The Case of Dr Bawa-Garba – Do we truly have a 'no blame' culture?

Eye News' medico-legal specialist shares his thoughts on the recent acquittal of Dr Bawa-Garba.

On 13 August 2018 the Court of Appeal ruled that Dr Hadiza Bawa-Garba should be reinstated on the UK medical register. The Court of Appeal rejected the High Court's decision, made in January 2018, to allow the General Medical Council (GMC) to erase Bawa-Garba's name from the medical register. This is clearly welcome news.

However, we have to remember what a hollow victory this is. Dr Bawa-Garba has been thrust from a situation of quiet hard work and obscurity to the glare of media spotlight and her career in tatters. How many nights of lost sleep has she had worrying over these issues? It is bad enough that she holds herself partially to blame for the death of a child but then to have this compound that pain over many years is a travesty of justice.

The Medical Practitioners Tribunal Service (MPTS) had decided not to strike her from the medical register, but the GMC appealed to the High Court against the decision and was initially successful. That decision has now been overturned and without doubt the decision is welcome, but it does not solve the fundamental issue of whether she should have been found guilty of gross negligent manslaughter in the first place. We all agree she made a series of mistakes in an extremely challenging situation. You or I may turn up tomorrow to find that our trainee is off sick, or they have overbooked the clinic two-fold and we will face those same challenging situations. We hope that our hard work will be rewarded by our Trust 'having our backs'. But does that happen? Is our 'no blame' culture truly no blame? If you make an error and then cite the challenging circumstances at the time, then it is an excuse. If you warn in advance of the challenging work situation you face, then you are deemed to be a troublemaker or a complainer as everyone else just gets on with it. We are trapped in between these two courses of action.

The GMC's decision to intervene and ask the High Court to have Bawa-Garba erased from the medical register led to global exposure of the case and it has been reported widely in the medical and mainstream media throughout the world. As per the comments in my previous article I, rather controversially, see the GMC's point and rationale but the GMC has failed to see the true problem here, which is the question as to why Dr Bawa-Garba was singled out rather than the Trust itself held to account.

The Court of Appeal stated that "The present case is unusual. No concerns had ever been raised about the clinical competence of Bawa-Garba, other than in relation to Jack's death." Furthermore, they recognised that the MPTS did not, either consciously or unconsciously, attempt to undermine the verdict of the jury in November 2015, which found Bawa-Garba guilty of negligent manslaughter. Rightly, the new ruling confirms that the MPTS was indeed entitled to conduct an 'evaluative exercise' to determine what sanction was most appropriate in the unique circumstances of this specific case. They stated that "There is no presumption of erasure in the case of serious harm and that the MPTS was right to draw attention to the systemic failings on the part of the hospital." The Court of Appeal recognised that her suspended sentence was arguably the mildest sentence possible and that she presented no greater risk of falling standards than "any other reasonably competent doctor". If this is indeed the case and the verdict of one of the highest Courts in the land, why has she been so penalised? Why has her life been ruined and why is her career in tatters? There but for the grace of God go any one of us.

So who should take the blame? Clearly everyone involved had a role to play and failed poor Jack. Gross negligence manslaughter trials focus on the personal actions of individuals. The trial judge even remarked that there was a limit on "how far the systemic failings of the hospital and the actions of others could be explored in the trial". That is concerning and inherently not fair.

Lots of failings were identified and the Trust itself has instigated numerous changes to avoid similar harm occurring. How can that be ignored? If only there were some sort of mechanism where the Trust could take some of the responsibility for the failings and the situation they left Dr Bawa-Garba in. If only there were some mechanism in law whereby the Trust could take some sort of corporate responsibility. Well, of course, there is. Corporate manslaughter legislation is specifically designed for this and yet, despite the unprecedented challenges we are facing and the harm which is inevitably occurring to patients due to errors from over pressured medics, no UK hospital has been convicted of corporate manslaughter. In the case of Bawa-Garba the Crown Prosecution Service did not feel that charges could be laid at the Trust's door.

The statutory offence of corporate manslaughter was brought in to ensure that there were "Effective laws in place to prosecute organisations where they have paid scant regard to the proper management of health and safety with fatal results."

The offence was created to ensure that companies and other organisations can be held properly accountable for very serious failings resulting in death. The offence of gross negligence manslaughter is abolished insofar as it relates to companies and other organisations but clearly can and has been applied to doctors, as it did to Bawa-Garba.

Corporate manslaughter is wider in scope than the previous common law offence. It continues to apply only to the most serious corporate failings. There is a high threshold for liability, requiring proof of a gross breach of the relevant duty of care. However, it is no longer necessary to show that a person who was the 'controlling mind' of the organisation was personally responsible for the offence.

Under the 2007 Act, the offence of corporate manslaughter relates to the way in which the relevant activity was managed or organised throughout the company or organisation. Wider considerations, such as the overall management of health and safety, the selection and training of staff, the implementation of systems of working and the supervision of staff can be taken into account.

An organisation is not liable if the failings were exclusively at a junior level. The failings of senior management must have formed a substantial element in the breach. Liability for the offence is assessed by looking at the failings of the organisation as a whole. The prosecution must prove that the breach of duty was causative of death. The test is whether the breach made a more than minimal contribution to the death and, because the defendant is a corporate body, the penalty must be a fine. Who pays the fine (clearly the NHS Trust itself) and who

receives the proceeds of the fine are topics open for debate. We also need to consider whether it is in the public interest to line up Trusts for further financial penalties.

The effect of this legislation was to widen the scope of the offence so that the focus of the offence is now on the overall management of the organisation's activities rather than the actions of particular individuals. Does this not sound like the ideal legislation through which the sad death of Jack Adcock should have been addressed?

So, who should take the blame? Dr Bawa-Garba's line manager who failed to ensure there were enough staff on? The Chief Executive of the Trust sitting in his or her ivory tower? I personally do not think so. Again, controversially, I have sympathy for these professionals who are working under intense pressure too. They are charged with delivering a service in challenging circumstances of their own. There is a finite pot of cash which is continually being squeezed. There is only so much that can be done with limited resources and we have already been through innumerable rounds of efficiencies. There is no longer any slack in the system.

So, should the blame be passed up the ladder to the NHS as a whole, which does not allocate enough money to the Trust? Or maybe the government who is not allocating enough resources to the NHS? Or should we follow the money trail all the way back to the taxpayer who expects the highest calibre of care but is reticent to pay an extra penny in the pound to fund it? Or maybe, more importantly, the successive governments who have been too afraid to ask the British taxpayer for fear of political backlash?

Ophthalmologists have wisely chosen a speciality where we are highly unlikely to see patients die under our care, but it does not take away from the fact that we will make mistakes and will be held accountable for those mistakes. Although we may not face manslaughter charges, we may be facing medical negligence charges or Fitness to Practice proceedings for innocent mistakes that cause harm to patients, and so the issue of some corporate responsibility for failures without our control is important. We should all eagerly await the results of the outcome of the Gross Negligence Manslaughter and Culpable Homicide review being conducted by Professor Sir Norman Williams and, when the report is published, put our weight behind a call for reform. We cannot be asked to work under pressure with the Sword of Damocles continually above our heads, knowing that if anything goes wrong our Trusts will not have our backs and we may be the proverbial sacrificial lamb. Equally, I do not think we should be scapegoating those higher up the food chain who are also working under pressure and making decisions which are never going to be easy. We want systemic factors to be taken into account when we fail, and I feel we should offer those managers above us the same courtesy and seek to understand the system failures which precipitate Trust failures. Sadly, money is the root of all evil.

Do you agree? Share your thoughts in a letter to the editors by emailing diana@pinpoint-scotland.com

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