



Healthcare Update Issue 14

March 2010

The rights of the unborn

The Minister for Health, Mary Harney, has stated that she will draft proposals in 2010 for governing assisted human reproduction and related practices. This follows a December 2009 Supreme Court decision that refused a woman the right to obtain an order against a fertility clinic to release three frozen embryos to her for implantation.

Facts. Article 40.3.3 of the Constitution acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable by its laws, to defend and vindicate that right. It therefore focuses on human life before birth. The word “unborn” is not defined in the Constitution. The primary issue in this case was whether the constitutional protection afforded to the unborn in Article 40.3 extended to three fertilized embryos which had been frozen and stored in a clinic. The couple in this case had two children through fertility treatment and stored the three embryos. They subsequently separated and the husband opposed his estranged wife’s court application to have the embryos implanted. The High Court ruled in his favour.

Decision. The Supreme Court dismissed the wife’s appeal and held that the term “unborn” only applies after implantation in the womb and did not apply to the frozen embryos. This was on the basis that the concept of “unborn” envisages a state of being born, the potential to be born, the capacity to be born, which occurs only after the embryo has been implanted in the uterus of a mother. Therefore pre-implantation embryos are not legally protected under Article 40.3.3.

The court further held that the consent forms which had been signed by the husband related to specific IVF procedures only and did not establish that there was any contractual engagement obliging the husband to consent to the implantation of the frozen embryos nor was there an implied consent to do so. The court went on to say that the moral status of embryos and the respect or protection which society may feel they are owed was a different issue to the question as to when life begins and was therefore not for consideration by the court.

Comment. The Supreme Court expressed concern at the total absence of any form of statutory regulation of this area in Ireland and sought to request that the Government tackle these issues as soon as possible. The court noted that the choice as to how life before birth can be best protected, and therefore the point at which in law that protection should be deemed to commence, is a policy choice for the Oireachtas.

Case: Roche v Roche & ors [2009] IESC 82

Improving the safety of cosmetic surgery

Cosmetic surgery has a significant rate of litigation possibly as a result of the high expectation of patients. A 14-year analysis of claims relating to cosmetic surgery cases by the Medical Defence Union between 1990 and 2004 throughout the UK indicated that 90% of the claims had as a significant component a deficiency in documentation which made the case difficult to defend. According to a recent article in the Clinical Risk Journal this indicates that in order to avoid these situations careful pre-operative counseling, document retention and exploring with the patient what degree of correction and scarring is realistic should help reduce claims. This highlights the need for surgeons (and in particular cosmetic surgeons) to carefully document all aspects of a patient’s case from initial consultation to final post-operative visit.



Children and medical treatment: new recommendations

On 22 December 2009 the Law Reform Commission's consultation paper on Children and the Law: Medical Treatment was launched. It examines the law concerning medical treatment as it applies to children (being, persons under the age of 18) and makes over 20 provisional recommendations for reform. The paper notes the fact that there is no explicit statutory definition of what constitutes "medical treatment" or "health care" and recommends that, in the context of determining the scope of consent to medical care and treatment, a broad definition of these terms should be used to encompass diagnosis and treatment and invites submissions on the form of these definitions.

The Commission provisionally recommends that:

1. 16 and 17 year olds should be presumed to have full capacity (based on a functional test of understanding) to consent to and refuse medical treatment. This should apply to surgery and access to contraception.
2. It should be provided in legislation that a person who is 16 years of age is presumed to have capacity to consent to and refuse health care and medical treatment. In the context of refusal of life sustaining treatment, it provisionally recommends that a 16 year old may make a High Court application to have his purported refusal appraised. It also provisionally recommends that children aged over 12 years of age but less than 14 years of age may not be regarded as being capable of refusing medical treatment.
3. A 14 or 15 year old person could be regarded as capable of giving consent to health care and medical treatment, provided he has the capacity to understand the nature and consequences of the treatment being provided, and subject to the following conditions:
 - a. in the opinion of the medical practitioner, the patient understands the nature and consequences of the proposed treatment;
 - b. the medical practitioner must encourage the patient to inform his parents or guardians;
 - c. the medical practitioner must consider the best interests of the patient; and
 - d. the medical practitioner must have due regard to any public health concerns.
4. It would be lawful for a health care professional to provide health care and medical treatment to 12 and 13 year olds provided that:
 - a. the medical practitioner must notify the parents or guardians of the child and take account of their views;
 - b. the medical practitioner must take account of the views of the child in question;
 - c. the medical practitioner must consider the best interests of the patient; and
 - d. the medical practitioner shall have due regard to any public health concerns.
5. It should be provided in legislation that a person who is 16 years of age is presumed to have capacity to make an Advance Care Directive.
6. The Mental Health Act 2001 be amended to make separate provision for people under 18; that all persons under 18 who are admitted and treated under the Mental Health Act 2001 should have access to an independent advocate; and that a Mental Health Tribunal (with an age appropriate focus) rather than the District Court should review their admission and treatment.

Submissions on the paper can be sent by post to the Commission or by email to info@lawreform.ie by 31 March 2010. This paper may be accessed at <http://www.lawreform.ie/publications/cpChildrenandtheLawMedicalTreatment.pdf>

New coroners' website

The Coroner's job is to look into the circumstances of a sudden, unexplained, violent or unnatural death so that a death certificate can be issued. On 29 December 2009 the Minister for Justice, Equality and Law Reform, Dermot Ahern launched a new website about coroners. The aim of the website is to improve the information available to the public in relation to the service coroners provide, why they become involved in a death, what deaths must be notified, what their work involves and how this may impact on the next-of-kin and friends of the deceased. Contact details of all coroners in Ireland are also available. The Beauchamps Healthcare team should be able to assist if you have further queries.

Link to new website: www.coroners.ie



Draft standards for the safety of children in residential or foster care

The Health Information and Quality Authority (HIQA) currently inspects foster care services, children's detention schools and HSE-run children's residential services. These responsibilities will be extended to the registration and inspection of all residential services for children and young people when the relevant provisions of the Health Act 2007 are commenced.

On 10 February 2010 new draft standards for the safety and wellbeing of children and young people in residential and foster care services were launched for public consultation by HIQA. The draft standards are grouped under seven headings and cover issues such as quality of life, children's and young people's rights, keeping children and young people safe and protected, and educational, health and social development needs. Comments are requested by 31 March 2010.

Further, on 10 March 2010 HIQA published guidance for the HSE for the Review of Serious Incidents including Deaths of Children in Care in response to the Department of Health and Children's implementation plan towards the Report of the Commission to Inquire into Child Abuse (Ryan Report) which states that the Authority should develop guidance for the HSE in relation to children in the care of the State and those children known to the HSE's child protection system. This follows on from child protection concerns following the HSE's report into the death of a child in foster care that criticised the many failures and lack of safeguards in the current system. An independent group is also to be set up to examine the deaths of children in the care of the HSE over the last decade.

Mental health care: recent developments

On 22 March 2010 the Health Service Executive announced it is planning to sell most of its 57 vacant properties such as disused health centres, closed hospitals and residential houses to fund improvements in mental health care. This follows on from recent inspections made by the Inspectorate of Mental Health Services which found that wards in a number of older psychiatric hospitals were "unfit for human habitation" and the Government's 2006 policy document on mental health "A Vision for Change" which sets out the direction for mental health services in Ireland and suggests a number of reforms.

National Quality Review of Symptomatic Breast Disease Services

On 25 February 2010 the Health Information and Quality Authority (HIQA) published its national report into the quality and safety of symptomatic breast disease services in Ireland and eight local hospital reports of the designated centres. HIQA has identified that significant progress has been made in providing high quality and safe services, though further improvements are needed to make this sustainable.

The report finds that some centres had well established clinical and managerial governance systems in place and others were at an early stage of development and in need of ongoing evaluation and support. However, all centres have in place the fundamental requirements for safe, quality care which include:

- triple assessment (where diagnosis is jointly based on three clinical specialty opinions);
- multidisciplinary teams;
- core staffing;
- appropriate equipment;
- standardised data collection and management systems.

In addition, many of the required access targets were being met by the centres. The report also found that:

- all designated centres have governance arrangements in place specifically to oversee the delivery of symptomatic breast disease services;
- all centres have put in place arrangements for informing and involving patients in their care;
- the collection and management of data is now happening in all centres;
- more than the minimum recommended volumes of patients are being seen in all centres and the investment in additional staff has allowed all centres to have in place the core recommended staff.



Nevertheless, some centres, particularly those consolidating after recent major service change, need time and support to establish successfully if patient safety and service quality are to be maintained and delivered.

The report concludes that there needs to be increased cooperation between the centres. It makes 18 recommendations and proposes that the Health Services Executive should nominate a National Director to oversee the development and implementation of an action plan for these recommendations.

Note: The HSE Director Brian Gilroy recently advised the National Healthcare Conference that he anticipates National Patient Identifiers to be in operation by November 2010.

Recent cases

i. Breach of confidentiality claim

In a recent case, a plaintiff alleged that during the course of her employment with the defendant hospital, that the hospital breached its confidentiality to her due to information concerning treatment to her family member allegedly being discussed among hospital staff. The claims were successfully defended on the basis that the plaintiff was statute barred from bringing her claim as she was outside the two year time limit in the Civil Liability and Courts Act 2004. In addition, following extensive investigation into the plaintiff's claim of a breach of confidentiality the plaintiff agreed to strike out her claim with no order as to costs on the morning of the hearing.

ii. Plaintiff claim struck out for failure to attend a medical appointment

The Healthcare Department defended a large Dublin hospital in an assault claim brought by a staff member and were successful in obtaining a judgment (for costs) against a plaintiff for failure to attend a medical appointment. The plaintiff failed to attend three successive medical appointments and following a motion to dismiss the claim, the judge gave the plaintiff a further six weeks in which to attend a further medical appointment and to discharge the non-attendance fees. The plaintiff failed on both counts and the judge dismissed the plaintiff's claim and awarded the costs of the motion to the defendant. The costs of the defence of the entire claim, however, were not awarded against the plaintiff.

iii. Brachial plexus injury

The Healthcare Department recently resolved a brachial plexus injury case alleged to have arisen at birth. The case ran for four days in the High Court further to which settlement negotiations resumed and the case was compromised at a level agreeable to all.

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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