Causation: the difference between risking harm and causing harm

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Our primary focus in FtP processes will always be the misconduct alleged rather than the consequences of that misconduct.

Focusing on what harm resulted from a past incident won't necessarily help us understand how likely it is that the professional on our register will repeat the misconduct that led to the concern. Our function is not to punish professionals for past conduct, but to protect the public, maintain public confidence in the professions and to uphold professional standards. As a result, a serious outcome will not always mean that the professional's FtP is impaired, because:

- it may not have been caused by a breach of our standards, or
- the work the professional has done since to strengthen their practice may mean the misconduct is unlikely to be repeated.[1]

Example 1

A nurse delegates the dressing of two patients' wounds to a healthcare assistant. The nurse follows our guidance on delegation, but when he checks with the assistant later that the tasks have been done it becomes clear the healthcare assistant misunderstood and only dressed one wound. As a result the other patient's wound becomes infected, causing serious harm. While something has gone wrong in the patient's care, the nurse's actions did not breach our standards and there would be no need to take regulatory action.

Nevertheless, some harm is so serious that confidence in the profession may be undermined if the impact of a professional's misconduct isn't fully explored. If it can be demonstrated that a professional's misconduct caused death or serious harm, it is right that our decisions makers should be able to record and explore that fact. We refer to this as 'causation'.

Proving causation can:

- allow the full story of the misconduct and its consequences to be told;[2]
- help to evidence just how serious the underlying misconduct was; and
- guide decision makers in their assessment of a professional's reflection and strengthened practice.

We should consider whether to allege causation of death or serious harm where there is evidence to show that the outcome was caused by the professional's misconduct, and serious harm could and should have been anticipated.

When deciding whether to add an allegation of 'causing death or serious harm', we'll consider whether:

- there is sufficient evidence to prove causation;
- public confidence in the profession requires a finding of causation;
- the Fitness to Practise Committee (the Committee) need to decide causation to properly consider the seriousness of the actions alleged.

What we mean by serious harm

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When considering whether to pursue an allegation of causation, we will consider the definition of 'serious harm' adopted by the CQC and NHS services in relation to the duty of candour.[3] By serious harm, we therefore mean either:

- a permanent lessening of physical, sensory or intellectual function; or
- harm that is not permanent but is still significant; or
- harm that requires a substantial increase in treatment, such as:
  - unplanned further surgery
  - unplanned admission or re-admission to hospital
  - a prolonged episode of care
  - treatment being cancelled, or
  - transfer to another treatment area (such as intensive care); or
- psychological harm that has lasted or is likely to last for at least 28 days.

However, as set out above, whether serious harm has been caused and should have been anticipated is not the only factor in deciding whether to pursue an allegation of causation. Even if serious harm is caused, it must still be necessary to pursue an allegation of causation in order to protect the public. Similarly, there may occasionally be cases where public protection requires the panel to consider matters of causation even where the definition of serious harm is not met.

The test for causation

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We will carefully consider whether to pursue a case of causation. We would only do so where there is clear evidence that:

1. The professional's misconduct actually caused serious harm or death (factual causation); and
2. A reasonable and competent professional in the professional's circumstances would have known that their misconduct could result in serious harm (foreseeability)

Evidencing factual causation

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There are two types of factual causation we will consider when drafting charges:

But for' causation

- We will consider bringing an additional causation charge if the evidence demonstrates that death or serious harm would not have occurred 'but for' (without) the misconduct alleged.

Loss of chance' causation

- Sometimes it is the professional's response to a particular risk or clinical issue that forms the basis of the regulatory concern. We will bring a causation charge if, as a result of the misconduct, the person receiving care lost any real prospect of survival or avoiding serious harm.

Contribution

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Demonstrating that one professional caused the harm can be challenging in a multi-disciplinary setting, where a number of professionals and care givers may have been providing care to the person harmed. Sometimes the alleged misconduct is one of multiple factors that could have contributed to serious harm or death, and as such we cannot prove causation on the basis set out above. In such cases we will charge the underlying misconduct alone, without a causation charge.

Foreseeability

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To include a causation charge, as well as the harm being caused by the misconduct, it must also have been clear to a reasonable and competent professional in the circumstances that their misconduct could result in serious harm or death to the person receiving care. We'll normally rely on expert evidence to establish this.

Where a reasonable and competent professional would not have anticipated the serious harm caused and sought to avoid it, we will not pursue an additional causation charge.

Example 2

A nurse on night shift in a care home disables alarm bells and goes for a nap. One of the residents receiving care suffers serious harm as a result of not being able to operate the alarm bell to seek assistance. The risk of serious harm here would have been clear to any reasonable and competent professional.

Example 3

A nurse administers the wrong drug to a patient. The name of the drug actually administered by the nurse sounds very similar to the drug which was prescribed to the patient. The packaging of both drugs is very similar and the wrong drug was issued by the pharmacy.

We would judge the actions of a reasonable professional according to the information known to them at the time. There are contextual factors in this scenario –the fact that the two drugs had similar names and similar appearance and that the pharmacy had issued the incorrect drug. Based on these facts, we would be unlikely to bring any charge of either misconduct or causation.

Third-party evidence

If a causation charge is brought to the Committee, they may need expert medical evidence to decide on causation. However, we may be able to use material from third party proceedings (such as coroner's inquests) or our own clinical advisers to assist in understanding contextual factors and clinical elements to decide earlier in a case that a causation charge would not be appropriate.

A panel cannot adopt wholesale the findings of third-party proceedings (such as inquests or civil claims) as to whether the professional caused the harm.[4] This is because they will have been applying different tests and looking at different issues, whereas we are interested in fitness to practise. We can, however, rely on the same evidence as was used in other proceedings. We'll usually ask any independent experts involved in other investigations (such as those held by employers, the police, other regulators, or the coroner) to help with our investigation if they can.

Referring to serious outcomes in non-causation cases

Where we are not pursuing an additional causation charge, we may sometimes mention that the person receiving care subsequently died or suffered serious injury, but only if it's relevant as background context and it would be artificial to conceal these facts from decision-makers. We would be very clear that we're not suggesting that the professional's misconduct caused the death or serious harm. In these cases, the Committee must also be careful not to make any assumption that the professional's misconduct caused the death or serious harm.

[1] Professional Standards Authority v General Optical Council and Rose [2021] EWHC 2888 (Admin)

[2] R (El-Baroudy) v General Medical Council [2013] EWHC 2894 (Admin)

[3] This is based on Regulation 20(7) and (8) Health and Social Care Act 2008 (Regulated Activities) Regulations 2014/2936. This definition applies to both NHS health and social care services.

[4] Enemuwe v Nursing and Midwifery Council [2013] EWHC 2081 (Admin)