



## Medical Malpractice Claims & Beauticians

In light of a recently reported criminal case for offences under the Irish Medicines Board Act in the District Court involving the administration of Botox by a beautician, it is an opportune time to review this area of the law and in doing so to try to identify when beauticians (as opposed to doctors or dentists) can carry out certain beauty procedures and what level of awards might be awarded for the common injuries caused by beauticians in carrying out such procedures.

The current social media culture has resulted in a proliferation of beauty treatments for both men and women alike. This article is not directed towards medical procedures (which are often elective or non-necessary in nature) which take place in the hospital setting such as face lifts, tummy tucks or indeed bariatric surgeries. Such treatments, if carried out in a negligent manner, clearly fall within the remit of medical or clinical negligence claims.

This article is focussed on the less clearly demarcated areas of treatments which sit between the hospital setting and the beauty salon and will also identify certain areas of difference between the UK and Irish regulatory frameworks. Such treatments would include the injection of Botox (or similar type product with the active ingredient of Botulinum Toxin A), the insertion of dermal fillers and laser-type treatments.

### Botox

Botox is a toxin injected into specific muscles to relax them and can be used to flatten wrinkles as well as a number of other medical conditions such as bruxism and grinding teeth. The first point to set out is that the prescribing and administration of Botox can only be carried out in the Republic of Ireland ("ROI") by a doctor or a dentist albeit importing Botox from the UK via the internet seems a lot more straightforward for the non-medical professional than going into your local pharmacy. In the abovementioned case, one of the issues allegedly affecting the beautician was an inability to find and/or retain a doctor who would prescribe and administer the Botox resulting in the salon allegedly importing Botox from the UK with a forged doctor's signature.

In short, a beautician who administers Botox is acting illegally and therefore, aside from the criminal sanction, would also have the likely outcome of not being covered by any medical malpractice insurance the beauty salon has in place.

It is noteworthy that the UK does allow beauticians to administer Botox (and dermal fillers). Health Education England recommends that anyone who administers Botox or dermal fillers should be qualified to Level 7 (Masters Level); however, a Level 7 qualification is not currently a *mandatory* requirement for practising aesthetic procedures (such as Botox or dermal fillers) in

the UK. That being said, as the beautician must still rely on a medically qualified prescriber to prescribe Botox, arguably there is still a duty of care on that prescriber for the outcome of the procedure to the client, or at least a duty to satisfy themselves as to the procedure and the person's ability to conduct same albeit this appears to be often ignored.

There is a proposed a new mandatory licensing scheme for the aesthetics industry in the UK which would mean that anyone practising aesthetic procedures would legally be required to obtain a license and whilst there does appear to be a commitment to bringing in this regulatory change, the current timeline for the publication of guidance on the licensing for non-surgical practices is July 2023.

Insurers need to be mindful of exporting UK medical malpractice insurance policies wholesale into the ROI in circumstances where certain procedures can be lawfully carried out in the UK by beauticians whereas a similar procedure in Ireland would be illegal. Equally, Insurers need to ensure that their policies are future proofed to ensure they are mindful of the changing regulatory landscape.

### Dermal Filler

Dermal fillers are gel-like substances injected under the skin to smooth lines or add fullness to the face or hands. Unlike Botox, while the materials for dermal fillers are regulated by law as "Medical Devices", there are currently no restrictions on who is allowed to administer them. It is of course possible for beauty therapists to learn how to administer dermal fillers safely, and ethically, by completing a Level 7 (Masters) qualification; however, the difficulty for consumers is that beauty therapists are not regulated and there is no requirement for such a qualification.

The Patient Safety (Licensing) Bill 2017 proposes introducing licensing requirements in ROI for high risk activities provided *outside of the hospital setting* which are referred to in the Bill as "designated activities". Unfortunately, this Bill has not come to pass as yet.

Equally, the EU legislation (EU 2017/745) did not result in a (reclassification) of Dermal Filler to "prescription only medicine" in the ROI rather, it classifies all dermal fillers as a Medical Device and must have a CE mark.

As matters stand, a beautician can administer dermal fillers in ROI which can be bought online without any formal training, albeit any medical malpractice policy of insurance may set out certain minimum training requirements for any administering beautician. Insurers would be prudent to ensure that any such conditions are conditions precedent in the policy.

### Intense Pulsed Light Treatment (IPL)

Intense pulsed light (IPL) therapy (or photofacial) is a way to improve the colour and texture of one's skin without surgery. It can undo some of the visible damage to the skin caused by sun exposure or minor scarring. IPL can also be used for hair removal. This type of treatment does not require any input from a medical professional and can be carried out by a member of staff of the beauty salon. However, the use of IPL does require specialist training by those in the beauty salon due to fact that one is using a burst of heat to destroy cells on or under the skin. The type of specialist training required is often a diploma (Level 4-6 training) in the use of IPL.

In order for any medical malpractice policy of insurance to respond, there are often conditions attached to the manner in which certified employees of a beauty salon carry out certain procedures. Conditions may include the need to maintain accurate records

or notes, the need to take photographs of the “before and after”, the need to complete a consent or risk assessment form and/or the need to carry out a consultation.

The National Standards Authority of Ireland has published the first European Standard for Beauty Salon Services. I.S EN 17226:2019. This gives an opportunity for the beauty salon sector to show they are following good practices in the delivery of beauty treatments and is a positive step towards proper regulation and going forward this is something that may come to be litigated in the context of what customers reasonably expected (or had represented to them) by virtue of the salon’s advertised compliance with these standards. Equally, the omission of a salon’s claim in this regard could be relied on to deny the position that an injured party had a reasonable expectation (or implied representation) as to the level of service they could expect.

### Quantum for Common Injuries

The ROI has seen a recent downward curve in recent Court awards following the introduction of the Personal Injury Guidelines on 24 April 2021 (despite challenges to their validity). The current Guidelines set out the awards for the following type of common injuries associated with the above beauty-type treatments.

### Personal Injury Guidelines & Facial disfigurement

Facial disfigurement is arguably the most common form of injury related to Botox, Dermal Filler and IPL. Page 54 of the Guidelines address facial disfigurement and refer to the fact that *“the very worst burns lead not only to considerable disfigurement and pain but to a variety of continuing physical and psychological injuries meriting very high awards, usually at the upper ends of the brackets or above them altogether.”* The Guidelines refer to numerous other common sense considerations in evaluating quantum such as age, nature of the injury and the impact on the person.

- (a) Most severe scarring - €80,000-€200,000
- (b) Severe scarring - €60,000-€80,000
- (c) Serious scarring - €30,000-€60,000
- (d) Moderate scarring - €7,000-€30,000
- (e) Minor scarring - €500-€7,000

The current willingness of the Judiciary to try to limit quantum (more so in line with other countries such as the UK) is a positive development and one would hope that the above injuries might fall within the jurisdiction of the District Court, which has a ceiling of €15,000. Aside from the lower nature of the awards, the District Court also has scaled (or fixed) costs (again similar to the UK with fixed recoverable costs in personal injury claims) which necessarily limits the legal costs associated with such a claim.

### Conclusion

There has been a dramatic increase in the use of beauty procedures and surgical procedures in an effort to look our best. The rise in such a demand increases the temptation for beauticians to stray outside of their scope and perform procedures which are currently the sole preserve of doctors. Based on recent cases, there does seem to be a tendency for the beauty salons to be given a warning as to the use of Botox by the Health Products Regulatory Authority before any formal prosecution occurs. This light touch approach may embolden beauty salons to continue acting outside of their field of expertise unless caught in the act or if

due to reports by doctors who are left to fix the damage caused by beauticians administering the above treatments. This is particularly worrying in circumstances where common injuries can and do occur even where beauticians are acting within their scope of expertise, and then the question of adequate consenting and forewarning of adverse complications arises. These traditionally 'medical' considerations can be overlooked by non-medically trained practitioners, once again blurring the lines between medical treatment (and with it, medical negligence) and invasive, though nonetheless cosmetic procedures.

The reality is that these quasi-medical procedures are here to stay. It is also arguable that these types of treatments are not necessarily of such an interventionist nature that they must be carried out by medical professionals and the issue is or ought to be one of training rather than qualification. It would seem the sensible way to address the current risks to consumers is to ensure the beauty industry is properly regulated with the more invasive and potentially dangerous treatments requiring a licence and those who act without such a licence being prosecuted to deter others and, more importantly, to protect the consumer from potentially life changing injuries.

### Further Information

Given the generality of the note it should not be treated as specific advice in relation to a particular matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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