Medical Negligence – Part I

What is Medical Negligence?

Medical negligence is a rapidly expanding area of litigation in Ireland. Medical Negligence is essentially an act or omission by a health care professional which is below the accepted standard of care and which results in injury or death to a patient.

Before the 1950s there was no reported case of medical negligence in Ireland. In fact, until 1989 the number of cases was minimal. In 1989 the case of Dunne v The National Maternity Hospital [1989] Irish Reports 91 came before the Supreme Court and remains to be the influential case in medical negligence to the present day. The principles set down by Finlay C.J. for establishing medical negligence:

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.

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 qualification.

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 of by his colleagues of similar specialisation and skill, he cannot escape liability if in reply the plaintiff establishes that such practice has inherent defects which ought to be obvious to any person giving the matter due consideration.

4. An honest difference of opinion between 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 the jury (or for a judge) to decide which of two alternative courses of treatment is in their opinion preferable, but their 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.

6. If there is an issue of fact, the determination of which is necessary for the decision as to whether a particular medical practice is or is not a general and approved within the meaning
of these principles, that issue must in a trial held with the jury be left to the determination of the jury.

…..’ General and approved practice’ need not be universal but must be approved of and adhered to by a substantial number of reputable practitioners holding the relevant specialist or general qualifications.

Though treatment only is referred to in some of the statements of principle, they must apply in identical fashion to questions of diagnosis.”

**What does “the reasonable standard of care” mean?**

The reasonable standard of care is the main test for establishing liability in medical negligence cases. Medical professionals must act with ordinary/reasonable care. It is possible that a doctor could be found negligent if s/he misdiagnoses a patient or if the treatment prescribed is unsuccessful. If the diagnosis or treatment were reasonable and there can be no finding of negligence. So, if a patient was misdiagnosed or not cured, this fact alone does not automatically amount to medical negligence if the medical professional passes the ordinary care test i.e. if another medical professional would have acted in the same manner. If the diagnosis and treatment are reasonable and pass the ordinary care test negligence cannot be found.

**How is the “General and Approved Practice” decided upon?**

In *Kelly v Crowley (1985) IR 212* Murphy J held that the onus is on the doctor to establish the existence of a practice where s/he defends his/her action by claiming to have been adhering to general and approved practice. However, departing from general and approved practice does not necessarily amount to negligence.

It was also established in Dunne that a doctor cannot escape liability for adhering to “general and approved practice” if the practice had “inherent defects” which should have been obvious to the practitioner.

In 2004 in *Gootstein v McGuire* and another the defendants disputed liability on the basis of “general and approved practice”. The Plaintiff’s husband had surgery to remove a tumour in his throat. On the second night after the surgery the tracheotomy tube became displaced. By the time the airway passage was established the man was brain dead. The case was brought on the grounds that the surgeon allowed his patient to recover in ICU where there was no-one trained to replace a tracheotomy tube. Johnson J acknowledged that nurses in Ireland are not specially trained to change tubes of this type and that no negligence therefore arose. However, he also noted that this was an emergency situation which required special training.

Johnson J found that failure to have a person, nurse or doctor in the ICU who was trained in the replacement of a tracheotomy tube, under the circumstances, was an “inherent defect”. So the surgeon was found guilty of negligence because had a trained person been present in ICU the deceased would not have died.

**Describe principle no. 4 - An Honest Difference of Opinion.**

This defence is only available where there are two approved methods of treating a patient.

An honest difference of opinion defence is not available to a doctor when an expert witness testifies that the course adopted was definitely incorrect. If this arises the Court must decide whether or not there was negligence based on the other principles.

In 2004 Griffin v Pattern a patient was 17 weeks pregnant and suffered intrauterine death. The obstetrician had four options available to her and decided that the Plaintiff’s uterus should be evacuated surgically. Following the operation the patient complained of a discharge and abdominal pain. An ultrasound, which was being carried out due to another problem, showed a piece of foetal bone measuring 5.5cm. This was later removed.
The Plaintiff sued on the basis that the doctor had been negligent in undertaking a surgical termination of the pregnancy without having the skill to perform the surgery and using inadequate equipment. Secondly, the Plaintiff claimed the Defendant failed to check that all bone structures had been removed and failed to carry out an ultrasound scan for this purpose.

The expert opinion in this case was majorly conflicting.

O'Donovan J relied on the Supreme Court decision in Dunne which held that “an honest difference of opinion between 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 the Defendant would follow one course rather than the other had been negligent.” On this point he concluded that the doctor was not negligent.

Again applying Dunne, O'Donovan J said that as there was no reason to doubt the honesty of any of the witnesses the doctor was not negligent.

Finally, O'Donovan J decided that failure to carry out an ultrasound scan amounted to substandard care on the part of the Defendant.

In the Supreme Court Geoghegan J decided that the Defendant was negligent.

Importantly, he also held that the “principle of honest difference” between doctors only arises when it comes to diagnosis and ways of treating a patient and so O'Donovan J could have formed the view that the obstetrician did not carry out the evacuation process properly.

**How would listeners know if they have a claim in Medical Negligence?**

If you, or a family member, have suffered injury due to the actions or inactions of a medical professional you may be entitled to compensation. You will be able to discuss the facts of your situation, in detail, with a member of our medical negligence team. As experts in the area of medical negligence litigation, we will assess your complaint and assist you in reaching a decision on whether to make the claim or at the very least investigating it further.

**Next week – Medical Negligence Part II**

On next week's show I will continue the discussion with how medical negligence occurs, how it is proven and the steps we take to establish a possible case.

**Contact Us**

Every healthcare professional owes a duty of care to their patients. This not only applies to surgeons, doctors, nurses and midwives but also extends to other medical professionals such as dentists, opticians, audiologists and psychiatrists. If you, or a family member, have suffered injury while receiving medical care contact Orlagh Wafer for advice at orlagh@lynchsolicitors.ie or telephone 052-612 4344 or Freephone 1800 750 850.

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