ICO vs. 'Fitness to Practise' Bodies: Doubling the Punishment

By Daniel Brown

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The General Data Protection Regulation 2016/679 ('GDPR') came into force on 25 May 2018. GDPR will significantly strengthen the legal protection given to personal data across the European Union and increase the maximum fine that can be imposed by the Information Commissioner's Office ('ICO') to €20,000,000 or 4% of global annual turnover (whichever is higher). But professionals required to meet separate standards set by regulatory bodies should be aware that the consequences of a data breach may extend beyond the powers of the ICO.

GDPR: key provisions

Many professionals, particularly those who are self-employed or otherwise running their own business, will fall within the definitions of 'controller' and/or 'processor' and therefore be under a duty to comply with the new requirements.

Under GDPR, the ICO will have powers to issue warnings and reprimands and to impose a temporary or permanent ban on data processing. Such a ban could potentially have the effect of preventing an individual from practising their profession or a business from operating. And, as indicated above, the ICO will also have the power to impose fines of up to €20,000,000 or 4% of global annual turnover (whichever is higher). In addition to the ICO's powers, individuals have the right to claim compensation for certain breaches of GDPR.

GDPR requires data controllers to have at least one of six recognised lawful bases for processing personal data:

- Consent: this requires positive action on the part of the data subject (pre-ticked boxes on forms should be avoided) and the consent given must be clear and specific.

- Contract: processing is permitted where it is necessary to fulfil a contractual obligation to the data subject or, where necessary, to do something the data subject has requested before entering into a contract (such as providing a quote).

- Legal obligation: this covers processing which is necessary to comply with a common law or statutory obligation.

- Vital interests: processing is permitted where it is necessary to protect someone's life.

- Public tasks: processing is permitted where necessary in the exercise of official authority or to perform a specific task in the public interest that is set out in law.

- Legitimate interests: in order to amount to a lawful basis there must be a legitimate interest, the processing must be necessary to achieve/protect the interest in question and the interest in processing personal data must be balanced against the individual's interests, rights and freedoms. Legitimate interests may include: the data controller's/data processor's interests, the interests of a third party, commercial interests and societal interests.

GDPR also provides individuals with a number of rights which include:

- Right to be informed: this includes informing people in clear and concise language of the purposes for which their data is being processed, retention periods and who it will be shared with.

- Right of access: individuals have a right to be provided with their personal data free of charge (subject to exceptions).

- Right to rectification: inaccuracies or incomplete personal data must be rectified if requested by an individual.

- Right to erasure: this is also known as the right to be forgotten.

- Right to restrict processing: the right to suppress the processing of personal data (this is not an absolute right).

- Right to data portability: the right to receive personal data in a structured, commonly used and machine readable format and the right to transmit the data to another data controller.

- Right to object (this is not an absolute right).

In terms of practical steps, there is a general duty on data controllers to implement appropriate technical and organisational measures designed to give effect to data protection principles and protect the rights of individual data subjects.

In addition, there are various documentation/record keeping requirements. For example, data controllers must provide information to individuals at the time when their personal data is obtained. This information might be set out in a 'fair processing notice' or a 'privacy notice'. The information provided must include: the identity of the data controller, the purpose and legal basis for the processing, where the lawful basis relied on is 'legitimate interests', details of the legitimate interests in question, any recipients of the personal data, information relating to any intended transfer of personal data to a 'third country', the retention period or category, an explanation of the data subject's rights, an explanation of how to withdraw consent, how to lodge a complaint, whether the provision of personal data is a statutory or contractual requirement. Please note that this is not an exhaustive list.

GDPR also requires data controllers to have a written contract in place whenever they use someone else (a data processor) to process personal data. GDPR makes detailed provisions in relation to what must be included in the contract. But data controllers must ensure that they have 'sufficient guarantees' that GDPR will be complied with and the rights of individual data subjects protected.

GDPR as a 'fitness to practise' issue

A large number of professionals including doctors, dentists, accountants, chiropractors and osteopaths are also subject to additional regulation or codes of conduct which impose requirements in relation to patient/client confidentiality. Some examples are as follows:

- GMC – Confidentiality: good practice in handling patient information

- GDC – Principles of Patient Confidentiality
- HCPC – Confidentiality - Guidance for Registrants
- GCC – The Code – Standards of Conduct, Performance and Ethics for Chiropractors, Principle H
- GOsC – Osteopathic Practice Standards, D6
- RCVS – Code of Professional Conduct for Veterinary Surgeons, paragraph 14
- ICAEW – Code of Ethics: 140 Principle of confidentiality

Principle H of the GCC Code makes it clear that confidentiality 'is central to the relationship between chiropractor and patient' (page 26). Many other regulators also view patient/client confidentiality as a principle of fundamental importance.

The GCC Code also appears to impose a specific requirement to inform patients/clients in the event of a breach of confidentiality; it states:

> **Patient and public expectations of chiropractors**
> …
>
> Maintain and protect patient information… Keep personal details confidential but inform patients of any breaches of confidentiality [page 10].

It should also be noted that in some cases, regulatory bodies may impose more onerous requirements than GDPR. For example, the GOsC's Osteopathic Practice Standards require that patient records are kept for a minimum of eight years from the last appointment or, if the patient is a child, until the patient is 25 years old (see D6(3)). And while GDPR does not apply to personal data of deceased persons, professional regulators may require that confidentiality is maintained following death; the GOsC's Osteopathic Practice Standards make this plain at D6(1.3).

It follows that for many professionals, a breach of GDPR has the potential to lead to fines and/or other sanctions imposed by the ICO and a disciplinary or 'fitness to practise' investigation by the relevant regulatory body. In this situation, the fact that the ICO has imposed a fine (or taken any other action) in respect of a breach of GDPR is very unlikely to

provide any sort of defence should a regulator decide to commence its own investigation or fitness to practise proceedings. Moreover, even if the ICO decides to take no action, regulators may still investigate and, if the allegations are proved, the full range of sanctions will be open to them.

It is too early to tell whether GDPR will herald heightened responses to data protection/confidentiality concerns on the part of regulatory bodies, or whether more severe sanctions will be imposed in respect of such matters. But it is clear that given the wide ranging powers of the ICO and the potential for separate disciplinary or regulatory proceedings (which may begin before or after or run alongside any ICO investigation), individuals who may fall within the definition of data controllers should ensure that they are fully aware of (and compliant with) their obligations under GDPR and, in the case of any potential breach, legal advice should be sought at an early stage.

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7 months on: A round up of the cases following 'Ivey v Genting Casinos'

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The case of *Ivey v Genting Casinos*[1] concerned Mr Ivey, a professional gambler, who employed a technique, "edge-sorting", to win £7.7m playing Punto Banco Baccarat. The casino refused to pay him, arguing that the technique amounted to cheating. Mr Ivey's case was that he had not cheated but had merely deployed a legitimate advantage. In the lower court, the Judge found that this was a belief which he genuinely held.

The Supreme Court's Findings

The Supreme Court concluded that the offence of cheating did not necessarily need to contain an element of dishonesty and that dishonesty did not assist in clarifying the definition of cheating.

Although it was not invited to decide the definition of dishonesty, the Court then, *obiter*, considered the two-stage test as set out in *R v Ghosh* [1982] QB 1053, i.e: 1. Whether the conduct in question was dishonest by the objective standards of ordinary reasonable and honest people; and, if it was found that the conduct was dishonest by that standard, 2. Whether the defendant must have realised this to be the case. If the answer was "yes", he or she should be convicted.

The Court outlined six unintended consequences of the second limb of the Ghosh test, noting in particular, that the more deviant a defendant's morals were, the more likely that the application of the test would result in their acquittal.

The Court noted the civil test for dishonesty, as confirmed by the case of *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37. It found no reason for the civil and criminal definitions of dishonesty to differ. Having reviewed the case law which preceded *Ghosh*, the Court held that the second limb of the test did not accurately reflect the law and should no longer be given as a jury direction by Judges.

[1] [2017] UKSC 67

Hughes LJ noted as follows at paragraph 74 of the Judgment:

> "*when dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to the facts is established, the question of whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest*."

The Court noted that this would still provide a defence to individuals without dishonest intent but that it would not allow those whose standards of integrity were so warped that they were no longer aware of society's norms of honesty to escape conviction. An example given was that of traders who had behaved dishonestly but who, due to their work environment, were unable to recognise that the rest of society would consider their conduct to be dishonest.

The Aftermath of the Ivey Judgment in the context of Regulatory Proceedings

While the test is applicable to criminal proceedings, the *Ivey* case has also impacted upon professional regulatory proceedings as, given that the criminal test of dishonesty had been essentially adopted such proceedings, the Ivey test is now applicable. Previously, the test applied was that in the case of *Hussain v General Medical Council* [2014] EWCA Civ 2246, namely:

'The tribunal should first determine whether on the balance of probabilities, a defendant acted dishonestly by the standards of ordinary and honest members of that profession; and, if it finds that he or she did so, must go on to determine whether it is more likely than not that the defendant realised that what he or she was doing was by those standards, dishonest.'

The notable difference was that the test imposed the standards of fellow professionals. However, in the case of *GMC v Krishnan* [2017] EWHC 2892 (Admin), the court held (at para 24) that the *Ivey* test should henceforth be applied in GMC proceedings.

Three cases have recently gone on to apply the *Ivey* test in professional regulatory proceedings as follows:

Wingate v Solicitors Regulation Authority [2018] EWCA Civ 366

"W" and "E" were partners in a small firm, responsible for management and litigation respectively. The firm was facing financial difficulties and entered into an agreement for a loan of £900,000. However, "W" signed a funding agreement which did not reflect the parties' true agreement. It was stated that the agreement would later be replaced with a less restrictive agreement, but this did not occur, and the firm failed to repay the loan.

The SRA alleged that, in accepting the money, W and E had failed to act with integrity, contrary to the SRA's Code of Conduct Principle 2, and had been manifestly incompetent, therefore failing to behave in a way that maintained the public's trust, contrary to Principle 6. It also alleged that W had acted dishonestly. The Tribunal acquitted the solicitors. The SRA appealed, but abandoned the dishonesty allegation.

The court of appeal applied the *Ivey* test for dishonesty regarding criminal and civil liability, noting that this was objective, although the defendant's state of mind and their conduct were relevant to whether they had acted dishonestly (para.94)

However, the court ultimately found that integrity was a broader concept than honesty (para 139). In professional codes of conduct, "integrity" expressed the higher standards expected of professionals. It connoted adherence to the ethical standards of ones' profession and involved more than mere honesty (paras 95-103). Manifest incompetence was one of many forms of conduct which would undermine public confidence in the legal profession. A solicitor acting carelessly, but with integrity, would breach Principle 6 if his conduct went beyond professional negligence.

Yussouf v Solicitors Regulation Authority [2018] EWHC 211 (Admin)

This was an appeal against a decision of the SRA refusing the Appellant a certificate of suitability to be a solicitor and to admit her to the Roll. In her application for admission as a solicitor, the Appellant had incorrectly stated that she had never had a county court judgment entered against her. A search subsequently revealed this to be false. Meanwhile, the Appellant withdrew her first application and made a subsequent application three years later.

This was refused on the basis that she had acted dishonestly and had provided misleading information in the first application. She initially argued that she had been unaware of the

judgment when completing the first application, but later said that she had been aware of the judgment but had mistakenly thought that it did not need to be declared as the Judgment had been satisfied.

She therefore appealed to the adjudication panel, who refused a request for an oral hearing on the basis that it considered that it had sufficient documentary evidence, and found that the appellant had acted dishonestly and had provided misleading information and that there were no exceptional circumstances.

She appealed this decision on the basis that the panel "misdirected itself on what constituted dishonesty" as they had applied the old test for dishonesty[2].

The Court noted that, following *Ivey* and, as confirmed in *GMC v Krishnan*[3] only the first of those elements was necessary. The Judge stated (para 69), that *"If the Adjudication Panel had applied the "objective" element without reference to the actual state of mind as to the facts of the individual concerned, then in my judgment they would have erred in law"*.

The Court ultimately found that the Panel *"did have regard to what they found Ms Yussouf's state of mind to have been when she filled in the application form…In reaching their conclusion in respect of the "objective" test they took into account their findings about her state of mind"*. Accordingly, the Panel had not made any material error of law in the circumstances.

However, the appeal was allowed, on the basis that, where factual or mitigation issues arose, fairness dictated that an opportunity should be provided for an appellant to give evidence orally on those matters, should they choose to do so. The Court stated (para 123) that although the apparent cumulative impact of all of the evidence appeared to suggest an "overwhelming case" against the Appellant, if there was an explanation that could be given, by way of an oral hearing, it was unfair for her to have been denied one.

General Medical Council v Raychaudhuri [2017] EWHC 3216 (Admin)

This case involved an appeal by the GMC against a decision by the MPT that Dr Raychaudhuri's fitness to practice was not impaired by reason of misconduct and also an appeal against the imposition of a warning upon his registration for five years.

Prior to seeing his patient, the Respondent had reviewed his medical history and made

[2] That individuals will be considered to have acted dishonestly (a) if they did so by the ordinary standards of reasonable and honest people and (b) if they were aware that they were acting dishonestly by those standards.
[3] [2017] EWHC 2892, at 22 and 24

several entries in a proforma assessment form. He was called away and left the proforma in another doctor's office. It was found and passed on, the assumption being that the patient had been seen by a doctor, given the notes in the proforma. The patient's parents advised that he had not been seen. A nurse contacted the Respondent who confirmed that he had not seen the patient, and, claimed that a senior house officer must have reviewed him.

A consultant contacted the Respondent, who denied writing examination findings on the proforma prior to seeing the patient and stated that he had only written background information on the basis of a GP's letter. He denied documenting findings without intending to see the patient.

The Tribunal found that the Respondent's actions in completing the proforma were misleading but not dishonest and that the details relayed to the nurse were false and misleading but that the Respondent had not known them to be false, and that they were not dishonest; and, that his denial to the consultant had been false and misleading but not dishonest. The conclusion was that the Respondent's actions amounted to misconduct, but not to the level that that public confidence in the profession would be undermined if no finding of impairment was made. The misconduct fell short of a finding of impairment and a warning was imposed.

On appeal from the GMC, the Court found that these findings were wrong, and that the Respondent had been false and misleading; and, that he had known it was false and that he had made a denial in the face of clearly and repeatedly expressed concerns from the consultant about his integrity.

Applying the *Ivey* test, there was no basis on which the Respondent's state of knowledge or belief as to the essential facts could lead to any conclusion other than that, by the standards of ordinary decent people, his denial had been dishonest.

Whether applying *Ghosh* or *Ivey*, the Respondent had acted dishonestly when he denied having written examination findings on the proforma prior to seeing the patient. The Tribunal's determination to the contrary was therefore wrong and the finding that the Respondent's denial to the consultant was not dishonest was quashed and replaced with a finding of dishonesty. The finding that he was not impaired was therefore quashed, as was the warning. The matter of sanction was therefore remitted to the Tribunal for further consideration[4].

[4] (para.57).

Conclusion

Seven months on, after the result of the *Ivey* Judgment, the application of the new test for dishonesty has begun to bite in courts and regulatory tribunals up and down the country. In determining whether an individual has been dishonest, tribunals in professional regulatory proceedings will need to objectively judge the standard of their behaviour, given whatever is known regarding the actual state of mind of the individual as to the facts. Time will tell whether proving 'dishonesty' has in actual fact become easier or more difficult!

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Dr Bawa-Garba: the fate of one Doctor

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Background to the Case

In 2015 Dr Hadiza Bawa-Garba, a paediatric registrar, was convicted of manslaughter and given a 24-month suspended sentence at Nottingham Crown Court. As part of the proceedings, a reflective note Dr Bawa-Garba had created after the event was allegedly used in evidence against her. Dr Bawa-Garba was held responsible for a sequence of failings and it was found that she had failed to recognise the early symptoms of sepsis in her six-year old patient and, as such, appropriate antibiotic treatment was delayed. Due to this, and a number of contributory factors, the patient died.

The jury in her case were directed to apply the test for gross negligence manslaughter as in the case of *R v Sellu* [2016] EWCA Crim 1716, i.e. whether Dr Bawa Garba's conduct was "*truly exceptionally bad and was such a departure from [the standard of a reasonably competent doctor] that it consequently amounted to being criminal*". The Jury found that her conduct satisfied this definition, resulting in Dr Bawa Garba's conviction.

The Court of Appeal refused her leave to appeal her conviction and it was noted that evidence of multiple *"systemic failings"* affecting the Trust on the day in question had been placed in front of the jury as part of Dr Bawa Garba's defence. These included "failures on the part of the nurses and consultants, staff shortages, IT failures, deficiencies in handover, and no automatic consultant review".

Following the criminal proceedings Dr Bawa Garba appeared before the Medical Practitioners Tribunal Service, who considered whether she should be erased from the Medical Register. By this point she had remained in practice and had been working safely for four years following the original incident. Accordingly, and having regard to the systematic failings identified in the Trust, the Tribunal found that Dr Bawa Garba's *clinical failings had been remedied, leaving a low risk of future harm*. As such, the Tribunal concluded that permanent erasure was disproportionate, and that suspension would be sufficient to maintain public confidence in the medical profession.

This decision was appealed in the High Court by the GMC. Giving Judgment, allowing the GMC's appeal, Ouseley J, strongly disagreed with the Tribunal's decision, as well as the way in which it was reached. He stated:

> *"[37] I have come firmly to the conclusion that the decision of the Tribunal on sanction was wrong, that the GMC appeal must be allowed, and that this Court must substitute the sanction of erasure for the sanction of suspension…the Tribunal did not respect the verdict of the jury as it should have. In fact, it reached its own and less severe view of the degree of Dr Bawa-Garba's personal culpability. It did so as a result of considering the systemic failings or failings of others and personal mitigation which had already been considered by the jury; and then came to its own, albeit unstated, view that she was less culpable than the verdict of the jury established. The correct approach…is that the certificate of conviction is conclusive not just of the fact of conviction…it is the basis of the jury's conviction which must also be treated as conclusive…[49] Where erasure is indicated, as on any view it was indicated here by the Sanctions Guidance at [103.c] – doing serious harm to a patient through incompetence even where there is no continuing risk to patients – a decision that erasure should not be imposed requires the reasons and circumstances why not, to be sufficiently significant to maintain public confidence in the profession and its professional standards. This was after all the basis for the finding of impairment, not a continuing need for remediation…There was no suggestion, unwelcome and stressful though the failings around her were, and with the workload she had that this was something she had not been trained to cope with or was something wholly out of the ordinary for a Year 6 trainee, not far off consultancy, to have to cope with, without making such serious errors. It was her failings which were truly exceptionally bad. [53] But I consider that the Tribunal did not give the weight required to the verdict of the jury, and was simply wrong to conclude that, in all the circumstances, public confidence in the profession and in its professional standards could be maintained by any sanction short of the erasure indicated by the Sanction Guidance..."*

The Reaction of the Medical Community

The medical community at large have reacted with anger and concern following the Judgment. Two main issues have been highlighted following the Judgment of the High Court:

1. The systematic failings on the part of the NHS Trust; and

2. The danger that doctors would no longer feel free to open up about their failures in order to learn from their mistakes.

Concerns have been expressed by doctors in the British Medical Journal, as well as in various news report interviews that Dr Bawa Gaba was apparently singled out unfairly for sanction instead of taking a wider look at the systematic failures of the Trust in question. This is an ongoing concern, which forms part of the wider concerns which have historically been associated with the NHS. Most recently, this has resulted in a vote of no confidence in the GMC at the Local Medical Committee conference on 9 March 2018 and a planned march on the GMC offices later in the month, with many calling for the resignation of the Chairman of the GMC.

Furthermore, a Government Review into the use of gross negligence manslaughter was ordered in February 2018, as a result of the outcry following the Judgment in this case.[5]

In that context, the Medical Protection Society have stated that the legal bar for convicting healthcare professionals of manslaughter is currently "too low" as neither intent, carelessness nor recklessness were required for a conviction. The MPS argued that medical manslaughter cases were complex, involving system failures and were “devastating” for everyone involved. Their recommendation is for the law to move into line with the legal test for culpable homicide in Scotland, which requires an act to be intentional, reckless or grossly careless.[6]

Perhaps more widely vocalised in the wake of this Judgment, and the trigger for the review is the perceived “criminalisation of medical error*” in circumstances where events were considered in isolation as opposed to as a part of the wider system. The fear from doctors is that this will have a negative effect on learning.*

Doctors have expressed their concerns over social and news media, that Dr Bawa Garba’s confidential reflections, used as a learning tool, were used as evidence against her during the hearing process, thereby undermining “a cornerstone principle of medical education” and demonstrated a forfeit of moral agency “in displays of public bluster”. There is fear that

[5] Matthews-King, A. *Bawa-Garba latest: Jeremy Hunt orders review into manslaughter by gross negligence rulings in the NHS*, 6 February 2018 - http://www.independent.co.uk/news/health/bawa-garba-latest-jeremy-hunt-nhs-manslaughter-gross-negligence-rulings-review-order-jack-adcock-a8196926.html

[6] *Legal bar for convicting healthcare professionals of manslaughter is 'too low', medical organisation warns*, Tuesday 13 March 2018 - https://www.telegraph.co.uk/news/2018/03/13/legal-bar-convicting-healthcare-professionals-ofmanslaughteris/

medicine will become more defensive as a result and that the medical landscape has been forever altered as a result of this Judgment[7]*.*

The Secretary of State for Health, Jeremy Hunt notably tweeted about the Judgment and appearing on the Today programme he noted the possible unintended consequences, stating:

"*For patients to be safe, we need doctors to be able to reflect completely openly and freely about what they have done, to learn from mistakes, to spread best practice around the system, to talk openly with their colleagues…If we are going to keep patients safe then we have to make sure that doctors are able to learn from mistakes."*[8]

Similarly, following the Judgment, thousands of doctors signed petitions in support of Dr Bawa Garba, several of which cited the 2001 declaration by the President of the GMC, Sir Donald Irvine, that "*honest failure should not be responded to primarily by blame and retribution, but by learning and by a drive to reduce risk for future patients*"[9].

The Royal College of Physicians and Surgeons of Glasgow have echoed this, noting the "significant implications for the supposed 'no blame' culture in the NHS and for "open learning from errors or near misses by way of reflective practice". Their argument, and that of many of the practitioners who came out in support of Dr Bawa Garba, is that detailed reflection by doctors is unlikely to be carried out in circumstances where it is likely to be used against them "in a punitive way", meaning that they will be more defensive and less likely to admit and learn from their mistakes.[10]

From an academic standpoint, it might well be argued that, Judgment of the High Court was faithful to the relevant principles which it had to apply; and, that it was merely operating within the existing regulatory medico-legal framework.

However, given the reaction of the medical community at large and, with the recent vote of no confidence, as well as the palpable anger and fear of working doctors, as well as the ongoing review into gross negligence manslaughter, it seems clear that a shake up of that framework is very much underway.

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[7] Khan. A, *As a doctor I know that any of my colleagues could be the next Hadiza Bawa-Garba*, The Independent, Thursday 1 February 2018 - http://www.independent.co.uk/voices/hadiza-bawagarba-british-doctor-jack-adcock-manslaughter-gmc-nhs-crisis-latest-a8189096.html

[8] *Jeremy Hunt says doctors must be allowed to discuss mistakes,* 26 January 2018 - http://www.bbc.co.uk/news/health-42833028

[9] http://www.bmj.com/content/359/bmj.j5223/rr-6

[10] https://rcpsg.ac.uk/news/2053-the-case-of-hadiza-bawa-garba-v-gmc?__hstc=55266676.1bb630f9cde2cb5f07430159d50a3c91.1517702400086.1517702400087.1517702400088.1&__hssc=55266676.1.1517702400089&__hsfp=998628806

Currently Dr Bawa Garba has decided to appeal the ruling, following a crowd funding campaign which has raised over £335,000; and, is considering appealing the original manslaughter conviction itself[11]. It remains to be seen how successful any such appeal might be, as well as the resulting effect on the medical and legal landscape.

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[11] Bawa-Garba to appeal High Court ruling and may challenge manslaughter conviction, 9 February 2018: http://www.bmj.com/content/360/bmj.k655