

## E-Newsletter

January 2018



Message from the PRASIS Chair *Anita Hazari*

PRASIS ended 2017 on a high note by sponsoring the Winter BAPRAS Medico-legal session on 30 November with fantastic educational talks by Prof John MacFie, Lord Justice of Appeal Sir Richard McCombe and PRASIS Specialist Medical Negligence Underwriter Ms Sharon Brennan. It was also a pleasure to meet members and trainees at the Winter BAPRAS drinks reception sponsored by PRASIS, MPI Group and CFC Underwriting on 29 November at St George's Tavern, Victoria. The PRASIS Trainee scheme has been overhauled following its teething problems and an update was given at the PLASTA AGM on 30 November. The new Trainee scheme will be launched in spring 2018.

This newsletter has several important articles. A useful *red flags/ notifications guide* of circumstances about which you should notify the medicolegal team; information on a change in law regarding *GDPR (General Data Protection Regulations)*, which will come into effect in May 2018 that will apply to all PRASIS members, and where significant penalties could be incurred if ignored; and finally an article on *no fault liability* in private practice.

Continuing the PRASIS commitment to improve our understanding of the medico-legal process and reduce litigation, the next educational day for Consultants- '**Mediation and Resolution**' will be on **Saturday 19 May 2018, at the CFC Underwriting Offices, London**. As the **Dermatoscopy training day** on 16 November 2017 in Leeds led by PRASIS Board member Howard Peach and his dermatology colleagues was a great success, it will be repeated again in **November 2018**.

To register your interest for either of the above educational days, please email Helen Roberts: [helen.roberts@bapras.org.uk](mailto:helen.roberts@bapras.org.uk) . Both days are free to PRASIS members.

If you have any issues you would like to discuss or be addressed, please contact me: [anita.hazari@nhs.net](mailto:anita.hazari@nhs.net)

**CFC Underwriting Ltd: Sharon Brennan**

### **How will the new General Data Protection Regulation (GDPR) affect your practice?**

On May 25<sup>th</sup> this year, the EU General Data Protection Regulation, the biggest reform to EU data protection laws in 20 years, will come into effect. At its core, its aim is to give control back to citizens and residents over their personal data as well as trying to simplify the regulatory environment by unifying the regulation within the EU. The UK government has confirmed that the UK's decision to leave the EU will not affect its commencement.

### **Who and what the GDPR applies to**

The GDPR applies to both individuals and organisations that collect personal information from EU residents (data controllers), as well as to those who process data on the controller's behalf (data processors). It could be argued that surgeons in private practice could fall into either camp but this will depend on how they conduct their business activities. This information comprises all "personal data," which includes names, addresses, any identification numbers and all health information, which for plastic surgeons will also include pre and post-operative patient photos.

The GDPR places specific legal obligations on data processors, including the maintenance of records of personal data and processing activities. Processors can also be held legally liable if they are responsible for a breach.

For data controllers, the use of a processor does not relieve them of their obligations and the GDPR requires these organisations/individuals to ensure that their contracts with processors comply. As a surgeon it is likely that both you and the private hospital will be registered as data controllers and any administrative or secretarial staff (who could be engaged by either you or the private hospital) will be the data processors, meaning you will need to ensure that both you and any admin support staff you employ adhere to the new rules of GDPR. You should contact the Information Commissioners Office if you are in any doubt about whether you need to be registered as a data controller.

### **The impact**

In order to ensure compliance with the GDPR principles, any organisation or individual that is in anyway involved with the collection of personal data, such as health information, will need to make significant changes to the way that they either collect and/or process that data or, at the very least, how they document it.

In order to achieve this, some of the things you will need to review will include:

- Exactly what data you hold?
- Is this data sensitive – is it personal/financial?
- Do you share this data? If so with whom and are their systems secure? This could include private hospitals, medical billing companies or marketing agencies.
- If data is shared, how is this communicated to data subjects? Is permission obtained in all instances?

Once you have considered these points, it is then your responsibility to put in place robust security arrangements, which can include:

- Implementing appropriate technical measures that ensure and demonstrate compliance - this may include internal data protection policies such as staff training, audits of processing activities or arranging for encryption software to be installed.
- Maintaining relevant documentation on processing activities – consider what personal information are you collecting, why it is purposeful to your business operations, and if there are appropriate document retention and destruction measures in place.
- Where appropriate, appointing a data protection officer.

In addition to the above, there is a duty to report certain types of data breaches to the relevant supervisory authority within 72 hours of first awareness and in some cases to report the breach directly to the affected patients themselves. But remember, these data rules apply to ALL data / clients pertaining to your business and not just that of patients!

Failure to comply with the above can result in fines of up to *20 million Euros or 4% of your (global) turnover*, whichever is greater, thus making non-compliance something that simply cannot be ignored.

#### **PRASIS indemnity scheme – how can insurance help?**

With this raft of new compliance, the indemnity offered by CFC Underwriting Ltd to PRASIS members, already provides comprehensive cyber cover. It will cover the legal liabilities arising from security breaches and any subsequent regulatory fines (where insurable), providing you with peace of mind. Cyber insurance can play a key role in working proactively with your insurer before an incident occurs, as well as be directed to the correct resources to assist in any notification procedures to effected individuals. However, this cover does not obviate your duty to adhere to the ICO rules and regulations.

#### **Next steps**

Further advice on preparing for these changes can be found on the ICO website, which provides an easy 12 step guide to preparing for the new regulations and we urge you to read this and make the necessary changes to your practice.

Please refer to: [www.ico.org.uk](http://www.ico.org.uk)

## **The Medico-legal Section**

**Weightmans LLP: *Melanie Isherwood***

### **No Fault Liability in the Private Sector**

Clinicians practising at private hospitals ordinarily do so under a contract placing the onus of meeting medical negligence claims onto the clinicians themselves, with any indemnity to be provided by separate arrangements they have made themselves. It is crucial to understand

that such a contract is not binding on the patient who may sue the clinician, their assistant, where relevant, those operating the private hospital, or all of the above if the clinical care was substandard.

The rights of patients to sue the private hospital in this context do not prevent the organisation pursuing recovery of its losses from the negligent clinician, or a clinician supervising an assistant who might have been taken on, informally, by the contracted clinician, for a particular procedure.

The dissatisfied patient is particularly well placed to argue that the hospital is vicariously liable for the negligent actions of an individual clinician. The ever-widening scope of the doctrine of vicarious liability imposes a far greater threat to private hospitals and also, quite possibly, to you if you involve an assistant to help you with a particular procedure, with or without any formal contract of employment or suitable checks as to suitability and any separate indemnity cover.

Where an assistant has been engaged, on possibly an informal basis by the contracted clinician, there is a possibility that the contracted clinician may be responsible for the negligent actions of the assistant. The risk would be greater should the assistant no longer be capable of being traced or be found to have been uninsured/inadequately insured.

Vicarious liability, having once been confined to employee/employer situations, now also applies where the relationship is “akin to employment”.<sup>i</sup> The courts will consider the centrality of the clinician in the hospital’s organisation and how integrated the clinician was into the business of the hospital. It may be difficult to argue that the clinician was truly in business for him or herself alone, as an independent contractor, this now being the only situation in which the hospital may escape liability.<sup>ii</sup>

Under most situations it appears that where a clinician performs clinical duties, those duties would be integral to the hospital’s business activity and may be said to have been performed for the hospital’s benefit. This leaves the private hospital vulnerable to a claim. It seems that vicarious liability will even extend to a situation where a clinician’s activities are such that they may be said to constitute an assault on their patient.<sup>iii</sup> In situations where the hospital is sued, they are highly likely to seek an indemnity from you.

The situation of assistants or locums is less clear but the UK courts have found that the principal of a dental practice was vicariously liable for the actions of an associate where the contract between them gave the dentist such a degree of control over the associate’s work that the relationship was “akin to employment”.<sup>iv</sup> Whether this would apply to a situation where you engage an assistant on an informal basis is unclear but it is worthwhile being aware of the risk that it might.

The justification for widening the scope of vicarious liability is to provide justice in the modern economy, where there are numerous examples of workers who do not have a contract of employment but it would be artificial to consider that they are not part of the workforce. While this provides solace for the victims of clinical negligence, it is serious news for those operating private hospitals and those supervising assistants. It certainly underlines

the importance of rigorous selection of clinical staff, flawless communications with NHS employers of those clinicians, robust clinical governance procedures and adequate insurance arrangements.

<sup>i</sup> Various Claimants v Catholic Child Welfare Society [2012] UKSC 56

<sup>ii</sup> Cox v Ministry of Justice [2016] UKSC 10

<sup>iii</sup> Mohamud v W M Morrison Supermarkets Ltd [2016] UKSC 11,

<sup>iv</sup> Whetstone v Medical Protection Society Ltd [2014] EWHC 1024 (QB).

## The Brokerage Team

**MPI Group (a division of Lucas Fettes and Partners Ltd): *Hugo Merison and Anna Painter***

### **A guide to notifying circumstances which may give rise to a claim: Red Flags**

There is the potential for confusion and uncertainty around when a claim should be notified to your insurers. The terminology, “If you become aware of any circumstance which may reasonably be expected to give rise to a claim under this Policy you ....” could be considered to be subjective and therefore we have prepared the following list that should act as prompts to notify the Medico-Legal helpline should you find yourself in any of these situations:

**Please note that this list is issued as *guidance* only and is not exhaustive. If a particular circumstance does not appear on the list, it does not mean that you do not have a duty to report it. If you are unsure, then please contact the Medico-Legal helpline for advice.**

### **First awareness/prelude to a Claim?**

- A verbal complaint, for example a patient who intimates or expresses dissatisfaction irrespective of the outcome of a procedure or consultation.
- A breakdown of the relationship with a patient, for example where a patient refuses contact or further treatment.
- When a patient expresses underlying issues – comments such as “I’m stressed / depressed” during the course of treatment.
- A verbal attack against any of the medical team involved in the treatment of a patient.
- A written complaint to the surgeon or the private hospital in relation to the patient’s pre-operative, peri-operative or post-operative management.
- A patient or solicitor’s request for medical records.
- A solicitor’s letter confirming that they have been instructed by one of your patients
- Any other forms of investigation - police/CQC/GMC/NHS/private practice/coroner’s inquest.
- Any formal letter of complaint/claim from a patient or solicitors instructed by a patient.

- A patient avoiding payment.
- A suspension or restriction of practising privileges imposed by a private hospital.
- A breach of patient data - loss or theft of computer/ work camera, loss of patient notes etc. including any claim for breach of privacy.
- Any claim for defamation resulting from advice, report or expert witness services provided within the scope of your medical and clinical professional services.
- Any claim for costs and expenses incurred in respect of the Health and Safety at Work Act 1974, Criminal Proceedings, a Tax enquiry or Contractual, Employment and Property Disputes.

### **Clinical circumstances**

- A cardiac arrest whilst in theatre.
- Loss of an implant.
- Loss of a flap.
- Any serious, unexpected or unintended complication of surgery, whether or not the patient has complained: for example a partial or total loss of the nipple areolar complex after breast reduction surgery.
- Any circumstances where more than one revision procedure is required.
- If an incorrect operation is performed.
- Any damage to facial nerve or branch paresis.

### **Tips to avoid litigation**

- You must have a good standard of record keeping. Clearly record the advice you give on every occasion. Write legibly.
- Make sure that a patient is asked to provide a written receipt for any supporting literature that has been provided to them.
- Keep up to date with all relevant literature / standards pertaining to the area in which you practise.
- Ensure you have appropriate systems ensuring the safety and security of all confidential material – whether that be written or electronic.
- When things might have gone wrong ensure immediate engagement with your insurers so that matters can be acknowledged and the relevant complaints process activated.
- Gather all relevant information and provide a comprehensive account of events to your insurers.

### **PRASIS Code of Practice 2017**

To download the PRASIS code of practice, please click on the link below:

[http://prasis.co.uk/support\\_guidance/best\\_practice/prasis\\_code\\_of\\_practice\\_2017.aspx](http://prasis.co.uk/support_guidance/best_practice/prasis_code_of_practice_2017.aspx)

## Contact Details

### *Medicolegal advice*

Please check your policy and call the appropriate 24 hour Medico Legal helpline for advice. You must report all circumstances which may reasonably be expected to give rise to a claim.

#### **For policies underwritten by CFC Underwriting Ltd contact:**

Weightmans LLP

1st Floor

Temple Row

Birmingham

B2 5AF

Tel: **0845 0131574**

Email: [surgeon.helpline@weightmans.com](mailto:surgeon.helpline@weightmans.com)

*INCIDENT RESPONSE HOTLINE (CYBER & PRIVACY cover only):* In the event of an actual or suspected privacy breach (e.g. you lose your laptop or your computer is compromised in any way) please call our free emergency 24-hour Data Breach Hotline: 0800 975 3034.

#### **For policies underwritten by W. R. Berkley Syndicate Management Limited (WRB) contact:**

MPI Group

Plough Court

37 Lombard St

London

EC3V 9BQ

Tel: **0845 5194393**

Email: [advice@mpi.group](mailto:advice@mpi.group)

## Adverse Events

### **Notification of adverse events**

The Indemnity Schemes arranged by PRASIS provide members with indemnity for costs and damages incurred in clinical negligence claims, through claims made insurance policies. You must report all circumstances which may reasonably be expected to give rise to a claim to the appropriate 24 hour Medico Legal Helpline, as soon as it is reasonably practicable. Your policy will also provide other covers such as Public Liability, and these claims should also be notified to the same helpline. Please refer to your policy documentation for full details of the policy cover, terms and conditions, which will also include details of the Medico Legal helpline that is applicable to your policy.

**Failure to notify cases or to co-operate with the claims management team may jeopardise the indemnity available.**