

Medico legal committee presentation to the BMA 2020 ARM

Introduction

About the committee

The committee is chaired by Dr Jan Wise:

Remit of the committee

- To consider and report on medico-legal issues of direct concern to the profession, including those referred to the committee by BMA Council, other BMA committees and external bodies.
- To lead on any work associated with Gross Negligence Manslaughter (GNM), on behalf of the Association.
- Knowledge sharing – medico-legal information for medical students and junior doctors.
- The committee holds an annual conference. This event provides medical professionals with a comprehensive introduction to working as an expert witness. The annual conference offers an important forum for doctors to meet leading barristers, solicitors and medico-legal experts in the field and the environment to exchange learning and good practice.

The committee's achievements this year (Non-Covid)

1. The President of the Family Division Working Group on Medical Experts in the Family Courts

In Autumn 2018, The President of the Family Division, Sir Andrew McFarlane established a Working Group to consider the problem of medical expert witness shortages in fact finding hearings in the family courts, to look at the causes and to identify possible solutions. Mr Justice Williams was appointed to Chair the Group with representation from the BMA Medico Legal Committee (MLC), the legal profession, the Royal Medical Colleges and other interested parties.

The impact of the shortages is principally creating delays although there are also concerns about the quality of some expert evidence which appeared likely to be linked to the shortages. The detrimental impact of delays is enshrined in statute and, relates to children under the age of three, where delays may have a direct detrimental impact upon the success of future placements.

Through its membership, the BMA attended a symposium, responded to the consultation on this matter and contributed to the Working Group report.

In particular, the MLC substantiated and enhanced the evidence on the factors which doctors identify as barriers or disincentives. These were Remuneration linked e.g. court processes, lack of support and training, perceived criticism by lawyers, judiciary and the press, financial concerns including delays in payment, the payment system (multiple invoices and having to submit invoices through solicitors and not direct to the Legal Aid Agency), tax/pension implication, Inflexibility in court timetabling (including scheduling witnesses).

The Working Group produced its final report in July 2020; it contained twenty-two recommendations. The MLC will continue to work with the group on solutions to the wide range of barriers identified through engagement at senior level with the Department of Health, the Ministry of Justice as well as the NHS at a senior level.



The Treasury (pension linked tax consequences) will require more concerted action and BMA active engagement with the Government on this matter will be important.

2. The BMA position statement on the law of Gross Negligence Manslaughter (GNM)

GNM is a common law offence – as opposed to a statutory offence – which is defined by parliament and codified in legislation such as an Act of Parliament. It has been developed as a result of decisions of principle, and the application of that principle by the appellate courts. Whilst this means that the law can be further developed in the same way, it does mean that this is likely to be case specific and incremental, rather than through significant one-off reform.

The MLC through its extensive research of legal and medical databases found that 11 doctors had been charged with medical GNM in the UK between 2006 and the end of 2013. Of these, six (55%) were convicted.¹

The last three doctors convicted in 2012-13 all received custodial sentences rather than the usual suspended sentence. Before that, the most recent doctor to get a custodial sentence for medical manslaughter was in 2004. Since December 2014 four more doctors have been charged with medical manslaughter and are awaiting trial.

Investigations into the suspected offence are often lengthy and can take as long as three years. In the process, the doctor affected is under a great deal of stress and an NHS system that is already strained may be denied the services of that doctor.

The MLC also found that a large proportion of GNM investigations begin after the Coroner has referred the matter to the police. This calls for clearer guidance and clarity on statutory roles, responsibilities and procedures and early prosecutorial involvement in police investigations in medical cases.

As part of its work on this issue, over the past year, the MLC:

- Responded to the Sir Norman Williams rapid policy review into the issues pertaining to GNM, commissioned by Health and Social Care secretary Jeremy Hunt in the aftermath of the Dr Bawa-Garba ruling.²
- Responded to the Leslie Hamilton independent review into how the law on GNM and culpable homicide are applied to medical practice³.
- In response to BMA member requests, the MLC raised the question of whether to lobby for legislative change to the law on GNM and sought advice from Duncan Atkinson, QC on whether to pursue this course of action. After further consultation with its members and following legal advice, the MLC advised the BMA not to petition for legislative changes to the law on GNM.

Future work to be undertaken by the MLC on this issue

- The irregular way in which the Crown Prosecution Service (CPS) approaches its investigations and prosecutions into GNM and the separate and often incoherent judiciary approaches.
- The need for good practice guidance.

3. Whistleblowing

The MLC has been developing its thinking about the various proposals for whistleblowing reform. To that end, the committee has had meetings with Protect (formerly Public Concern at Work) and Whistleblowers UK and attended a whistleblowing All Party Parliamentary Group meeting.

In January 2020, the committee presented to the BMA Council, its report on proposals for whistleblowing reform and the Bill put forward by Protect (formally known as Public Concern at Work). The report pointed to the difference between raising concerns and whistleblowing, how to create a culture that deals with concerns, training and support for managers, assisting people collectively when concerns are raised about the same thing, support for post-graduate training, the consideration of a specialist tribunal, the engagement of front line staff in dealing with patient safety and the cooperation of external stakeholders.

1 <https://www.bma.org.uk/collective-voice/committees/medico-legal-committee/medical-manslaughter>

2 ibid

3 ibid

The committee asserts that as a trade union, the BMA is advised to support measures that will help members to raise concerns about patient safety without fear of reprisals.

The terms and conditions of appointment and the accompanying guidance to assist an expert witness

The MLC has developed the terms and conditions of appointment and the accompanying guidance to assist an expert witness to consider the matters that are most relevant to their contract to provide services and their obligations to the Court.

Future work to be undertaken by the MLC on Whistleblowing

The committee will continue to:

- Endorse incremental changes in legislation and promote improvements in organisational processes for responding to concerns without adding to the bureaucratic burden on the NHS, especially for GP practices, the duplication of the role of regulators and/or provide new opportunities for satellite litigation.
- Lobby for the introduction of a benchmarking tool in the healthcare sectors.

Things the committee has learned/developed this year (Covid)

1. Protection for the NHS and for NHS staff from clinical negligence claims arising from the Covid-19 pandemic

- Through its engagement with the defence organisations and other stakeholders, the MLC has continued to help shape wider debate and solutions on how doctors, dentists and other NHS staff involved in providing treatment to patients during the Covid-19 pandemic should be able to do so without the undue risk of the NHS being sued for negligence.
- As more NHS services resume, the MLC engaged with the MDU, the UK's leading medical defence organisation, in its call for the government to take action to stop the NHS being overwhelmed by an avalanche of negligence claims over the next few years.

The year ahead

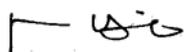
The MLC will form part of an expert committee to investigate how complaints against doctors are dealt with fairly after Covid-19.

The MLC will work with a cross party group headed by Dr Philippa Whitford, the SNP MP for Central Ayrshire, to urge Government ministers to commission an independent advisory report into how patients' complaints and claims against doctors are dealt with fairly after Covid-19.

Dr Philippa Whitford, the SNP MP for Central Ayrshire, has led efforts – supported by MPs from five political parties – to support to a call made by the medical protection organisation MDDUS for an independent expert committee to make recommendations on this issue.

The MLC will work with this party political grouping to present a cross-party proposal for an expert committee to advise Government on the full range of claims, disciplinary, regulatory and other legal matters likely to be raised in relation to medical practice during and more importantly in the aftermath of the Covid-19 pandemic.

This will help to ensure that the unique operational and ethical pressures faced by the profession in the last months are fully factored into processes and decision making, and in a way that does not jeopardise legitimate claims.



Dr M E Jan Wise
 MBBS MSc FRCPsych IDFAPA CCST
 Board member, European Psychiatric Association
 Honorary member, World Psychiatric Association