miga ALWAYS

Bulletin

August 2016

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New MIGA Plus offer
Business Education

Earlier this year we launched MIGA Plus to provide you with access to additional products and services which are aligned to your business and day to day medical practice. In addition to the Business Insurance product I am pleased to introduce to you a new MIGA Plus offer.

We have entered into a partnership with The Private Practice, a well-established education provider to the health care profession, to give you access to their Business Education courses at special rates. Whether you're starting-out, established, or planning a successful retirement, through their courses The Private Practice can help you gain efficiencies in your business, financial and personal life.

Offering a regular schedule of Business Education courses in major capital cities across Australia the courses are both accessible and focused on the business issues impacting medical practice. Designed specifically for the healthcare profession these courses assist doctors and practice managers develop their business management skills to help them get the most out of their medical practices.

We believe these courses will be very beneficial to our members and clients, particularly those in private practice or considering starting in private practice. The arrangement enables you to access courses at a substantial discount through MIGA Plus.

The addition of Business Education to MIGA Plus through our partnership with The Private Practice delivers on our aim to provide you with high quality, value added services and also supports the Group's broader commitment to education and risk management.

For more information about the offer, the courses available and timing please visit the MIGA Plus page on our website.

Mandy Anderson
CEO and Managing Director

Welcome to the August issue of the MIGA Bulletin. In this issue you will find a great case study about providing information to non-English speaking patients. While the case itself deals with 'risk warnings' in surgery it has application across the medical spectrum.

As practice owners and managers increasingly recognise the need to protect their practices from medico-legal complaints and claims, so we begin our new breakfast series to help you learn from our claims files and the experiences of others. There is no better place to consider the issues that may exist in your practice than standing on the outside and looking in!! Find the session details later in this Bulletin and take the opportunity to book places for you and your practice manager, enjoy breakfast and learn from the '**Secrets of the claim files**'.

Shirley Lynott
Underwriter – Healthcare Companies

AGM and election of Directors

MIGA's Annual General Meeting is scheduled for Saturday, 26 November 2016. It will be held in conjunction with a Risk Management Conference in Adelaide at the Hilton Hotel, Adelaide.

The business of the Annual General Meeting includes the election of Directors to the Board of MDASA, the parent company of the Group.

As per Article 46 of the Constitution of MDASA, the number nearest one third of medical Directors must retire by rotation. This means that both Dr Andrew Pesce and Assoc. Prof. Peter Cundy will retire by rotation at the AGM and both offer themselves for re-election.

Therefore, there are two Board vacancies this year and nominations for election to the Board are now invited. Other nominations for election must be proposed and seconded by members of MDASA and lodged at our Adelaide Head Office on or before 5.00pm (CST) Friday, 16 September 2016 and marked to the attention of the CEO.

Nominations must be made on the official Nomination Form and be accompanied by a brief and relevant statement (up to 300 words) about the nominee, which will be circulated to members of MDASA prior to the Annual General Meeting.

Nomination Forms are available from our Head Office. If you have any queries concerning the Annual General Meeting, please contact Mandy Anderson CEO on 1800 777 156 or at mandy.anderson@miga.com.au.

Details about the Annual General Meeting and nominee statements, if applicable, will be distributed with the October Bulletin.

Mandy Anderson
CEO and Managing Director

Queen's Birthday Honours

The following members received Queen's Birthday Honours and we extend our congratulations to them.

Dr Gordon Beaumont (AM) – Member of the Order of Australia

For significant service to medicine, particularly in the field of otolaryngology, and to medical research and education.

Dr David Wilkinson (OAM) – Medal of the Order of Australia

For service to hyperbaric medicine.

Changes to your practice and Medical Board Registration

We recently published an article on the new registration standards applying from 1 January 2016. A critical aspect of the registration standard is the requirement for doctors to declare annually they will not practise unless they have professional indemnity insurance that meets the registration standard.

The key requirements of the doctors' professional indemnity insurance are that it must:

- Cover the doctor comprehensively – that is provide cover for work they have done in the past and work they intend to do
- Provide appropriate cover for claims arising out of or as a consequence of activities that occurred in prior practice – i.e. retroactive cover
- Continue to provide appropriate cover for claims that may be made after a doctor ceases practice or ceases some activities that were undertaken in the past – i.e. run-off cover.

We have had situations where doctors have been working in a field of practice for which they had not been insured and had inadvertently omitted to advise us of their change in circumstances – sometimes for very lengthy periods without appropriate cover.

We have also had several situations where doctors have expressed a desire not to effect retroactive or run-off cover.

So what are the risks?

The risks of not being covered or not being covered appropriately are obvious as the financial impact on a doctor funding an uninsured claim can be devastating.

The additional, and perhaps less understood risk, is the potential impact on a doctor's registration for practising without (or without appropriate) professional indemnity insurance. The consequences of non-compliance with the registration standard can lead to disciplinary proceedings with the potential for conditions on registration or the registration being cancelled.

In view of the above it is extremely important that doctors take care to ensure they are at all times covered and at all times correctly covered. This will provide doctors with the confidence to practise knowing they will be supported in the event of adverse outcomes or complaints and it will also ensure their registration is not placed at risk.

Cover under your medical indemnity insurance with MIGA is dependent on your selected Category of practice. Your Category must accurately reflect your specific area of practice and the work you undertake (or have undertaken). In some cases your work may be covered by more than one Category or your cover may need to be extended to provide clarity that you are covered for specific aspects of your work.

It is particularly important that doctors tell us as soon as possible if they intend to undertake additional work (e.g. cosmetic work) or that the nature of their practice will change (e.g. entering private practice or graduating from a registrar training program).

If you have any concerns or queries about your cover please contact your Client Services Officer. They will be happy to discuss your insurance arrangements with reference to your past and present work.

Maurie Corsini
National Manager – Underwriting

Advocacy snapshot

MIGA represents its members' and clients' needs in a variety of ways.

MIGA has a particular focus on advocacy in areas which directly impact on members and clients.

Over recent months MIGA has made submissions on the following:

Advance Care Directives (NSW)

The NSW Government is undertaking a review of the Advance Care Directive template and associated information booklet.

MIGA has provided feedback, to the effect that these documents must be clear and unambiguous. This in turn will make it easier for health practitioners who have to act on these Directives.

The work MIGA has done on Advance Care Directives is also relevant to submissions made in other areas such as the NSW Law Reform Commission's review of guardianship law and the Victorian Government's position paper on End of Life Choices. MIGA's aim in involving itself in these reviews is to ensure the health practitioner's role and responsibility when working in these areas is appropriate and clear.

Medical Council of NSW Performance Assessments

The Council is reviewing the whole process associated with Performance Assessments.

We are preparing a submission targeting areas for improvement, including:

- Selection, training and review of performance assessors
- Improved materials to assist practitioners understand the purpose of the Assessment
- Feedback mechanisms.

If you are interested in these or other medico-legal or insurance industry issues, and have a view you would like to share, please contact us.

Timothy Bowen
Senior Solicitor – Advocacy, Claims & Education

Case Study

Is your privacy policy up to scratch?

Key issue
The OAIC has been reviewing medical practice privacy policies and released the findings of its assessment.

Key takeaway
The OAIC assessment has made a number of recommendations which will be useful in reviewing and updating the Privacy Policy for your practice.

Mark Helier
Solicitor – Claims & Legal Services

Recently, the Office of the Australian Information Commissioner (OAIC) released the findings of an assessment it made of the privacy policies of forty general practice clinics against Australian Privacy Principle 1 (APP1).

APP1 requires all entities that are subject to the *Privacy Act 1988 (Cth)*, which includes all health service providers, to have a clearly expressed and up to date policy about how the entity will manage personal information. Although the assessment only related to general practice, its comments are clearly applicable to all health service providers.

More specifically, APP1.3 requires health service providers to have an up to date policy, APP1.4 advises the minimum requirements of the policy and APP1.5 and 1.6 provides for access to the privacy policy.

The OAIC assessed the content of the privacy policies and access to those documents.

In summary, some of the main recommendations coming out of the assessment are:

- If a GP practice has a website then the policy should be available on the website
- The practice should make a hard copy of the privacy policy available to patients at the clinic
- The policy should be easy to read
- The policy should contain the position title, telephone number, postal address and email address of a contact person at the practice to whom a request to access and correct personal information should be directed (although a generic telephone number and email address can be used in case of staff changes)
- In addition to advising patients that the practice collects information relating to their medical care the policy should go further to detail that the patient's name, date of birth, address, Medicare or individual health care identifiers will also be collected
- Practices should include further information advising patients how the practice collects information such as patient registration forms, the consultation process or from third parties such as other health care providers, pathology labs
- Practices should be encouraged to include further details about how personal information is held securely, for example, with the use of passwords to protect electronic information and storing files in secure cabinets
- The policy should clearly state all of the "usual" purposes for which the information is collected, held, used and disclosed which may mean also stating in the policy that information may be used for quality assurance, accreditation purposes or by IT service providers
- Expanded detail on the complaint resolution process such as asking patients to make the complaint in writing, that the organisation will respond to the complaint in a reasonable time (usually 30 days) and the ability of the complainant to take the matter to the OAIC if dissatisfied with the practice's response
- There was also a specific emphasis on E-Health which included the *My Health Records Act 2012 (Cth)* and the *Healthcare Identifiers Act 2010 (Cth)* and the use of electronic transfer of prescriptions (eTP) services. If the clinic uses the My Health Record system then it should inform the patients that the clinic may collect, use and disclose their health information for the purpose of using the My Health Record system.

As with every practice policy, the contents should be reviewed on a regular basis to ensure compliance with the relevant legislative obligations and that it reflects your current practice requirements.

We recommend you undertake a review of your practice's privacy policy and should you have any particular questions, please contact the Claims and Legal Services department at MIGA for further assistance.

Other resources

General Practice Clinic – APP1 Privacy Policy Assessment
https://www.oaic.gov.au/privacy-law/assessments/general-practice-clinics-app-1-privacy-policy-assessment

OAIC Guide to Developing an APP Privacy Policy
https://www.oaic.gov.au/agencies-and-organisations/guides/guide-to-developing-an-app-privacy-policy

The RACGP's privacy policy template for general practices and privacy policy pamphlet template
http://www.racgp.org.au/your-practice/ehealth/protecting-information/privacy/

Case Study

Language barriers – making sure your patient understands

Key issue
Language barriers present a key medico-legal risk to practitioners.

Key takeaway
If you cannot be satisfied that a patient understands the risks of a procedure by reason of their command of English (or otherwise), the procedure should not go ahead. Consider using a professional interpreter and document the discussion.

Ellie Theodore
Solicitor – Claims & Legal Services

The foundation of a healthy doctor/patient relationship is good communication. But what happens if language barriers exist?

A recent NSW Court of Appeal decision determined that where a language barrier exists, a medical practitioner must take all reasonable steps to ensure that the material risks related to a proposed surgical procedure are conveyed, and that practitioners must satisfy themselves that the substance of the information has been conveyed and has been understood.

Facts

The patient was Macedonian and her English was poor. The patient was diagnosed with a tumour on the sheath of an acoustic nerve. The patient consulted an otolaryngologist ('the practitioner') and surgery was recommended. The patient agreed to undergo surgery to remove the tumour. During the operation an adjoining facial nerve was severed[1], resulting in a facial palsy. Further treatment to try to rectify the nerve injury was unsuccessful.

Prior to the surgery, the patient attended four pre-operative consultations. The first consultation was with a different practitioner. The patient brought a friend to interpret. Following this consultation the patient mistakenly understood that an MRI scan showed a brain tumour.

The second consultation was with the practitioner. The patient again attended with her friend as interpreter. She still believed she had a brain tumour. A decision was made to have surgery. The patient's version of events was that no warnings or risks were explained to her at this consultation. The practitioner had no notes of the consultation and gave evidence based on his usual practice, that is, he would have informed her of the risks, including the material risk of injury to the facial nerve.

The third and fourth consultations were held at the hospital, the third with the practitioner, the fourth with a hospital staff member, and both with a professional interpreter present. The practitioner's and hospital's version of events was that there was discussion about the risks on both of these occasions and the patient provided consent.

District Court Proceedings

The patient commenced proceedings in the District Court against the practitioner and the hospital. The patient alleged that there had been a failure to warn her of the risk of damage to the facial nerve (which was the risk that materialised in this case) and alleged that the operation had been performed negligently.

The trial Judge found the patient was not successful in relation to her allegation that there had been negligent performance of the surgery, however, the patient was successful in establishing that there had been a failure to warn her of the risks and was awarded $331,000.

In finding that there had been a failure to warn in this case, the trial Judge devised a form of protocol to be followed by practitioners in order to comply with the duty to convey relevant information to patients, comprising 16 separate elements.

The practitioner and the hospital appealed the decision of the District Court Judge.

Appeal Proceedings

The issues that the Court of Appeal were asked to consider included:

a. whether the trial Judge overstated the obligations on a practitioner in circumstances where effective communication was dependent on an interpreter;

b. whether adequate warnings of the risk were provided to the patient;

c. whether the alleged failure to warn materially affected the patient's decision to have the operation.

The appeal was successful

The appellants successfully argued that the 16 elements devised by the trial Judge were, amongst other things, onerous and not a true statement of the duty to warn.

The Court of Appeal found that the medical practitioners involved in the patient's care had taken reasonable care in ensuring the patient was provided with, and had understood, the relevant information about the material risks of the surgery.

The Court of Appeal found that there may have been a misunderstanding on the patient's part as to her condition (a brain tumour) and treatment options leading to her choosing surgical intervention, but her misunderstanding was not due to any breach of duty on the part of her doctor.

Tips

Although the case focussed on the consent process for a surgical procedure, the Court of Appeal's decision applies to any practitioner providing any form of treatment, surgical or otherwise.

This case highlights that in relation to non-English speaking patients, you must take reasonable care to ensure that the material risks of a proposed procedure are explained, and you must be satisfied that the patient understands.

If you cannot be satisfied that a patient understands the risks of a procedure by reason of their command of English (or otherwise), the procedure should not go ahead.

We recommend, for non-emergency situations, involving a professional interpreter and making detailed notes of the discussion of risks, the presence of the interpreter and confirmation the patient understands the information conveyed.

Contact one of the solicitors in the Claims and Legal Services department for advice if you have concerns.

1 The nerve was severed by a member of the surgical team under the practitioner's supervision

Links

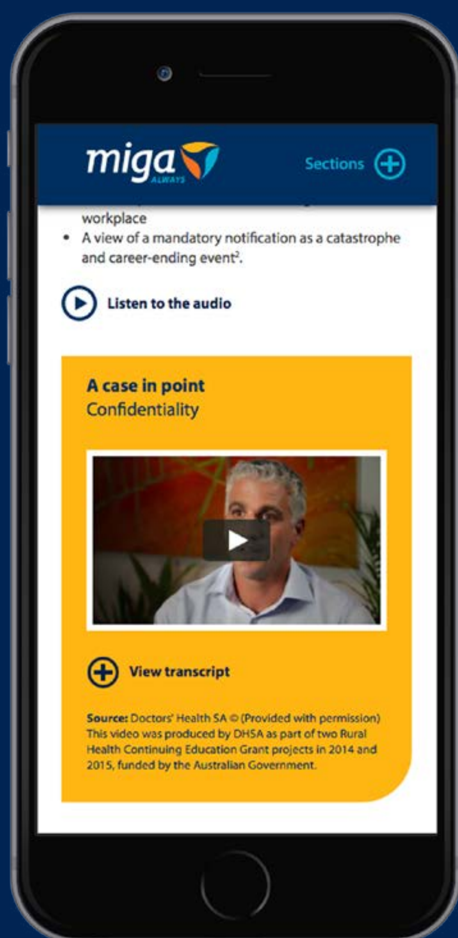
Review the case at:
https://www.caselaw.nsw.gov.au/decision/573956c0e4b05f2c4f04e155

Only 50% of Australian doctors have their own GP!

Take control of your health.

Healthy doctors are less at risk of a complaint, claim or disciplinary action.

MIGA has some great resources on how the good health of doctors is a good risk mitigation strategy. Access the full range of articles and videos via ebook.miga.com.au/resources/doctors-health



Why doctors avoid the doctor

"Well, confidentiality is a big issue. It seems that if you are a doctor with an illness, it's news for the medical grapevine. I've had my confidentiality breached repeatedly by the staff at my GP's office, and even worse at the pharmacy where the word is non-existent. I remember being in a private hospital heading to the nurses' station and they've got me down on the inpatient board as "doctor". What's worse is that a senior clinician who is not even treating me was going through my case notes. The most important thing is that we need to find a doctor who we can trust and keep our details confidential. That's the most important thing."

Eighty-seven percent of Australians have a general practitioner, but only 50% of Australian doctors have one, with surgeons being the least likely to have a GP.[1]

In MIGA's Workshop "Caring for our Colleagues" workplace pressures on mental health are examined in an interactive session facilitated by MIGA doctor presenters. The Workshop examines why your health is important (to you, your family, your colleagues and your patients), how unwell doctors behave, the impairment progression and the barriers to seeking help.

MIGA's focus on the well-being of doctors is not just because we are a member based organisation. Promoting the health of doctors is also a good risk mitigation strategy. Healthy doctors are less at risk of a complaint, claim or disciplinary action.

Take control of your health. MIGA has some great resources to help.

Keryn Hendrick
Risk Education Manager

1 Doctors' Health SA (DHSA) Survey data (2008)

Online resources

View our new **Doctors' Health eBook** on computer, tablet or smartphone for video case studies, tips and resources

http://ebook.miga.com.au/resources/doctors-health

Attend "Caring for your Colleagues" Workshop - At an MIGA Conference or Workshop session (5 MIGA Points)

Book through the Client Area of the website www.miga.com.au

Undertake a comprehensive health assessment with a GP (5 MIGA Points)

http://www.miga.com.au/content.aspx?p=209

Complete the new Doctors' Health Questionnaire (5 MIGA Points)

Client Area of the website www.miga.com.au

MIGA Practitioners Support Service

http://www.miga.com.au/content.aspx?p=72

Doctors' Health SA (DHSA)

www.doctorshealthsa.com.au

Heads Up – promoting the mental health of doctors and medical students

https://www.headsup.org.au/creating-a-mentally-healthy-workplace/taking-action/promoting-the-mental-health-of-doctors-and-medical-students

Australian Medical Association: Resources on doctors' health

https://ama.com.au/resources/doctors-health

Australian Medical Association: Position statement on the health and well-being of doctors

https://ama.com.au/position-statement/health-and-wellbeing-doctors-and-medical-students-2011

Independent local, state and territory doctors' health service providers

http://www.adhn.org.au/

DIT Grants Program

Dr Thomas Volkman's incredible experience - Neonatology in Pakistan

For doctors in training, there are many additional opportunities to gain experience, grow skills and expand knowledge – but making the time and finding the funds can be difficult. To assist, MIGA's Doctors in Training (DIT) Grants Program provides four $5,000 Grants annually. This funding aims to help doctors grow personally and professionally, and ultimately facilitate the sharing of newly acquired knowledge with medical colleagues and patients alike.

Grant recipient Dr Thomas Volkman received funding from MIGA to undertake a courageous Neonatology Mission through Médecins Sans Frontières (MSF) in Peshawar, Pakistan. An excerpt from his fascinating report provides an insight into his time in the country's North, an area home to millions of displaced refugees from Afghanistan:

"I was under no illusions as to the cultural challenges of operating as a male doctor in a maternity hospital in Pakistan. Sporting a newly grown beard and dressed in the local Shalwar Khameez, many of the Pakistani staff say I look like a local Pashtun man; I feel anything but local but I appreciated the sentiment.

The main problems we face are the challenges of treating pre-term babies who are born underweight and underdeveloped. One baby was born with an opening in the abdominal wall leaving the abdominal organs exposed to the outside world. This baby fought hard and had a family with unending love, but the resources to provide this level of surgery do not exist for so many children of refugees or displaced people. Seeing babies succumb to readily treatable conditions is challenging for all of the team involved in their care.

This experience and these stories will stay with me through much of my professional and personal life. The expectations and trepidation stepping off the plane have been replaced with new skills, professional confidence and a sense of resilience…In this competitive age filled with the 'fear of missing out,' it can be easy to stay on the path well-travelled. I say to everyone reading this report, if you have the voice inside you, just say yes."

Be inspired by Dr Volkman and embrace an additional training opportunity – funding from MIGA could help you on your way! Jump on our website to access Dr Volkman's full report, details of the available Grants and the Program Application Form.

Read about the incredible experiences of many other Grant winners

Visit the Doctors in Training Grants Program on our website.

Dr Mark Dowling
Training Program Research Project – Neurological complications in recipients of bone marrow transplants

Location Massachusetts General Hospital, Boston, Massachusetts, USA

Dr Matthew Cheng
Training Program Clinical Research Fellowship – Plastic and reconstructive Surgery

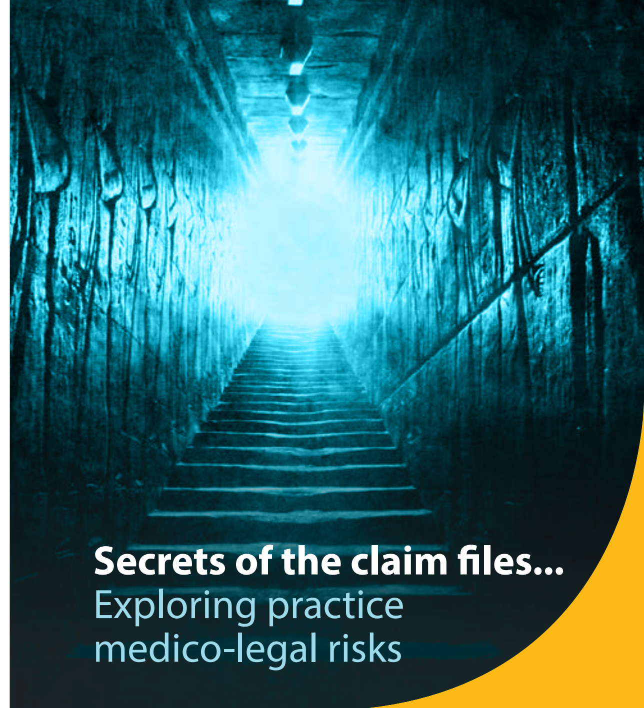
Location Princess Alexandra Hospital, Brisbane, Queensland, Australia

Dr Thomas Volkman
Training Program Neonatology Mission through Médecins Sans Frontières

Location Peshawar, Khyberpakthankwa Frontier Region, Pakistan

Dr Annabelle Enriquez
Training Program Master of Medicine (Developmental Biology)

Location University of New South Wales, Sydney, New South Wales, Australia



Secrets of the claim files…
Exploring practice medico-legal risks

Practice manager and owner breakfasts 2016 and 2017

This very popular series of practice manager/owner breakfasts is now into its fourth year!

Medical practices face a number of common insurance risks which in many cases are well managed, but when a complaint or claim arises sometimes the circumstances can be surprising and even defy belief.

MIGA deals with many complaints and claims on behalf of insured practices and our claims files not only relate some interesting stories, but also highlight learnings that will be of benefit to your practice. Discover strategies to manage issues that may be bubbling under the surface of your practice and avoid being our next big story!

Register now!

Breakfasts commence in Adelaide on 15 September 2016 and will be running around the country until June 2017, including two online sessions.

Places are limited, so book early to secure your seats.

For information and bookings miga.eventbrite.com.au

Midwifery snapshot
Clinical notes to the rescue!

We understand that our message of *document, document, document* can be a little repetitive so we are always pleased when we can share case studies that reinforce how clear, contemporaneous clinical records can determine the outcome of a trial as it did on this occasion, some seven years after the event.

The UK decision of *Bajraktari v Barts Health NHS Trust (2016)*[1] relates to the birth of a baby in October 2008. A woman (M) was two days post her delivery date and awoke at midnight in pain and noticed blood in her underwear. Her evidence was that she contacted the labour ward and was told that the bleeding she was experiencing was normal as she was overdue and that it was a 'show'. M said that the Midwife on the telephone reassured her and advised her to call back when her contractions were getting closer together. M was adamant when giving evidence, that she was not advised to go to the hospital by the Midwife and was told that everything was normal and felt reassured.

Nearly 5 hours later (at 0440) M's contractions were closer together so she called the hospital again. During this telephone call, she was advised to come in if she was concerned. M stated that she could still feel the baby moving so she did not rush in. She arrived at the hospital at approximately 0630. After her initial assessment, she underwent an emergency caesarean section and the baby was born at 0704. Sadly, the baby had suffered brain damage as a result of placental abruption.

Naturally when the claim was filed, the Midwife had no recollection of the events of that morning and had to rely on what was written in her contemporaneous notes. The hospital record had a clear note of the first telephone discussion between M and the Midwife. The note recorded that the Midwife had advised M to come into the hospital during that first discussion.

The Midwife had 28 years' experience and explained when giving evidence that as it was M's second pregnancy she would have advised her to come in as her labour was likely to be quick. She said if she had been told of vaginal bleeding she would have advised her to come into the hospital straight away. This evidence was supported by her entry in the clinical records.

The Judge preferred what was written in the hospital records at the time over M's version of events. He found that the advice had been given by the Midwife during the first telephone call and there was therefore no breach of duty by the Defendant Hospital Trust.

This case is an excellent reminder that clear notes written at the time of consultation (whether in person or on the telephone) will provide you with the best defence should a claim arise, particularly if it is many years after the event as it was in this instance.

Marie-Clare Elder
Senior Solicitor – Claims & Legal Services

1 Sindi Bajraktari (A Child by His Mother and Litigation Friend Stella Rexhepi) v Barts Health NHS Trust [2016] EWHC 858 (QB)

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(Office hrs and 24hr emergency legal support)
Free Call 1800 839 280
Facsimile 1800 839 281

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Letters to the Editor

We encourage clients to contact us with their views by email to mandy.anderson@miga.com.au or follow the links on our website at miga.com.au.

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