



Protecting the protectors: Calls for emergency legislation to prevent the prosecution of healthcare professionals when treating COVID-19 patients

BCL Solicitors Associate **David Hardstaff**, a specialist in professional discipline and criminal litigation, discusses recent calls for emergency legislation to protect healthcare professionals from prosecution arising from incidents during the COVID-19 pandemic.

UK healthcare organisations have written to the Secretary of State for Health and Social Care, pushing for the introduction of emergency legislation to protect healthcare professionals who could find themselves at risk of “inappropriate legal challenge when treating COVID-19 patients in circumstances beyond their control.”

The letter, which is co-ordinated by the Medical Protection Society (MPS) and signed by organisations including the Medical Protection Society, the British Medical Association, the Royal College of Surgeons of Edinburgh, and the Doctors’ Association, cites the Prime Minister’s warning in November 2020 that if the NHS is overwhelmed, the country could face a “medical and moral disaster” where doctors and nurses could “be forced to choose which patients to treat, who would live and who would die.”

As we emerge from the deadliest phase of the pandemic, few would argue that the prospect of the NHS finding itself overwhelmed was anything but likely, if not inevitable. It is against this backdrop that a significant proportion of doctors, 61% of 2,400 surveyed between 8-12 January 2021, expressed concerns about facing an investigation as a result of a clinical decision made while working in extremely challenging, high-pressure environments. 36% of those surveyed specifically said they are concerned about the prospect of an investigation following a decision to withdraw or withhold life prolonging treatment due to capacity and resource constraints during the pandemic.

The MPS letter refers to existing guidance on whether to administer or withdraw treatment, pointing out that this does not provide legal protection and does not consider additional factors created by a public health

emergency, such as COVID-19. It states, “We do not believe it is right that healthcare professionals should suffer from the moral injury and long-term psychological damage that could result from having to make decisions on how limited resources are allocated, while at the same time being left vulnerable to the risk of prosecution for unlawful killing.”

It is suggested that the emergency legislation proposed should only provide protection where healthcare professionals have acted in good faith; it should be temporary only; and, it should apply retrospectively, from the start of the pandemic. Any emergency legislation would not, the MPS letter clarifies, apply to “wilful or intentional criminal harm or reckless misconduct”.

The need for reform

The concept of ‘intentional criminal

harm' is fairly unambiguous and clearly it is not being suggested that doctors should have complete immunity from criminal liability. However, 'reckless misconduct', as referred to in the letter, is less clear as a concept. The letter does not specify what offences should not be prosecuted. The most obvious offence likely to be of concern is gross negligence manslaughter. The offence is committed where a death is a result of a grossly negligent (though otherwise lawful) act or omission on the part of the defendant. In order to prove the offence, the prosecution must establish the following elements:

- The defendant owed a duty of care to the deceased;
- By a negligent act or omission, the defendant was in breach of the duty which he owed to the deceased;
- The negligent act or omission was a cause of the death; and
- The negligence, which was a cause of the death, amounts to gross negligence and is therefore a crime.

On first glance, it may not be immediately obvious how to account for the unique conditions created by the pandemic, so that due consideration is taken. Whether a breach of duty of care has occurred is tested by the objective standard of reasonableness. Applying this to the pandemic, it is difficult to imagine how any level of objectivity that is sufficiently consistent and fair could be achieved given the dramatically varied picture across the country. Comparing the experience of a doctor in a Cornish hospital in September 2020 with that of a doctor in Hackney in January 2021 would be pointless. The risk that healthcare professionals are treated unfairly as a result of the extreme variety of experiences is clearly something the authors of the MPS letter had in mind.

Concerns within the healthcare profession regarding gross negligence manslaughter are not new. In 2019, following outcry regarding its decision to seek the erasure of a convicted senior paediatric trainee by way of an appeal, the General Medical Council (GMC) commissioned an independent review of gross negligence manslaughter and culpable homicide. The report found that many doctors feel vulnerable to criminal and regulatory proceedings should they make a mistake which leads to a patient being harmed: "The depth of this feeling has resulted in a breakdown in the relationship between many doctors and their regulator", the report found, making 29 recommendations aimed at rebuilding trust in the GMC.

Against this backdrop, doctors may have been disappointed that it took until September 2020 for the GMC to publish its COVID-19 specific guidance. The purpose of the guidance is to support decision makers in determining how to assess the overall risk to public protection posed by doctors in relation to allegations of fitness to practise in a clinical setting during the pandemic. The guidance is intended to account for the unprecedented demand on the healthcare system and the need to consider this as context when assisting a doctor's fitness to practise. Examples given include concerns about clinical treatment where guidelines were unclear, or a doctor working outside their usual area of practice with limited or no support or guidance to do so safely.

While the GMC's guidance was welcomed at the time (albeit some six months after the pandemic struck the UK in earnest), the level of protection it affords doctors is limited; not least because it has no bearing as to whether doctors are subject to criminal investigation and prosecution. The MPS letter reflects this and suggests that as the pandemic stretches healthcare systems to breaking point, healthcare professionals fear they may unfairly be made accountable for failures that are more likely to be the result of a lack of resources and capacity.

Accountability and the 'blame game'

What then of accountability at management and even government level? In December 2020, the Law Commission published its long-awaited report on misconduct in public office. The Commission's report concludes that the offence in its current form should be abolished and replaced with two statutory offences:

- 1) an offence of corruption in public office, where the public office holder, in using the position or power, has knowingly engaged in "seriously improper" conduct with the purpose of achieving a benefit or detriment, and cannot prove that their conduct was, in all the circumstances, in the public interest; and
- 2) an offence of breach of duty in public office, where the public office holder has a specific duty to prevent death or serious injury, is aware of that fact, and breaches the duty, causing or risking death or serious injury, while being at least reckless as to whether that would result.

The past 12 months have seen allegation after allegation of the

government's mishandling of the response to the pandemic. Criticisms have ranged from ignoring scientific advice and delaying lockdown resulting in the loss of thousands of lives, to PPE procurement disasters and corruption (or at least, cronyism). Wouldn't several of the worst allegations to have come out of the pandemic fall squarely into one or both of the two proposed statutory offences?

As vaccine success stories and a roadmap out of lockdown give rise to renewed hope and optimism, there is a palpable sense of relief in the air. After relief, there will be a period of reflection, and then scrutiny as to how the pandemic was handled by those in charge. There will be countless inquiries and reviews, during which significant criticism will inevitably be meted out. However, the prospect of anyone in any senior position facing a criminal investigation, let alone prosecution, for decisions and judgment calls that may have resulted in avoidable deaths, seems remote; perhaps understandably, because it is generally accepted that the pandemic has required individuals to make incredibly difficult decisions in extraordinary circumstances. More than a few doctors may have raised an eyebrow then when Matt Hancock was asked about the issue of emergency legislation to protect healthcare workers and responded, "I am very glad to say that we are not in a position that doctors have to make these sorts of choices and very much hope that we don't get into that situation. It is not necessary at this point to change the law on this matter."

That such a range of organisations have publicly raised this issue suggests there is a genuine and widely held concern amongst healthcare professionals. The letter highlights that healthcare professionals are vulnerable on several fronts, including in relation to criminal liability, but also in relation to professional discipline and fitness to practise. Being subject to investigation by the police and a professional regulator is an extremely stressful experience, with career, livelihood, and liberty at stake.

There will be a time in the future when we will need to debate the range of legal and ethical challenges that have been raised by this pandemic, the MPS letter concludes. In the meantime, it is hoped that some more practical assurances can be provided to healthcare professionals who have sacrificed so much already.

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