



Healthcare Update

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New professional conduct and ethics guide for practitioners

It is a function of the Medical Council to give “guidance on all matters related to professional conduct and ethics for registered medical practitioners” under the Medical Practitioners Act 2007. On the 17 November 2009 the Council published their revised Guide to Professional Conduct and Ethics for Registered Medical Practitioners (7th Edition 2009).

In the Guide the Council has sought to clarify a number of specific areas including consent, confidentiality, end of life care, provision of information to the public, prescribing practices and referral of patients. Principle 18 states that doctors should acknowledge their mistakes to patients if something goes wrong and, if appropriate, apologise. It confirms in writing the “ethical” duty of candour: note that this is not a legal duty despite being called for by patient advocacy groups. The Council also states in the Guide that it intends to develop, in consultation with relevant stakeholders, further guidelines relating to assisted human reproduction and the relationship between doctors and commercial enter-prises.

Link to Guide: http://www.medicalcouncil.ie/_fileupload/misc/171109%20Final%20Version%20Ethics%20Guide%20Update%20For%20Printer.pdf

New Nursing Homes Support Scheme

The Nursing Homes Support Scheme set up under the Nursing Homes Support Scheme Act 2009 commenced on 27 October 2009. It set up a new voluntary scheme of financial support for people who require long-term nursing home care. It does not cover short-term care such as convalescent or day care.

The scheme is the same for public and private care and anyone who applies for and is assessed as needing long term nursing home care will now make a contribution to their care costs based on their means. A person’s contribution is limited to 80% of their disposable income. The scheme does not differentiate between people based on their age or medical condition. Individuals already in receipt of subvention under the previous nursing home subvention scheme can retain their existing arrangements or opt to transfer to the new scheme. The Act also allows for the deferral of part of the contribution in specified circumstances. The scheme also offers protection for those applicants who lack the mental capacity to apply for the scheme. Under the scheme, care representatives can be appointed by the Circuit Court to represent their interests.

Working Time Directive and doctors

Under the EC Working Time Directive (93/104/EC) as consolidated in Directive 2003/88/EC (the Directive), workers in the EU are generally subject to a maximum working week of 48 hours. The main provisions of the Directive are to limit maximum hours of continuous working, daily working and weekly working and to establish minimum entitlements to rest periods and paid annual leave for most workers in the EU. The Organisation of Working Time Act 1997 implements this Directive in Ireland.

The “activities of doctors in training” were excluded from the Directive until recently. However a 48 hour average working week was introduced on 1 August 2009 for doctors in training.

“Activities of a doctor in training” are defined as the activities of a registered medical practitioner other than the activities of:

- a. a hospital consultant;
- b. a consultant psychiatrist - whether in hospital practice, practice in the community or both; and
- c. any other person, not being a person in hospital practice or psychiatric practice, who is entitled to be registered in the Register of Medical Specialists and who works without being supervised in professional matters by any other person.



Formal offers: what are they?

Section 17 of the Civil Liability and Courts Act 2004 deals with the mandatory making of formal offers of settlement in personal injuries actions. It provides that all parties to an action must indicate their terms of settlement in writing and the offer must be lodged in court. The court must then consider the formal offers when deciding the issue of costs. The formal offers can be used to ascertain the plaintiff's valuation of his case and are designed to promote early resolution of cases. Section 17 operates in addition to the existing rules relating to lodgements and tenders and only requires the court to have regard to the terms of the offer and the reasonableness of the conduct of the parties making it. The Act sets out the procedure to be followed.

While the facts of each individual case and the most effective strategy must be considered, formal offers should be filed in accordance with the rules in order to achieve the best result by either persuading a plaintiff to settle out of court or persuading a court to penalise a plaintiff on costs for not accepting a reasonable offer.

Medical Register registration issues

Patient Focus has called on the Medical Council to comment on rules to ensure doctors who were struck off in another country may not be registered in Ireland. The patient advocacy group referred to a recent case where it emerged that a doctor who was removed from the medical register in another country was employed in Ireland. It is hoped that an appropriate response from the Council will soon be available. In a related development the Council has just published the criteria for restoring the registration of a doctor who has been struck off the Medical Register.

Freedom of information and access

Under the Freedom of Information Act 1997 and the Freedom of Information (Amendment) Act 2003 (the Acts) the public may ask to see any record (including medical records) held by the public authorities (such as public hospitals) covered by the Acts. In September 2009 the Minister for Finance published the Freedom of Information Act 1997 (Section 28(6)) Regulations 2009 clarifying access issues for next of kin, spouses, parents and guardians with regard to the Acts. The definitions and clarifications have been welcomed by those dealing with requests daily.

Recent cases

Brachial plexus injury case

In a recent case a plaintiff (suing through his mother/next friend following his birth) alleged that shoulder dystocia occurred at the time of his birth and that as a result the plaintiff subsequently suffered a brachial plexus type injury. The plaintiff was 11 years old at the time of the hearing. The Healthcare Department represented the hospital and midwives and following the plaintiff's mother's evidence in court, negotiations resumed and that case was compromised at a level agreeable to all. This was a positive result for the hospital.

Back injury claim

In a recent case a plaintiff alleged that during the course of her employment with the defendant hospital she injured her back while lifting instruments on and off a trolley provided. The plaintiff alleged that she did not get training on using the trolley system and therefore believed that the hospital was liable for her injuries. However, other employees of the insured hospital represented by the Healthcare Department were able to establish that they had been given a demonstration on the use of the new system by the trolley supplier and produced supporting training documents. This proved very helpful towards a reasonable 'all in' settlement being reached on the day of the High Court hearing.

Successful settlement of an alleged significant injury

The Healthcare Department recently obtained a very successful settlement on behalf of a large Dublin teaching hospital. The plaintiff alleged that he sustained an injury to his shoulder during the course of his employment. He claimed that the injury prohibited him from working or carrying out basic daily tasks. By analysing each of the heads of damage claimed by the plaintiff in some detail, the defendant was in a position to secure a settlement that represented one fifth of the plaintiff's initial claim.



Eye laser surgery case

In a recent Circuit Court case, the plaintiff alleged that following a laser procedure carried out in a private clinic under the care of a consultant ophthalmologist represented by the Healthcare Department, she suffered an eye infection and had to be hospitalised for two weeks. At hearing Mr. Justice Matthews noted that the plaintiff's allegations related to the aftercare provided to the plaintiff rather than any negligence in terms of the procedure. Having heard the plaintiff's evidence Mr. Justice Matthews noted that there was only one issue for the consultant to answer and once dealt with he was released entirely from the proceedings and awarded costs against the plaintiff.

MRSA case statute barred

Generally speaking under the Civil Liability and Courts Act 2004 the statute of limitations for all personal injury actions is two years from the date of the cause of action. This is the maximum period of time, following certain events, that legal proceedings based on those events may be initiated. The plaintiff in a recent case wrote to the defendant hospital alleging that she had contracted a healthcare-associated infection while hospitalised. The facts were on a par with the *Cunningham v Neary* case. She did not, however, commence proceedings within the requisite two year period under the Act. The Healthcare Department on behalf of the defendant hospital issued a motion to have the statute of limitations heard as a preliminary issue. The plaintiff was deemed to have had the requisite knowledge and that she should have commenced proceedings at the time she wrote the letter or prior to writing it. Therefore her case was dismissed by the High Court as it was statute barred.

Hair transplant procedure action: damages awarded

In a recent case a man who underwent a hair transplant procedure at a clinic for €7,000 was very unhappy with the outcome. An independent expert instructed by him advised that it would cost €50,000 over a period of three years for the repair work to be carried out. He took an action against the treating clinic. In court the plaintiff's expert could not be specific in terms of the repair work that would be required or the cost of that work. The defendant's expert was able to propose an approximate figure and time line for the repair work to be carried out. Despite the "unclear" evidence given by the plaintiff's expert, Mr. Justice Quirke in the High Court ordered that €30,000 general damages and €40,000 special damages be paid to the plaintiff together with his costs.

False evidence and damages

In a notable recently reported case a plaintiff was not awarded any damages for injuries suffered because he gave false and exaggerated evidence (*Gammell v Doyle and White [2009] IEHC 416*). Mr Justice Hanna in the High Court said he had to find Mr Gammell was injured as a result of an assault and he assessed damages at €15,000 for suffering to date and €25,000 into the future but because of Mr Gammell's behaviour on the night, that award was reduced by 50%. Mr Gammell's claim was then dismissed by the court because of his "fanciful and self-serving" evidence and costs were awarded against Mr Gammell.

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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