



Healthcare Update Issue 9

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National Strategy for Service User Involvement

On 6 May 2008 the Minister for Health and Children, Mary Harney, and Professor Brendan Drumm launched the National Strategy for Service User Involvement in the Irish Health Service. Consisting of seven goals, the Strategy will build on current good practice in involving service users (that is, patients, their families and voluntary and community organisations) across Ireland. One of the goals is to develop a Patient's Charter, seeking to service quality guarantees that patients can expect when they use the health services. The principles of the Strategy apply to all who use health and social services, those who participate in health programmes and services and those who work in the health service. Given that the HSE is to evaluate its success on an annual basis, it is advisable that where possible 'end users' are constructively consulted/ considered when formulating policies and initiatives.

For more details see
<http://www.dohc.ie/press/releases/2008/20080506.html>

HIQA: new nursing home standards

The Health Information and Quality Authority (HIQA) have published the National Quality Standards for Residential Care Settings for Older People (http://www.hiqa.ie/media/pdfs/HIQA_Residential_Care_Standards_2008.pdf 11 March 2008). For the first time, all residential care settings for older people run by private and voluntary providers and the Health Service Executive will be inspected by the Social Services Inspectorate within HIQA. The 32 quality standards set out the rights of residents in residential care settings in the areas of protection, health and social care needs, quality of life, staffing, the care environment, governance and management. For example, this will see the end of the use of open wards for residents within six years. The standards are due to be signed into law later this year.

Pharmacy/HSE dispute

The agreement of the various parties to enter mediation to resolve the ongoing dispute between the Health Service Executive (HSE) and pharmacists is welcome. The dispute relates to the HSE's recent implementation of an 8.2% reduction in the reimbursement price paid to pharmacists for drugs supplied under the GMS and Community Drugs Schemes, together with a further 1% reduction proposed for January 2009.

The existing Community Pharmacy Contractor Agreement between each community pharmacist and the HSE was negotiated in 1996. This 1996 contract amounts to a stand alone agreement which is legally binding on the pharmacist and HSE, conferring rights and obligations on both parties. One of the key clauses to note is clause 12(1) which states that "The Board shall in consideration of the service provided by the pharmacy contractor...make payments or arrangements for payments to be made to the pharmacy contractor for prescriptions dispensed at his/her contracted community pharmacy in accordance with such rates as may be approved or directed by the Minister from time to time after consultation with the Pharmaceutical Contractors' Committee"

In light of the above, it could be argued that there can be no change in rates of remuneration without those rates being approved or directed by the Minister and without there being "consultation" with the PCC. Consultation does not simply mean keeping someone informed. Even if the HSE places reliance on clause 12(3) it is not at all clear that the consultation requirement has been satisfied. This is only one of main issues that need resolution and it will be interesting to see how a compromise can be reached.

Regulating cosmetic surgery

The Irish Association of Plastic Surgeons (IAPS) has recently called on the government to change the advertising laws and provide for the regulation of cosmetic surgery clinics. Currently private health clinics are unregulated in Ireland. The IAPS wants a new code of practice and a regulatory body to be established to regulate the private healthcare sector. The IAPS also wants stricter rules for advertising and greater action to be taken by the Advertising Standards Authority for Ireland to remove misleading claims made for medical or surgical treatment. The newly established Irish Association of Cosmetic Doctors has echoed the IAPS's calls for regulation.

According to the Department of Health and Children, the need for regulation in the area is "currently under examination".



National infection prevention and control standards

Recent national hygiene audits and ongoing assessment initiatives ultimately aim to reinforce the three basic principles of infection prevention and control namely: hygiene; asepsis; and sterility in the prevention and control of health care associated infections. One of these initiatives is the assessment of infection prevention and control standards. Infections in the healthcare setting have traditionally been seen as a matter for clinicians only. However, draft National Infection Prevention & Control Standards, which will be subject to public consultation, state that healthcare managers will be central in ensuring appropriate structures are built into the system. The draft standards provide for executive level responsibility by a named person.

Causation: a robust approach in the UK

Case: *Drake v Harbour* [2008] EWCA Civ 25

Background. Although a professional may be deemed to have acted negligently, if his actions cannot be shown to have caused the loss complained of, there is no entitlement to damages.

Facts. The claimant engaged the defendant electrician to rewire her bungalow and vacated the property during the works. A fire started in the loft one night after the defendant had gone home. The English High Court held that the maxim *res ipsa loquitur* ("the thing speaks for itself") applied in circumstances where the defendant was in sole control of the bungalow when the fire started. He therefore had an extra evidential burden to discharge which he failed to do. The court held that it was more likely than not that the fire had been caused by the defendant's negligence. The defendant appealed.

Decision. The English Court of Appeal dismissed the appeal and held that the High Court had correctly held that, on the evidence, the fire resulted from the defendant's negligence. It, however, considered the correct approach to causation where negligence has been established but the claimant can not show which, of a number of possible factors, caused the loss. If the loss is of a type which one would expect to happen as a result of the proven negligence, then a court can infer that the proven negligence caused the claimant's loss. The onus is therefore on the defendant to show that other possible causes were *at least as likely* as his negligence to have caused the loss.

Discovery and privilege

Case: *Tír na nÓg Projects Ireland Ltd v The County Council of the County of Kerry* [2008] IEHC 48

Background. The purpose of discovery is to make available such documentation that exists and must be shared, whether it is in support of or undermines the respective parties' case.

Legal professional privilege protects against compulsory disclosure of communications made between a client and his lawyer in which advice is sought or given within a relevant legal context. Litigation privilege applies only where litigation is anticipated or is, in fact, underway.

Facts. The plaintiff sought a declaration that the defendant, Kerry County Council (KCC) had been deemed to grant planning permission for a holiday home development as KCC had not made a decision within the time specified in the Planning and Development Act 2000. The issue arose as to whether KCC had been in default and whether it involved a material contravention of the relevant development plan. Discovery of a single document which contained legal advice from KCC's solicitor was sought. KCC argued that the document had been placed in error on the public file, had been withdrawn, and could not be the subject of an order for discovery by virtue of legal professional privilege and/or litigation privilege.

Decision. Clarke J in the High Court in directing discovery of the document in question ruled that any privilege attaching to it had been waived by KCC. The document in question was relevant to the issues arising in the pleadings and while the document provided legal advice, it was available on a public file. The question of whether privilege can be said to have been waived in relation to the document in dispute turns on whether, objectively speaking, the plaintiff and its advisors should have realised that the disclosure of the document was by mistake. On the facts it was held that there was no error in this inclusion as there was no explanation given by KCC as to how it was put on the public file by mistake. The legal professional privilege attaching to it therefore had been waived.



Damages for alleged wrongful death

In a recent case a man underwent surgery for prostate cancer. He became unwell a few days after his hospital discharge and he was examined in his home by a locum GP. It was alleged that the GP failed to properly examine and diagnose the man's condition. It was also alleged that he was advised that he did not require any immediate medical attention but should attend his own GP after the weekend. Three days later he died from a massive fatal embolus. His widow sued the GP and another medical professional for damages for mental distress over the alleged wrongful death of her husband. Both defendants in separate defences denied the claims and the case against the other medical professional was struck out. The High Court action was settled for €300,000.

Third party claims funding

IMF Australia is the world's largest fund to invest in lawsuits. It is to open in Dublin to finance litigation in Europe and hopes to benefit from an increase in litigation arising from the global credit crunch. It will back cases against cartels in return for a percentage of any court award or settlement. The availability of funding may encourage parties to bring claims which might otherwise have been considered too costly or too risky, although generally the funder will wish to ensure that it is investing in a case with good prospects.

Changes in funding practice could lead to parties bringing actions which would not have been pursued previously, for example, in the field of class actions.

Maternal death: HSE report

The Health Service Executive report into the death of Tania McCabe in Our Lady of Lourdes Hospital last year is available at the following link:

http://www.hse.ie/eng/newsmedia/Report_into_the_death_of_Mrs_Tania_McCabe_and_her_son_published.html

New High Court judge

The Government has nominated Mr Daniel O'Keeffe, Senior Counsel, for appointment as a High Court judge. He has had wide experience in the areas of administrative law, judicial review, commercial/chancery law, and general practice.

The Healthcare Unit

If you have any queries on the contents of this update, or if there are other topics you would like to see us address in future editions, please contact any member of the Healthcare Unit listed below.

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