Issue 10 • October 2020

Challenge Medical Indemnity

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24 Hour 7 Day Consultant Helpline

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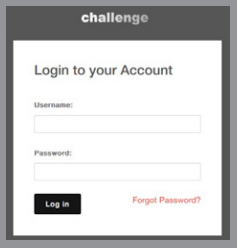


Consultant Online Portal

All Challenge clients also have 24 hour, 7 day communication channel and access to their insurance documents via our online client portal at **www.challenge.ie**

Dear Consultant,

I hope all is well with you and your family.

We are pleased to bring you issue 10 in our newsletter series.

We are also pleased to report that it has been an encouraging few months as we see confidence returning to our private healthcare sector. We are monitoring the ongoing negotiations with HSE and the proposals to provide Covid-19 surge safety-net capacity and private hospital facilities for public patients requiring time dependant procedures in a non-covid environment. The appetite within the current administration would appear to lean towards the more favoured NTPF type approach which has a proven track record of producing results for the public sector in a more economical manner.

At Challenge we appreciate the upheaval experienced across our client base during these past summer months. I can assure you that all is being done in the background to ensure we are obtaining the maximum indemnity support measures across our underwriting markets. I would particularly like to thank our hardworking broking and underwriting teams for their efforts during this time.

In this edition I would formally like to welcome Ms Josephine Breen to our Challenge Helpline Team, Josephine is the perfect candidate to enhance our expanding medico-legal services and we are pleased to be bringing this level of experience and expertise directly to all of our healthcare clients.

We are also including a comprehensive article from Kennedys Law entitled 'The Anatomy of a Claim'. This is a very informative piece on the claim process which can be a very frustrating and worrying time for our clients. At Challenge we are working continuously to try and improve the claim experience for all concerned

Our claims-made based and underwritten insurance policy contracts continue to be the indemnity option of choice for many private practitioners and healthcare providers nationwide.

We look forward to servicing your requirements throughout this unprecedented time and please do get in touch if we can be of any further assistance to you.

Thank you for being on the frontline.

David Walsh
Managing Director
Challenge.ie

Challenge Welcomes **Josephine Breen**

We are delighted to announce the appointment of Josephine Breen to the Challenge Helpline Team as Medico-Legal Advisor.

Josephine has extensive experience in the area of medical negligence defence litigation and health law generally. She has managed and resolved a wide range of healthcare related claims and complaints on behalf of individual healthcare practitioners and healthcare organisations. She has advised on many and varied healthcare-related issues including capacity to consent to medical treatment; confidentiality and disclosure of personal information; public health issues and mental health issues.

Josephine has been admitted as solicitor in two jurisdictions, having been admitted as a solicitor in the Republic of Ireland in 1998 and as a lawyer in the Supreme Court of Western Australia in 2013.

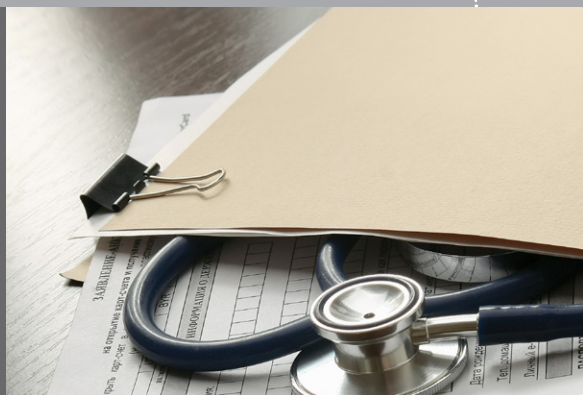
In Ireland, Josephine worked for eight years as a Solicitor/Clinical Claims Manager in the specialist clinical litigation section of the State Claims Agency (Clinical Indemnity Scheme). Prior to that Josephine was a Solicitor and Medico-Legal Advisor with St. Paul Ireland Insurance.

In Western Australia Josephine worked as a Medico-Legal Case Manager (Solicitor) with MDA National, a leading Australia-wide Medical Defence Organisation. Before that Josephine was a Solicitor with the Department of Health (Western Australia) in their Legal & Legislative Services Unit.

Our local medico-legal and helpline service is an integral part of the Challenge offering. Josephine's expertise and experience is a brilliant resource for our healthcare clients at a time when it is needed most. We look forward to seeing the benefits this appointment will bring to them and our wider team.

The Anatomy of a Claim

October 2020



The idea of being embroiled in a clinical negligence claim can be very daunting. A US study suggests that by the age of 65, more than 75% of clinicians will have experienced a malpractice claim[1] making it an occupational hazard for many clinicians. This article sets out some guidance on what do in the event that you find yourself involved in a clinical negligence claim.

Why have I been sued?

According to a study by Vincent C Young et al[2], the four main reasons why patients sue are because they are seeking:

- Accountability: When things go wrong someone should be held responsible.
- Information: How the injury occurred and why.
- Prevention: The desire to prevent similar incidents in the future.
- Compensation.

What do I do when I receive a complaint/ request for records/Letter of Claim/ Personal Injuries Summons?

The most important thing is not to panic. On receipt of any of the above documents, whether received through your hospital's legal/risk management department, or if you happen to receive them personally, immediately notify Challenge who will provide all of the necessary assistance and advice.

The language contained in a Letter of Claim/solicitor's letter and Personal Injuries Summons is frequently written in archaic legal jargon and can seem threatening. For instance, Letters of Claim often demand that you must admit liability within a specified period of time.

Once the legal process commences, you should not engage in any correspondence with the patient or the patient's solicitors and should instead immediately provide the correspondence to Challenge who will advise you accordingly.

The duration of a case

There is probably a reasonable degree of truth in the oft-cited saying that "the wheels of justice turn slowly", and this is the case throughout the process, from the happening of an event/the patient's complaint in the clinical setting to the ultimate resolution of the claim, be it by way of settlement or a hearing.

It is important to note that in the background and at all times, Challenge, and its legal advisers/your solicitors will be dealing with a multiplicity of legal matters to include obtaining copies of all relevant medical records and briefing medical experts etc. Therefore, while a defendant might feel as if nothing is happening after the commencement of a case and that there are long gaps between contacts with Challenge/your solicitor, matters are proceeding and the "wheels are turning".

How long does a patient have to bring their claim?

- An adult plaintiff who has capacity has two years from the date of injury (usually the date of the incident) or the date of knowledge (the date when the plaintiff first became aware of the injury) within which to issue proceedings. When section 221 of the **Legal Services Regulation Act 2015** comes into force, amending the **Civil Liability and Courts Act 2004**, this time period will increase to three years in clinical negligence actions.

- The limitation period for minors is two years from the date they turn 18.

In obstetric cases where a child is profoundly injured at birth, these cases are often not brought until the child is aged between 11 and 14 years old, as this is when the child's cognitive ability can be suitably assessed.

1 Jena AB, Seabury SA, Lakdawalla DN, Chandra A. Malpractice risk according to physician specialty.

2 Vincent C Young, Phillips A. Why people sue doctors? A study of patients and relatives taking legal action.

What does the plaintiff have to do to prove their claim?

In order to bring a successful clinical negligence claim, the onus of proof is on a plaintiff who must prove:

- That a duty of care was owed to them;
- That there was a breach of this duty of care;
- That the plaintiff suffered a harm; and
- That the harm was caused by the actions of the defendant (causation).

The plaintiff must prove that there was a 'breach of duty' by the defendant which caused them harm.

Duty of Care

A duty of care is an obligation on one party to take care to prevent harm being suffered by another. Doctors owe a duty of care to their patients.

Breach of Duty

The Court will look at whether the care provided was of a reasonable standard and will rely on expert evidence to make this assessment. The applicable standard is not a gold standard but that of the ordinary doctor acting with reasonable care.

Causation

For causation of injury to be established, the legal test which the Court applies in clinical negligence claims, is whether on the balance of probabilities (greater than 50%), the breach of duty by the clinician caused the injury complained of. If a plaintiff only manages to reach the 50% threshold but not exceed it – which will occur if the court finds that the evidence of both the plaintiff and defendant are equal – then as the plaintiff has not exceeded the 50% threshold, liability will not have been established. As Denning J stated in ***Millar v. Minister of Pensions*** **[1947] 2 All E.R. 372:** "If the evidence is such that the tribunal can say: *"we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not."*

Causation can be defended in appropriate cases with supportive expert evidence, even where there has been a breach of duty. This is well exemplified by the well-known UK case of ***Barnett v. Chelsea and Kensington Hospital Management Committee*** **[1968] 2 W.L.R. 422**, where a failure by the Hospital in not attending to a plaintiff who had suffered from accidental arsenic poisoning was found to be a breach of duty (as if a hospital emergency department opens its doors to provide a service, it must do so, or otherwise refer patients on elsewhere. Not to do so was a breach of duty) but this breach of duty did not cause the harm to the patient (the patient's death) in circumstances where the poisoning was so advanced that even if the hospital had attended to this patient, he would have died in any event. Therefore, causation was not established and the plaintiff's action failed.

CASE EXAMPLE:

A GP fails to refer a patient for further gynaecological investigation when a patient presents with symptoms of post-coital bleeding and an abnormal cervix. The patient is subsequently diagnosed with cervical cancer. Even if expert evidence is critical on breach – stating that the care provided by the GP fell below a reasonable standard - causation may be defensible, if expert causation evidence is obtained which establishes that despite the delay in diagnosis, an earlier referral would have made no difference to the patient's treatment options/outcome.

Why am I being asked to provide a witness statement and attend a consultation?

When a Letter of Claim or Personal Injuries Summons is received, Challenge and/or your panel solicitor may ask you to provide a witness statement of events.

Witness statements should include the following:

- Heading 'Privileged Statement – Prepared at the Request of my Insurers in Contemplation of Litigation'
- Details of your qualifications and experience
- Your recollection of the patient (if any)
- A chronology of events (which will largely follow the contemporaneous notes)
- A response to the allegations of negligence

Your witness statement provides an invaluable insight into your treatment and management plan. Unlike in other jurisdictions, your witness statement will not be shared with the Court or the plaintiff. It will be used to assist your legal team in instructing experts and in the defence of the case generally. The witness statement will also serve as an invaluable aide-memoire to you throughout the life of the claim.

The medical records are of seminal importance when drafting your statement. It is important that you carefully review your records and take your time when drafting the statement, to ensure that you provide as much detail as possible at the beginning of the case.

Consultation meetings with your lawyers

During the lifetime of a claim you may be asked to attend several meetings (now remotely) with your panel firm, your appointed barrister and, on occasion, with your appointed experts. These consultations provide an invaluable opportunity for you to ask any questions you may have about your case and the legal process; for your legal team to discuss the case in detail with you; and for you and your legal team to discuss matters with your expert(s).

It is advisable for you to come to these meetings well prepared, having read all the medical records carefully again, studied your witness statement and read any expert reports you have been given.

Instructing Experts

Liability experts

Your panel firm will instruct appropriate expert(s) to comment on the allegations of breach of duty and causation.

A breach of duty report should be obtained from an expert of like qualification and skill as the person being sued.

The High Court recently restated the applicable standard when considering allegations of clinical negligence against a clinician in the high profile BreastCheck case of ***Freeney v Health Service Executive*** **[2020] IEHC 115** where Ms Justice Niamh Hyland stated:

> *"What is required is the standard approach of an expert with like specialisation and skill i.e. an equivalently situated professional of equal standing. This ensures the behaviour of the professional is evaluated by an appropriate standard and the evaluation is not being skewed by the application of irrelevant factors."*

For example, in a straightforward claim against an orthopaedic surgeon, an orthopaedic surgical expert will be instructed to comment on breach of duty and causation of injury.

A catastrophic injury claim will require the instruction of a number of experts. For example, where a patient suffers an injury during spinal surgery resulting in cauda equina, leading to a claim against an orthopaedic surgeon, a number of liability experts may be instructed. This will include an expert orthopaedic spinal surgeon to comment on breach of duty and an orthopaedic spinal surgeon, neurosurgeon, neurologist and neuro-radiologist may all be instructed to comment on causation of injury.

In an attempt to avoid 'expert shopping' and limit costs and Court time, the Rules of the Superior Courts (RSC) limits the number of experts that can be utilised in any case, to ensure the proper administration of justice. RSC Order 39 rule 58(3) states that:

> *Save where the court for special reason so permits, each party may offer evidence from one expert only in a particular field of expertise on a particular issue. Such permission shall not be granted unless the court is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties.*

Once liability evidence (i.e. breach and causation evidence) is obtained, it is often a pivotal moment in the life of a claim, when it will become apparent whether the case is defensible and can proceed to Trial or whether there are vulnerabilities in the defence and whether consideration needs to be given to settlement.

Quantum experts

A plaintiff is also required to quantify the value of their case and set this out in a detailed Schedule.

The relevant legal teams for the plaintiff and the defendant will usually obtain expert evidence to assist in valuing the case (quantum evidence). This is particularly so in cases where a plaintiff is claiming an ongoing injury and, of course, in any catastrophic injury claims.

In a straightforward case, often only one condition and prognosis report will be obtained from a relevant expert. In cases involving more complex injuries a myriad of quantum evidence is obtained by the plaintiff and defendants' legal teams. For instance, taking our example above in relation to causation of cauda equina, quantum evidence will often be obtained from experts such as care/nursing experts, occupational therapists, vocational assessors, actuaries and sometimes accommodation experts.

For Duties of an Expert see previous Challenge newsletter (Issue 6, July 2018) on the Challenge website.

What is a Defence and Affidavit of Verification?

A Defence is the most important document in the defence of proceedings, as it is a formal response to the allegations being made by the plaintiff. It is essential that all aspects of the Defence are correct and that you are entirely happy with the Defence as pleaded.

There are four types of Defence:

1. **"On proof" Defence:** usually drafted when expert evidence is awaited. This Defence makes no formal admissions or denials on behalf of the defendant, but requires the plaintiff to prove their case.
2. **"Full Defence":** a full denial of all aspects of the plaintiff's claim, usually prepared when your team is in receipt of supportive expert evidence. Allegations can be 'denied' when your legal team will corroborate the denial of an allegation with evidence.
3. **"Defence admitting breach":** a Defence admitting breach but denying causation of injury. Usually prepared when your legal team has received critical breach evidence but supportive causation evidence.
4. **"Defence admitting liability":** a Defence admitting both breach and causation of injury. Often the only matter in issue in such a case will be the extent of the injury, which may not be admitted and which a plaintiff will still be required to prove. Such cases will proceed on an "assessment" basis only, as the only issue required to be dealt with by the court is the assessment of quantum i.e. the value of the claim.

Once a Defence is served you will be required to swear an Affidavit of Verification. This is a document sworn in the presence of a solicitor or commissioner for oaths, in which you are verifying to the best of your knowledge and belief, that the Defence delivered is true and accurate. It is a contempt of Court to make a statement in your Defence that is false and/or misleading.

The importance of the content of the Defence and the verifying affidavit cannot be overstated: the Defence underpins your case, the facts of which you have verified and sworn by affidavit. Therefore, at this part of the process, you must take time with your panel solicitor to ensure that you understand all aspects of the case, your Defence and the legal process.

The Anatomy of a Claim (Continued)

At what point do most cases resolve?

A case can resolve at any stage either pre-action or post-proceedings, depending on the evidence. Cases often settle when expert evidence is obtained and/or when expert evidence is exchanged between the parties, which happens after the Defence is served.

A small percentage of cases go to trial for a full hearing and judgment, with some cases also settling at trial.

The State Claims Agency's 2016 and 2017 annual reports state that 98% of medical negligence claims were settled without a court hearing, either through obtaining a discontinuance, negotiating a settlement or through mediation.

How can I attempt to lessen the chance of litigation:

Good documentation: accurately recording the information provided by the patient which influenced your treatment decisions. Ensuring the patient is informed of all of the known risks of the surgery and this is documented in the notes:

The High Court emphasised the importance of accurate note keeping in the case of ***McManus v Medical Council* [2012] IEHC 350**, where it was held that:

> "However inconvenient and burdensome it may be to write up medical records accurately, such records constitute a vital safeguard for both medical practitioners and patients alike in a situation where it later becomes necessary to conduct any form of investigation as to what transpired during the course of the patient's treatment. Every practitioner must be taken as knowing that records may later be used in court proceedings or other investigations or inquiries and hence their importance is self-evident"

Good communication: Ensuring the patient has provided informed consent: that they have been informed of all of the known risks of the treatment, the benefits of the treatment and the alternatives to treatment (including the option of no treatment). It is vital that the consent process is documented and not just a signed consent form.

Follow up advice: Ensure that you provide and document any follow up advice (often referred to as 'safety netting' advice) provided e.g. a frequent feature of any claim is a plaintiff alleging that they were not told to return to the GP or A&E in the event that their condition deteriorated or did not improve. Safety netting advice is probably always given but seldom documented. Every consultation should finish with safety netting advice, where appropriate, and this should always be documented in the notes.

Open and Honest: Be candid with patients when something goes wrong and offer an apology where appropriate. The culture of open disclosure is expected of medical practitioners: "Open disclosure is supported within a culture of candour. You have a duty to promote and support this culture…" (Medical Council: ***Guide to Professional Conduct and Ethics for Registered Medical Practitioners*** (Amended) 8th Edition 2019, at section 67):

Doctors are human and mistakes will sometimes be made. Taking responsibility does not mean admitting that your care fell below an acceptable standard. The HSE's policy is that where failures in the delivery of care to a patient have been identified, these failures must be acknowledged and a meaningful apology provided. The HSE also considers that an apology can minimise the possibility of a verbal complaint becoming a formal written complaint or the further escalation of a formal written complaint to litigation. Being candid with a patient early on and, where appropriate, offering an apology is invaluable in maintaining the doctor-patient relationship of trust but also, on occasion, in avoiding litigation.

Conclusion

The prospect of litigation and the worry involved will undoubtedly be lessened with adequate preparation. Challenge and your panel solicitors are available at every stage of the process: from the happening of an adverse incident followed by a complaint or patient query and through any regulatory and litigation process. Your time, preparation and communication with your indemnity and legal advisers is a worthwhile investment in your practice, as while your team cannot necessarily stop such a process from taking place, it can, with your co-operation be less daunting than it would otherwise be, and in addition, may in fact be an exercise which will also provide for on-going learning and clinical risk management.

If you receive a complaint from a patient, advise the Challenge team as soon as possible and they will be able to assist you.

Further information

To find out more about our services and expertise, and key contacts, go to: kennedyslaw.com

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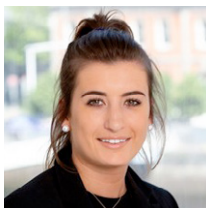

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Guidance note for notifying **claims and circumstances**

These guidelines are intended to assist you in identifying what you need to report to Challenge under your Medical Professional Liability, Public & Professional Liability Insurance policy. They are not intended to replace the policy terms and conditions in any way.

Claims Process

Swift resolution of claims is reliant upon the quality of the initial information Challenge receives. The more complete the information is, the more quickly Challenge can move to resolve a claim.

A Claim/Circumstance Notification Form should be completed in respect of all new notifications and should be sent to: **insurance@challenge.ie**

What needs to be notified

You are responsible for notifying Challenge of Claims and Circumstances which may give rise to a Claim under the policy. Such notice should include:

a. details of what happened and the services and activities that you were performing at the relevant time; and

b. the nature of any, or any possible, bodily injury; and

c. details of how you first became aware of the Claim or Circumstance; and

d. all such further particulars as Challenge may require.

Claims

Under the terms of your policy, any Claim must be reported to Challenge in writing immediately. The definition of a "Claim" is any:

> *"1. written or verbal demand made of you; and/or*
>
> *2. assertion of any right against you, including but not limited to any proceedings, including any counter-claim; and/or*
>
> *3. invitation to you to enter into alternative dispute resolution, alleging any occurrence, negligent act, error or omission that may give rise to an entitlement to damages."*

Examples of a Claim are:

- A letter of claim from solicitors.
- A letter or verbal demand from a patient or third party, alleging wrongdoing and requesting compensation.
- Legal proceedings (e.g. a Summons/Particulars of Claim, etc.).

Circumstances

Under the terms of your policy, any Circumstance must be reported to Challenge in writing immediately. A "Circumstance" is defined as:

> *"any circumstances of which you become aware, or should reasonably have become aware, that may reasonably be expected to give rise to a Claim."*

Examples of a Circumstance are:

- Any complaint, written or verbal, in which the patient or patient's representative expresses dissatisfaction regarding the treatment received and alleges that, as a result, the patient suffered bodily injury.
- A request for access to medical records received from a solicitor or third party on the basis that a Claim against you/your service (to include any of your employees) is being contemplated.
- Any incident in which a Serious Untoward Incident Report is generated.
- Any unexpected or unusual death of which you become aware.
- Any adverse outcome or clinical "near miss" in which you believe there may have been a negligent act, error or omission, irrespective of whether or not the patient is aware of this or whether the patient or patient's representative has made a complaint.
- A loss of patient records (which after a relevant search cannot be found).

These examples are for general guidance only and this is not an exhaustive list. If you are in any doubt regarding whether an incident is reportable then you are encouraged to notify the matter to Challenge as a precaution.

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If you would like a quotation please contact us today

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