WILLIAM FRY

Response of William Fry to the request for submissions to the Expert Group chaired by the Honourable Mr Justice Charles Meenan to consider alternative mechanisms to the court process for resolving clinical negligence claims

Introduction

William Fry acts for clients in the defence of clinical negligence claims. We welcome the opportunity to make these submissions to the Expert Group.

It is agreed the environment and structure within which clinical negligence claims take place needs improvement to facilitate early open disclosure and engagement. The current system, despite some advancements, such as having to exchange expert reports before trial and the changes introduced by the Civil Liability and Courts Act, 2004, remains largely adversarial. Delays are frequent.

Some of the issues on which the Expert Group have been asked to report have been considered by the Working Group on Medical Negligence and Periodic Payments, set up by the President of the High Court in 2010 ("the Working Group"). The work done by that group, which was comprised of experienced practitioners in clinical negligence claims, was wide ranging, practical and comprehensive. As can be seen from our submissions, we support the conclusions reached by the Working Group in each of their three reports.

The submissions of William Fry on issues (a) and (b) of the Expert Group are:

(a) to review the law of torts from the perspective of the management of clinical negligence and personal injury claims in order to assess the effectiveness of the legal framework and to advise on and make the recommendations on what further legal reforms or operational changes could be made to improve the current system.

1. Pre-action Protocols

We support the recommendations of the Working Group as set out in its Module 2 report of March 2012, to introduce pre-action protocols in clinical negligence claims. We call for these pre-action protocols to be introduced without delay, through the commencement of Part 15 of the Legal Services Regulation Act 2015. We agree with the benefits identified by the Working Group which would flow from the introduction of pre-action protocols.

Pending the introduction of these pre-action protocols, we submit parties to clinical negligence claims should seek to operate them voluntarily.

2. Patient Records

No clinical negligence claim can be investigated by patients or healthcare defendants without full access to the relevant medical records. Delays in that access can lead to early conflict, which can hinder effective and early engagement on the real matters at issue. The Module 2 report of the Working Group, March 2012, correctly highlights the importance of early disclosure of patient records. In its Executive Summary, the Working Group concluded that the pre-action protocols being recommended by it should secure earlier disclosure of patient records. It is to be hoped that the Part 15 of the Legal Services Regulation Act 2015, which is to give statutory footing to these advised pre-action protocols, will be commenced in the immediate future. In the interim, we suggest all parties to clinical negligence claims agree to operate these pre-action protocols, to the extent at all possible, on a voluntary basis.

We further suggest that there either be a rule of court or a practice direction that in clinical negligence claims, disclosure may be ordered by the Court prior to delivery of the Defence. It can currently happen that full disclosure of relevant patient records does not take place until a very advanced stage in a claim.

3. Case Management

We further endorse the recommendations of the Working Group, as contained in its Module 3 report of April 2013, to introduce case management of clinical negligence claims. We believe judicial case

management of these claims, alongside pre-action protocols, is central to their efficient conduct and to enable early resolution.

4. Experts

The Module 3 report of the Working Group, which deals with case management of clinical negligence claims, makes recommendations with regard to the use of and role played by experts in these claims. We suggest that the Expert Group consider if the current Order 61 of Rules of Court which apply to trials in the Commercial and Competition Lists, introduced by SI 254/2016 would also be introduced to apply to clinical negligence claims.

5. Costs

Clinical negligence claims can be complex, of very high value and the trials can be lengthy. Preparation and investigation can be very time consuming. Such claims require significant legal advice and representation. Nonetheless, not all of these claims fall in to this category. We believe it is time to carry out a detailed review of the costs of these claims, with input from legal cost accountants with experience of dealing with them, to identify if there are costs which could be reduced or contained from the perspective of both Plaintiffs and Defendants. For instance, we believe the practice that counsel's Brief Fees are deemed incurred from the date the Notice of Trial issues should be revisited, perhaps when the case management of Clinical Negligence Claims is introduced, as a Notice of Trial can be considerably in advance of a trial.

(b) to consider whether there may be an alternative mechanism to the court process for resolving clinical negligence claims, or particular categories of claims, particularly from the perspective of the person who has made the claim. To do this, the Group will examine whether a mechanism could be established which would deal more sensitively and in a more timely fashion with catastrophic birth injuries, certain vaccine damage claims, or with claims where there is no dispute about liability from the outset. It will also examine whether an alternative dispute resolution mechanism or a no-fault system would be effective in some cases.

1. ADR

The Expert Group is referred to the ADR agreement in place between claimants and defendants within the large cohort of High Court claims against the manufacturer(s) of voluntarily recalled hip implant devices. This ADR agreement was approved by Mr Justice Kevin Cross in December 2016. The parties report to Judge Cross at intervals as to the progress being made pursuant to it. This ADR agreement, and its judicial oversight, may provide helpful guidance and precedent to the Expert Group as to how a large number of claims arising from the same or similar events could be dealt with through ADR, other than mediation, albeit the aforementioned ADR agreement deals with product liability claims.

2. No Fault Compensation

An advisory group was set up by the Department of Health in 2001 and chaired by Prof Peter McKenna, former Master of the Rotunda Hospital, to look at the feasibility of establishing a no fault compensation scheme for those who suffered cerebral palsy at or close to the time of birth. It may be that some of the work done by this advisory group could be of use to the Expert Group.

Conclusion

We hope the above is of assistance. William Fry remain available, should you wish, to make further and more detailed submissions to the Expert Group across the important and wide ranging issues on which you have been asked to report.

William Fry
7 August 2018

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