

Re: Possible industrial action by doctors in the NHS
Re: s.240 Trade Union and Labour Relations
(Consolidation) Act 1992

O P I N I O N

1. I am asked to advise the BMA on a passage in a document entitled *FAQs – Contingency Planning and Industrial Action* published by Capsticks solicitors in October 2022 and evidently designed to inform managers and, probably, medical staff in the event that the BMA calls industrial action by NHS doctors in the near future. The passage in question (paragraphs 19 and 20 at pp14-15) focusses on s.240 Trade Union and Labour Relations (Consolidation) Act 1992.

2. S.240 of the Act reads as follows:
 - 240 *Breach of contract involving injury to persons or property*
 - (1) A person commits an offence who wilfully and maliciously breaks a contract of service or hiring, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be—
 - (a) to endanger human life or cause serious bodily injury, or
 - (b) to expose valuable property, whether real or personal, to destruction or serious injury.
 - (2) Subsection (1) applies equally whether the offence is committed from malice conceived against the person endangered or injured or, as the case may be, the owner of the property destroyed or injured, or otherwise.
 - (3) A person guilty of an offence under this section is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 2 on the standard scale or both.
 - (4) This section does not apply to seamen.

3. The relevant passage in *FAQs – Contingency Planning and Industrial Action* commences by accurately reciting s.240(1). It ignores the significance of s.240(2). Later s.240 is summarised thus:

Section 240 ... makes it a criminal offence for a person to strike or take other industrial action if to do so is likely to endanger human life or cause serious bodily harm.

The passage continues by proposing that the unions involved should grant exemptions of particular areas or activities apparently based on the need to avoid committing a s.240 offence. Thus, the document continues:

If a union is refusing to negotiate on exemptions, the employer could write to employees in those areas pointing out that they consider them to be critical and that failure to attend work could place employees in breach of section 240, however, the onus should be on unions/individual staff members to ensure that those areas designated critical are covered.

4. The document is in danger of seriously misleading readers, whether doctors or managers. To suggest, as the document does, that '*it is a criminal offence for a person to strike or take industrial action if to do so is likely to endanger human life or cause serious bodily harm*' and that, in critical areas (A&E, maternity, pharmacy and radiology are given as examples), '*failure to attend work could place employees in breach of section 240*' fails to do justice to the provision.
5. S.240 creates a statutory offence which must be construed strictly. There are several aspects, all of which require consideration. In summary:
 - a. Each element of the offence must be proved to the criminal standard of proof.
 - b. The offence requires that the individual not only intentionally breaks his or her contract of employment (as is inevitable in organised industrial action) but also that s/he knows or ought to know that the probable consequence of *his or her* breach (alone or with other doctors) will be to endanger human life (or cause serious bodily injury).
 - c. It should be noted that the phrase "*probable consequence*" is not the same as "*possible consequence*". It must therefore be proved that the doctor's withdrawal of his or her labour is significantly more likely than not to be the cause of death or serious injury to a patient.

- d. The phrase '*either alone or in combination with others*' does not detract from the fact that the doctor charged with the offence must be proved to be a direct cause of the death or serious injury, though others with whom the doctor was acting (by participating in the same industrial action, for example) may also have a causative role in the death or serious injury.
- e. The offence also requires that the doctor knows (or had reasonable cause to believe) that the probable consequence of his/her participation in the strike will be that a patient will probably die or sustain serious injury.
- f. The premise of subsection (2) is that there must be proved to be a patient whose life is endangered or who will probably be seriously injured by the doctor's withdrawal of labour; a hypothetical patient will not suffice. It is to be noted that subsection (2) was not in the original text of the forerunner of this offence in the Conspiracy and Protection of Property Act 1875 so that it was not necessary before the inclusion of the subsection to identify a person whose life was endangered or who was injured.¹
- g. The word 'maliciously' in a criminal statute is a term of art and as such is not limited to, nor does it require, ill-will towards the person injured. Instead it connotes that *mens rea* (guilty intention) is required for the offence. In this instance it must mean that for the defendant to be guilty it must be proved that s/he: either intended the particular harm in question to occur; or was reckless as to whether it would occur.² 'Recklessness' in this context means actually appreciating the risk and then going on, unreasonably, to run that risk.³ However, in the s.240 offence, the import of subsection (2) is that it must be proved that the individual, in participating in the strike, did so with the intention of

¹ See M A Hickling, *Citrine's Trade Union Law*, 3rd ed., 1967, at 530. The original offence is found in s.5 Conspiracy and Protection of Property Act 1875, though this manifestation was surely derived from the Master and Servant Acts of the eighteenth and nineteenth centuries, and in particular the Acts of that name of 1823 and 1867.

² *R v Cunningham* [1957] 2 QB 396, 41 Cr App R 155, CCA.

³ The wider definition of recklessness in *Metropolitan Police Comr v Caldwell* [1982] AC 341, [1981] 1 All ER 961, HL only applies to a statutory offence which uses the word 'recklessly' expressly, and so does not apply here where the older formulation of 'maliciously' is used.

endangering the life of, or of causing serious injury to a specific person, or, appreciating the risk, was reckless as to whether it would eventuate. Were it not so, the addition of subsection (2) to the offence as drafted in 1875 would serve no purpose. This is an important point, for whatever ill-will a junior doctor in the present dispute may have towards the Secretary of State or towards his/her employing Trust and which may be part of the motivation for his or her participation in the planned strike, it is (Shipman apart) next to impossible to conceive that a doctor will join the BMA strike with the intention of harming a patient.

6. It will be noted that I have cited no legal precedent on the proper construction of s.240 but simply applied modern canons of statutory interpretation. The reason is that since the forerunner of this offence was first introduced in 1875 it appears that no prosecution has *ever* been brought in respect of it.⁴ The offence does not even merit a mention in the leading criminal law text, *Archbold on Criminal Pleading, Evidence and Practice*, 2023. The leading labour law text, *Harvey on Industrial Relations and Employment Law*, mentions but contains no analysis of s.240 beyond consideration of the general principles of construction of criminal statutes.⁵ Any consideration of the elements of the offence, above, shows the profound difficulties facing any prosecutor seeking to bring a charge founded on s.240. It is easy to think of several occasions in industrial history over the last century and a half in which prosecutors must have considered the possibility of mounting a s.240 prosecution but it is apparent that they decided that the difficulties could not be overcome.

⁴ S Deakin and G Morris, *Labour Law*, 6th ed., 2012, para11.5; *Stair's Laws of Scotland (Stair Memorial Encyclopaedia)*, Employment (3rd Reissue), section 3. Rights And Duties Within Contract of Employment, subsection (10) Contractual Duties and the Criminal Law, para.118; and (12) Industrial Action, para.127 Application of criminal law to industrial action; *Sweet & Maxwell's Encyclopedia of Employment Law*, E12.2. No case is reported in *Citrine* either. This contrasts to the thousands of prosecutions brought under the Master and Servant Acts which never fell below 7,000 p.a. between 1857 and their repeal in 1875 (Deakin and Morris, *op cit*, para 1.16).

⁵ *Halsbury's Laws of England*, *Stone's Justices Manual* and *Archbold Magistrates Courts Criminal Practice* all either recite or summarise the provision without analysis or commentary.

7. It might be thought grossly insulting for an NHS employer to suggest of its doctors that any of them would participate in industrial action in the belief that his/her personal participation (alone or with other BMA members) would, or would probably, endanger human life or cause serious bodily injury. It would be equally insulting to suggest that such a doctor would be indifferent (reckless) as to such a consequence. The principle of 'first, do no harm' is in the mind of every doctor. The avoidance of danger to human life or of serious injury is the very reason why the BMA invariably seeks to agree arrangements to deal with the industrial action with NHS employers, in the first place dealing with emergency cover and in the second in the circumstances of a complete withdrawal of labour by BMA members.

8. No doubt the arrangements will differ from employer to employer but I see no justification for the assertion that s.240 compels an automatic exemption from the right to strike (a fundamental human right protected by Article 11, European Convention on Human Rights⁶). The right to strike is an individual right though it is exercised collectively.⁷ No doubt Local Negotiating Committees (and the doctors themselves) will consider carefully, in the light of the arrangements which can and should reasonably be made, whether any particular doctor will know (or should know) that his or her participation in the strike will probably endanger the life of or cause serious injury to any patient. If the conclusion is that the doctor will not have that actual or constructive knowledge then s.240 is an irrelevance. It appears to me that doctors are entitled to rely on the good sense of their employers, senior colleagues, nursing and other staff and the Local Negotiating Committees to make arrangements so that the industrial action is carried out without, so far as is possible, intentionally or recklessly endangering life or causing serious injury.

9. The implied threat in *FAQs – Contingency Planning and Industrial Action* that doctors might be subjected to criminal prosecution for an offence unused for nearly 150 years, is hardly conducive to the maintenance of good industrial

⁶ See *RMT v UK* [2014] I.R.L.R. 467; (2015) 60 E.H.R.R. 10; 37 B.H.R.C. 145.

⁷ *Danilenkov v Russia* (2014) 58 E.H.R.R. 19.

relations in the NHS and may impede discussions about strike arrangements as well as doing little to aid the resumption of goodwill and normal working after the conclusion of the industrial action.

Lord Hendy KC
Old Square Chambers

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Re: s.240 Trade Union and
Labour Relations (Consolidation)
Act 1992

O P I N I O N

Gareth Williams,
BMA,
BMA House,
Tavistock Square,
London WC1H 9JP