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Your Ref.

Our Ref. DOM/KG/OFF2/9

By email: **info@health.gov.ie**

Dear Sirs,

We note you are forming an expert Clinical Negligence Group to examine ways of reform.

As one of Ireland's leading medical negligence firms we feel we would be tailor made to have a representative on the group.

We have been working on different litigation models in our practice for many years. Less, than 0.5 per cent of our cases, go to trial as we always are willing to engage with our colleagues and stakeholders to put the client first.

Currently we are developing a pilot model of Pre Accident Protocols or PAPs with the MPS (Medical Protection Society) and have been chosen out of all the Plaintiff firms to be a flagship for such a model which is to commence early next month.

We would have a very effective working relationship with the SCA and, the MPS in minimizing the adversarial nature of litigation, and we suggest both bodies should be on the Expert Group together with a Defendant Solicitor expert such as James Sweeney of VP McMullin Solicitors and/or in terms of Dublin, Kevin Power of Mason Hayes and Curran.

We note you require submissions by 7th August 2018.

Please find enclosed some brief submission re areas of reform below:
(We hope to delve further as part of an expert group.)

The Government has announced the establishment of an expert group to consider whether there are alternative ways to address clinical negligence claims in a more sensitive and timely manner than the current court system. Most recently, the cervical smear cases and the ordeal which Vicky Phelan and other survivors were put through, pushed this issue front and centre. Clearly and understandably, there is public anger at the current litigation model.

Most recently, we heard that despite the Taoiseach's Statement in the Dáil that all cervical cases pending before the courts would be mediated, the High Court ruled that this was not a binding promise, highlighting the unpalatable truth that "*the HSE is not the State*".

Putting Patients First –

Regardless of the system used to resolve medical negligence cases, the first thing that needs to change is the State Claims Agency's attitude to injured patients. The reality is that nothing in the current system prevents the State Claims Agency/ HSE admitting medical blame and settling claims early at low administrative costs . The State Claims Agency and hospitals fight claims over many years. In November 2009, James Reilly, then Minister for Health, wrote an article in the Irish Times in which he expressed the view that a more effective system was needed "*which avoids the angst of costly legal actions for the claimant whilst ensuring that the injured party receives adequate and timely compensation, as well as the necessary supports...*".Crucially, he also wrote that "*the principle of putting patients first should be at the centre of our approach to all areas of the health service*".

A look at the numbers cause us concern.

International studies clearly establish that medical accidents represent a leading cause of premature death. The US National Academy of Sciences estimated that as many as 4% of all patients treated in hospitals in America will suffer an adverse outcome because of preventable error. It has been estimated that as many as 4 million patients are seen in Irish hospitals each year, and translating those numbers into an Irish context, this could mean as many as 160,000 people avoidably damaged. The number of people bringing cases against the HSE, is in approximately 7 to 800 per annum. About 84,000 medical accidents are reported every year by Irish hospitals administrators to the State Claims Agency. Less than 1% of those injured in a medical context end up suing, and this is in line with all the international data. Whilst clinical actions cases are always newsworthy, a sense of proportion is needed, and we are not seeing is a tsunami of claims; we are seeing a trickle not a flood.

The simple, but unpalatable truth, is that the best way to reduce clinical negligence claim cases is to improve patient safety. Simple steps can be taken now with a view to addressing the concerns identified nine years ago by then Minister Reilly.

They include: a mandatory Duty of Candour, better use of Mediation, and the introduction of Pre-action Protocols.

Candour

All international studies show that mandatory candour works: In the US, where such a duty of disclosure has been introduced, the number of claims has been reduced by 50%, and the time taken by the two thirds. One of the leading international proponents of this model, Dr Timothy MacDonald, will be speaking at our conference in Sligo in September to outline how this model could be introduced here.

Mediation

A new Mediation Act came into force on 1 January 2018. Under this Act, lawyers have obligations, before court papers are lodged, to advise the clients to consider Mediation. Furthermore, Section 16 of the Act, states a court may, on its own Motion, or an application, consider Mediation as a means of attempting to resolve the dispute and can make a court Order directing the party facilitating the parties to engage in the Mediation process. This Act was nine years in the making, but already it is starting to bear fruit. Mediation is tailor-made for medical negligence cases because of the high level of distress, the emotional stakes from patients and their families, and the opportunity it affords for healing, on both sides. We have personally seen situations where caregivers can sit down with the family actively tell the counter explanation of what happened, and proffer meaningful apologies. Aside from any issues of compensation, achieving such a scenario provides massive vindication for families.

Pre Action Protocols

In the UK, confronted with similar concerns about the unsuitability of the current system to deal with cases involving clinical actions, reforms were introduced which created a set of Pre-Action Protocols which has drastically reduced the number of cases progressing to hearing. Under this Model, information is exchanged at the earliest possible stage, including expert reports. Expert witnesses hold judge- directed meetings where the issues in dispute are condensed down and agreed. These Reforms, led by Lord Woolf, have been massively successful. Cases rarely go to court; costs are reduced; and cases end much more quickly. Draft Pre-Action Protocols were prepared 12 months ago by the Government, but have not progressed. We are actively working with the main private insurers, medical insurers to introduce a Pre-Action Protocol Scheme in cases which do not involve the HSE or the State. These new rules are at a very advanced stage, and will be rolled out in the autumn.

No Fault

It has been suggested that a "no-fault" system may be the means to address clinical actions claims. Such models exist in Sweden and New Zealand. With a population similar to ours, the Scheme in New Zealand seems, at first glance, to have appeal. In essence, patients in that country seek compensation for medical injuries not through the courts, but via a no fault compensation system in which they do not have to demonstrate blame. Its champions claims that the system, run by the country's Accident Compensation Corporation (ACC) is one of the simplest in the world for

patients to navigate. The ACC claims that straightforward cases are dealt with within weeks and all decisions are made within nine months. The ACC provides financial support for: treatment and rehabilitation; modifications, aids and appliances; compensation for loss of earnings (up to 80% of earnings at the time of entry) and a once off lump sum compensation of €50,000.

Crucially, though, from a prevention viewpoint, the system has not demonstrated gains in patient safety. Over 30 years after the implementation of the ACC, hospitals in New Zealand are no safer than those of other Western countries- roughly midway between the levels recorded in the UK and Australia.

If a no-fault system is introduced, the argument runs, the cloud of claim of negligence will not hang over doctors , and they will feel much more free to disclose medical errors. It could be assumed that the system in New Zealand which insulates doctors from the threat of litigation should produce an unparalleled record in terms of adverse incidents being reported. However, 61% of patients who are the victims of medical error in New Zealand established that they were never informed of the error in the first place. The international data are consistent: a majority of doctors continue to fail to report their errors, regardless of whether the country used a traditional court system or a no-fault model.

The Faults with "No Fault"

Such Schemes are notoriously costly to run. Recently, the New Zealand government declared that "*if the ACC was an insurance company, it would be insolvent*". Due to an €8.5 billion deficit a number of years ago, an extra taxation levy had to be imposed on employers and workers of 1% and 1.5%, respectively.

Even in no-fault systems, difficult issues of causation still exist: would-be claimants need to show a causal relationship between their alleged injury and their care. In an accident on the road or on a building site, how somebody has sustained injury is always clear. In a medical context, however, someone is already sick before they get to hospital and therefore the issue of whether the medical care, as opposed to the underlying illness, caused the adverse outcome is an extremely difficult one to determine, even for trained doctors, let alone lay people.

Getting an independent answer on this point can only be done by injured patients and their families seeking assistance from external medical advisers. Again and again, lawyers who practice on behalf of injured patients see situations where reports are produced by the HSE which defend the conduct of their doctors and hospitals to the hilt. Can it be said that in those reports, there is no perception of bias? This is a small country; in some disciplines, there are just a handful of doctors.

Conclusion:

Patients First in all things The authors of an international study in Boston (Kachalia et al 2008) wrote as follows "... *Patients are ultimately the critical constituency. Any compensation system must be trustworthy and deliver what patients want [which] is to know that if they are injured by medical care, a consistent and fair system of adjudication, one that is not biased towards provider interests, will deal with their claim promptly".*

At the moment we do have such a model: the Courts. With the introduction of key changes: a Mandatory Duty of Candour, widespread use of Mediation, and Pre-Action Protocols, the time it takes with cases to be completed would be drastically reduced and the level of angst for caregivers and patients minimised to the maximum possible extent.

Any complete overhaul of the system which denies would-be litigants access to the courts would, in all likelihood, be unconstitutional and would infringe their basic Human Rights.

Putting patients first has to be at the heart of any meaningful review. Instead of spending months listening to experts, the Government can take action now if it has the courage to match its ideals.

Dropping "*deny and defend*" as the HSE's default response to a case; bringing in a mandatory duty of disclosure; making Mediation the norm as opposed to the exception; and introducing special rules to penalise those who unnecessarily drag out cases are clear, uncostly and workable solutions.

We hope you consider and submissions and ensure we are represented on the Clinical Negligence group.

Yours sincerely,

Callan Tansey

Roger Murray
Joint Managing Partner
CALLAN TANSEY