ongoing implications for patient safety of an individual's continued practice.

In addition, the scope of hearings at MPTS will usually be broader: while a court trial is concerned with individual culpability, professional tribunals will consider the systemic factors which come into play and which can have huge bearing on whether an individual can be deemed fit to practice in future.

In the case of Dr Bawa-Garba, an appeal against the MPTS ruling was lodged by the GMC because it felt the MPTS had placed insufficient weight on public confidence in its deliberations. By extension, its appeal reflects the current impression among Hospital Doctors that the GMC places insufficient weight on the professional fitness to practice of an individual – surely the key deciding factor in whether a doctor should be able to continue to hold a licence.

HCSA believes that when it comes to the professional ramifications of misdemeanours by clinicians, the MPTS is best placed to weigh up the nuances of each case, and its findings should be given far greater weight without the threat of being undermined by the GMC, whose apparent fear of negative headlines should not end a doctor's career when there is no over-riding professional basis for doing so.

HCSA believes that it is essential that the GMC's right to appeal the decisions of the MPTS is removed. The MPTS should be the primary body granted the power to decide on the professional competence of a doctor. It should be noted that the Professional Standards Authority also has the right of appeal against MPTS decisions, as it does with the tribunal's counterparts for other healthcare professionals. This should continue.

HCSA also opposes the proposition of removing the possibility of a professional tribunal in criminal cases deemed "serious" – an intolerable and loosely framed proposal that removes any process whereby the continued competence of a doctor is considered. As with the rather vague legal definition of medical criminal negligence manslaughter itself, this opens the door to further injustices in future. The combination of criminal court and professional tribunal is appropriate.

We believe that to ensure that the MPTS is equipped to deliver, a review of the MPTS, in particular its remit and status, should take place to ensure that it is able to act effectively as the independent arbiter of professional fitness to practice.

4. Other Areas for Consideration

a. Specific Issues Concerning Doctors in Training

While issues around Medical Gross Negligence Manslaughter affect all Hospital Doctors, HCSA members report current widespread fears among Doctors in Training specifically over their vulnerability to prosecution for incidents which take place as they are deployed to fill gaps within an extremely stretched NHS. It has had a measurable effect on recruitment and retention, particularly in high risk and shortage specialities.

HCSA believes that Doctors in Training are a special case, and incidents involving them should be treated differently to more senior grades.

Prior to any move towards legal action, there must be a full assessment of the context and framework in which an incident takes place. Doctors in Training should be protected from prosecution until the full facts about not just the specific incident but the wider learning culture within an institution are established.

Such an investigation should thoroughly examine shortcomings in workplace and supervisory support, effectively setting the legal bar for Doctors in Training higher than for other grades of doctor.

We believe that a proper centrally defined and mandatory induction process is essential to ensure in particular that trainees, who regularly rotate, and locums are appropriately introduced to the distinct systems and processes at play in their place of work.

Junior doctors have reported starting their first shifts in a new hospital or department not knowing where things are, who people are, and how to perform certain functions such as

ordering tests. While support is often available, contact information detailing who can provide support or assistance is often not distributed.

Such mandatory inductions should be supported by an "induction pack" which outlines key contacts, information, etc and this must be distributed in advance. This already happens in some places, but must be rolled out throughout the NHS.

To minimise the risk of MGNM, it is also essential that sufficient time is allocated for the necessary supervision of junior doctors by Consultants takes place. There must be an acknowledgement and reversal of the detrimental new "normal" situation where opportunities for scheduled mentor contact time has been eroded to nearly nothing. This means that supervision and mentoring is often ad hoc and ineffective, something frustrating to trainees and senior doctors, and ultimately damaging to patient care.

b. Legal Framework

The terms of this Review explicitly states that it "will not consider any changes to the law of gross negligence manslaughter." HCSA, however, respectfully asks that this review notes the strength of correspondents' concerns over existing law, even if it does not make specific recommendations in this area.

Concern over the poor definition and test of, in particular, Medical Gross Negligence Manslaughter is well-founded. The clearly subjective test passed to juries, that a defendant must be guilty of an act which is "truly exceptionally bad", is flawed and ambiguous.

HCSA would, first, seek to recommend a specific crime of Medical Gross Negligence Manslaughter. This crime should be defined in such a way as to ensure that healthcare professionals can only be found guilty if they have acted in a way that is intentional, reckless or grossly careless – echoing the current position in Scotland.

This should serve to add more weight to the systemic issues and backdrop underpinning any incident, and produce a more just outcome in such cases.

HCSA is, however, firmly of the belief that the decision to resort to prosecution for Medical Gross Negligence Manslaughter should be subject to a far more robust initial test.

There is a risk that fear of prosecution among Doctors in Training impedes and by extension has a detrimental impact on patient care, rendering individuals less likely to take actions which may be life-saving or medically beneficial.

The litmus test for proceeding with charges of Medical Gross Negligence Manslaughter should automatically take into consideration the grade at which a doctor is working. Doctors in Training should not be used as scapegoats for systemic issues or for failings in a culture of learning.