

APIL NI Regional Meeting – 4 September 2015

Attendees: See List

Time taken: Between 12.00 noon – 2.00 pm

The introduction was given by Peter Jack. Speaker, Liam McCollum

Liam gave a very interesting talk on the recent development in clinical negligence and he went firstly through the following:

1. Key Steps

The key steps he went through as follows:

- (1) We need to get the client's full instructions as detailed and precise as possible. This is often difficult as the client does not always know what happened but there can be nuggets of information from overheard comments by other family members and from various members of the medical staff.
- (2) The medical records. Whilst processes have improved we need as much as possible, not just the clinical notes. We need the radiology, the blood tests as well. We need to specify in our request that that is what we need, any internal investigation, disciplinary investigation and their findings.
- (3) Next stage is instructing our expert and obviously it is very important to keep our own personal bank of experts for future cases. We can use AVMA. It is obviously crucial to look beyond the jurisdiction with the correct discipline, have the correct number of experts. A good first expert can point us towards whoever we need and we are not to overlook causation.
- (4) At that point we need to consider funding. It is important to get counsel and their opinion early because of the stance that Legal Aid are currently taking in relation to funding.
- (5) The protocol letter does not need to include our expert's details. We are giving allegations rather than evidential explanations.
- (6) We are now at the stage where counsel are drafting proceedings. We need to be very careful of the use of possible and probable from a medical point of view.
- (7) Quantum report

- (8) Close of Pleadings
- (9) Disclosure. We need consultation before exchanging reports. You don't have to give all your reports, only those you are relying on. Also that consultation may introduce new or better points and we may need amended reports. Only offer, do not send. We need express agreement for like and like exchange. We need to identify the discipline of our doctor providing the report and only serve like for like.
- (10) Meeting of experts. Agenda needed for the meeting of these experts and counsel usually drafts this. We need closed questions from a factual point of view. More traditional English experts will refuse to answer negligence type questions and they are quite right to do that and it is important to insist on good minuting of this meeting.
- (11) We need to consult with experts after the exchange. Always need Legal Aid authority to do that because that will give rise to another fee.
- (12) We need to consider possible joint consultation.
- (13) Trial Bundle – we need a core bundle that is pleadings, both sets of reports, minutes of any meetings, and the financial loss. The medical records themselves can be available at the trial but need to be separate from this core bundle.
- (14) Need to get witnesses organised for the correct days.

2. Breakthrough decision in Montgomery –v- Lanarkshire County Council

There then followed a discussion on the recent breakthrough in Montgomery –v- Lanarkshire County Council which dealt with a pregnant woman whose baby had a serious increased risk of shoulder dystocia but yet she was not warned and the baby was very badly brain damaged on birth. At first instance she lost on the reasonable body of opinion defence and the Scottish Court of Appeal upheld this decision but there followed the Supreme Court's decision and they decided, and the most important part of the judgement is paragraph 86 of the Judgement so the strength of the decision essentially is that it is now removed from the medics as to whether or not the advice or warning should or should not have been given. It is not for medical professionals but for the court to decide. Should the warning have been given it becomes then an objective test. What would a reasonable person have needed to know in relation to the warnings of risks? Liam indicated that the avoidable risk of surgery defence will go because if it was unavoidable then they should have been warned of it.

In the follow-up Peter Jack encouraged members to attend the PI Update course. Lois then introduced the Agenda for Change document. It was distributed amongst the member and they were urged to contact us with aspects that they felt were essential for the NI context.