Keeping abreast of medico-legal developments

Aisling Timoney looks at recent court judgments on medico-legal matters which will be of interest to GPs

IN THIS ARTICLE, we examine the implications of four recent court judgments, relating to child protection, personal injuries, Medical Council complaints and data protection, which may impact on general practice.

- **Clarification in relation to Tusla notifications of allegations of historical abuse, including where notification may cause harm to the victim**

This judgment[1] arose out a perceived discrepancy between a 2019 HSE policy and the Children First Act 2015. The particular HSE policy stated that counselling service users should be advised that any issue of child protection would be notified to Tusla where there were reasonable grounds for concern that abuse had occurred. The HSE's National Counselling Service considered that this could cause harm to clients and sought clarification from the court. It also argued that the Children First Act did not mandate reporting of information from adults regarding historical childhood abuse.

Judge Phelan accepted that the legislation could be interpreted broadly or narrowly. Either all reports of historical abuse had to be notified to Tusla regardless of the victim's age at the time of reporting, or reports were only mandated when the victim was currently a child. The judge rejected the latter possibility because it would leave a gap in the State's reporting mechanisms that could not have been intended. It would also be inconsistent with Tusla's statutory duty to investigate allegations of historic abuse.

Judge Phelan said the reporting obligation applies even if the counsellor believes this might cause harm to the service user. The judge said it would be for the Oireachtas to draw any distinctions between the role of counsellors and other mandated persons, but that the Oireachtas had not so done.

The takeaway point is that all reports of historic child abuse need to be reported to Tusla by mandated persons, regardless of whether the victim is now an adult and arguably, because the broad interpretation was adopted, regardless also of whether there is any ongoing harm or future risk. The risk of harm to the victim does not negate the reporting obligation.

- **Stretching the statute**

The High Court recently allowed the renewal of a personal injuries summons despite notable delay[2] and highlighted the onus on defendants to move quickly to set aside renewals. The plaintiff alleged that medical negligence occurred on February 5, 2015 and a personal injuries summons was issued on January 12, 2017, just before the statutory limitation period expired. The summons was not served within one year, as required, so it lapsed and could not be served without a court application to renew it.

Subsequently, the test which applied to applications for renewal of a summons under the Rules of the Superior Courts was changed to a requirement to show 'special circumstances'. Each case turns on its own facts and once special circumstances are established, the balance of justice must be considered.

Two days after the new rule took effect, the plaintiff's solicitor applied to court to renew the summons. Six months later, solicitors for the defendant doctor issued a motion seeking to set aside the renewal of the summons. A further seven months later, solicitors for the hospital issued a similar motion.

The court found there were special circumstances which related to confusion as to which solicitor was on record for the plaintiff and the fact that the first solicitor involved did not hold a practising certificate.

The court said the delays did not prejudice the doctor or hospital because the case would turn on the medical records, not on any individual doctor's recollection. By contrast, there was likely to be significant prejudice to the plaintiff whose claim was likely statute-barred if the renewal was refused.

Two takeaway points arise here. Firstly, the statutory limitation period can be stretched at times beyond the expected two years, which highlights the importance of having a robust records retention policy so that you can access records should you require them in the event of a claim.

Secondly, if you become embroiled in a claim against you which should be dismissed, your legal team must act expeditiously in bringing a motion to dismiss.

• A reminder from the Court of Appeal to the Preliminary Proceedings Committee (PPC) to give reasons for its decisions[3]

As GPs will be aware, the Medical Council PPC has the statutory role of screening and investigating regulatory complaints against registered doctors at first instance.

In the McEvoy case, the daughter and husband of a patient made a lengthy and detailed complaint against two doctors arising out of their management when the patient presented to hospital following a stroke. Both respondent doctors provided replies and the complainants submitted further detailed comments addressing different aspects of the doctors' replies.

The PPC engaged an independent expert consultant neurologist to provide a report and his principal conclusion was that the thrombectomy performed was not unreasonable and that the patient's subsequent deterioration was most likely due to the natural progression of her condition, not the procedure. The PPC shared the expert report with the complainants, who submitted lengthy additional comments rejecting the expert's views in trenchant terms.

Subsequently, the PPC "formed the opinion, pursuant to section 61(1)(a) of the Medical Practitioners Act, 2007, that there was not sufficient evidence to warrant further action being taken in relation to the complaint, as there was no *prima facie* evidence of professional misconduct or poor professional performance... The Committee was satisfied that [the expert] did not identify any serious failing in relation to [the doctors'] clinical management of Mrs McEvoy's presenting symptoms. The Committee noted [the expert's] conclusion that Mrs McEvoy's deterioration cannot be considered a consequence of [the doctors'] actions and more likely this happened as a result of the natural history of the stroke syndrome."

One of the complainants' allegations was that the PPC's decision was irrational and unreasonable insofar as it preferred the expert report over their submissions without explanation.

The High Court judge refused leave (permission) to judicially review the PPC's decision as it was bona fide, reasonable and factually sustainable. The fact the expert's views differed considerably from the complainants' views was not grounds for judicial review. The complainants argued on appeal that the trial judge had erred in law and fact.

The Court of Appeal found that the PPC's brief decision did not address the substance of the complaint. The PPC had made it clear that it based its decision on the expert report and that it had rejected the complaint for the reasons set out in the expert report. The PPC had dismissed the complainant's comments in response to the expert report without explanation.

The Court of Appeal said: "While the opinion of an expert is very likely to be preferred to that of an unqualified person on the substance of an issue, the astute and well-informed unqualified person may well be able to point out inconsistencies in the report of a qualified person or expert, and may also be able to address and correct issues of fact upon which the expert opinion is based. Moreover, a lay person may identify relevant issues not addressed at all by an expert report."

The Court of Appeal gave the complainants leave to judicially review the PPC decision on the basis that a critique of an expert report must be considered and rejected or accepted for stated reasons, and no reasons were provided. The judicial review proceedings have yet to be heard.

This judgment shows the courts' important oversight role in the Medical Council's complaints process. The requirement to give reasons facilitates access to justice and this judgment should lead to greater transparency for respondent doctors and complainants alike.

• Evolving case law on the question of compensation for breaches of GDPR

In a development welcomed by data controllers across Europe, advocate general Campos Sánchez-Bordona has provided his opinion in UI v Österreichische Post[4] and does not agree that all GDPR breaches should be compensable.

In this case, the Austrian postal service collated data on the Austrian population's political persuasions. The claimant was profiled as having a strong leaning towards a certain political party. He argued that was insulting and that he suffered distress, reputational damage and diminished confidence.

This case was referred by the Austrian Supreme Court to the Court of Justice of the European Union (CJEU) because it raises questions of interpretation of European Law.

The opinion suggests that mere annoyance or upset should not be compensable. Any breach of GDPR is likely to cause some degree of irritation or upset and it cannot have been intended that all non-material damage should be compensated.

The opinion of an advocate general is not binding on the CJEU. It will be interesting to see if the CJEU follows the opinion and if it elaborates further on where the threshold between mere annoyance and compensable damage should lie.

Despite best efforts, minor data breaches will arise from time to time in general practice and in a litigious society, doctors are often worried about the risk of litigation. Your professional indemnifier can advise you on how to handle the situation appropriately and this opinion is welcome because it strikes against the concept of automatic compensation in cases of mere upset or distress.

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References
1. McGrath v Health Service Executive, High Court, Phelan J, 03 October 2022 [2022] IEHC 541
2. McGuinness v Sharif & Anor, High Court, Hyland J, 20 June 2022, [2022] IEHC 438
3. McEvoy and McEvoy v The Preliminary Proceedings Committee and the Medical Council, Court of Appeal, 29 July 2022, Binchy J [2022] IECA 174
4. UI v Österreichische Post AG (pending case) – C-300/21