Lessons from the Case of Dr. Hadiza Bawa-Garba

Maya Pearlston and Natasha Danson

The case of Dr. Hadiza Bawa-Garba has ignited fierce debate in England, particularly among regulated health professionals. Dr. Bawa-Garba, a junior doctor, was found guilty of manslaughter and ultimately stripped of her medical licence after a series of fatal errors led to the death of a young boy under her care. In this article, we review the facts of the case and the outcomes of the criminal and regulatory proceedings and consider what lessons can be drawn that may be useful in the Ontario context.

Underlying Facts

Dr. Bawa-Garba faced criminal and regulatory proceedings with respect to her treatment of a six-year-old boy named Jack Adcock. In February 2011, Jack, who had Down syndrome and a known heart condition, was admitted to a children's assessment unit where Dr. Bawa-Garba was the most senior treating doctor present in the unit that day, despite her being a medical trainee. The unit was understaffed and Dr. Bawa-Garba was covering the work of two doctors. A series of errors by Dr. Bawa-Gaba, including missing signs of Jack's infection and mistakenly thinking he was under a do-not-resuscitate order, led to Jack's death 11 hours after being admitted to the hospital. Jack ultimately died of organ failure, including heart failure, as a result of undiagnosed sepsis.

On November 4, 2015, Dr. Bawa-Garba was convicted of manslaughter by gross negligence in connection with Jack's death following a criminal jury trial. The jury was satisfied that Dr. Bawa-Garba's negligence had significantly contributed to Jack's death. On November 14, 2015, Dr. Bawa-Garba was sentenced to two years' imprisonment, which itself was suspended for two years. On November 29, 2016, the Court of Appeal Criminal Division refused to allow Dr. Bawa-Garba's appeal of the conviction.[1]

Medical Practitioners Tribunal Service

Dr. Bawa-Garba then faced disciplinary proceedings in respect of the same events. The disciplinary hearing occurred in February 2017. Dr. Bawa-Garba admitted to the criminal conviction and sentence, which were the allegations against her at the Medical Practitioners Tribunal. The Tribunal was tasked with deciding whether on the basis of her conviction and sentence, Dr. Bawa-Garba's fitness to practise medicine was impaired (or, in Ontario terms, whether she had engaged in professional misconduct).[2]

As part of her regulator's reflective practice program, Dr. Bawa-Garba had reflected on how the mistakes that occurred in her treatment of Jack could have been prevented. Dr. Bawa-Garba referenced her reflective work when testifying in the regulatory proceedings against her; however, this evidence was not considered in the criminal proceedings.

Finding of Impairment

The Tribunal ultimately concluded that Dr. Bawa-Garba's fitness to practise medicine was impaired by reason of her criminal conviction.

The Tribunal found that Dr. Bawa-Garba's actions fell far below the standards expected of a competent doctor at her level, had brought the profession into disrepute, and had breached a fundamental tenet of the medical professional relating to good clinical care.

Despite these findings, the Tribunal considered that Dr. Bawa-Garba's clinical failings were capable of being remedied. It accepted evidence from a number of consultants and clinical colleagues that

Dr. Bawa-Garba had undergone remedial work directly related to the concerns in this case and that she had addressed the deficiencies in her practice in a significant way. The Tribunal found that the risk of Dr. Bawa-Garba's practice "suddenly and without explanation falling below the standards expected on any given day is no higher than for any other reasonably competent doctor".[3]

In relation to the principle of public interest, the Tribunal stressed that a finding of impairment was required in order to maintain public confidence in the profession and to promote proper professional standards and proper conduct for members of the profession.

Determination on Sanction

The Tribunal imposed a sanction of a 12-month suspension of her license to practise medicine.

In assessing the appropriate sanction, the Tribunal considered its overarching objectives to protect the public interest, on the one hand, and to ensure that a sanction is not overly punitive, on the other. The Tribunal also considered a number of mitigating and aggravating factors specific to this case. The mitigating factors included Dr. Bawa-Garba's prior unblemished record as a doctor and the fact that her actions occurred in the context of wider systemic failings. The aggravating factors included Jack's vulnerability and Dr. Bawa-Garba's numerous failings in her treatment of him.

The Tribunal ultimately concluded that a suspension would be the most appropriate sanction:

> [T]he Tribunal was of the view that a fully informed and reasonable member of the public would view suspension as an appropriate sanction, given all the circumstances of your case. It was therefore satisfied that the goal of maintaining public confidence in the profession would be satisfied by suspension of your registration.[4]

The Tribunal rejected the regulator's submission that Dr. Bawa-Garba should be erased from the register (the equivalent to 'revocation' in Ontario). It determined that erasure would be a disproportionate sanction given the circumstances of this case. It stated that Dr. Bawa-Garba's "actions and subsequent conviction are not fundamentally incompatible with continued registration" and that given her actions were neither deliberate nor reckless, "public confidence in the profession would not be undermined by a lesser sanction [than erasure]".[5]

Appeal to the Divisional Court

The regulator appealed the decision to impose a 12-month suspension, arguing that erasure from the register was the appropriate penalty.

The Divisional Court heard the appeal, and on January 25, 2018, it directed that the 12-month suspension be quashed and substituted with the sanction of erasure.[6]

In deciding the appeal, the Divisional Court determined that the Tribunal did not properly take into account the outcome of the criminal proceedings. In the Divisional Court's estimation, Dr. Bawa-Garba's failings were "truly exceptionally bad":

> [T]he 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 (disputed identity apart); it is the basis of the jury's conviction which must also be treated as conclusive, in line with what the Rule states about Tribunal findings. … [T]he Tribunal had to approach systemic failings or the failings of others on the basis that, notwithstanding such failures, the failures which were Dr. Bawa-Garba's personal

> responsibility were "truly exceptionally bad" … Although … such factors may reduce her culpability, they cannot reduce it below a level of personal culpability which was "truly exceptionally bad". The Tribunal had to recognise the gravity of the nature of the failings, (not just their consequences), and that the jury convicted Dr. Bawa-Garba, notwithstanding those systemic factors and the failings of others, and the personal mitigation it considered. The jury's verdict therefore had to be the basis upon which the Tribunal reached its decision on sanction.[7]

The Divisional Court concluded that the Tribunal was "simply wrong to conclude that, in all the circumstances, public confidence in the profession and its professional standards could be maintained by any sanction short of erasure … ".[8]

Second Appeal

On March 28, 2018, Dr. Bawa-Garba was granted a second appeal with respect to the judgment of the Divisional Court regarding the regulatory sanction imposed. The appeal has not yet been heard; it is set to be heard by the end of summer 2018.

Media Attention

The case attracted a significant amount of media attention. Doctors in the United Kingdom maintained that systemic factors in the hospital contributed to Jack's death and further questioned whether Dr. Bawa-Garba was treated more harshly because she is a woman who wears a headscarf and who had recently returned from maternity leave. Many doctors were alarmed by the police's decision to charge Dr. Bawa-Garba criminally in the first place, and they were equally shocked by the regulator's decision to appeal the Tribunal suspension, given that Dr. Bawa-Garba had not intentionally caused Jack's death. Hundreds of doctors signed an open letter in support of Dr. Bawa-Garba.[9]

Williams Review

The government in the United Kingdom commissioned Professor Sir Norman Williams to conduct a review in the aftermath of the *Bawa-Garba* case.[10] Professor Sir Williams had previously worked as the President of the Royal College of Surgeons, an organization in the United Kingdom committed to improving patient care. Through the Williams Review, Professor Sir Williams specifically set out to examine "the wider patient safety impact resulting from concerns among health care professionals that simple errors could result in prosecution for gross negligence manslaughter, even if they occur in the context of broader organisation and system failings".[11]

Recommendations from the Williams Review included the following:

- The establishment of a working group setting out a clear position of the law on gross negligence manslaughter.
- Individuals providing expert opinions must have proper training and must clearly understand their obligations to provide impartial decisions, given that expert opinions are crucial to any decision to pursue a charge for gross negligence manslaughter.
- Improvement of the quality of investigations prior to bringing charges of manslaughter by gross negligence. The Williams Review explained that investigations were often conducted in an arbitrary and inconsistent manner. It was also noted that black, Asian and minority groups were disproportionately subject to investigations for manslaughter by gross negligence.
- Health regulators should provide clear and consistent guidance on how health care professionals conduct reflective activities and whether such reflective materials can be used in criminal and disciplinary proceedings.
- The professions must determine what actions could result in the public losing confi-

dence in the professions. There should be consistency in fitness to practise/misconduct outcomes.

- Regulators should introduce equality and diversity standards.
- Regulators should consider ways to improve the supports offered to patients and family members affected by professionals who are undergoing fitness to practise proceedings.

Ontario Context

Gross Negligence Manslaughter

As a result of the *Bawa-Garba* case, the Ontario medical community expressed some concern that health care professionals, particularly medical residents, would become more hesitant in making independent decisions for fear of a regulatory complaint or a criminal charge. However, in our view there is no immediate cause for concern that health professionals in Ontario would be faced with the same fate as Dr. Bawa-Garba.

A 2008 article entitled "The Criminalisation of Medical Mistakes in Canada: A Review"[12] examined the incidence of criminal negligence causing death (the Canadian equivalent to the United Kingdom's gross negligence manslaughter) in professional practice.[13] The article identified 15 physicians in Canada who faced serious criminal charges as a result of alleged negligence in professional practice between 1900 and 2007. Only one of those physicians was convicted of criminal negligence causing death over this period (a 6.67 per cent conviction rate).

The 2008 article highlights the fact that physicians in the United Kingdom are more likely to face serious criminal charges for errors in professional practice and are more likely to be convicted of those charges than physicians in Canada. When looking at the rates in the United Kingdom during a similar time period, approximately 54 physicians were charged with manslaughter, with an approximately 30 per cent conviction rate. Even with this higher incidence of criminal convictions in the United Kingdom, the Williams Review makes it clear that "[d]espite reports to the contrary, investigations of gross negligence manslaughter in health care are unusual, prosecutions are rarer and guilty judgements rarer still".[14]

It should also be noted that Ontario courts have weighed in on the policy implications in relation to criminal negligence charges against health care professionals, such as in *R. v. Omstead*.[15] In that case, a nurse was accused of criminal negligence after mistakenly administering the incorrect medication to a patient, which resulted in the patient's death. The court found that the nurse had a reasonable belief that she administered the correct drug and determined that there was no marked departure from the conduct of a reasonable nurse. In coming to its decision, the court took into account the fact that the nurse immediately and voluntarily self-reported her error, which in turn helped the hospital to assess whether policy changes needed to be put in place to prevent similar occurrences in the future. The court noted that convicting the nurse in the circumstances could deter self-reporting, which would ultimately not be in the public interest, underscoring the need to maintain an open dialogue between health regulators and the professionals they regulate.

All that said, very recently two Hamilton paramedics were criminally charged for failing to provide the necessities of life in connection with the death of Yosif Al-Hasnawi, a 19-year-old man who was killed while trying to stop a fight in December 2017. It is alleged that the paramedics took too long to treat Mr. Al-Hasnawi and underestimated Mr. Al-Hasnawi's injuries. The head of the union that represents the paramedics has stated

that the charges are "unprecedented".[16] The criminal proceedings are at a very early stage, and so it is difficult to make any direct comparisons to the *Bawa-Garba* matter.

Reflective Practice

Another facet of the *Bawa-Garba* case that may interest Ontario health regulators relates to the use made of Dr. Bawa-Garba's reflective statements.

In Ontario, health care professions engage in formal reflection through regulators' quality assurance programs. The *Regulated Health Professions Act, 1991*,[17] which is the umbrella legislation governing the 26 regulated health professions in the province, requires all health regulators to administer a mandatory quality assurance program. The purpose of a quality assurance program is "to assure the quality of the practice of the profession and to promote continuing evaluation, competence and improvement among the members".[18] Beginning in 2009, the legislation requires that the quality assurance programs have self, peer and practice assessments,[19] which often involve a documented self-reflective activity. Importantly, subject to very few exceptions, the legislation prohibits a health care professional's quality assurance activities from being disclosed in other provincial proceedings. The general prohibition on the broad use of quality assurance information recognizes that health care professionals are less likely to honestly reflect on their practice if there is a risk that such reflections could be used against them in the future. However, it is not entirely clear if such information would be prevented from use in federal criminal proceedings against a health care professional.

As noted above, Dr. Bawa-Garba participated in her regulator's reflective practice program and reflected on how the mistakes that occurred in her treatment of Jack could have been prevented. She testified about these activities in the regulatory proceedings against her. Although the reflective materials were not used as evidence in the criminal trial, there was widespread concern among health professionals in the United Kingdom that such materials had been used in securing the criminal conviction against Dr. Bawa-Garba and could be used in such proceedings generally.

Recommendations from the Williams Review in relation to reflective practice, which may be of interest to Ontario health regulators in the development of their quality assurance programs, include the following:

- Regulators should amend guidance on how health care professionals carry out reflection, stressing the value of reflective practice in supporting continuous professional development.
- Regulators should clarify their approach to reflective material to make clear that they would be unlikely to use a health care professional's reflective material either for a regulatory or criminal proceeding.
- Regulators that have a power to require information from registrants for the purposes of fitness to practise procedures should have this power modified to exclude reflective material.

Conclusion

In our view, the *Bawa-Garba* decisions highlight the need for clarification in Canadian law regarding the use that can be made of quality assurance information in criminal proceedings and discipline proceedings. Doubts raised by cases like *Bawa-Garba*'s could lead to a decline in the honest participation of health care professionals in reviewing their own practice and could detract from the important goals of regulators' quality assurance programs. However, regulators should also consider the effect that protecting that information may have

on principles of transparency and how the public interest is best served vis-à-vis the use of quality assurance information. It is also noted, of course, that the ultimate use that can be made of such material will often be decided by Legislatures when they draft statutes, rather than by regulators when they interpret them.

The case also highlights the need for regulators to be mindful of issues surrounding the over-representation of racialized professionals in investigations and disciplinary proceedings. The medical regulator in the United Kingdom has recently embarked on an investigation of whether black and other ethnic minorities are subject to racism in disciplinary processes. From 2010 to 2016, the regulator noted that of the complaints received against doctors, 8.8 per cent of the complaints were against white doctors as compared to 10.2 per cent against racialized doctors.[20] It is critical for Ontario regulators to examine whether their investigation and disciplinary processes reflect values of diversity, equity, and equality.[21]

In any event, Ontario health regulators should continue to closely monitor the outcome of the appeal in the *Bawa-Garba* case to assess what lessons can be drawn and applied in the Ontario context.

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1 *R. v. Bawa-Garba*, [2016] EWCA Crim 1841.

2 *Re Bawa-Garba* (13 June 2017), online: Medical Practitioners Tribunal Service <https://www.mpts-uk.org/static/documents/content/Dr_Hadiza_BAWA-GARBA_13_June_2017_appealed.pdf>.

3 *Ibid*., at para. 20.

4 *Ibid*., at para. 31.

5 *Ibid*., at para. 32.

6 *General Medical Council v. Bawa-Garba*, [2018] EWHC 76 (Admin).

7 *Ibid*., at para. 41.

8 *Ibid*., at para. 53.

9 Nick Ross, *et al*., "Letter to the GMC chair regarding Hadiza Bawa-Garba" (2018) BMJ; Nick Ross, *et al*., "Second letter to the GMC chair regarding Hadiza Bawa-Garba" (2018) BMJ; Nick Ross, *et al*., "Third letter to the GMC regarding Dr Hadiza Bawa-Garba (reply to Professor Terence Stephenson)" (2018) BMJ; Abi Rimmer, *et al*., "'We would employ Hadiza Bawa-Garba,' say 159 paediatricians" (2018) BMJ.

10 "Gross negligence manslaughter in healthcare: The report of a rapid policy review" (2018), online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717946/Williams_Report.pdf> ["Williams Review"].

11 *Ibid*., at 7.

12 Fiona McDonald, "The Criminalisation of Medical Mistakes in Canada: A Review" (2008) 16 Health L.J.

13 The article focuses specifically on physicians who faced criminal charges.

14 Williams Review, *supra*, note 10, at 5.

15 [1998] O.J. No. 4821, 57 C.R.R. (2d) 342 (S.C.J.).

16 "Paramedics charged in connection with death of good Samaritan", *CTV News* (2 August 2018), online: <https://www.ctvnews.ca/canada/two-hamilton-paramedics-charged-in-death-of-good-samaritan-1.4037512>; Nicole O'Reilly, "Hamilton paramedics face criminal charges in Good Samaritan case", *The Star* (2 August 2018), online: <https://www.thestar.com/news/gta/2018/08/02/hamilton-paramedics-face-criminal-charges-in-al-hasnawi-case.html>.

17 S.O. 1991, c. 18 ["RHPA"].

18 *Health Professions Procedural Code*, being Schedule 2 to the RHPA, s. 1(1) ["Code"].

19 *Ibid.*, s. 80.1.

20 Henry Bodkin, "GMC to investigate racism as black doctors face greater number of complaints", *The Telegraph* (28 March 2018), online: <https://www.telegraph.co.uk/news/2018/03/28/gmc-investigate-racism-black-doctors-face-greater-number-complaints/>; "GMC commissions new research into fitness to practise referrals" (21 April 2018), online: <https://www.gmc-uk.org/news/media-centre/media-centre-archive/gmc-commissions-new-research-into-fitness-to-practise-referrals>.

[21] In the case of *Brar and others v. B.C. Veterinary Medical Association and Osborne*, 2015 BCHRT 151, the British Columbia veterinary regulator unsuccessfully defended an application before the British Columbia Human Rights Tribunal regarding whether its regulatory activities were discriminatory as against several Indo-Canadian veterinarians. In our view, this decision underscores the importance of these issues.

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