

MARK D. O'HAGAN

---

BARRISTER-AT-LAW

# **MEDICAL NEGLIGENCE CLAIMS – FIGHT OR FLIGHT?**

Useful points of practice from the plaintiff's perspective.

In this session, we'll explore:



- Key pointers for gearing up to a successful outcome
- Key drivers of success/ failure
- Recommendations on process and approach for practitioners
- Common pitfalls and issues to watch out for
- Trends and pipeline indicators potentially impacting this area

In particular, we'll focus on:



- Initial Attendances** – Educating clients from the ‘get-go’
- Records and Reports** – Gathering what is already available and instructing necessary experts
- Limitations** – From statute barring to informed consents.
- Damages** – Maximising heads of damage.
- Case Study** – Birthing Injuries

“whether at any point the doctor acted as no other doctor in his speciality would have acted if he had been exercising the care ordinarily expected of such a doctor”

# Dunne-v-National Maternity Hospital

1. The true test for establishing negligence in diagnosis or treatment on the part of a medical practitioner is whether he has been proved to be guilty of such failure as no medical practitioner of equal specialist or general status and skill would be guilty of if acting with ordinary care.

# Dunne-v-National Maternity Hospital

2. If the allegation of negligence against a medical practitioner is based on proof that he deviated from a general and approved practice, that will not establish negligence unless it is also proved that the course he did take was one which no medical practitioner of like specialisation and skill would have followed had he been taking the ordinary care required from a person of his qualifications.

General & approved practice

# Dunne-v-National Maternity Hospital

3. If a medical practitioner charged with negligence defends his conduct by establishing that he followed a practice which was general and which was approved by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such practice had inherent defects which ought to be obvious to any person giving the matter due consideration.

# Dunne–v–National Maternity Hospital

4. An honest difference of opinion between the doctors as to which is the better of two ways of treating a patient does not provide any ground for leaving a question to the jury as to whether a person who has followed one course rather than the other has been negligent.

5. It is not for a jury (or for a judge) to decide which of two alternative courses of treatment is in their (or his) opinion preferable, but their (or his) function is merely to decide whether the course of treatment followed, on the evidence, complied with the careful conduct of a medical practitioner of like specialisation and skill to that professed by the defendant



# Proofs Required

1. Proof that the treating doctor has failed to do what any doctor of equal specialisation, status and skill would have done if they were acting with ordinary care, and/ or,

2. If it is proved that the treating doctor departed from general and approved practice:-

Proof that such a departure would not have been followed by any doctor of equal specialisation, status and skill if they were acting with ordinary care, and/ or,

3. If the HSE defends the claim on the grounds that the treating doctor followed a general and approved practice in providing care: -

Proof that such a general and approved practice holds inherent defects which would be obvious to any person who duly considered it.

# Litigation Objectives

1. Establish a breach of the doctor's duty of care

- Requires Medico-legal report from doctor of equal specialisation, status or skill.

2. Establish the causation of the injury- 'but-for' test

3. Argue the level of blameworthiness-

- remoteness
- *novus actus interveniens*
- mitigation of loss

# Initial Attendances

Find out what your client wants: –

## **Damages**

Object is to put the claimant in the same position as if the wrong had not occurred.

## **Apology**

Likelihood, wording, timing

## **Public forum**

Opportunity to ventilate/ expose the faults and deficiencies in the system

## **Mediation**

Private assisted settlement, role of mediator, cost, disclosure

# Educating your client from the ‘get-go’

An injury sustained while undergoing medical treatment does not speak for itself.

Expert medical reports are necessary

- medical appointments with specialists to establish whether a claim can be made
- medical appointments with specialists identified by other medical reports/ counsel
- medical appointments with specialists for the defence

Code of Conduct for The Bar of Ireland: Rule 5.16

# Records & Reports

Obtain client's written consent

Specify the Freedom of Information Act, 2014 in written requests to HSE

Cite Article 15 of the General Data Protection Regulation in Data Subject Access Requests

Develop a network of reporting medical professionals in the UK & NI

Reports must address the standard of care or causation.

# Limitations

Letter of Claim- 1 month from date of cause of action without reasonable cause  
(s.8 Civil Liability Act, 2004 from 28<sup>th</sup> January, 2019)

Better to complete investigations prior to delivering letter and explain any delay

Exempt from Injuries Board application process

2 year limitation period

s.221 Legal Services Regulation Act, 2015

Issue and serve protective writ reserving right pursuant to O. 1A, r.6 RSC

# Consent

Consent given freely and voluntarily without force or duress

Scene of Accident / Critical unresponsive patient

- HSE must prove that patient was unconscious or without capacity to make decision when proposed treatment became necessary and that no lawful proxy was available to give authority

Failure to obtain attracts civil liability in trespass for a battery

# Informed Consent

Ongoing conversation

Reasonable doctor  Reasonable patient

Pro-forma consent form = circumstantial evidence

Failure to inform sufficiently represents a potential breach of doctor's duty of care and a liability in negligence





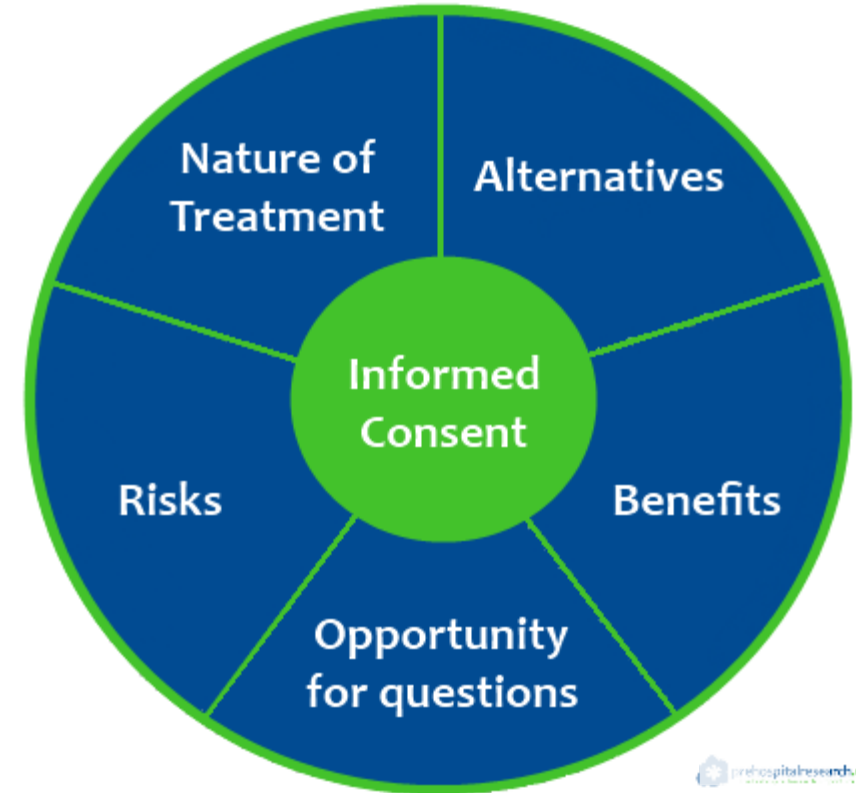
# Informed Consent

Elective Treatments- all known risks regardless of remoteness

Cosmetic Treatments- Cooling off periods

Flynn-v-Sulaiman & Advanced Cosmetic Surgery [2006]  
IEHC 160

Inquisitive Patients



# Maximising Heads of Damage

Care & Equipment: -

Need

Benefit

Reasonableness

## Russell-v-HSE: Summary of Agreed Items allowed

Physiotherapy and Hydrotherapy €78,828 (to 18)	Folding holiday hoist €675	Wheelchair frame €26,539	Mounting system for wheelchair €11,499
€20,800 thereafter	Kinkraft easy bath €8,875	Service and parts €3,185	Handheld AT system tablet €12,739
Therapy Costings: Second Physiotherapy €480	Delivery €508	Assisted power €42,410	Eye Gaze Tracker add on United States €23,674
Twelve sessions to implement home hydrotherapy programme €5,760	Body and head cushion €1,997	Service €3,034	Height adjustable table €6,185
Further twelve sessions €5,760	End cushion €722	Battery replacement full powered wheelchair €3,286	Printer, scanner and copier €3,204
Further twelve sessions €5,760	Side cushion €635	Annual service €13,652	Insurance for AT system €9,691
Fifty additional physio treatments over life time €4,000	Cushion from Great Britain €241	Moulded seat power chair €56,481	External door openers €17,466
Adolescent thera-wedge guesser €737	Paediatric shower chair €8,686	Wheelchair cosy €1,285	Door intercom €5,015
Gait Trainer €3,623	Adult shower chair €18,038	Swing €1,196	Gate openers €968
Leckey horizon stander €20,667	Folding holiday SH. seat €1,257	Lounge chair €21,581	Addition to current house, new build and site €485,000
Leckey stander service €4,551	Showering trolley €14,175	Service €5,710	Stamp duties €145,619
Wide electric neurology plinth €4,958	Service €5,339	Portable ramp €443	
Haussam posture mirror €1,048	Wall mounted fan heaters €276	Van raam velo bike €22,482	<b>Total €2,042,802</b>
Theraband exercise mat €806	Chemicals/Hydrotherapy €3,792	Service €2,427	
Therapy balls €962	Maintenance €3,034	Delivery €350	
Power pump for therapy balls €106	Running costs €27,683	Assisted power €9,828	
Dynair ball cushion €1,611	Medium nappies €68,877	Service €4,551	
Movin sit junior €29	Disposal of nappies €2,912	Washing machine €2,146	
Lisclare oasis H/A bed €4,986	Disposal gloves €5,537	Tumble dryer €1,005	
Installation €150	Wet wipes €4,733	Washing liquid €5,143	
Height adjustable bed (from age 18) €2,370	Feeding spoons €1,289	Heating oil €36,405	
Cocoon bumpers €3,813	Food processor €4,035	Electricity €23,489	
Crash mat €417	Bibs €9,174	Gardening €26,183	
Wendy Lett sheets €20,023	Kitchen towels €11,295	Maintenance and decoration €25,975	
Pressure mattress €7,596	Extra nutritional costs €32,103	Insurances €20,629	
Ceiling mounted hoist €36,781	Clothes allowance €15,168	Occupational therapy/ACC €6,166	
Ceiling hoist hydrotherapy €13,382	Lycra body suit €28,365	Speech and language (lesser figure for six years) €60,588	
Slings €5,308	Bedding €10,679	From 14 – 18 years €18,974	
Maintenance and parts €19,295	Orthotics €36,405	From 18 – 25 years €15,359	
Maxi twin floor hoist €8,854	Monitor €4,551	From 25 – 45 years €18,549	
Service €5,764	Moulded seat manual WC €36,951	Additional speech and language therapy for communication sys €4,000	
Sling €3,450	Seat for every four years after 18 – life €22,436	First AT system €155,573	

**Russell-v-HSE: Summary of Disputed Items which were allowed**

Sterile water for PEG machine €106,181	Special needs software €88,171	Legal fees €36,816
Cost of two wheelchairs €120,000	Green reader software €16,956	
Cost of Scotson therapy items €40,606	Visits for installation and assessment in training of software €30,000	<b>Total €1,242,217</b>
Cost of extra holidays €102,435	Less deductions for IT purchased in any event -€4,199	
Cost of vehicle €150,000	Internal doors €25,000	
Occupational therapy €75,000	Electrically operated curtain openers €13,748	
Additional assisted technology €50,000	System design and installation €5,500	
Digital camera €7,461	Cost of moving assisted technology €3,000	
Text capture system €32,148	Travelling expenses, legal costs, GPs,	
Replacement of electrical devices €6,104	drugs and hospital charges €337,290	

# Maximising Heads of Damage

Professional Advisors: –

Lump sum Management

Lifetime investment fund- €19,000.00 per million (Russell-v-HSE)

Periodic Payment Orders

# Current Indicators

Mediation

Cerebral Palsy

Increase in Awards

# Mediation

Private informal opportunity to discuss issues raised by the case.

Not a fact finding exercise, not results based

Result is entirely confidential and without prejudice to proceedings.

Mediation Agreement establishes what is to be disclosed to the mediator and what can be disclosed to other side

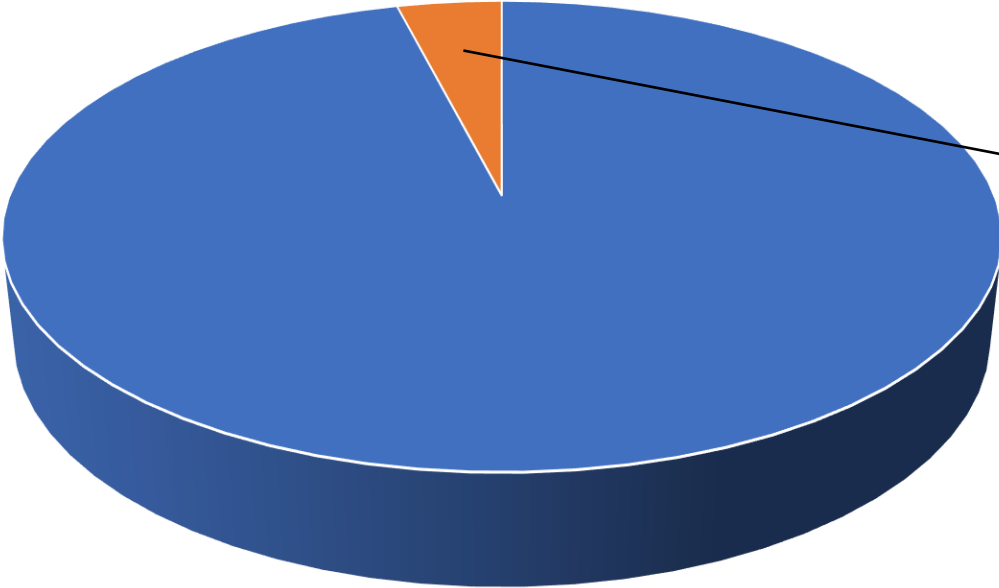
Openminded-ness is a prerequisite, mediation should not be imposed.

Personal statements can be conveyed through the mediator.

Trend towards HSE proposing mediation in particular where liability not highly problematic.

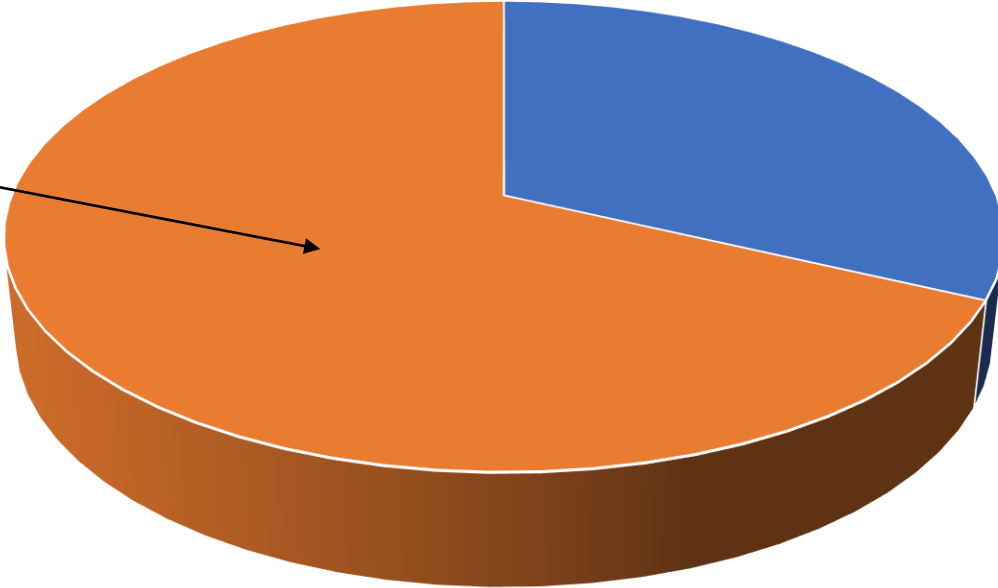
# Health Spending

HSE Estimated Healthcare Expenditure  
2019: €16.2b



■ Other      ■ Maternity

HSE Estimated Negligence Claim  
Expenditure 2019: €360m



■ Other      ■ Obstetric related claims



# Cerebral Palsy

UK rates obstetrics as bigger financial risk to the economy than Brexit.

Cerebral Palsy (CP) amounts to 86% of overall liability in obstetric medical negligence claims

c. 60,000 deliveries per annum

1:3000 sufficiently damaged in negligence to result in a payout

15-20 cases settled per annum at between €2-20m

# Cerebral Palsy

Therapeutic hypothermia

Yes/ No decision by independent expert

within 6–8 hours of birth

# Increase in Awards

Awards have increased from €2–8m in Cerebral Palsy cases to €2–20m

Russell-v-HSE [2014] IEHC 590

Changed rate of return from 3% to 1.5%

CoA upheld the decision SC refused to grant HSE leave to appeal.

Award was €13.5m at 1% would have been c. €9m at 3% rate of return

# Thank you

**MARK D. O'HAGAN**

**B. Comm., B.L.**

**Law Library, Dublin 7.**

***mark.ohagan@lawlibrary.ie***

**DX: 814196**

**086 818 01 34**

# CASE STUDY:

Barbara elects to deliver her second pregnancy by Caesarean section. She receives full information regarding the procedure in consultation with her obstetrician and signs the consent forms. Damage to the bladder is one of the main risks involved in the procedure. Barbara was informed that any damage caused to her bladder would be repaired during the procedure. Her daughter is delivered successfully on the 11<sup>th</sup> November, 2018 at the Coombe. Barbara is noted to have succeeded in toileting following the operation albeit at reduced levels. Barbara reports abdominal pains while an in-patient in recovery two-days post-surgery. Nurses record a minor fever. Paracetamol is prescribed. Barbara is reviewed and advised that she is likely suffering wind in the bowel which will pass in due course. Barbara is discharged from hospital the following morning, 14<sup>th</sup> November, 2018.

On the 17<sup>th</sup> November, 2018 Barbara is admitted to Vincent's hospital with high fever and severe abdominal pains. Barbara is diagnosed with a large volume of urine in her abdominal cavity and by her consent is rushed for surgical intervention under general anaesthetic. The surgeons repair a surgical cut to Barbara's bladder and fit her with a catheter/drain. Barbara is obliged to undergo further surgery to remove the drain on the 22<sup>nd</sup> November, 2018 and is discharged on the 25<sup>th</sup> November, 2018.

On the 23<sup>rd</sup> March, 2019, Barbara attends on her general practitioner with complaints of incontinence since the surgical procedure. Her general practitioner has advised that the condition is incurable but can be managed with medication. Barbara presents herself to your offices for advices.

Can Barbara make a claim in medical negligence against the HSE?  
If so what experts might be required to prepare medical reports?