Submission by **Medisec Ireland CLG** to:

The Expert Group on the review of the law of Torts and the current system for managing clinical negligence claims

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Introduction

Medisec welcomes the invitation by Mr. Justice Charles Meenan to make submissions to the Expert Group on the review of the law of torts and the current system for managing clinical negligence claims.

Medisec Ireland CLG : Who we are / corporate philosophy

Established in 1994 by Irish general practitioners in response to concerns that their rapidly-escalating insurance premiums were subsidising colleagues in higher-risk clinical specialties, Medisec Ireland CLG ("**Medisec**") is a successful not-for-profit company, owned solely by its members, Irish GPs. Since its inauguration in 1994, it has contracted professional indemnity insurance on behalf of its membership with Allianz plc and their predecessors, Church & General Insurances Ltd.

The Irish College of GPs recently estimated that Ireland has 64 GPs per 100,000 population[1]. Assuming a population of 5 million, that suggests a cohort of 3,200 or so GPs in Ireland. Other commentators / sources have put the figure closer to 4,000. With current membership in excess of 1,900 and projected membership by year-end of 2,000, Medisec indemnifies over half the GPs in Ireland.

With an overarching focus on supporting our doctors in providing excellent patient care, Medisec's mission is to provide GPs with competitively sourced medical indemnity insurance, give 24/7 advice and guidance on practice, procedure, legal and ethical matters, assist members with complaints, investigations and disciplinary issues and provide education on best practice and risk mitigation.

With the support of Allianz, Medisec champions the importance of risk management in clinical practice in preventing adverse patient outcomes. Medisec delivers over 40 educational and training presentations to GPs and specialist GP registrars throughout the country, annually. Medisec continuously develops best practice guidelines and practical risk management initiatives, often in conjunction with other stakeholders such as the HSE and SCA.

In partnership with Allianz, Medisec consistently adopts an ethical approach to the resolution of claims against its membership. Medisec and Allianz plc are committed to the fair and appropriate resolution of Plaintiff claims, on a reasonable basis, by means of settlement or alternative dispute resolution ("**ADR**") where there are clear grounds for doing so on the basis of expert evidence.

Where the expert evidence confirms that a claim is defensible, Allianz and Medisec support the general practitioner in rigorously defending the case to trial if necessary, cognisant of the importance of preserving a doctor's professional reputation, particularly within the small community of general practice in Ireland.

[1] See ICGP Briefing Document to the Joint Oireachtas Committee on Health dated February 2017 which quotes Teljeur C, Tyrrell E, Kelly A, O'Dowd T, Thomas S. Getting a handle on the general practice workforce in Ireland. Ir J Med Sci 2014 Jun; 183(2):207-213.

Medisec's members report significant challenges in general practice in recent years, including ever-increasing workloads, an ageing population of GPs, younger GPs emigrating and the constant threat of litigation and related negative publicity. Medisec recognises the challenge posed to GPs who wish to invest in well-equipped, modern and accessible premises, state of the art systems and technology in the furtherance of optimal patient care, but who face constraints due to under-resourcing and diminished revenues.

Medisec's experience in managing clinical claims on behalf of our membership is that the current system often fails both patients and GPs, rendering early and compassionate resolution of claims almost impossible and damaging the therapeutic relationship between doctors and patients.

Against the background set out above, Medisec is pleased to make substantive submissions on paragraph (a) of Section 2 of the Terms of Reference and brief comments only on paragraphs (b) to (e) inclusive of section 2 of the Terms of Reference. For ease of review, Medisec's general commentary on the various issues addressed is set out in normal font, with specific submissions highlighted in bold font.

Pre-action Protocols

Medisec recognises the excellent work done by the Working Groups on Medical Negligence and Periodic Payment Orders (the "**Working Group**"). Interested parties previously made submissions to the Department of Justice and the Working Group provided a detailed template pre-action protocol (the "**Protocol**"). The Legal Services Regulation Act 2015 (the "**2015 Act**") is in place to allow immediate introduction of the Protocol.

The 2015 Act aims to facilitate the early investigation and management of potential claims through:

- timely disclosure of relevant medical records, documents and information
- timely notification and acknowledgement of allegations / enquiries regarding potential clinical negligence actions
- ADR including an opportunity for an apology
- refinement of the issues in dispute if litigation does follow.

The experience of England and Wales is available and suggests that this is the single most important initiative to benefit both injured parties and healthcare providers.

Medisec welcomes the 2015 Act as an important step in encouraging the early resolution of clinical negligence actions but expresses disappointment that almost three years on, the Protocol is not yet in force.

Medisec submits that the Protocol should be introduced without further delay.

Statutory protection of the Apology

It is a continuing source of hurt to injured parties in litigation that they still tend not to receive an apology at an early stage.

Legislation (The Civil Liability (Amendment) Act 2017) exists to enable such apologies to be given with the benefit of statutory protections for the healthcare provider, but the relevant provision has yet to be commenced. This Act provides for *voluntary* open disclosure and does not impose a mandatory disclosure obligation on healthcare providers.

Section 10 (2) of the Civil Liability (Amendment) Act 2017, when enacted, will provide that information and an apology provided in this context shall not constitute an express or implied admission of liability, fault, professional misconduct, poor professional performance or unfitness to practise and shall not affect any contract or entitlement to insurance. Offering an apology or explanation in these circumstances will not prejudice a general practitioner's position before the Medical Council.

However, in the aftermath of the Vicky Phelan case and the cervical smear scandal, the Minister for Health proposed new measures to make disclosure and notification of *serious* patient safety incidents *mandatory*. Such measures will be incorporated into the Patient

Safety Bill 2018 and serious sanctions (fines and / or imprisonment) will attach to non-compliance.

The general scheme of the Patient Safety Bill, published on 05 July 2018, says a notification will not be admissible in any civil proceedings (whether by discovery or otherwise) as evidence of the liability of a health care provider but *would* be admissible in evidence for other civil proceedings and in criminal proceedings.

Medisec fully supports the principles of open disclosure and the application of the ethical duty of candour. However, if a doctor makes an admission of fact and /or potential wrongdoing in compliance with a mandatory policy of open disclosure at an early stage and without the benefit of legal and expert advice, that doctor may be depriving themselves of a defence in the event of a Medical Council Fitness to Practise Inquiry or criminal proceedings.

The standard of proof currently required at such an Inquiry is the criminal standard of proof beyond reasonable doubt. Statements made in mandatory open disclosure, without adequate safeguards may make it more difficult for a doctor defend allegations of poor professional performance or professional misconduct, with the potential to affect a doctor's ability to work and / or earn a livelihood.

Medisec submits that statutory protection must be a feature of any mandatory notification / open disclosure requirements. This should ensure that patients receive timely and fulsome explanations and apologies as appropriate, in keeping with the Medical Council's ethical guidance.[2] It would permit doctors to engage meaningfully in open disclosure, without risking self-incrimination and prejudicing their constitutional rights, prior to investigation of all issues.

Settlement offers and invitations to settlement negotiations

Unfortunately, Medisec regularly sees claims where the legal costs equate to or actually exceed the settlement agreed in favour of the injured party. Medisec believes that parties should be incentivised to engage pre-litigation in attempts to settle on a fair and cost-effective basis and submits that:

- an invitation to settlement negotiations or ADR at an early stage, should be specifically provided for in the Pre-Action protocol. Refusals to engage in settlement or ADR should be penalised, absent a compelling reason, with a clear and fast-tracked access route to the Courts to determine whether such refusal is fair and/or appropriate. There should be an opportunity, at the conclusion of a trial, to highlight that an offer to engage in pre-litigation settlement or ADR was refused and the court should be mandated to consider the reasonableness of that refusal when determining the appropriate costs order.

- the Court should have regard, in any proceedings which may follow, to any settlement offer made by the healthcare provider under the Protocol, when awarding the costs of the proceedings.

[2] Medical Council Guide to Professional Conduct and Ethics, 8th edition 2016, see paragraph 43 Open Disclosure and the Duty of Candour

Mediation Act 2017

The Mediation Act 2017 recognises the importance of mediation and requires a statutory declaration from a Plaintiff's solicitor to confirm they informed their client about mediation and advised their client to consider mediation and outlined the pros and cons of mediation.

The Act envisages that there could be costs consequences for a party who unreasonably refuses to consider or fails to attend mediation. It may however be difficult for a Defendant in a clinical negligence action to argue that they made a reasonable attempt to mediate and the Plaintiff unreasonably declined to engage. A Plaintiff can always argue that he wants an open and transparent explanation about what went wrong with his medical care and a Defendant is not obliged to accept liability or give to an explanation at mediation.

Medisec submits that an amendment to the 2017 Act should be considered, to provide that when liability is admitted in clinical negligence proceedings and mediation is offered, the court is mandated to consider the reasonableness of a party's refusal to engage in mediation in those circumstances.

Case Management of Medical Negligence Actions

Given the complexity of medical negligence actions and in light of the considerable difficulties encountered with multiple co-defendants, Medisec believes there is a strong argument in favour of the case management model, based upon the highly successful model deployed in the Commercial Court, which involves close judicial supervision.

Examples of case management specific to healthcare include the "*Professional Negligence List*" in the Supreme Court in New South Wales, which seems to have had an impact on court filings, and seems to be leading to timely trials and enhanced efficiencies. Hong Kong has also relatively recently (2010) introduced active case management procedures (such as a special court protocol for medical negligence – which aims to explore settlement, encourage transparency and co-operation and fix timetables, etc.) The commentary seems to be positive but notes there are still issues which is similar to the reception to case management in the UK.

Medisec strongly suggests the assignment of one or more High Court Judge(s) with specific responsibility for the case management of clinical negligence actions and that timelines, rules and penalties should be consistently applied.

Medisec submits that case management of clinical negligence actions must be supported by a mandatory framework, which emphasises parity of disclosure obligations and frontloads the exchange of factual and expert evidence, and Schedules of Special Damages in accordance with strict timelines set down by the Court and well in advance of service of Notice of Trial, in order to be effective.

Medisec submits that if it is not feasible to introduce such a system for clinical negligence claims generally, perhaps such a system of case management could be available, upon the application of either party, when certain criteria are met, for example, the likely quantum of the case and the naming of more than one Defendant to the action.

Expert Evidence grounding a Claim for Medical Negligence

It is established law that professional negligence proceedings should not be instituted without an expert report from a relevant professional sufficient to sustain the allegations of wrongdoing advanced[3].

Medisec regularly sees medical negligence claims where the initiating summons does not contain any particulars of negligence against the general practitioner and is endorsed pursuant to Order 1 A rule 6 of the Rules of the Superior Courts 1986 as amended, to the effect that the particulars will be furnished as soon as they are available.

It is not uncommon to find, at the time that the personal injuries summons is served, the endorsement pursuant to Order 1 A rule 6 of the Superior Courts is *still* operative, and that no particulars of negligence and/or breach of duty are furnished.

Consequently, in Medisec's experience, the general practitioner can be served with a summons and accused at some high level of negligence, but left in the dark indefinitely as to the specific allegations. Medisec is aware of one case where allegations have not been particularised eight years after the alleged incident. Such delays cause untold distress to the Defendant doctor.

Medisec has had to issue Motions returnable before the High Court, in an effort to compel a Plaintiff to particularise the alleged negligence and/or breach of duty. It is common to obtain a return date months in the future and if such a Motion has to be adjourned for any reason, this leads to further delays.

While Medisec acknowledges that medical negligence cases are complex and difficult to prepare and prosecute, the current legal system appears overly tolerant of professional negligence actions issuing in the absence of supporting expert opinion, contrary to existing case law and the Rules of the Superior Courts.

It is common to see repetitive particulars of alleged negligence and / or breach of duty running to many pages in the Summons. This can be very distressing for a Defendant general practitioner and it is undoubtedly equally upsetting for the Plaintiff to receive the correlating defence. There may be scope for promoting some degree of succinctness in pleadings.

Medisec submits that where a Personal Injuries Summons alleging medical negligence is issued in reliance upon Order 1A rule 6 of the Rules of the Superior Courts, the Plaintiff's solicitor should be required to swear an Affidavit of Verification, confirming that steps have been taken to instruct an appropriate expert.

Medisec further submits that, in medical negligence actions, Order 1A rule 6 of the Rules of the Superior Courts should be amended to stipulate a specific time-line, within which the awaited particulars of negligence must be furnished and providing that save in *exceptional*

[3] See Cooke v Cronin Unreported Supreme Court judgment 14th July 1999, Connelly v Casey [2000] 1 IR 345

***circumstances*, no adjournment of an application to compel delivery of same will be granted. In addition, any such rule should be strictly and consistently applied.**

Discovery in Medical Negligence Actions

Medisec recognises the paramount importance of access to medical records at an early stage of investigations and litigation and always advises its members to facilitate patients, family members and/or their legal advisors in this regard. Medisec supports its members when dealing with data protection access requests and FOI requests.

As matters stand, the jurisprudence of the court is that discovery follows the defence when the issues have been narrowed between the parties. This is not a suitable approach in clinical negligence claims and it results in such claims taking longer to resolve because the claim is more advanced before the Defendant can form a view on whether or not the case is defensible.

It is noted that in *McGrory -v- ESB* [4], the Supreme Court stated that there is no room in properly conducted litigation for the withholding of medical records at an early stage in litigation, that would have to be made available at a later stage.

Medisec frequently observes difficulties in obtaining medical records, particularly in complex cases where different aspects of a long and complex clinical journey are the subject of the Plaintiff's litigation, with a number of co-defendants named. A general practitioner has no access to hospital records whereas other healthcare providers who may also be named defendants have ready access to such records.

The traditional distinction between "pre-accident" records and "post-accident" records (i.e. that post-accident records should not be generally discoverable) does not serve the needs of either party to a medical negligence action.

Records concerning treatment which post-dates the alleged negligence often go right to the heart of the issues of liability and causation and are needed to allow a Defendant to serve an appropriate defence. Access to the relevant medical records is required so that the defence experts can review the case from a liability and causation perspective. Access to such records may also make it apparent that liability must be conceded and issues going to quantum can then be considered at an early juncture.

Discovery applications are often necessary because of a Plaintiff's refusal to provide medical records to the Defendant. Such applications incur considerable court time and legal costs and prolong litigation.

Medisec proposes an amendment to the Rules of the Superior Courts in the context of medical negligence actions to require co-operation by all parties as regards producing and sharing relevant medical records pre-action and to introduce a structured procedure for the disclosure of all relevant medical records, including post-accident records, at an early stage in proceedings.

[4] [2003] 3 IR 407

Subject to mandatory and early disclosure by all parties of full particulars and all relevant medical records, Medisec submits that, in medical negligence actions, the Rules of the Superior Courts should be amended to stipulate a specific time-line, within which the defence must be furnished. The Rules could go on to provide that save in *exceptional circumstances*, no adjournment of an application to compel delivery of the defence will be granted. Again, any such rule should be strictly and consistently applied.

Proposed limitations on the introduction of Expert evidence

Medisec disagrees with the proposition made by the Working Group in Report (Module 3) that only one expert should give evidence from a sub-specialty field, or that co-defendants should be limited to offering evidence on a joint basis.

Medisec submits that each Defendant ought to be entitled to the views of an individual expert, bearing in mind that GPs may have different indemnifiers. However, Medisec would support the appointment by the Court, of one expert on issues of quantum, current condition and prognosis. In high value cases, Medisec would support the appointment by the Court of one expert to consider life expectancy.

Settlement offers

Medisec submits that the appropriate timing of section 17 offers should be clarified (i.e. whether they should be simultaneous or Plaintiff first) and that failure by a Plaintiff to "beat" a section 17 offer at trial should have adverse costs implications.

Medisec also submits that the windows of opportunity to make an effective Lodgment / Tender should be less restrictive. In the UK, the equivalent "Part 36 offer" may be made at any point up to the time of judgment and even before proceedings are issued.

Wasted costs orders

Medisec believes that a patient who suffered harm or injury as a result of clinical negligence is entitled to fair and timely compensation and that this should not be hindered by delays by any legal advisors involved on either side of the patient's claim.

Medisec submits that Order 11 rule 7 of the Rules of the Superior Courts should be applied more stringently so that costs improperly incurred by undue delay or misconduct or default of a solicitor are disallowed or fall to the solicitor to pay. It is submitted that this should help to incentivise the efficient progression of claims, notingthat wasted costs orders have proven efficacy in the UK.

Constitutional Rights of the Defendant Doctor

The Constitution of Ireland provides that justice shall be administered in public and provides for Constitutional rights to privacy, to a good name and to earn a livelihood.

The media coverage and publicity surrounding medical negligence cases sometimes has the potential to infringe these rights. Mr. Justice Hardiman explored this issue in the Supreme

Court decision in *Corbally -v- The Medical Council* [5] wherein the Court noted that the appellant was subjected to extraordinarily damaging press coverage which was not always characterised by fairness or moderation. Mr. Justice Hardiman reiterated the comments of Kearns. P in his judgment in *Corbally -v- The Medical Council* [6] :

" *The gravity of the matter from the perspective of [Prof Corbally] could hardly be greater because he was the subject of extensive media coverage in relation to this case, which had it been a trial before judge and jury would most certainly have caused the trial to be aborted*".

This is a particular issue where such coverage arises early in proceedings or before the determination of the matter. Media reports are often very damaging because they tend to report the allegations made without reporting properly the Defendant's position. Even if the doctor is vindicated in respect of his clinical treatment and management, the opportunity to salvage an impugned professional reputation is often lost by the time the case concludes.

This is in sharp contrast to the position for consultant and non-consultant hospital doctors working within the public hospital system, who benefit from the protection of the Enterprise Liability model of indemnity provided by the State Claims Agency. Under the Enterprise Liability model, it is sufficient for the patient/Plaintiff to sue the enterprise or clinical entity as a whole, and there is no requirement to name individual doctors or healthcare professionals.

A patient claim of medical negligence against an individual GP is very different to a claim against a body corporate such as the HSE. In reality, an individual general practitioner is a more vulnerable Defendant, more recognisable within the community and more exposed to consequences and criticism than another healthcare professional with the protection of the corporate entity. By way of example, if a settlement requires ruling even when there was no admission of liability, it is often only the general practitioner who is personally named in media reports.

Medisec is concerned by the introduction of rules on 03 August 2018 under the Data Protection Act 2018, allowing bona fide members of the media access to information and documentation, which has either been opened, presented or deemed to have been opened in court. It is not uncommon to receive notification, through communications with, for example, the SCA or MPS, that a Medisec member had peripheral involvement in a matter now the subject to of litigation, albeit that the Medisec member is not a named Defendant. In such circumstances, a journalist can access the court documents but the Medisec member who might be mentioned by name in the pleadings cannot, nor can his legal advisors or indemnifier, without a court order. This creates an inherently unfair situation.

Medisec submits that the possibility of the Courts imposing interim reporting restrictions (e.g. anonymisation) on all medical negligence cases, pending the outcome of proceedings, merits consideration. Alternatively, if a news outlet carries coverage of any aspect of the proceedings, it should then be required to report the outcome of those proceedings in a commensurate level of detail. Consideration could be given to introducing sanctions for misreporting / underreporting or misleading media publications.

[5] [2015] 2 IR 304
[6] [2014] IEHC 500

Quantum review

Medisec notes the recent media coverage regarding the so called "compensation claims crisis" and the review being undertaken by former High Court President, Nicholas Kearns.

Medisec notes that personal injury awards in Ireland are currently a multiple of those paid in other jurisdictions and welcomes recent decisions of the Court of Appeal revising awards of damages downwards.

Medisec submits that the judiciary should compile new guidelines on appropriate compensation levels, akin to the Book of Quantum and submits that that there is an urgent need for a rebalancing and recalibration of awards to reflect international standards.

Inter-Defendant Issues

One of the greatest challenges that Medisec encounters is the management of litigation where a Plaintiff sues a number of clinical defendants, encompassing general practice and acute services.

Medisec submits that specific provisions regarding conduct of defendants should be included when designing case management protocols.

Expert "hot-tubbing" as between co-defendants

In conjunction with Allianz plc and its solicitors, Medisec adopts a proactive and pragmatic approach to claims but has encountered a more defensive style from some co-defendants. It can be very challenging to establish common ground between co-defendants if expert analysis of the primary and tertiary aspects of care reaches contradictory conclusions or identifies overlaps in responsibility.

This specific issue ought to be considered in Pre-Action Protocols, requiring certain steps to be taken by co-defendants, such as mandatory "hot tubbing" of experts to narrow down the issues.

Medisec submits that including specific provisions within the Pre-Action Protocols, directed at inter-Defendant / co-Defendant cooperation, would help avoid unnecessary delays and unnecessary costs.

Medisec submits that effective case management Inter-Defendants would allow the position adopted by the individual general practitioner to be adjudicated upon fairly, by the Court with specific provisions made for the Court ultimately determining the issue to rely upon the offer made when apportionment of liability and the future payment of costs is determined.

Settlement offers inter-defendants

It is common to find a general practitioner named amongst multiple defendants to a high value clinical negligence action. Investigations often confirm that the general practitioner played a relatively minor role and should carry a lesser share of liability or in some cases, no share at all.

The current reality of inter-Defendant entrenchment can act as a bar to the early settlement of a case by a general practitioner Defendant. Co-defendants can effectively force an individual general practitioner to continue litigation, at enormous cost professionally, financially and personally, despite a willingness on the part of the general practitioner to settle the case on reasonable and fair terms.

By way of example, Medisec was involved in a case concerning a missed cancer diagnosis against a number of defendants, including tertiary hospital based clinicians and entities providing clinical services out of the jurisdiction. The overall value of the case was estimated at a seven figure sum.

Based on expert evidence, Allianz and Medisec were willing to settle the case on behalf of the general practitioner at an early stage and at a level reflective of the general practitioner's comparatively small share of liability. However, due to the position adopted by the co-defendants in the proceedings, this proved impossible. In these circumstances, the costs of litigation continued to escalate and the case continued, causing untold distress to the Plaintiff and to the general practitioner.

The Civil Liability Act 1961 provides for the service of Notices of Indemnity & Contribution between co-defendants, but Medisec believes that more simple and cost effective mechanisms to extricate a Defendant from proceedings should be available.

Medisec submits that defendants should be required to serve their section 17 offers[7] on their co-defendants and that failure by a co-Defendant to "beat" such section 17 offers at trial should have adverse costs implications.

Medisec submits that defendants should be able to serve a Lodgment / Tender on their co-defendants and that failure by a co-Defendant to "beat" such Lodgments / Tenders at trial should have adverse costs implications. The windows of opportunity to make an effective Lodgment / Tender should be less restrictive. In the UK, the equivalent "Part 36 offer" may be made at any point up to the time of judgment and even before court proceedings are issued.

Medisec submits that Calderbank offers between co-defendants should be permissible and effective.

Comments on paragraphs (b) to (e) inclusive of the Terms of Reference

(B) Medisec would welcome the introduction of tighter rules around mediation, possibly requiring the Plaintiff solicitor to disclose the specific written advice provided to the Plaintiff about the availability and merits of mediation and requiring the Plaintiff to confirm having received and understood such advice and confirming his decision, notwithstanding such advice, not to mediate.

[7] Section 17 of the Civil Liability and Courts Act, 2004

Medisec believes that restraints on finances and resources militate against the introduction of a no fault system and that such a system may actually serve to reduce accountability and increase litigation rates against healthcare professionals. Medisec supports, in principle, redress schemes or the possibility of ex gratie payment schemes in defined circumstances.

(C) Medisec believes that a focus on investment and a consistent application of risk management initiatives is important. In recent years, Medisec commissioned a study looking at communication between primary and secondary care and the issues arising at this interface, particularly as regards consistency of practice with referral and discharge letters. A follow up study has been completed. Medisec hopes that the learnings from these studies will be reviewed and implemented.

(D) Medisec arranges indemnity for more than half the GPs in Ireland and will be happy to work with the SCA as an interested stakeholder in implementing initiatives under this heading.

(E) As above, Medisec fully supports open disclosure and strongly urges the introduction of appropriate statutory protections to ensure that doctors can meaningfully engage with patients.

Medisec has drawn on its learnings since 1994 to prepare this submission, which is intended as a constructive contribution to the pursuit of a streamlined, efficient and equitable system for managing clinical negligence claims in Ireland.

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