Criminal liability following Mid Staffs

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Corporate Crime analysis: With Mid Staffordshire NHS Foundation Trust facing criminal charges over the deaths of patients, Tom Kark QC at QEB Hollis Whiteman Chambers says this prosecution will no doubt be a salutary reminder to chief executives and chief medical officers of NHS Trusts up and down the UK of their exposure to health and safety legislation.

Original news

HSE charges NHS trust after patient deaths, LNB News 19/10/2015 18

The Health and Safety Executive (HSE) has charged Mid Staffordshire NHS Foundation Trust following is investigation into the deaths of four patients. The HSE said there was sufficient evidence and it was in the public interest to bring criminal proceedings.

What is the legal framework surrounding a Trust's legal liability to face criminal charges?

The legal framework for the Trust's criminal liability in this prosecution is contained in the Health and Safety at Work etc Act 1974 (HSWA 1974). The HSE are likely to allege that the Trust breached HSWA 1974, s 3(1) which imposes a duty on every employer to conduct its undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in its employment who may be affected by the conduct of its undertaking, are not as a result exposed to risks to their health or safety.

Section 3(1) requires the Trust to do all that is reasonably practicable to prevent or minimise 'material risk'. The term risk is given its ordinary meaning and therefore includes the possibility of danger rather than actual danger.

How does this work in practice?

In practice, HSWA 1974, s 3(1) is drafted to include NHS Trusts within its ambit. It applies to 'employers' and is not therefore limited to corporations. Mid Staffordshire NHS Foundation Trust has previously been prosecuted under this section in 2013 following the death of Mrs Gillian Astbury in 2007. The Trust made a formal admission accepting responsibility for the death and pleaded guilty to that offence on 9 September 2013.

The Trust now faces four charges under HSWA 1974, s 3(1) in respect of the deaths of four individuals between 2005 and 2014. Under the legislative framework of HSWA 1974, the jury will have to determine, for each charge, firstly whether the patients at Stafford Hospital were clearly exposed to risks to their health and safety arising from procedural failings such as inadequate handover and record-keeping procedures. The jury will secondly have to consider whether the Trust failed to take every reasonably practicable step to minimise or reduce that risk.

The health and safety legislation focuses upon avoiding the risk of harm. It will be for the Trust to demonstrate that it took all reasonable and practical steps to minimise risk to patients which, given the background to the case, might prove difficult for it to do. However, it is worth pointing out that two of the patients mentioned in the press reports appear to have died in 2013 and 2014 after the worst excesses of the maladministration of this Trust and after Monitor had intervened and a new chief executive had been appointed in July/August 2009.

What sanctions could the Trust face if it were held to be criminally liable for the deaths at Mid Staffs?

If held criminally liable, the Trust would be subject to a fine, as per HSWA 1974, Sch 3A. While on summary conviction the fine is limited to £20,000, upon conviction on indictment there is no limit to the fine that the court can impose. When the Trust was sentenced in April 2014 under HSWA 1974, a fine of £200,000 and costs of £27,000 were imposed. The level of the fine was said to be strongly influenced by the financial state of the Trust.

In deciding the level of the fine, the decision in *R v Southampton University Hospital Trust* [2006] EWCA Crim 2971, [2006] All ER (D) 181 (Nov) shows that the court will take into account a range of factors including:

- the Trust's record
- the blameworthiness of the Trust, and
- how quickly the issue was acted upon

Had the Trust still been operational, the court would have also borne in mind the need to ensure that any fine imposed would not impact on the Trust's ability to fulfil its duty to the public.

New guidelines to be published in November 2015 are likely to have the effect of considerably increasing the fines in these types of cases.

HSWA 1974, Sch 3A also states that up to two years' imprisonment can be imposed--however, that would clearly require an individual to be prosecuted. This is possible by virtue of HSWA 1974, s 37, which extends liability to directors, managers, secretaries or other similar officers of the body corporate or a person purporting to act in such a capacity in certain circumstances. That said, such prosecutions are rare, especially in healthcare and in this case it is very unlikely indeed for a host of reasons.

As the Trust is in administration, what does this mean for the ongoing administration?

At this point the Trust is merely a 'shell organisation' with all its operations having been transferred to other healthcare bodies. However, Tim Rideout, the special administrator for the Trust, has specifically stated that the organisation would oversee any potential criminal liabilities. Nevertheless, the Trust was operating at a reported annual loss of £11m when it went into administration and already needs to satisfy a previous fine of £200,000. In imposing that fine, Mr Justice Haddon-Cave accepted the evidence of Ms Sarah Paton, the Trust's director of finance, that the Trust was not going to be in a position to pay that fine any time soon. It was therefore suggested at the sentencing hearing that the Department for Health may ultimately be responsible for payment of this fine. Mr Justice Haddon-Cave said that the fine was to be imposed whether or not that was the case. Under the National Health Service and Community Care Act 1990 (NHSCCA 1990), if an NHS Trust ceases to exist the Secretary of State must exercise his rights so as to ensure its liabilities are dealt with.

It follows that being in administration does not prevent the imposition of a criminal penalty against a Trust, but who will ultimately pay that fine is a matter, one suspects, for the Department of Health.

Interestingly, had the Trust been dissolved and purported to transfer all its liabilities to another Trust the position might have been harder for the HSE--the courts have shown reluctance to allow such a transfer to include that of criminal liability. In *R v Pennine Acute Hospitals NHS (formerly Rochdale NHS Trust)* [2003] EWCA Crim 3436, [2004] 1 All ER 1324 the Court of Appeal found that the Secretary of State, simply did not have the power to transfer criminal liability under NHSCCA 1990, Sch 2.

Potentially, what are the wider ramifications of all this?

This prosecution will no doubt be a salutary reminder to chief executives and chief medical officers of NHS Trusts up and down the UK of their exposure to health and safety legislation. The effect, if not the purpose, of this type of prosecution might be thought to be 'pour encourager les autres'.

As Mr Justice Scott Baker said in *R v F Howe & Son (Engineers) Ltd* [1999] 2 All ER 249:

> 'The fine must be fixed to meet the statutory purposes with the objective of ensuring that the message is brought home.'

However, while rare, the prosecution of NHS Trusts when there has been a breach of duty under HSWA 1974 is nothing new. The real ramification of this prosecution is that due to its high profile it will bring this issue to the forefront of public consciousness, and perhaps bring about a greater impetus for change.

Further, this second prosecution of the Trust indicates that the HSE may have shifted its enforcement strategy. While historically the HSE has tended to prosecute healthcare bodies only for 'technical' health and safety offences, this is a prosecution based on a substantive failure relating to the provision of healthcare.

As Sir Robert Francis said in the executive summary to his report:

> 'However, while it is always going to be difficult to devise policies which will satisfy the many conflicting requirements of the public interest, it is clear that the principles by which the HSE has sought to decide whether or not to involve itself in healthcare cases has led to a particularly unsatisfactory situation when placed alongside the CQC's refusal to investigate individual cases. This has led to a regulatory gap which needs to be closed.'

Perhaps the gap is closing, the tide turning.

Any further points of interest?

In 2013, the government began a consultation process on a new framework of offences relating to wilful neglect of patients as a direct response to the events involving the Mid Staffordshire NHS Foundation Trust. The response to this consultation was published in a Department of Health document entitled 'New offences of ill-treatment or wilful neglect: Government response to consultation' (LNB News 11/06/2014 165). This consultation resulted in amendments to the Criminal Justice and Courts Bill, which was undergoing parliamentary review at that time.

Sections 20-25 of the Criminal Justice and Courts Act 2015 (CJCA 2015) set out a framework of offences for wilful neglect. For the purposes of these sections a care provider is defined in CJCA 2015, s 21 as a 'body corporate or unincorporated association which provides or arranges for the provision of health care'. An NHS Trust would be likely to satisfy this definition.

These new provisions will apply to offences committed on or after 13 April 2015 and consequently this is something that healthcare bodies will have to be aware of going forward.

Tom Kark QC was counsel to the inquiry into the Mid Staffordshire NHS Trust and last year prosecuted a case involving HSWA 1974 offences and manslaughter against two companies involving a death in the workplace. He is currently representing the General Medical Council in a lengthy and complex hearing.

Tom would like to thank Nadesh Karu and Kathryn Hughes, both pupils in chambers, for their assistance with some background research for this interview.

Interviewed by Kate Beaumont.