

# **MEDICO-LEGAL RELATIONS - A CODE OF CONDUCT**

The proper formulation and just finalisation of claims for damages for personal injuries is a matter of considerable public importance. The welfare and rehabilitation of patients may depend not only on expert medical treatment but also on a proper award of damages for their injuries. Accordingly, it is most desirable that there be a spirit of co-operation between the practitioners who have treated and examine the patients and their legal advisers to assure a proper presentation of the claims for damages. The following points are made in the hope that they will lead to further and more effective co-operation and understanding between the two professions.

## **1. Arrangement of Medical Examination:**

It is inappropriate for a solicitor to send a client to the client's general practitioner to obtain a referral to a specialist when the sole purpose is to obtain a medico-legal report. Solicitors should be aware that the provision of a medico-legal report is not a medical service and does not attract a medical benefit rebate to the client under the Health Insurance Act.

The client should not be encouraged to consult a doctor on the pretext that the consultation is for treatment., when in fact the true purpose of the consultation is to obtain a medico-legal report. The doctor seeing a patient for a medico-legal assessment may need to obtain a more detailed history and address different clinical areas than ordinarily considered in a routine medical or surgical consultation.

If the appointment for the examination prior to the preparation of the medical report is arranged by telephone the appointment should be confirmed by letter from the solicitor in which the following matters should be set out: -

- (a)** The date and circumstances in which the injuries were suffered.
- (b)** The hospital in which the patient was treated.
- (c)** Particulars of the main injuries.
- (d)** A brief summary of the main disabilities complained of, so far as the solicitor is then aware.

The specific matters which the solicitor desires the practitioner to include in the report should then be set out; such as: -

- (e)** A description of the injuries.
- (f)** An outline of the course of treatment.
- (g)** Whether or not the patient's condition is stabilised.
- (h)** Whether there is any residual disability, and, if so, the extent of such disability.
- (i)** Whether any further medical treatment is indicated.
- (j)** Whether the patient is fit for any and, if so, what type of work.
- (k)** If the patient is unfit for work, the extent to which this incapacity has resulted from his injuries.

## 2. Furnishing of Medical Reports:

- (a) Any doctor who has treated a patient should on request and at the appropriate fee promptly furnish to the patient's legal advisers a report as to the patient's treatment and condition.
- (b) Whilst no practitioner is legally obliged to accept instructions to assist a patient's legal advisers with a damages claim, in those cases where the patient is admitted to hospital under the care of an honorary or other surgeon the practitioner in charge (or a suitable practitioner nominated by him) should on request and at the appropriate fee furnish to the patient's legal advisers a report as to the admission to and treatment of the patient whilst in hospital and furnish such follow up reports as may be reasonably necessary to enable the patient's claim for damages to be properly presented.
- (c) In addition to any other information specifically sought by the solicitor medical reports should normally include:
  - (i) the history obtained from the patient.
  - (ii) the patient's present complaints.
  - (iii) the observations and findings on examination of the patient.
  - (iv) details of any special diagnostic reports, including X-ray, pathology, E.C.G.'S and E.E.G.'s.
  - (v) the diagnosis of the patient's condition.
  - (vi) the prognosis of the patient's condition. (Where it is alleged that a pre-existing disease or condition has been aggravated, or that future disease or degeneration may occur, specific reference to this should be made.)
- (d) A medico-legal report must contain the **unbiased and objective opinion of a medical expert** and must be based upon facts which have been presented to him/her. A doctor should not become an advocate for the patient/client who has been examined.
- (e) Where the solicitor who is applying for the medical report is acting for the patient he will normally enclose with his letter of request a brief note signed by the patient, authorising the supply of such information

The practitioner should endeavour to give prompt attention to the request for a medical report. Often the patient's claim for damages will be seriously prejudiced if the required medical report is not promptly supplied.

In any event the report must be supplied within thirty days of the examination (Section 85(3) Workers Compensation Act 1988).

### **3. Court Attendances of Medical Witnesses:**

- (a)** There is frequently uncertainty as to the precise date upon which the trial of an action will commence. Generally, the case is warned for trial during a particular week but unless it is the first case in the list for that week it may not be possible to accurately predict on what day during that week the trial will commence or in fact whether it will definitely be reached at all during that week. This situation is one of considerable concern to solicitors, parties to the action and other witnesses, but at the present time no scheme has been devised whereby all cases can be warned to commence on specific dates.
- (b)** As soon as a case has been warned for trial during a specific week the solicitor should telephone or write to the practitioner who may be required to give evidence advising him of the listing of the case and checking as to the practitioner's commitments during that week and the most suitable times for him to attend Court.
- (c)** The solicitor should attend the practitioner's rooms for the purpose of briefing the practitioner and at that time advise the practitioner of all those aspects of the practitioners evidence that are likely to be the subject of some dispute at the trial.
- (d)** Immediately upon the solicitor ascertaining the actual day on which the trial of the action is to commence he should speak to the practitioner to arrange a specific time for him to attend Court to give his evidence, trying to fit in with the practitioner's other commitments with as little inconvenience as possible. If the case is likely to last for only one or two days there will obviously be more difficulty in meeting the convenience of the practitioner than where the case is likely to spread over a period of three or four days.
- (e)** With proper co-operation between the two professions in regard to these matters the need to issue a subpoena to compel the Court attendance of a medical witness should never arise.
- (f)** Solicitors should ensure that maximum notice of cancellation of a Court appearance is given to a practitioner. Short notice will result in payment in full for the time set aside, earlier notice will attract a lesser fee.

### **4. Payment of Fees:**

- (a)** Medical Reports:
  - (i)** Notwithstanding that the strict legal responsibility for payment of a fee for providing a medico-legal report rests with the client, it is the view of the Law Society that, where a solicitor arranges for a patient to be medically examined and the medical practitioner furnishes a proper report of his/her findings and opinion, the solicitor is responsible for payment of the medical practitioner's proper fee for that service and failure to pay may be referred to the Disciplinary Committee of the Law Society.
  - (ii)** If following a request by a solicitor for a medico-legal report, the solicitor notifies the medical practitioner that the report is no longer required, the fee is payable if the report has been prepared. If the report has not been prepared out the examination has been conducted the consultation fee is payable.

- (iii) The solicitor should pay the practitioner's account for the consultation and report promptly upon receipt of such account.
  - (iv) If any special or expensive tests are considered necessary the practitioner should not incur the expense of same without first obtaining the solicitor's approval to the incurring of this expense. In the alternative the recommendation for such tests should be contained in the practitioner's report.
  - (v) The practitioner's account for the examination and preparation of the report should bear a proper relationship to the time and consideration involved. The practitioner should not assume that ultimately all such accounts will be paid by an insurance company. This certainly is not so if the patient's claim does not succeed, in which case the patient must ultimately bear this expense himself.
- (b) Outstanding Medical Accounts:**
- (i) The solicitor is not liable for payment of the treating medical practitioner's treatment fees. It is unreasonable for a medical practitioner to withhold a medico-legal report until treatment fees are paid.
  - (ii) Even though the patient has a claim for damages or worker's compensation pending, the practitioner is not obliged to wait until the claim is settled before seeking payment of his account from the patient. The solicitor should clearly advise his client of this fact and advise his client of the right to apply to Medicare and/or his private health fund for provisional payment of those accounts.
  - (iii) Even upon settlement of a claim for worker's compensation or damages the solicitor is not permitted to pay out of the money recovered the outstanding account of the practitioner without the authority of the patient. Normally the solicitor is given such authority and does pay such outstanding accounts.
  - (iv) Where the solicitor has written to the practitioner to wait for payment until the claim has settled and the practitioner agrees to do so then there is an obligation on the solicitor to inform the solicitor that the action has been settled.
- (c) Witness fees:**
- (i) It is not proper for a practitioner to seek, either before or after Court attendance, excessively high fees for such attendance to give evidence. Where the party calling the witness succeeds in obtaining a judgment he is only obliged to recover from the other party such witness fees as are ultimately fixed by the Court if the amount claimed is disputed. This means that the party calling the witness would have to bear the excess if an exorbitant fee were sought and paid.
  - (ii) If a practitioner declines to attend to give evidence because the solicitor will not undertake to pay excessively high fee the solicitor would then be forced to subpoena the practitioner, who in such circumstances would only be entitled to receive the witness fee fixed by the Court. Fortunately, the relationship between the two professions has been such that it is only in very rare circumstances that solicitors have had to resort to subpoenaing practitioners.

**5. Sundry Matters- Relating to Medical Reports, Damages and other Matters:**

- (a)** Medical reports which are prepared for the purposes of contemplated Court proceedings are privileged documents and must not be disclosed to other persons without the consent of the patient or his solicitor. If the practitioner is of the view that the patient's general practitioner should be informed of any relevant medical fact or opinion the practitioner should write direct to the patient's general practitioner as to that fact or opinion.
- (b)** If a practitioner is served with a subpoena to produce his notes it is important that those notes are produced to the Court which is the authority which issues the subpoena. Notes should not be provided direct to the solicitor who files the subpoena.
- (c)** Practitioners should not express opinions to patients as to the quantum of damages that they are likely to recover or as to whether they are likely to be successful or unsuccessful in their action.

**6. Dispute Resolution:**

- (i)** Where a practitioner believes that a solicitor, or vice versa, has persistently declined to act in accordance with the spirit of this document he should be at liberty to report the matter to his Society which in turn should make complaint to the other Society.
- (ii)** The President of the Medico-Legal Society for the time being will appoint a practitioner and a solicitor to be available to mediate any dispute between another practitioner and another solicitor.