The first prosecution of an NHS trust for corporate manslaughter

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Corporate Crime analysis: What should potential defendant NHS Trusts take from the ruling in R v Cornish and another? James Leonard of Outer Temple Chambers, who represented Dr Cornish, considers this first prosecution of a health service body following the introduction of the offence under the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA 2007).

What is the background to this case?

Both Dr Cornish and the Maidstone and Tonbridge Wells NHS Trust were charged with the manslaughter and corporate manslaughter of Frances Cappuccini. This was the first time in the chequered career of CMCHA 2007 that it had been deployed against an organisation of the size and substance of an NHS Trust. In due course the case collapsed at the end of the prosecution case. While not forgetting for a moment the devastating tragedy of the case for Mrs Cappuccini's family and the impact on Dr Cornish personally as well as others involved, lawyers involved in this area of the law want to know whether this case tells us anything.

Mr Justice Coulson presided over pre-trial issues and the trial itself at the Inner London Crown Court. He gave a pre-trial ruling (see *R v Cornish and another* [2015] EWHC 2967 (QB)). The judgment on the submission of no case to answer was not reported but the judgment on the costs application was reported (see *R v Cornish and another* [2016] EWHC 779 (QB), [2016] All ER (D) 167 (Apr)). For more details on the costs application, see News Analysis: Pursuing costs for 'impropriety'.

What were the key facts?

Mrs Cappuccini died in on 9 October 2012 following a caesarean section while under the care of the Maidstone and Tunbridge NHS Trust. When she started to bleed significantly after the surgery, she underwent an operation under general anaesthetic to remove a piece of placental tissue. This stopped the bleeding. However, she never fully regained consciousness after the operation and ultimately died following a cardiac arrest later that same day. She should not have died, but the exact cause of death was not certain. The prosecution alleged that she died as a result of criminal failings of her anaesthetists Dr Cornish and Dr Azeez. The latter was not in the UK for the trial. What will happen in his case should he return remains to be seen.

Following the operation, Mrs Cappuccini was noted not to be properly regaining consciousness. Her intubation tube had been removed but she required ventilation. Dr Azeez (who was responsible for Mrs Cappuccini's anaesthetic care before, during and after the operation) ventilated her using an oxygen bag and facemask in accordance with standard procedure and NHS Trust policy. Dr Cornish (a locum consultant anaesthetist) was summoned away from his own patient in the adjacent operating theatre for advice and assistance. Dr Cornish called a more senior consultant and, over the next half an hour or so, a number of increasingly senior consultants attended Mrs Cappuccini. Once a more senior consultant had arrived, Dr Cornish returned to attend to his own patient for whom he was the sole responsible anaesthetist. He assisted Dr Azeez for no more than around 40 minutes.

There was evidence that Dr Azeez's use of the oxygen bag was not perfect and, although she was receiving oxygen, '[Dr Azeeez] may not have been extracting the CO2 as quickly as he might' (para [26]). Despite this, Mrs Cappuccini's oxygen saturations and blood gasses remained within acceptable limits and none of the alarms on the monitors were triggered. Mrs Cappuccini was eventually re-intubated but did not regain consciousness.

The prosecution alleged that Mrs Cappuccini should have been re-intubated earlier in the course of events and that, had she been, she would not have died. Dr Cornish was charged with gross negligence manslaughter and the prosecution informed the court that, had Dr Azeez not moved to Pakistan, they would have brought proceedings against him too. In addition, the NHS Trust was charged with corporate manslaughter under CMCHA 2007, s 1(1). The judgment of Mr Justice Coulson at the end of the prosecution case was an informative recitation on the law relating to gross negligence manslaughter as against Dr Cornish. The conclusion in that regard was that it was 'as far removed from a case of gross

negligence manslaughter as it is possible to be'. However, this article focuses on the case against the NHS Trust under CMCHA 2007, s 1(1).

The prosecution (following clarification with Coulson J) alleged that the NHS Trust had made the following specific breaches of duty:

- appointing Dr Azeez when his foreign experience and qualifications did not adequately qualify him for the role
- appointing Dr Cornish without formally interviewing him, relying on their previous experience of him as a locum and relying on his experience in a number of other hospitals
- failing to discount CPD credits earned by Dr Azeez and for which he did not have independent verification
- failing to adequately supervise Dr Azeez on the day of the death

Submissions of no case to answer were made on behalf of both Dr Cornish and the NHS Trust. Both applications were successful.

What did the court decide on the facts?

Coulson J put the prosecution's case firmly to rest. He held that the only allegation for which the prosecution had advanced an arguable case was the 'lack of clarity as to who Dr Azeez's supervisor was' on the day of the death. All of the other allegations were, in Coulson J's opinion, unarguable:

- there was no evidence that the NHS Trust were not entitled to treat Dr Azeez's foreign experience as sufficiently 'equivalent' to conventional qualifications and to appoint him on the basis of that experience
- the NHS Trust were 'plainly entitled' to rely upon their previous experience of Dr Cornish without holding a formal interview
- it was 'perverse' to suggest that Dr Cornish's experience working in a number of different hospitals was not adequate or gave rise to a cause for concern
- there was nothing to suggest that the NHS Trust should have disregarded Dr Azeez's CPD points and, in any event, he had recently received training on precisely the scenario which led to the death of Mrs Cappuccini

The next flaw in the prosecution's case was that these other allegations were also all 'one-off' events which, for that reason, it was held, could not demonstrate a deficiency in management or organisation by senior management. They could not, therefore, constitute relevant breaches of duty.

Coulson J then went on to consider whether any of the alleged breaches would, even if they had been found to be breaches, have amounted to 'gross' breaches. He held that they would not. Any breach in relation to appointments and appraisal was 'nowhere near the sufficient gravity required to categorise their failure as criminal' (para [104]). Moreover, any breach in relation to supervision on the day of the death did not 'create a significant problem in fact' (para [105]), and so there was no prospect of that breach amounting to a sufficiently 'gross' breach.

To finish things off, Coulson J held that since there was no evidence that better supervision would have altered the chain of events in any way, causation could not be established (para [108]).

Does this case assist in clarifying the law in this area?

Coulson J, uncontroversially, identified the following ingredients of corporate manslaughter, namely:

- a relevant duty of care
- activities which were managed or organised by senior management in a way which comprised a breach of the NHS Trust's duty
- in all the circumstances, that breach was gross
- the gross breach caused or made a significant contribution to the death

Coulson J made clear that it was necessary to adopt a careful analysis of each element of the offence and not merely consider the evidence 'in the round'. Each element is considered below.

Duty of care

The existence of a relevant duty of care was conceded by the NHS Trust. This was entirely unsurprising. It is difficult to imagine a corporate manslaughter case arising out of medical treatment by an NHS Trust in which the NHS Trust could deny the existence of a duty of care.

Activities managed or organised by senior management

Two points of potential importance for other cases arose from Coulson J's consideration of the second ingredient of the offence—'the way in which its activities are managed or organised by its senior management'.

First, the prosecution was permitted a degree of vagary in identifying the relevant 'senior management' for the offence.

The defence put much effort into attacking the prosecution for failing to adequately particularise the precise level of management said to be at fault. This approach met with only limited success.

Pre-trial, Coulson J ordered the provision of further particulars of the level of 'senior management' said to be at fault. The prosecution provided these further particulars. The defence continued to assert that they were inadequate. This argument met with very little favour. Giving judgment on the submission of no case to answer, Coulson J forcefully rejected the submission that 'in some way the case against the Trust should be stopped because the precise tier or the precise individuals involved in the Trust's management had not been identified' (para [79]). In a subsequent decision on an (unsuccessful) application by the NHS Trust for costs, Coulson J expressed his surprise that the point had even been taken by the NHS Trust in the trial and reiterated that he had 'rejected it out of hand' and considered the point to be of only 'peripheral relevance'.

One of the reasons given by Coulson J for refusing to find that the prosecution had failed to adequately particularise the senior management was that the prosecution had called expert evidence about how an NHS Trust would and should be organised. A jury could, from that evidence, it was held, decide who was the relevant 'senior management'. This is significant. It implies that the issue of identifying the senior management is as much a question of fact as a question of pleading. It is open to the defence to challenge the prosecution's view of who constitutes the relevant senior management. However, that may well get the defence only so far—it may simply mean that the charge is satisfied in a different way from that envisaged by the prosecution, not that it is not proved at all.

It is unlikely to be open to a defendant to have the prosecution case dismissed at halftime merely because there is some wooliness in the prosecution's identification of the relevant 'senior management'—it is a matter which can be left to the jury to determine, relying on evidence of fact and of experts.

Second, Coulson J took a limited view of CMCHA 2007, s 1(3) which provides that:

> 'An organisation is guilty of an offence under this section if the way in which its activities are managed or organised by its senior management is a substantial element in the breach…'

On its face, CMCHA 2007, s 1(3) might give the prosecution room to argue that the offence is intended to cover both systematic errors over a period of time (errors in 'organisation') and specific errors which might not have occurred over a particularly lengthy period (errors in how a particular situation or decision was 'managed'). However, Coulson J was careful to repeatedly distinguish between systematic errors and 'one-off' errors. He contrasted errors in 'custom and practice' (para [102]) and 'systematic failure' (para [92]), with individual 'one-off errors' (para [92]). It is clear that he felt that 'one-off' failings were not capable of amounting to relevant breaches of corporate manslaughter.

This is a clear steer from the court and it is a perfectly sensible interpretation of the statute. However, it is not the only possible or sensible interpretation and Coulson J did not hear argument on the point. It would be open to challenge by a future prosecutor on the basis that it has the effect of elevating considerations in CMCHA 2007, s 8(3)(a) of 'the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation which were likely to have encouraged any [failure to comply with health and safety legislation], or to have produced tolerance of [such failure]' from factors which the jury 'may also' consider, to be a necessary part of the offence.

A future potential defendant NHS Trust should take heart from the narrow view taken by Coulson J, but should also be cautious that a future court would not (yet) be obliged to follow the same course.

Gross breach

'Gross' is not defined by CMCHA 2007. Coulson J held that it should be interpreted consistently with the case law on gross negligence manslaughter (para [14]). He adopted the various tests set out in the familiar line of authorities, which emphasise the high threshold and the seriousness of the conduct required in order to elevate a mistake or negligence to a serious crime. The relevant standard was summarised as being conduct which 'fell so far below the standards to be expected…[and] was so flagrant and so atrocious that it would consequently amount to a crime' (para [9]).

One element of Coulson J's analysis of the test for 'grossness' is surprising and is not likely to be adopted in future cases. Coulson J suggested that 'gross breach could only be properly an issue for the jury if there was evidence that the [breach] created a significant problem in fact' (para [105]). This is certainly not a correct statement of the law insofar as it applies to gross negligence manslaughter. The assessment of 'grossness', for gross negligence manslaughter, is directed at the level of risk created by a breach of duty, not at the level of harm actually created. Given that Coulson J explicitly adopted the common law definition of 'gross' (para [14]), Coulson J's apparent focus on the creation of actual problem 'in fact' is unlikely to be adopted in future cases—it would be inconsistent with his own reasoning and with the common law definition.

Causation

Two important points also arise from Coulson J's consideration of causation.

First, this case reiterates that it is important not to overlook causation arguments. Regardless of the seriousness of any breaches of duty, there will be no liability unless those breaches are the factual and legal cause of the death. In this case, the prosecution failed to provide any evidence that the specific failings alleged had actually made any difference to the treatment which was given to Mrs Cappuccini. That shortcoming alone would have been enough for the defence's submission of no case to answer to succeed.

Second, Coulson J was clear that, contrary to the way in which the case was put by the prosecution, a corporate manslaughter conviction does not depend upon a conviction for gross negligence manslaughter by an individual. A corporate manslaughter case against a corporate body 'exists wholly independently' of a gross negligence manslaughter case against any individuals working for the body (para [111]). This is clearly correct as a matter of logic and it cuts both ways. There is no inherent reason why the same facts which demonstrate a criminally culpable failing by a staff member should also demonstrate a criminally culpable failing of management or organisation by senior management, nor why a criminally culpable failing of management or organisation by senior management should necessarily demonstrate any criminally culpable individual failings.

What other practical points does this case raise?

CMCHA 2007 came into force on 6 April 2008 and does not have retrospective effect. This meant that any acts taken by the NHS Trust before that date (which included appointing Dr Azeez) could not be relevant, even if though the death occurred later. A future potential defendant NHS Trust should keep this time point in mind and carefully assess whether the alleged wrongdoing—rather than the alleged fruits of that wrongdoing—happened before 6 April 2008, as this would provide a strong and complete defence (albeit a potentially unattractive one).

In the judgment on the costs application, Coulson J considered the use of experts. He observed that:

> '[I]t is unrealistic to think that a case of corporate manslaughter against an NHS Trust, which dealt with wide issues of practice and procedure, could have been successfully concluded without the input of an expert.' (para [31])

This is likely to be applicable to all corporate manslaughter cases involving an NHS Trust and a future potential defendant NHS Trust should seek to involve a relevant expert from an early stage in preparing its defence.

What are the key things to take from this decision?

In summary, a future potential defendant NHS Trust should keep the following points arising from this case firmly in mind:

- there may be limited mileage in challenging the prosecution's particularisation of the 'senior management'
- an expert will almost invariably be required
- 'gross' means the same as it does for the purposes of gross negligence manslaughter and it is a very high bar
- a corporate manslaughter charge will not necessarily stand or fall with individual gross negligence manslaughter charges—there is nothing inherently inconsistent, as either a matter of logic or of law, in reaching different verdicts on corporate manslaughter and gross negligence manslaughter charges
- the offence is likely (but not certain) to require systematic breaches of duty—'one-off' breaches of duty, even very serious breaches, are unlikely to be enough

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