



Healthcare Update

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New legislation to regulate nurses and midwives

On 30 November 2007 the Minister for Health and Children, Mary Harney commenced a consultation process on proposed new legislation for the regulation of nurses and midwives.

The main aim of the proposed Nurses and Midwives Act 2008 is to protect the public and to ensure the integrity of these professions through the promotion of high standards of professional education, training, practice and professional conduct. The proposed Act also reflects the recommendations made in the Commission on Nursing Report 1998.

The key changes relate to:

- The reconstruction of An Bord Altranais including changing its composition and membership and providing for increased representation of the general public.
- Requiring the Board to give professional leadership, guidance and support to nurses and midwives.
- Changing the Register and registration process for nurses and midwives to allow for specialists, students and temporary registration.
- Providing for registered nurses or midwives to maintain their professional competence on an ongoing basis.
- Changing the Fitness to Practise process to provide greater protection to the public in line with the Medical Practitioners Act 2007 (which is not yet in force).
- Enhancing transparency and accountability in the governance framework.
- Recognising midwifery as a separate profession to nursing.
- Protecting the title of Advanced Nurse Practitioner (ANP) and Advanced Midwife Practitioner (AMP) and the provision to allow for additional titles to be protected if required.
- General realignment of the regulatory framework for the nursing and midwifery professions in line with the regulatory framework for other health professionals.
- Dissolution of the National Council for the Professional Development of Nursing and Midwifery and the transfer of its functions to An Bord Altranais and the Health Service Executive.

See http://www.dohc.ie/issues/nurses_and_midwives/ for more detail. Latest date for receipt of responses is 5 February 2008.

Solicitor's practice closed down during High Court action

The healthcare team were recently involved in a case that was adjourned mid-way through the hearing as the Plaintiff's solicitor's (Thomas Byrne & Co) practice was closed by the Law Society. The Plaintiff had commenced High Court proceedings as a result of an alleged injury sustained at a Defendant hospital following a trip and fall. The Law Society seized the firm's files for safe keeping and advised the Plaintiff to instruct a new solicitor. The Society does not nominate a new firm nor does it act on behalf of the Plaintiff in the interim.

An adjournment was sought to allow a new solicitor to come on record and take instructions. The Plaintiff did instruct new solicitors and the matter resumed before Miss Justice McCarthy very shortly afterwards where the matter was brought to a close.



Discovery in the electronic age: proposals for change

The purpose of discovery is to make available evidence which either supports or undermines the respective parties' cases. In March 2007, the Litigation Committee of the Law Society reviewed the current discovery rules (SI 233 of 1999) in light of the expansion of electronically stored information (ESI). The Committee identified the difficulties in applying the current rules to ESI such as the problems in searching for and reviewing such material and the fact that some parties may not realise that such data may be discoverable.

It is also important to note that just because one party argues that it may be more economical to have access to data on certain hardware and/or software applications, it may not necessarily warrant a discovery order.

The Committee made a number of recommendations:

1. Discoverable documents should be defined. The Committee also recommended adopting the English definition of: 'anything in which information of any description is recorded'.
2. Following a discovery application ESI should be provided in a searchable format. If this is too costly, provision should be made for the relevant party to inspect and search the relevant information with an independent expert, if necessary.
3. Where a large amount of information is sought in a discovery application, the party subject to the application should be allowed to limit it to the relevant information particularly if it involves an undue burden or cost and is unlikely to be necessary for disposing fairly of the case or for saving costs. The party seeking discovery could then seek further and better discovery if deemed necessary following a review of the initial discovery, subject to court approval.
4. Parties should list and provide documents for inspection in a manner that corresponds with the categories in the agreement or order for discovery or as they are kept in the usual course of business.
5. The Rules of the Superior Courts should be amended to provide that the affidavit of discovery should include an express statement of the obligation to discover.

Statute of Limitations and inordinate and inexcusable

In a recent case the Plaintiff commenced proceedings as a result of treatment provided to her during "and following" the birth of her first child in 1971. An episiotomy was carried out during the birth and the Plaintiff alleged that she had been sutured with inappropriate material and suffered from chronic diarrhoea and incontinency as a result. The Defendant hospital sought a direction that the Plaintiff's case was either statute barred or should be dismissed because of inordinate and inexcusable delay. In relation to the Statute of Limitations the High Court held that even though the Plaintiff was aware that apparently the wrong suturing material was used she was not aware that her subsequent incontinency problem was connected to this and hence was not aware this was "causally relevant act". The Plaintiff's claim was held not to be statute barred as the date of relevant knowledge for the claim was found to be within the appropriate time periods.

The court also held that the absence of relevant records and evidence from the medical personnel involved inevitably gave rise to the risk of information gaps being filled by speculative assertions. The court was satisfied that the loss of the records had not occurred due to any culpable omission, particularly as 25 years had passed between the treatment provided and the initiation of proceedings. The court also found that as the Plaintiff's GP records could not be located, the Defendant could not defend the proceedings. It was further held the delay involved in the prosecution of the action was inordinate but given the circumstances no fault was attributed to either party. The Defendant was therefore successful in having the Plaintiff's claim dismissed on grounds of inordinate and inexcusable delay.



PIAB, the Civil Liability and Courts Act 2004 and personal injury litigation

Recent court decisions have addressed the application of the Personal Injuries Assessment Board Act 2003 (2003 Act) and the Civil Liabilities and Courts Act 2004 (2004 Act). The 2003 Act applies to most personal injuries claims except for medical negligence claims and a number of other limited claims.

Under the 2003 Act the Personal Injuries Assessment Board (PIAB) does not have to make an assessment of personal injury compensation in certain circumstances, for example, where it considers that there is not a sufficient body of case law to which the claim relates; or in its opinion:

- The issues involved are too complex.
- The injuries incurred are wholly or partly physiological in nature.
- The aggravated or exemplary damages sought are *bona fide*.
- The claim relates to trespass to the person.
- The gravity of the injury or illness of the claimant requires a court action.

In relation to aggravated damages, given the limited assessment that a PIAB assessor might carry out, the “rejection” of a claim for aggravated or exemplary damages by PIAB is not only sensible but probably constitutionally mandated as endorsed by Mr Justice McCracken in *Philip v Ryan* ([2004] 5 IR 241).

The 2004 Act applies to most personal injuries actions. However like the 2003 Act there are some exclusions, such as applications under the Garda Siochana (Compensation) Acts. Section 22 provides that the courts are required to have regard to the provisions of the PIAB book of quantum. However, some injuries are not mentioned in the book of quantum. In *Kenny v Cowley* the Supreme Court considered the assessment of damages in relation to the loss of an eye ([2006] IESC 37). The trial judge had made an award of €90,000 for general damages. Mrs. Justice Denham in the Supreme Court sought to refer to the PIAB book of quantum however noted that “it does not quantify damages for the loss of an eye, as yet.” From previous experience she considered that €120,000 was more appropriate.

There may be other cases where the book of quantum may be of no assistance at all. For example, in *Corbett v Quinn Hotels Ltd* Mr. Justice Finnegan considered the evidence in relation to the injuries sustained by the Plaintiff to her knees and shoulder ([2006] IEHC 222). While the judge accepted that the Plaintiff had sustained injuries, he considered that the Plaintiff was overly concentrating on her injuries and he was unable to accept that she had significant pain or discomfort. Because of the nature of the case the judge did not propose to apportion damages between the various injuries and therefore the book of quantum would not have assisted in this determination.

In *Shelly-Morris v Bus Atha Cliath* in the Supreme Court Mrs. Justice Denham identified the manner in which the issue of exaggeration may arise: where the whole claim is concocted; where there is a genuine claim but injuries are exaggerated due to the Plaintiff’s subjective belief; or where there is a genuine case of negligence established but the plaintiff deliberately exaggerates the injuries ([2003] 1 IR 232). Mr. Justice Hardiman stated that “It must not be thought that a falsehood in respect of one aspect of the claim will, at worst, lead to that particular part of the claim being reduced or disallowed. The courts have a power and a duty to protect their own processes from being made the vehicle of unjustified recovery. In a proper case this will be done by staying or striking out the plaintiff’s proceedings.” However, this was not followed in *O’Connor v Bus Atha Cliath* ([2003] IESC 66).

In *Carmello v Casey & anor* a case involving a road traffic accident the court dismissed the Plaintiff’s action ([2007] IEHC 362). The Defendants alleged that the Plaintiff deliberately gave false and misleading evidence in order to exaggerate his claim and they applied to the court to dismiss the claim under the 2004 Act. The Plaintiff claimed for damages to his face as a result of striking the left hand side of his face off the dashboard. However, he had failed to disclose in his statement of claim or replies to particulars a subsequent and relevant later injury to his face. In evidence, the Plaintiff was unable to recall the later incident. Mr. Justice Peart considered that on the balance of probabilities the Plaintiff had knowingly given false or misleading evidence. This case highlights the importance of what is pleaded being wholly consistent with the evidence to be adduced in line with the affidavit of verification as sworn.



Law reform: proposals for the future

The Law Reform Commission's Third Programme of Law Reform 2008 – 2014 was launched on 17 December 2007. It was prepared following consultation with the Attorney General, members of the public and public representatives, Government Departments and non-governmental voluntary and community organisations. 37 areas of law have been identified for review including limitation of actions; alternative dispute resolution; consolidation and reform of the Courts Acts; documentary evidence and technology; hearsay in civil and criminal cases; advance disclosure of defence cases; forensic evidence; expert evidence; legal aspects of bioethics; legal aspects of assisted human reproduction; and damages in contract and tort law.

For more detail see <http://www.lawreform.ie/3rd%20Prof.pdf>

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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