MEDICAL NEGLIGENCE & REFORM PROPOSALS

IMO CONFERENCE – NOVEMBER 2019

OVERVIEW

- A brief overview of tort law/medical negligence
- How the courts system in medical negligence cases operates
- Recent legislative changes and their effects.
  i. Pre-action protocols.
  ii. Mediation Act,
  iii. Open disclosure
  iv. Periodic payment orders

WHAT IS 'A TORT'?

- A civil wrong that causes a person to suffer loss or harm, resulting in legal liability for the person who committed the act in question
  - Generally excludes criminal acts (although some torts can also be crimes)
  - Excludes breaches of contract
- Examples of torts include:
  - Defamation
  - Occupiers' Liability
  - Negligence, including medical negligence

MEDICAL NEGLIGENCE – THE BASICS

- Medical Negligence happens were:
  i. Dr A owes a duty of care to Person B (who will ordinarily – but not always – be a patient)
  ii. Dr A breaches her duty to Person B by acting – or failing to act - with the requisite level of care
  iii. Person B suffers harm
  iv. That harm is as a result of the negligent Act

- If any of these elements is missing, then there can be no case.

HOW A MED NEG CASE NORMALLY PROCEEDS - I

Starting a Case

- There must be an expert report criticizing the acts or omissions of the doctor
  - That doctor should have the same qualifications as the doctor being criticized
- The case must be commenced within the applicable time limit
  - Typically within 2 years of the incident in question (although there are exceptions)
- The case is commenced by the production of certain formal documents
  - Letter notifying the claim and formally setting out

HOW A MED NEG CASE NORMALLY PROCEEDS - II

Defending claim

- Defendant needs to investigate the plaintiff’s claim.
- This will also involve expert evidence dealing with (a) whether there was a poor standard of care and (b) what the consequences of that were.
- There may partial or technical defences that complicate cases
- There may be multiple defendants
- Strategic decisions may have to me made (and this is true for all sides in a claim)

HOW A MED NEG CASE NORMALLY PROCEEDS - III

Procedural Steps

- "Pleadings" are exchanged – aimed at accurately delineating the claim and the defence to the claim
  - The nature of claim can change during its lifetime: a defensible claim can become indefensible very late in the day
- Attempts may be may to resolve the claim
  - Unmeritorious claims may fall away
  - Settlement – can happen very early in a case (contrary to perceptions)
  - Mediation
- Hearing of the case
  - Typically only if all else fails and typically for important reasons

PROPOSED REFORMS – PRE-ACTION PROTOCOLS - I

- Arises – a little counterintuitively – from Part 15 of the Legal Services Regulation Act 2015
  - The Act allows for their introduction, but has not yet resulted in their introduction
- Lays down a legal framework for the management of potential clinical negligence claims by placing new obligations on the parties involved.
- Applies to claims against almost all categories of health service providers
- Similar systems already exist in the UK.

REFORM - PRE-ACTION PROTOCOLS - II

- Broad outline of what they will entail:
  - Disclosure of the claimant's medical records/other records including time specifications for doing so (40 days in UK);
  - Exchange of notifications of allegations and responses relating to potential clinical negligence actions, including time specifications (UK guidelines envisage this being done within a year, with some extensions permissible);
  - The disclosure of all relevant material;
  - Agreement to submit a potential clinical negligence claim for dispute resolution other than through the courts.
  - Proceedings only commence **if the pre-action protocol fails to resolve the case**

- Aim is to facilitate speedy (and ideally cheaper) resolution of some claims: important to remember the complexities of cases and the good faith differences that may arise between parties.

REFORM - PRE-ACTION PROTOCOLS - III

Measures to encourage compliance

- The court can prevent the action from proceeding until the Protocol has been complied with;
- The Court can order a non-complying party to pay some or all of the costs of the other party;
- A non-complying Plaintiff may be deprived of interest on an award or be subjected to a lower rate of interest than would otherwise apply;
- A non-complying Defendant may be ordered to pay interest on the Plaintiff's award at a higher rate.

Important to note that Protocol still only exists at the level of principle.

REFORM – MEDIATION – I

What is mediation?

- Mediation is a process in which an independent, neutral Mediator assists two or more disputing parties in resolving the dispute in a collaborative, consensual manner.
- Flexible
  - Remedies other than money
- Confidential
  - Contrast with Court proceedings
- Does not impose a solution on parties: parties must be content with the outcome

REFORM – MEDIATION – II

Mediation Act 2017

- Commenced with effect from 1 January 2018.
- Imposes obligations on solicitors to provide advice and information prior to instituting proceedings;
- Provides an ability for courts, either at their own instance or at the request of a party, to invite the parties to consider mediation; and
- Enables the courts to consider an unreasonable refusal to consider mediation when awarding costs.

- There has been much commentary about the practicality of the Legislation

REFORM – MEDIATION – III

- Court can – and frequently do – **recommend** mediation

  Whilst it is not a panacea, it has proven to be very beneficial and it has succeeded in bringing about settlements of seemingly intractable disputes. Experience teaches us that even if the mediation itself is unsuccessful it frequently succeeds in dealing with some of the issues in dispute or creates a climate for continued negotiation. – Kelly P

  "Mediation is a thousand times preferable than litigation" – Court of Appeal

- Under other legislation, the Court can **direct** mediation in Personal Injuries cases but it is a sparingly exercised jurisdiction
  - Civil Liability and Courts Act 2004

REFORM – OPEN DISCLOSURE – I

- **Legislation providing for open disclosure**
- Two questions:
  - Is there already a duty of Open Disclosure or Candour? It is in **most** professional guidelines

    Open disclosure is supported within a culture of candour. You have a duty to promote and support this culture and to support colleagues whose actions are investigated following an adverse event. If you are responsible for conducting such investigations, you should make sure they are carried out quickly, recognising that this is a stressful time for all concerned.

    Patients and their families, where appropriate, are entitled to honest, open and prompt communication about adverse events that may have caused them harm.

  - Does it need to be made **obligatory** by Statute?

OPEN DISCLOSURE & PROFESSIONAL REGULATION

- Implications of the presence of Open Disclosure in Codes of Conduct:
  1. Instructive for clinicians
  2. Normative: sets the standards for behaviour
  3. Capacity of Regulators to deal with breaches through Fitness to Practise processes

IS THERE AN EXISTING LEGAL DUTY OF CANDOUR?

- One question to ask is whether legislation requiring candour would add anything?
- Courts recognize that a duty of candour is one of the duties healthcare professionals owe to their patients as a matter of law?
  - English cases: *Naylor* (1987), *Powell* (1998)
  - Recent *Morrissey* decision (under appeal to the Supreme Court)
  - Constitutional law?

STATUTORY OPEN DISCLOSURE – I

- Can be voluntary or mandatory
- Civil Liability (Amendment) Act 2017 Part IV of the Act:
  - the legal framework to support **voluntary** open disclosure
  - applies to all patient safety incidents **including near misses and no-harm events**.
  - provides for an open and consistent approach to communicating with patients and their families
  - providing an apology, as appropriate,
- Designed to give legal protection for the information and apology made to a patient during open disclosure once it is made in line with the legislation.
  - Apology cannot be used in litigation against the provider.

STATUTORY OPEN DISCLOSURE – II

- The 2017 Act is quite new:
  - Legislation commenced on 3 July 2018 and Regulations to accompany the Act signed on 4 July 2018.
  - Regulations come into play on 23 September 2018
  - Scope for seeing how these regulations change the landscape?

STATUTORY OPEN DISCLOSURE – III

Patient Safety Bill 2018

- "mandatory open disclosure": the required disclosures of any **serious** patient safety incident…any **unintended** or **unanticipated** injury or harm to a service user that occurred **during the provision of a health service.**

- Modelled on the approach taken by
  - UK Health and Social Care Act 2008 (Regulated Activities) Regulations 2014: Regulation 20 (Duty of Candour)
  - Scottish Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016.

STATUTORY OPEN DISCLOSURE – III

Patient Safety Bill 2018

- Not intended to include ‘near misses’
- Safeguards for professionals who make the open disclosure
- Information cannot be used in subsequent proceedings
- Creates a Criminal Offence:
  - A registered **health service provider*** shall be guilty of an offence if the health service provider fails to make a mandatory open disclosure in accordance with Section 5 of the Act…
  - A fine (up to €7000) or imprisonment (up to 6 months) or both,
- **Still at Bill stage, so not law.**

* 'HEALTH SERVICE PROVIDER' IS **VERY** WIDELY DEFINED

CHALLENGES FOR OPEN DISCLOSURE? - I

- Desirable that the implementation phase of open disclosure does not produce cumulative problems:
  - a poorly developed understanding of open disclosure principles
  - poorly developed execution of the open disclosure process

- Extra training, research and support may be needed to ensure that openly disclosing clinical error will not produce a backlash as a result of
  - errors of process,
  - inconsistencies in disclosure
    - See for example: different approaches in 2017 Act and 2018 Bill – "patient safety incident" in the Act and a "serious patient safety incident" in the Bill: confusion may be obviated by clear guidance.
  - inadvertent errors in communication (too much or little information).

SOME CLOSING THOUGHTS

- Medical Negligence procedure is not as blunt an instrument as is sometimes thought
  - Complex and unwieldy precisely because many cases can be complex and unwieldy
  - Plaintiffs and defendants **both** have rights that need to be respected, even in cases where a defendant has made a mistake.
- However, any reform that can mitigate **unnecessary** delays and hardships is welcome
- Pre-Action Protocols will be helpful in many cases, but some of those lessons are already in play due to existing reforms by defendant parties themselves.
- Mediation has very much taken root in the resolution of cases and is likely to grow.
- Open disclosure is an essential element of good medical practice,
  - Whether criminalization of non-disclosure is necessary?

THANK YOU

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Medical Law in Ireland

(3rd ed, with Andrea Mulligan BL)

Disciplinary Proceedings in the Statutory Professions

(2nd edition forthcoming, with Aideen Ryan & Colm Scott Byrne)