

Group Briefing

June 2019

Doctors and healthcare providers – what are your disclosure obligations to patients?

KEY CONTACTS



JOANELLE O'CLEIRIGH
PARTNER

+353 1 920 1650
joanelle.ocleirigh@arthurcox.com



JILLIAN CONEFREY
ASSOCIATE

+353 1 920 1165
jillian.conefrey@arthurcox.com



REBECCA CAWLEY
ASSOCIATE

+353 1 920 1438
rebecca.cawley@arthurcox.com

A recent judgment of the High Court in the CervicalCheck litigation highlights the obligations on doctors and healthcare providers in respect of the disclosure of information to patients.

The case of *Morrissey v the HSE* serves as a reminder to doctors, healthcare providers, and professional medical bodies of the duty of doctors and healthcare providers to disclose information to patients. This obligation extends to the disclosure of general information in relation to a patient's condition, in addition to the duty to disclose risks in advance of a procedure in order to obtain informed consent from a patient.

Much has been written and discussed about disclosing risks to patients in order to obtain informed consent to treatment; this article considers the requirement to disclose information in relation to a medical condition generally.

DUTY OF CARE AND THE OBLIGATION TO PROVIDE INFORMATION

Prior to any treatment or procedure, doctors are required to provide a patient with information about the condition of which they suffer, including the nature of the condition, the options for treatment, the benefits and risks of treatment or non-treatment. This was

endorsed by the Court of Appeal in *Healy v Buckley* in 2015:

“For the plaintiff’s consent to have been informed she had to know and understand the nature of the condition for which she required treatment, the extent of her need for treatment, the options for treatment, what each treatment option entailed and the benefits and risks of adverse consequences attaching to each treatment option including that of doing nothing”.

The “*patient centred*” approach to disclosing information to patients has been adopted by virtually every major common law jurisdiction.

DISCLOSURE TEST

A failure to warn a patient as to certain risks of their condition or proposed treatment could give rise to a possible breach of duty of care giving rise to a claim in negligence against a doctor.

According to the Supreme Court decision of *Fitzpatrick v White*, the courts favour a patient-centric approach with regard to disclosure of risks to patients: if there is a significant or material risk,

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of the doctor to inform the patient of that significant or material risk.

WHAT IS A SIGNIFICANT OR MATERIAL RISK?

Whether a risk is significant or material involves a consideration of:

- a. the severity of the consequences (if the risk manifests); and
- b. the statistical frequency of the risk.

To put it simply, a risk may be seen as material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned

of the risk, would be likely to attach significance to it. This test to determine the level of information that should be disclosed to a patient is also found in the HSE's National Consent Policy 2017 and it forms the basis for the Medical Council's advice in its Guide to Professional Conduct and Ethics for Registered Medical Practitioners (8th Edition, 2016) (the "**Guide**").

The Guide provides that patients must be given information both generally, and in relation to treatment:

"Patients will always need basic information about their condition, its investigation and treatment, and any serious or frequently-occurring risks".

CONCLUSION

Those involved in the provision of healthcare are reminded that, as a basic feature of treating a patient, there is a requirement to provide a patient with sufficient information, including information about their medical condition diagnosis and certain risks associated with it.

A patient must be given enough information such that the patient can understand the nature of the condition for which they require treatment, the extent of the need for treatment, the options for treatment, and the benefits or risks attached to each treatment, including that of doing nothing.

arthurcox.com

Dublin

+353 1 920 1000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com