Fitness to Practise
General Osteopathic Council
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ebulletin

Insurance lapsed? Don't cover it up

Having an appropriate level of professional indemnity insurance is fundamental to your practice. Not being covered is a serious matter – but talking to us about it will prevent the situation from getting any worse

We have recently seen a marked increase in fitness to practise investigations involving osteopaths who have failed to ensure that they have professional indemnity insurance (PII) in place.

As our Professional Conduct Committee has noted, PII is 'a critical part of practice intended to protect the public', and a lack of cover 'creates a real risk to patients'. The legal requirement to have appropriate indemnity cover is set out in Section 37 of the *Osteopaths Act 1993*, and you must confirm that you have this cover in place every year when you renew your registration.

Not being insured – even over a short period for which you later obtain retrospective cover, and whether or not any patients come to harm – could make you subject to fitness to practise proceedings. But if you engage fully with us as soon as you become aware of the break in cover, this will help to avoid worsening the situation.

If you realise your cover has lapsed

You have a legal requirement[1] to advise the GOsC immediately if your PII cover ceases. If you are selected for one of our regular audits of registrants' insurance, and we find that you have been on the Register for any length of time while uninsured, we will ask you why you did not tell us about this.

If you continue to practise while knowing that you do not have insurance, you could also face an allegation of dishonesty.

[1] Under Section 9 of *The General Osteopathic Council (Indemnity Arrangements) Rules Order of Council 2015*

If we ask for proof of cover

If our Registration Department sends you a letter requesting proof of your PII cover for a specific period, and this alerts you to the fact that there is a gap in your cover during that period, we appreciate that this will be a stressful experience.

Nevertheless, it is vital for you to respond to us. Ignoring the regulator's request for proof of insurance can itself amount to unacceptable professional conduct – and can result in a more significant sanction than might otherwise be applied.

What should you tell us?

As soon as you are aware of a break in your cover, get in touch to tell us the circumstances that led to the break, and to explain the steps you will take so that it will not happen again.

Continued on page 2

Also in this ebulletin

> Obtaining valid consent from patients

Continued from page 1

Two recent cases heard by our Professional Conduct Committee demonstrate the importance of talking to us if there has been a break in your cover. Any engagement, even if it is late in the day, is better than none.

'Head in the sand'

One case involved an osteopath who had practised for five months without insurance; she had then failed to respond to emails, telephone messages and a letter from the GOsC seeking information about that five-month period, and had continued not to engage with us when fitness to practise proceedings were begun against her.

The osteopath told the Committee she had been unaware that her insurance had expired; it had happened because she had been confused about her registration renewal and insurance renewal dates. Regarding her failure to reply to GOsC requests, she said she had been partly 'burying her head in the sand' and had been frightened that attempts might be made to stop her from working.

Finding that her lack of PII and her continued non-engagement with the GOsC amounted to serious breaches of the *Osteopathic Practice Standards*, the Committee found her guilty of unacceptable professional conduct. It accepted her expression of regret as genuine, but was not satisfied that her failings would not reoccur; she was suspended from the Register for four months.

Learning from mistakes

In another case, the Committee found that an osteopath's failure to maintain her cover had been a failure to organise her professional affairs satisfactorily – but concluded that this had not been deliberate and she had not acted dishonestly.

Explaining why she had not given a timely response to our requests for proof of insurance, the osteopath said she had taken up a demanding role in a new practice at the time of the initial contact, and had not placed enough importance on administrative matters. However, she had acted on a second letter, and had engaged with the GOsC subsequently.

The Committee considered that she appeared to have learnt from her mistakes: she had changed her mode of practice so that she could give proper time to dealing with administrative matters; had employed an administrator; and had made use of the Institute of Osteopathy's professional support services.

Taking into account her explanation and the steps she had taken to prevent a repetition of her failings, the Committee imposed a sanction of admonishment.

Patient consent: not just a form-ality

Obtaining consent to an examination or treatment isn't simply a matter of a signature on a consent form at the start of a consultation. How can you be sure that your patients' consent is valid?

We know osteopaths want to be sure they are obtaining patients' valid consent – and there has been a welcome decline between 2013 and 2015 in the number of patient complaints, concerns and claims raised with the GOsC, the Institute of Osteopathy and insurers about consent and shared decision-making (see bit.ly/gosc-concerns).

But enquiries received by our Regulation Department, and hearings of the GOsC Professional Conduct Committee, show that some osteopaths think they *are* obtaining patients' valid consent when in fact they are not.

Structured approach

All healthcare professionals have an ethical and legal requirement to obtain patients' valid consent for examination or treatment. For osteopaths, this is set out in standard A4 of the *Osteopathic Practice Standards*, available at: bit.ly/gosc-practice-standards

Obtaining consent is an integral part of the structured approach that osteopaths should adopt: you need to make a working diagnosis and formulate a treatment plan, taking account of the patient's wishes, and the patient must consent to that treatment.

In several cases, the Professional Conduct Committee has found that valid consent was not obtained when an osteopath failed to take this structured approach. It has noted that failing to obtain consent demonstrates 'an unacceptably casual and disrespectful approach to a patient' and means that 'the osteopath is exceeding the boundaries of their role'.

Continued on page 3

Continued from page 2

To be valid, guidance to standard A4 says, consent must be given *voluntarily* by someone who is *appropriately informed* and has *capacity*. It adds:

'Consent may be best obtained by explaining your approach, describing the types of treatment methods you might like to use and setting the parameters within which you will work. If the patient consents to you proceeding on this basis, you may do so.'

Here are some tips for obtaining valid consent, with further extracts from the guidance to standard A4 in blue.

Explain the 'material risks'

For your patient to be appropriately informed, it is vital to explain to them what you intend to do and why – and what the outcomes might be.

The Professional Conduct Committee recently heard a case in which an osteopath admitted not explaining the risks of cervical spine manipulation and thoracic spine manipulation to a patient. The Committee accepted that he had explained his working diagnosis and discussed his proposed treatment plan with her, but found that his failure to explain the risks meant he had not obtained her valid consent to the treatment – and this was sufficient for him to be guilty of unacceptable professional conduct.

Guidance to standard A3 ('Give patients the information they need in a way that they can understand') stresses the need to inform the patient of 'any material or significant risks' associated with the treatment you are proposing, and those associated with alternative treatments (including doing nothing).

A ruling (known as the 'Montgomery judgment') by the Supreme Court last year defined a *material risk* as one where, 'in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or [you] should reasonably be aware that the particular patient would be likely to attach significance to it'. This is based on factors including the nature of the risk; the effect, if any, on the patient's life; the importance to the patient of the treatment's benefits; and alternative treatments and their associated risks. For example, a patient who you know is due to go on a long flight or get married the next day may attach greater significance to the likelihood of short-term soreness following a treatment.

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The ruling also establishes that it is the *patient's* perception of a risk's significance that is important, not yours – so, rather than adopting a course of action based on what most osteopaths would do, you need to make a decision with the patient about this. For advice on explaining risks and shared decision-making, see the National Council for Osteopathic Research website at: bit.ly/ncor-benefits-risks

Has the patient understood?

'How well [patients] understand the details and implications of what is proposed … is more important than how their consent is expressed or recorded.'

In its Montgomery judgment, the Supreme Court pointed out that informing patients about benefits and risks does not mean 'bombarding [them] with technical information which [they] cannot reasonably be expected to grasp'.

It is essential to discuss the proposed course of action and alternatives with the patient, and let them ask questions and reflect on what you have said, so you can be sure they are making an informed decision.

A case heard by our Professional Conduct Committee this year involved an osteopath who had inserted acupuncture needles into a woman's shoulder. The osteopath believed the woman had given her consent for the treatment, but the Committee disagreed: while it was likely that there had been 'some limited conversation', she had been tired and preoccupied, and had not realised that the osteopath proposed to treat her.

This was an unusual case, involving treatment of someone who was not even in the consulting room as a patient; the woman had accompanied her husband to *his* appointment. But it highlights the need to be sure that a patient has received and understood all the appropriate information, and appreciates that this is the examination or treatment you propose to carry out.

Allow time for reflection

'Some patients may need time to reflect on what you have proposed before they give their consent to it.' If you think this may be the case (because you want their consent for a procedure involving an intimate area or a risk that they may consider significant, for example), allow them to defer the treatment until a subsequent appointment so they can consider whether to consent to it.

Continued on page 4

Continued from page 3

Another recent case heard by the Professional Conduct Committee involved an osteopath who had 'swapped treatments' with an acupuncturist at a festival. After treating her knee and receiving acupuncture in return, he had suggested treating her neck; despite her concerns, he had persisted until she agreed, and then carried out HVT manipulation with little discussion. The Committee 'concluded that he clearly pressured her to have the procedure against her better judgement'. Taking account of other failures relating to issues including consent, and rejecting the osteopath's argument that lower standards were acceptable in the informal environment of a festival, it suspended him from the Register for nine months.

What form can consent take?

'The validity of consent does not depend on the form in which it is given.'

A patient 'may imply consent by complying with the proposed examination or treatment … or by getting ready for the assessment or care' – but you cannot assume they have given their *valid* consent simply because they have undressed or have not objected to the treatment you are giving them. You must be certain that they 'understand the nature, purpose and risks of the examination or treatment proposed', and are free to accept or refuse it.

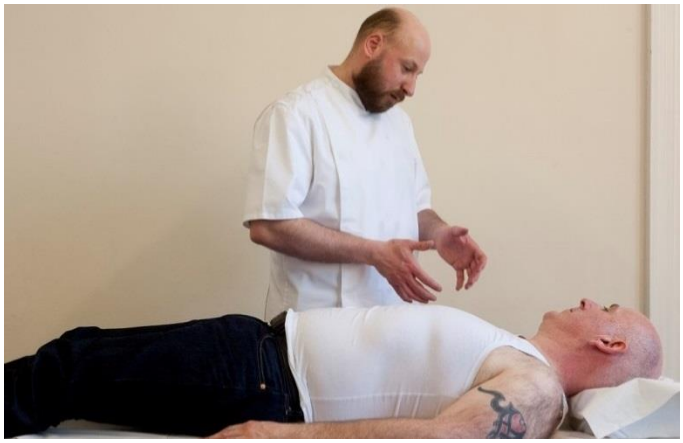
Getting patients to complete a consent form will not provide that certainty, even if the form contains some standard wording asking the patient to confirm that they have understood what has been explained to them. 'If the elements of voluntariness, appropriate information and capacity have not been satisfied, a signature on a form will not by itself make the consent valid.'

However consent is given, you need to record specifically what the patient has given their consent for, and how you have ensured the consent's validity. The patient must be made aware that they can still withhold their consent to any aspect of the examination or treatment at any time.

Remember that you *should* obtain written consent if you are proposing a rectal or vaginal examination or treatment.

Consent is continuous

Throughout your examination and treatment, ensure that you have the patient's consent to proceed. If you have set out your treatment plan initially and gained their consent to it, their consent can be implied while you continue the treatment – but you must stop and obtain their consent for any variation to the treatment plan.



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Last year the Professional Conduct Committee imposed conditions on an osteopath's practice for failings around patient dignity and modesty and obtaining consent. It found that his patient *had* given consent for treatment to her neck and back at a first appointment, but subsequently he had not communicated effectively or obtained her consent before carrying out other procedures.

If you ask your patient in the middle of examination or treatment for their consent to an additional procedure, they may feel unable to refuse – especially if they feel they are in a vulnerable position. Let them sit up, put some clothes on or do whatever it takes for them to feel less vulnerable, so they can give you their undivided attention without being embarrassed or distracted, and you can be certain that they are giving their consent voluntarily.

Take note

Finally, be sure to keep notes when obtaining consent, so you can explain why you are satisfied that the patient has understood the information and consented freely.

If a dispute should arise about whether you obtained valid consent, the key issues will be whether the patient had capacity to consent, the information you gave them, and their ability to reflect and decide whether to accept or refuse the examination or treatment proposed.

The law on consent has progressed significantly in the last decade. You have a duty to stay informed of legal developments that may have a bearing on your practice, so keep up to date by reading GOsC e-bulletins and *the osteopath* magazine.

General Osteopathic Council

This GOsC Fitness to Practise e-bulletin is produced by the GOsC's Regulation Department. For further information, email regulation@osteopathy.org.uk