

13 August 2018

MEDIA SUMMARY

Bawa-Garba (Appellant) v General Medical Council (Respondent) [2018] EWCA Civ 1879

On appeal from: [2018] EWHC 76 (Admin)

JUDGES: Lord Burnett of Maldon, CJ, Sir Terence Etherton, MR, Lady Justice Rafferty.

BACKGROUND TO THE APPEAL

This appeal considers the circumstances in which a doctor, convicted of manslaughter by gross negligence, should be erased from the Medical Register of licensed medical practitioners.

Dr Bawa-Garba is a junior doctor specialising in paediatrics. In February 2011 she had recently returned to practice as a Registrar at the Leicester Royal Infirmary Hospital (“the Hospital”) after 14 months of maternity leave. She was employed in the Children's Assessment Unit of the hospital (“the Unit”). That was an admissions unit of 15 beds which would receive patients from Accident and Emergency or from direct referrals by a GP. Its purpose was to assess, diagnose and (if appropriate) then treat children, or to admit them onto a ward or to the Paediatric Intensive Care Unit as necessary. The case concerns Dr Bawa-Garba’s care and treatment of Jack Adcock.

In February 2011 Jack was six years of age. He had been diagnosed from birth with Downs Syndrome. He was also born with a “hole in the heart”, which required surgery. As a result, he required long-term medication, and he was more susceptible to coughs, colds and resulting breathlessness. In the past Jack had required antibiotics for throat and chest infections, including one hospital admission for pneumonia. On Friday 18 February 2011, after having been very unwell, he was admitted to the Unit. Dr Bawa-Garba was the most senior junior doctor on duty. Jack was initially treated for acute gastro-enteritis and dehydration. After an x-ray he was subsequently treated for pneumonia with antibiotics. In fact, when Jack was admitted to hospital, he was suffering from pneumonia which caused his body to go into septic shock. The sepsis resulted in organ failure and caused his heart to fail. Despite efforts to resuscitate him Jack died.

The members of the Court express their deep sympathy with Jack’s parents, who attended the hearing in person, as well as respect for the dignified and resolute way in which they have coped with a terrible loss in traumatic circumstances.

Dr Bawa-Garba and also a nurse on duty at that time were subsequently convicted at Nottingham Crown Court on 4 November 2015 of gross negligence manslaughter. On the basis of the legal test for that offence, the jury found their conduct to be “truly exceptionally bad”. They were each sentenced to a term of two years’ imprisonment, suspended for two years.

On 20 February 2017 a Medical Practitioners Tribunal (“the Tribunal”) was convened to determine whether, on the basis of Dr Bawa-Garba’s conviction, her fitness to practise was impaired. The Tribunal comprised three members, assisted by a legal assessor. There were two lay members, one of whom chaired the Tribunal and was legally qualified, and a medical practitioner member. The Tribunal concluded that Dr Bawa-Garba’s fitness to practise was impaired. After a subsequent hearing in June 2017 the Tribunal issued its decision imposing the sanction of immediate suspension for a period of 12 months. The suspension was subject to review before the period of suspension expired in case there remained an issue as to Dr Bawa-Garba’s fitness to

practise. The Tribunal rejected as a disproportionate sanction the erasure of Dr Bawa-Garba's name from the Medical Register.

The General Medical Council appealed the Tribunal's sanction to the Divisional Court of the Queen's Bench Division of the High Court. The Divisional Court held that the Tribunal's decision was not consistent with, and did not respect, the verdict of the jury that Dr Bawa-Garba's conduct was "truly exceptionally bad". The Divisional Court considered that the Tribunal had been wrong to take into account that there were systemic failings of the Hospital and that Dr Bawa-Garba shared with others the responsibility for failings in the care and treatment of Jack. The Divisional Court concluded that, in view of the decision of the jury as to Dr Bawa-Garba's personal culpability, the Tribunal was wrong to think that public confidence in the profession could be maintained by any sanction short of erasure from the Medical Register. The Divisional Court, therefore, quashed the order of suspension of the Tribunal and substituted an order of erasure.

JUDGMENT

The Court of Appeal unanimously allows the appeal. It holds that the Divisional Court was wrong to interfere with the decision of the Tribunal. The Court of Appeal sets aside the order of the Divisional Court that Dr Bawa-Garba should be erased from the Medical Register and restores the order of the Tribunal that she be suspended from practice for 12 months subject to review

REASONS FOR THE JUDGMENT

The decision of the Tribunal that suspension rather than erasure was an appropriate sanction for the failings of Dr Bawa-Garba, which led to her conviction for gross negligence manslaughter, was not a decision of fact or law but an evaluative decision based on many factors. It is the type of decision which has been described as a kind of jury question about which reasonable people may reasonably disagree. An appeal court should generally be cautious before interfering with such an evaluative decision. That caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal. An appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation, or (2) for any other reason, the evaluation was wrong, in the sense that it was a decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide [60-67]. Neither of those grounds applies in the present case.

The Tribunal did not reduce the level of Dr Bawa-Garba's culpability below that which had been found by the jury and established by her conviction, namely that her failings in her care and treatment of Jack were "truly exceptionally bad", by taking into account evidence of systemic failings of the Hospital and the failings of others [70-71 and 74]. First, as Mr Justice Nicol said in his sentencing remarks at the criminal trial, there was a limit to how far systemic failings of the Hospital and the failings of others could be explored in the trial [74-75], the focus of which was on the personal actions of Dr Bawa-Garba and their contribution to Jack's death. Second, the criminal court and the Tribunal were different bodies, with different functions, addressing different questions and at different times. The jury was concerned with Dr Bawa-Garba's guilt or absence of guilt having regard to her personal past conduct. The task of the Tribunal, looking to the future, was to decide what sanction would most appropriately meet the overriding objective of protecting the public [76]. Third, there are different degrees of culpability which are capable of satisfying the requirement of gross or severe negligence for a conviction of gross negligence manslaughter. That is reflected in the range of penal sentences that are available, depending on the particular facts of the case. The sentence imposed by Mr Justice Nicol at the criminal trial was at the lightest end of the sentencing range for the offence. In passing that sentence he took into

account the systemic failings of the Hospital and the failings of others, who shared a responsibility with Dr Bawa-Garba for the care and treatment of Jack. They included that the Unit was a busy ward which could not limit its intake; the communication of Jack's blood results was delayed because the Hospital's 'I Lab' computer system was not working that day; there was not a consultant on the Unit the whole time; and the nurse assigned to the care of Jack while on duty was herself guilty of gross negligence manslaughter as a result of her failings. Other multiple systemic failures were identified in the Hospital investigation following the events of 18 February 2011. The Tribunal was just as entitled, as Mr Justice Nicol had been in determining Dr Bawa-Garba's sentence, to take into account, in determining the appropriate sanction, systemic failings on the part of the Hospital, as well as matters of personal mitigation [77]. Fourth, it follows that the Tribunal was not disrespecting the jury's verdict. Rather, it was conducting an evaluative exercise to determine what sanction was most appropriate to protect the public in all the circumstances [78]. The Tribunal made no error of principle.

Undoubtedly, there are some cases where the facts are such that the most severe sanction, erasure from the Medical Register, is the only proper and reasonable sanction. This is not one of them. Once it is understood that it was permissible for the Tribunal to take into account the full context of Jack's death, including the range of persons bearing responsibility for that tragedy and the systemic failings of the Hospital, as well as the other matters relied upon by Dr Bawa-Garba, and that the Tribunal plainly had in mind its overriding obligation to protect the public for the future, it is impossible to say that the suspension sanction imposed by the Tribunal was not one properly open to it and that the only sanction properly and reasonably available was erasure. Contrary to the approach taken by the Divisional Court, there is no presumption of erasure in the case of serious harm [88-90]. The appropriate sanction will always depend upon the precise circumstances of the particular case.

The present case is unusual. No concerns have ever been raised about the clinical competence of Dr Bawa-Garba, other than in relation to Jack's death, even though she continued to be employed at the Hospital until her conviction. The evidence before the Tribunal was that she was in the top third of her Specialist Trainee cohort. The Tribunal was satisfied that her deficient actions in relation to Jack were neither deliberate nor reckless, that she had remedied the deficiencies in her clinical skills and did not present a continuing risk to patients, and that the risk of her clinical practice suddenly and without explanation falling below the standards expected on any given day was no higher than for any other reasonably competent doctor [92].

The Tribunal was an expert body entitled to reach all those conclusions, including the important factor weighing in favour of Dr Bawa-Garba that she is a competent and useful doctor, who presents no material continuing danger to the public, and can provide considerable useful future service to society [93].

In those circumstances, the Court of Appeal allows the appeal, sets aside the decision of the Divisional Court, restores the decision of the Tribunal and remits the matter to the Medical Practitioners Tribunal Service for review of Dr Bawa-Garba's suspension [98].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment of the Court of Appeal and a copy of this media summary are available at www.judiciary.uk