Office of the Lord Chief Justice Northern Ireland

Consultation on Clinical Negligence Protocol and Practice Directions

A response by the Association of Personal Injury Lawyers

July 2021

Introduction

We welcome the opportunity to provide comments on the draft protocol for clinical negligence claims and the accompanying practice directions and template letters.

We feel it is also important to raise a further issue with the Lord Chief Justice in relation to clinical negligence claims. We urge the Lord Chief Justice to revisit the current rules surrounding attendance in court in personal injury cases, in particular those involving clinical negligence. Members report that plaintiffs are required to give evidence in court without the support of their legal representative when they are in an extremely vulnerable state The importance of the relationship between the plaintiff and their solicitor, particularly in sensitive cases or where the plaintiff is vulnerable, cannot be understated or ignored. We urge the Lord Chief Justice to reconsider the position regarding solicitors attending court and to make provision for plaintiffs to have their legal representative present in court with them.

We have the following comments on the draft clinical negligence protocol.

Paragraph 3

We query why one of the objectives within the old protocol "The development by healthcare providers of early reporting and investigation systems" has been removed. We suspect that the decision was made that this objective was no longer required to be achieved by the protocol because the duty of candour is being introduced. The duty of candour proposals are only in consultation phase at present - this objective must remain in place until the duty of candour has been implemented.

At paragraph 3(iii), "early" provision of medical records has been changed to "timely" provision. We query the need for this change, and suggest if changes are to be made to this part of the wording, an actual timeframe would be most helpful – both "early" and "timely" are vague and do not have a set meaning. Further, the General Data Protection Regulations give a set timeframe, and the protocol should mirror this timeframe.

Paragraph 8

"Copies of the relevant records should be supplied by the relevant healthcare provider…"

Who decides what a "relevant" record is? Plaintiff solicitors should not be restricted in the records that they are entitled to obtain – healthcare providers should not be permitted to refuse requests for certain records because they are not "relevant". Different records will be required at different times. For example, some records may be required to establish negligence, but then additional records may be required to calculate quantum – it is the plaintiff solicitor who will decide what records they will require, and they should not be denied those records because the defendant decides that they are not "relevant"

Paragraph 10

We question the removal of the requirement for healthcare providers to provide a written explanation of the difficulty and their proposed resolution if they cannot disclose medical records. Healthcare providers should provide an explanation if they are not able to provide the medical records that have been requested.

Paragraph 11

"**It shall be the duty of the party affording initial disclosure to make available… or, to assist with progress toward paper-light litigation, an encrypted disc containing the records".**

If the protocol is to be amended so that parties can provide documents on an encrypted disk in place of paper documents, it must also require the parties – if they are providing the documents electronically - to provide the documents in a format that allows them to be saved directly to the other party's system for an unlimited time. At present, many files that are provided electronically can only be accessed for a limited amount of time. In order to be able to access the files on a non time-limited basis, practitioners must print the documents and then scan them back in. This is cumbersome and time consuming. If documents are provided electronically, they should be provided in a way that they can simply be saved on the other party's system, and then accessed as and when they are required.

Paragraph 13

"While a complete set of records may be required in some cases, a file may also contain records as to unrelated conditions. Legal representatives should use their discretion in making requests for disclosure, bearing in mind the defendant's duty to make full relevant disclosure and the cost and delay caused by copying bulky files."
We are concerned about the addition of this paragraph. Co-morbidities are often relevant to the claim, especially when calculating quantum, and we are concerned that this paragraph will allow defendant representatives to withhold or redact important information.

Paragraph 14

"If pursuing a means of alternative dispute resolution would assist in achieving a settlement, then this should be fully explored if the parties agree. Whilst it is recognised that no party should be forced to take part, representatives are reminded to advise their clients of this option for dispute resolution."

There may on occasions be some circumstances in Northern Ireland where alternatives to judicial determination maybe suitable but these alternatives should be for the parties involved to explore. Mediation should never be compulsory or a tick box exercise, to do this will simply increase costs and will not provide any progress towards settlement. Personal injury claims are already dealt within in a proportionate manner through the system of scale costs in the County Court in Northern Ireland. There is already a great deal of work undertaken by Northern Irish practitioners before and after issue, to ensure that claims do not go to court unnecessarily. We are concerned that this addition to the protocol, although it mentions that no party should be forced to take part in mediation, could lead to parties having to spend time discussing mediation, to simply satisfy the protocol, even if this is something that is not right for their case. We are concerned that parties will be required to produce

evidence that they have suggested mediation in every case, or they will incur sanctions. There should never be costs sanctions for failure to use alternative dispute resolution methods.

Additionally, there is reference to the template letter for mediation in commercial cases. This is inappropriate. It will not be workable to forecast the costs of a mediator, and the comparative costs of litigation, in a personal injury case. Commercial litigation is very different in nature to personal injury litigation – in commercial litigation there are sophisticated parties on both sides, and there are substantial amounts of money involved in every case. In contrast to personal injury litigation, the focus of commercial litigation also tends to be purely financial, with both parties looking to negotiate the best value deal from the outset.

If there is to be a template letter for mediation, this should be specifically for use in personal injury cases, and should not require costs to be forecast or a mediator to be appointed from an early stage.

Paragraph 21

We welcome the addition of the paragraph requiring a standstill agreement. A draft of a standstill agreement would be useful.

Paragraph 25

We welcome that defendants will be required to provide reasons as to why they cannot provide certain information.

As above, we are concerned by the inclusion of "relevant" to describe the disclosable documents. What is "relevant", and who decides what is classed as relevant? Plaintiff solicitors should not be denied important documents because the defendant believes that they are not "relevant" to the particular case.

Paragraph 26

"The Court may consider costs penalties and/or procedural penalties for non-compliance such as a stay in proceedings if there is no letter of claim or a costs sanction if there is no letter of response from the proposed Healthcare Defendant(s)"

We welcome that there will be costs sanctions and procedural penalties for failure to comply with the protocol. The protocol needs "teeth" in order to be effective.

Paragraph 47-48

"No later than 21 days before the experts meeting, the parties shall agree (i) a properly collated, paginated and indexed core bundle of documents… As soon as possible after agendas have been agreed, and no later than 28 days thereafter, the parties shall convene meetings of the experts by telephonic means"

While we welcome the use of time frames rather than vague concepts such as "timely", we are concerned that there is a lack of flexibility built into this part of the protocol. While in other areas of the protocol, the defendant is permitted to divert from the requirements if they provide an explanation (and sometimes even if they do not provide an explanation), there is no such flexibility in relation to the rules relating to expert meetings. These rules are very labour intensive, and we suggest that there should be some flexibility built into them.

Draft Practice Direction

We welcome the amendments to the Practice Direction, and that it is now more tailored to personal injury claims.

In the first instance, any questions about this response should be directed to:

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