

# Surviving a criminal prosecution for manslaughter

KEN WOODBURN

**It is any healthcare professional's nightmare to receive a call telling them they are being investigated for misconduct or, worse, medical manslaughter. But that is what happened to surgeon Ken Woodburn. In this article he provides a very personal and honest account of what he and his family went through.**

The phone call came while I was on a New Year break with my family – it was my Trust Medical Director letting me know that the police had been in touch. Following allegations made by a member of Trust staff, they were investigating the intra-operative death of a patient in my care two years previously. The patient had died from a rare but recognised complication of the procedure I had performed. Once the coroner's post-mortem had been undertaken, I had met with the patient's relatives to apologise and explain what I thought had led to the patient's death. The coroner's inquest following the event had recorded a verdict of accidental death.

I had notified the Medical and Dental Defence Union of Scotland (MDDUS) immediately following the patient's death, and they had provided clear and logical advice regarding my statement for the coroner as well as legal representation at

the subsequent inquest. It was to them that I now looked for further advice and support. Their advisor and lawyer both did their best to reassure me that this was merely a police enquiry and that I would probably be interviewed under caution in a month or so, once the police had completed their enquiries. It was unlikely that there would be any grounds for the Crown Prosecution Service (CPS) to recommend a prosecution once all the facts had been ascertained. However, until the police had completed their enquiries there was nothing else to be done.

I continued my normal working routine as an NHS Consultant Vascular Surgeon, with a heightened awareness of the vulnerability of my role. As time passed and we heard nothing further, I found myself becoming increasingly anxious, both at work and at home. I was finally interviewed by police, in the presence of my lawyer, some five months after their enquiries began. I was open and honest with the interviewing officers, answering all the questions to their apparent satisfaction, and the interview was as cordial as could be expected in the circumstances. Despite that, I had a strong feeling that a decision had already been made to proceed with a prosecution.

## FORMALLY CHARGED

About six weeks later, on the family summer holiday, the MDDUS lawyer phoned to confirm that the CPS had decided to proceed with a prosecution for manslaughter due to gross negligence. I was to be immediately suspended by my NHS Trust on return from leave, and was to present myself at the local police station



*Ken Woodburn: 'Seeing the security vans outside the court brought it home that I could be leaving in one'*

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to be formally charged, fingerprinted, and have DNA samples obtained. My initial response to this news, apart from the overwhelming fear of where these events could lead, was concern that my clinical reputation, built up over 15 years of hard work and study, was going to be destroyed by press coverage that I would be unable to respond to, and that patients and staff would believe the negative and highly exaggerated stories that would inevitably follow. My wife, a consultant radiologist, was the voice of reason who helped me get these thoughts into perspective. Talking things through with her, and the medical friends we were on holiday with, enabled me to obtain some clarity of thought.

On presenting myself to my Trust Medical Director, I was suspended from NHS clinical practice with immediate effect, and informed that I would not be allowed on Trust premises until the conclusion of the prosecution. I was forbidden from contacting any Trust employees at their work, and denied access to all emails sent to my Trust email address. My wife, who continued to work at the Trust, was briefed to expect lurid press headlines, attempts by journalists to obtain photographs and information about our family, and all manner of nefarious tabloid activities that terrified her. Fortunately, these never materialised. However, she went to considerable lengths to shield me from the worst of the press coverage that appeared in the days following my suspension and charging.

Although I had already voluntarily withdrawn from practising at the local private hospital, I received a flurry of correspondence from private health insurers informing me that I was no longer eligible to treat their policyholders, and that this would remain so until I was in a position to be reinstated. At this stage, neither the MDDUS lawyers nor I had any real insight into the basis for the charge that was being brought, and these actions,

although understandable and appropriate, did little to foster a belief that I was viewed as 'innocent until proven guilty'. However, my wife and I did our best to maintain some semblance of normality for the sake of our children.

### THE LEGAL PROCESS BEGINS

Following an initial appearance at the magistrates' court, a date was set for my appearance at the local crown court a week later, where I was required to confirm my identity and enter my not guilty plea. I made no other contribution to proceedings at that time, but my lawyers requested an early trial date, which was provisionally set for the end of the year.

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As the MDDUS lawyer and I had still not seen any of the prosecution statements, we remained unable to start framing my defence. Until these papers arrived, I spent my free time digitising the extensive collection of clinical teaching slides that I had accumulated as a senior registrar, in the hope that I would have the opportunity to use them for their intended purpose once more in the future.

The arrival of prosecution witness and expert statements finally gave me an active role in my own defence. Many hours were spent reading and re-reading these documents, pointing out the factual errors contained in them, and discussing how best to reveal these errors and misinterpretations with my legal team. It was certainly therapeutic to be able to see what the allegations against me were, and to start formulating answers to them. I worked closely with my legal team to obtain the opinions of experts

whose professional experience was pertinent to the procedure concerned and whose clinical and professional judgment I respected. After a number of case conferences, we were able to assemble a small team of experts who could offer a rational explanation of events on the day in question to assist the court in its deliberations.

In between the bouts of activity that followed the appearance of each batch of prosecution papers, I felt extremely isolated and fearful, wishing that something could be done to make the whole thing disappear. Despite the opinions of our experts, the fact that I was being prosecuted made me doubt my own clinical competence – I required regular reassurance that I hadn't done anything wrong and that everything would work out all right. Telephone conversations with senior members of my profession and others offered some comfort, but I came to realise that there was nothing that could be done to avoid my case going to trial.

Late in the preparation of my defence I received a summons to appear before a preliminary proceedings committee of the General Medical Council (GMC), who wished to commence a fitness-to-practise hearing, despite the fact that I was not practising in any capacity. My defence team believed that such a hearing might seriously compromise the forthcoming legal proceedings, and it took a half-day appearance at Hallam Street, with my barrister in attendance, to persuade the GMC that they should not commence a hearing until completion of the court case. I left that meeting aware that, even if I came through the court case, I was likely to have to go through the whole thing again before the GMC in the New Year – double jeopardy, indeed.

### THE TRIAL

The trial took place in the two weeks running up to Christmas. My mother stayed with us to look after our children,

while my wife and I faced a daily walk from our hotel to the court. For the first few days, we were met by press photographers and TV cameras. My father and sister sat in the public gallery with my wife, while I had to sit in silence through the prosecution opening statement and their subsequent evidence, all of which was designed to make me appear as negligent and guilty as possible. I had to rely on my barrister to ask the questions and make the necessary points that would reveal the lack of understanding and misrepresentations that had led to the trial. As a surgeon, I found this abdication of control very unsettling, and spent a lot of time making notes and passing them to my legal team – until my lawyer advised that I desist, as it might make the jury think that I didn't trust my legal team.

Sitting in the dock, observing the proceedings before me, I imagined that a crown court trial could be considered as a theatrical performance by prosecution and defence teams for the benefit of the jury, who then had to decide whose performance had been the more convincing. Unlike the serious untoward incident reviews we undertake in clinical practice, the legal process is not interested in 'root cause analysis' or why adverse events occur; it is simply an adversarial process designed to hold an individual to account for a perceived wrongdoing. The prosecution barrister's role was to make me look like a 'killer surgeon', a liar, and a man who didn't care about his patients and their outcomes. Any facts that were inconvenient to that narrative were to be ignored. My barrister's role was to sow doubt in the minds of the jury by highlighting all those inconvenient facts that didn't support the prosecution narrative, with our expert witnesses providing the only plausible explanation of the events in question that would enable the jury to understand a complex sequence of medical events and my role in them. The junior barristers seemed to spend a considerable amount of the time observing

the jury and how they responded to the various pieces of evidence presented to them. This 'audience reaction' is used to inform counsel's subsequent strategy.

## “ We are all only one error away from potential criminal prosecution ”

In medical manslaughter cases, the performance of the expert witnesses and the accused are usually the key to the outcome of the case. There are rare cases where the alleged negligence is so fundamental as to be apparent to a lay jury with no knowledge of medical procedures. However, it is far more likely that the alleged negligence relates to the finer points of clinical management and operative procedure, and in these cases the lay jury require detailed explanation from medical experts to ensure that they are furnished with enough understanding to reach a sound verdict. I had every faith in my expert witnesses and, as senior clinicians with in-depth knowledge of the events under discussion, they fully repaid that faith.

The main prosecution expert acknowledged that I had undertaken the procedure with a higher level of intra-operative monitoring than was the norm in his own institution at the time in question, and under cross-examination admitted that he was aware of a number of other, similar unfortunate events associated with the procedure in question. When I took the stand I was petrified, but managed to give clear, coherent and detailed responses to the aggressive interrogation of the prosecution barrister – responses that were the same as those that I had given to my patient's family, the coroner and the police following the event. My defence team felt that I had given the best possible account of myself.

My father remarked that the judge hearing the case appeared to grasp the key issues

fully, and had been extremely considerate to both sides during the presentation of evidence. This now became obvious in his summing up and direction of the jury, which was balanced and fair, highlighting evidential inconsistencies where they existed, and emphasising those areas where there was narrative consistency between police statements and subsequent verbal delivery of evidence in court under cross-examination. Then the jury retired to deliberate.

### THE LONGEST HOUR

It was only when we retired to await the jury's verdict and my legal team explained that if I was found guilty we would need to present evidence to the judge to justify why I should not face an immediate custodial sentence, that my wife realised how fragile our position was. We were at the mercy of 12 individuals who had to understand complex medical evidence, delivered in a confrontational setting. Their understanding and interpretation of the evidence was now out of our hands, and we could only hope that they were able to evaluate it in a balanced manner. I had always known that an adverse outcome could lead to incarceration. Going off to be alone with my thoughts while the jury deliberated, I was faced with rows of Group 4 Security vans parked in the court precincts, well aware that I could be leaving in one of them.

In under an hour, the jury foreman informed the clerk of court that they had reached a verdict. I returned to the dock to hear the result, overhearing the junior prosecution barrister comment on the way that, as the verdict had come in so soon, they must have found me guilty. When the 'not guilty' verdict was read out, I thanked the jury. Following an application by my legal team for costs to be met by the crown in view of the verdict, the ordeal was finally over.

### AFTERMATH

The press coverage of my acquittal was far more subdued and limited than any of the prior coverage, with no acknowledgement

of the impact that their unfounded, and now legally unproven, headlines may have had on any of the parties involved in the trial. Clearly, not being guilty meant that I was of no further interest to the media. My NHS Trust, however, were very interested in establishing just how quickly I would return to work for them, and I agreed to return to work the following February, some seven months after I had last been permitted on Trust premises.

Despite the jury taking less than one hour to find me not guilty, I was still facing the prospect of investigation and possible sanction from the GMC. This caused me considerable further anxiety, until I received a communication from them which indicated that, in light of the evidence presented at trial and my subsequent acquittal, they had decided that no further action was required on their part at the present time. However, the letter went on to say that if I was brought to their attention for any reason at any point in the next five years, they would reconsider this decision.

In the years following my acquittal I have done my best to rebuild my career and reputation, although there remains an online legacy of these events. The experience of losing a patient in such circumstances and the subsequent legal nightmare will always be with me. My first-hand experience of the criminal legal process is not something I like to revisit and it took 14 years before I finally felt able to describe it to my children. I doubt very much that the adversarial legal system provided all the answers to all the

questions that must have arisen for my patient's family, and it is certainly not a forum which encourages full and frank examination of all the facts.

Aviation, medicine and other professions have long acknowledged the contribution of the 'error chain' to adverse events. In my experience, investigating clinical incidents for my NHS Trust, there is never a single error or omission that leads to an untoward event, but a chain of suboptimal events that ultimately contribute to it. Our legal system seeks to attach all culpability to the individual at the end of that chain of events. It seems to be politically expedient to blame the unfortunate clinician who is trying to do their best for the patient, rather than to admit that our healthcare institutions may not have adequate organisation, resources and infrastructure to deliver their services with the lowest possible risk.

#### FINAL THOUGHTS

Medical manslaughter prosecutions consume an enormous amount of time and money, and cause considerable distress for everyone connected with them. The adversarial nature of our legal system precludes a thorough investigation of healthcare systems failures in favour of a focus on individual actions; yet this is an expensive game of chance, whose variables include the attitude of the presiding judge, the capacity of the jury to understand complex medical evidence, and conflicting interpretations of that evidence presented by medical expert witnesses. The ability to secure the most appropriate barrister for the defence, as well as the approach of

the prosecution barrister, are also highly relevant. Furthermore, the jury have to be able to identify with the defendant and empathise with them if there is to be any prospect of an acquittal.

I hope that my experience has made me a better doctor, and one who is more aware of how his actions may be perceived by others. However, I now believe that, as senior clinicians working in a healthcare environment that seems determined to hold individuals to account for its collective failings, we are all only one error away from potential criminal prosecution. If and when that happens, you will need your gods and your defence union with you all the way.

#### Declaration of interests

*None declared. No fee was paid to the author for contributing this article.*

#### Acknowledgements

The support that I received from my patients and hospital staff during this ordeal is the reason that I returned to clinical practice following my acquittal. I would like to take this opportunity to acknowledge that support and express my gratitude to them. I would also like to thank my wife and family for their unfailing support during these difficult times, as well as those colleagues, past and present, who offered support and counsel. The MDDUS, and in particular George Fernie, Huw Llewellyn-Morgan, and the legal team they assembled for my trial may say that they were only doing their job, but I am forever in their debt. Without their efforts I would not be in a position to relate this tale.