

In the wake of the landmark case against an English NHS Trust Michael Appleby wonders if this is really what the Health and Safety at Work Act was meant to be about?

A suitable case for prosecution?

NHS IN THE DOCK

On 11 April, in a landmark case, Southampton University Hospitals NHS Trust was fined £100,000 at Winchester Crown Court for breaching s3 of the Health and Safety at Work, etc. Act 1974 (HSWA) in relation to the death of a patient five years ago.

The patient died after developing toxic shock syndrome following a routine knee operation. Two senior house officers were found to have responded inadequately to the patient's obvious signs of infection, such as his raised temperature and pulse rate, and failed to chase up blood test results that should have led to antibiotics being administered.

On 11 April 2003, also at Winchester Crown Court, both doctors were convicted of gross negligence manslaughter and each sentenced to 18 months in prison, suspended for two years.

The leading case in this area of law is *R v Adomako* [1995] 1 AC 171 (a case also involving a doctor). To be guilty of this offence the jury must be satisfied that:

- 1 The defendant owed a duty of care to the deceased; and
- 2 He/she was in breach of that duty; and
3. The breach of duty was a substantial cause of death, i.e. something more than trivial); and
- 4 The breach was so grossly negligent that the defendant can be deemed to have had such disregard for life of the deceased that it should be seen as criminal and deserving of punishment by the State.

After the criminal proceedings against the doctors were concluded a decision was taken to prosecute the hospital for failing to ensure patients were not exposed to risks to their health and safety so far as was reasonably practicable. At an earlier hearing the hospital pleaded guilty to this offence on the single particular that it failed to adequately supervise the two doctors.

Originally, the indictment



Illustration by Arthur Phillips

contained allegations of other failures that included the hospital employing one of the doctors without taking up references or conducting a face-to-face interview, failing to organise ward rounds properly, and not encouraging nurses to report concerns about colleagues. All were dropped by the prosecution.

Organisational issues, such as excessive workloads, inadequate supervision, misunderstandings and poor systems are often relied upon by doctors in their defence when facing manslaughter charges. HSG 65 says: "Accidents, ill health and incidents are seldom random events. . . The immediate cause may be a human or technical failure, but they usually arise from organisational failings which are the responsibility of management."

The hospital has now accepted it failed to supervise these doctors properly. In sentencing the hospital, Mr Justice Cresswell described this breach as "extremely serious", which had resulted in tragic and unnecessary death.

Ifs and Ands

The question is, if the hospital and the doctors had been tried together

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would the jury have been so willing to find the doctors grossly negligent if they knew the hospital accepted failings in their supervision? Alternatively, if the doctors had acted in such a terrible and grossly negligent fashion in relation to this particular patient would any jury have accepted that better supervision would have prevented the death?

It is hard to believe that the authors of the Robens Report in 1972, which led to the enactment of the HSWA, would have envisaged the legislation being used to prosecute a hospital in these circumstances. It may be the Act is being stretched beyond its intended aim.

In more general terms, perhaps this case also illustrates how difficult it is becoming, when defending individuals in work-related death manslaughter prosecutions, to put before the jury all the circumstances relevant to the incident; it is not unusual for evidence to be curtailed in the interests of 'case management'.

However what is certain is that the ramifications of the prosecutions resulting from this patient's death will impact not only on the health service but also beyond, on other organisations and industries. ■