

Clinical Negligence newsletter

This newsletter is one in a series of publications produced by the clinical negligence and personal injury group within the Private Individuals Division of Penningtons Solicitors LLP. If you would like further details on any of the subjects covered, please contact us at the addresses at the end of the newsletter.

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The arrival of the Chief Coroner

The oldest judicial system in England is about to see its first fundamental changes since 1887. They are expected to be introduced in April 2012, but no doubt only if funding remains available. For a system that has its origins in the Middle Ages, it is perhaps not surprising that the implementation process will be slow.

Coroners and lawyers might say that, while the function of the inquest remains establishing the identity of the deceased, the place, time and cause of death, that investigation has been much expanded by Article 2 of the European Convention on Human Rights. This requires the State to conduct a formal inquiry into a death in certain circumstances. The operation of the coroners' courts has also been affected by the right to a fair trial, as set out under Article 6.

These changes are generally welcome, except perhaps by those who have caused a death. However, they have thrown up defects in the current system which has come under increasing public scrutiny and perhaps interest as the process of investigation discloses more detail. The inquest has always been a useful and easy source of copy for the press and that fosters the public interest.

The changes to be brought in by the Coroners and Justice Act 2009 are to provide that improved system. Whilst the framework as defined in the Act is not yet implemented, the detail of the changes is out for consultation with the response period due to end in July, around the time of publication of this article.

Particular areas which are being considered are:

- appointment of a new official, entitled a 'Chief Coroner' and an associated national leadership team;
- making it easier to transfer inquests between different coroners' areas - in effect, unifying the current separate geographical jurisdictions;
- ensuring that bereaved family members have the right to request information being used by the coroner to make his decision;
- introducing a national complaints and appeals system that would avoid the current need to make use of judicial review by way of the Divisional Court as the only practical forum to question a coroner's decision;
- ensuring that the inquest answers all questions of the bereaved family as well as possible - perhaps to establish a family-centred approach to the findings of the inquest;
- improving standards and ensuring consistency across the country.



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Most important of all is the creation of central control by the Chief Coroner.

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Most important of all these is the creation of central control of the system by the Chief Coroner and the dilution of the current system of separate geographical

jurisdictions to each coroner. Central control should produce a more reliable system but there is always the risk that it

will bring with it a bureaucracy that will stifle the personal approach of the current system.

Can insurers still insist on panel solicitors?

A case has recently been decided at the European Court of Justice (ECJ) which has caught the attention of claimant solicitors and legal expenses insurers in the clinical negligence field.

The case is that of *Eschig v UNIQA Sachversicherung AG* (C-199/08, 10 September 2009) in which the ECJ has ruled that a legal expenses insurer cannot insist that its policyholders use its panel solicitors rather than a solicitor of their own choice.

Before considering the ECJ's decision, the ruling needs to be placed in context. When setting up funding for potential clients, claimant solicitors are required by law to check whether or not they have Legal Expenses Insurance (LEI) to fund the claim. Many individuals have LEI under their household or motor insurance policies. If LEI exists, then we are obliged to investigate whether the insurer will indemnify us to act for that claimant before we consider alternative funding arrangements such as a conditional fee agreement.

A common stumbling block for claimant solicitors where potential clients have the benefit of LEI, is that the insurers will often require the policyholder to instruct a firm from their designated panel. Insurers are keen to pass on cases to firms on their panel in exchange for referral fees and an agreement to work at reduced rates, so non-panel solicitors are often met with a blanket refusal. The potential downside for the claimant is that they lose the freedom to choose their own solicitor in their desired location.

The insurers find support for their position in UK law (see the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (the Regulations)), which has been interpreted by the Financial Services Ombudsman to mean that the right for a

policyholder to choose their own solicitor only kicks in once court proceedings have started. Thus during the pre-action stage of clinical negligence claims, legal expenses insurers have been at liberty to refuse to provide indemnity to non-panel solicitors. The effect of the *Eschig* case has been to suggest that insurers are acting contrary to European law by only allowing policyholders to choose their legal representation once an enquiry or proceedings have commenced.

Turning to the facts of the case, Mr Eschig was one member of a disgruntled group of investors in some asset management companies in Austria who had the benefit of LEI with UNIQA. When the companies went into financial demise, Mr Eschig instructed solicitors to bring bankruptcy proceedings and criminal proceedings against the executive management. As UNIQA insured multiple victims of the financial collapse, it claimed that it was entitled to select legal representation for the group action. UNIQA therefore refused to cover Mr Eschig's costs on the basis of some wording in the policy which restricted the policyholder's choice of solicitor if the claim was a group action. The standoff resulted in a protracted claim in the Austrian domestic courts and an eventual referral to the ECJ for a ruling on European Directive 87/344.

The ECJ ruled that European law guarantees the policyholder the right to choose its own solicitor, even in a group action when several parties wish to pursue a claim against the same defendant. Specifically, the ECJ ruled that under article 3(2)(c) of Directive 87/344, the policyholder has the right to instruct a legal representative of his choosing from the moment that he has a right to claim from



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his insurer under the policy. That right is not limited to cases where proceedings have commenced, but exists from the time the potential claim arose for which the claimant had valid cover. The ruling from the ECJ therefore calls into question whether the limitations in our legislation are appropriate.

Does this case indicate a change in the way insurers will deal with policyholders' freedom of choice of legal representation? A letter from Ken Hogg, The Financial Services Authority (FSA) Insurance Director, which we understand was sent to all LEI providers last month, should provide clarity. Mr Hogg states that the FSA is obliged to ensure that the Regulations are applied effectively and that customers are treated fairly. He also makes clear that under the Regulations the freedom to choose a lawyer arises *before* the commencement of any proceedings; whenever there is a conflict of interest; and where an insurer has adopted Regulation 5(4) and the insured is afforded the right to a lawyer of his choice, that freedom exists as soon as the right to claim under the policy arises. In summary Mr Hogg reminds insurers that any terms that detract from the freedom to choose a lawyer will not be compliant with the Directive. It appears that it might be difficult for an insurer to argue against the ruling in *Eschig* and the FSA's interpretation of it.

Plastic surgery under the microscope

A decision to proceed with plastic surgery is not usually one taken lightly and a great deal of trust is placed in the surgeon. When the results are not as hoped, it can be extremely distressing for the patient who may then face the need for revision surgery and also be considerably out of pocket.

Investigation of potential claims usually involves looking very closely at the records from pre surgery consultations and how carefully consent has been taken from a patient as well as considering how the procedure itself has been carried out.

Clients often say to us that they thought their surgeon was 'charming' or 'one of the best' and that they had complete trust in him. However, the concept of 'super surgeons' is a fallacy. Plastic surgery, or cosmetic surgery as it is often referred to in relation to elective aesthetic surgery, is a branch of medicine and everyone knows that medicine is not an exact science. Things do not always go to plan and results may not be perfect, even in the best hands.

We have recently represented a client who

had surgery from an eminent surgeon, a 'surgeon to the stars' as portrayed by the media, and she was very concerned about her results. Independent medical evidence established that her care had fallen short and her claim was settled out of court.

Patients must be free to consider their options, to make informed decisions and to be able to choose the best surgeon and treatment for themselves, free from any external pressure, be it by way of extravagant advertising or financial incentives. We are aware that some cosmetic surgery providers market their services aggressively and offer, for example, 'two for the price of one' procedures or discounts if procedures are 'booked by the end of the month'.



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There is considerable scope for stamping out such undesirable behaviour.

We cannot imagine this happening in any other private healthcare sector; indeed regulation would not allow it. However, the cosmetic surgery industry is very loosely regulated as matters stand and there is considerable scope for tightening up and stamping out such undesirable behaviour.

There are many excellent service providers offering good quality care to patients and it is a shame that their reputations may be prejudiced by those who are less scrupulous. Tighter regulation would surely go some way to preventing this and to safeguarding patient safety.

Casewatch

Examples of the work undertaken by our team:

Substandard plastic surgery care

Our client underwent rhinoplasty and a facelift under the care of an eminent plastic surgeon. She was very unhappy with the results of both procedures and after seeking a second opinion from another plastic surgeon, she sought legal advice.

We obtained independent medical evidence advising that both procedures had been carried out poorly. The surgeon had removed too much bone from the dorsum of the claimant's nose, meaning that he had no option other than to seek to rebuild her nose using a graft secured by external stitches. The surgeon then left the stitches in too long resulting in permanent scarring and a

dipped appearance to the claimant's nose.

The facelift was poor in that the skin had been pulled too tightly around the claimant's ears, again leaving her with excessive scarring and tethering of the skin. The claimant would need to have both procedures revised to try to improve her appearance but there would always be some cosmetic disfigurement. Following service of a Letter of Claim, we negotiated a settlement of £26,000 plus costs.

Incomplete termination of pregnancy

Our client had a termination of pregnancy at 13 weeks gestation at Newham Hospital in 2008 but due to errors made by the

surgeon, she subsequently haemorrhaged and needed a further operation to remove the retained products of conception.

We established that if the procedure had been carried out to a satisfactory standard, our client would have avoided the very distressing events of the haemorrhage. She would not have needed to undergo a hysteroscopy and would have avoided suffering Post Traumatic Stress Disorder.

The claim settled following investigations and settlement negotiations for £23,000 plus costs. It was funded by a conditional fee agreement.



Expanding the team

We are delighted to announce several new additions to our team over the summer months, reinforcing our position as one of the leading clinical negligence advisers in the UK.

Partner John Kyriacou now heads up the growing team in London while Grainne Barton, who joins as an associate, will work out of our Godalming and London offices. Both John and Grainne, who were previously partners at Pattinson & Brewer and Charles Russell

respectively, are recognised by *Chambers Guide to the UK Legal Profession* and *The Legal 500* as experts in their field. A further high profile appointment is the recruitment of Kay Taylor, who led Shoosmiths' clinical negligence team in Basingstoke, as an associate in Godalming. Kay joins us in September.



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Also contributing to our expansion are Vicki Kingston and Camilla Wonnacott, who have both taken up the role of case manager.

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- Corporate
- Corporate recovery and reconstruction
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- Family businesses
- Healthcare
- Intellectual property
- Pensions
- Professional regulation
- Travel and tourism

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- Banking and finance
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- Projects and infrastructure
- Property investors
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- Retailers and tenants
- Social housing

Private individuals

- Clinical negligence
- Family
- Farming and landed estates
- Personal immigration
- Personal injury
- Residential property
- Tax including offshore
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