

**EXPERT GROUP TO REVIEW THE LAW OF TORTS AND THE CURRENT SYSTEMS FOR THE MANAGEMENT OF CLINICAL NEGLIGENCE CLAIMS**

**Interim Report**

*Establishment and Terms of Reference of the Expert Group*

In June 2018, as part of a commitment in the Programme for Government, the Minister for Health, the Minister for Justice and Equality, in association with the Minister for Finance, announced the establishment of an Expert Group to consider an alternative mechanism to the court process for resolving clinical negligence claims. The group chaired by the High Court Judge, Mr Justice Charles Meenan, was established to review current systems for the management of clinical negligence claims.

The Terms of Reference of the Expert Group are as follows:-

- a) 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 recommendations on what further legal reforms or operational changes could be made to improve the current system (the Group needs to ensure that its work does not duplicate the work of the President of the High Court, Justice Peter Kelly on the Review of the Administration of Civil Justice on behalf of the Minister for Justice and Equality);

b) 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;

c) examine the role of the HSE in addressing the problems encountered by persons involved in clinical negligence claims and addressing the health needs of persons affected by clinical negligence, with consideration given to whether particular care packages could be made available for persons with specific injuries, e.g. cerebral palsy following birth;

d) examine the role of the State Claims Agency in managing clinical negligence claims on behalf of the HSE to determine whether improvements can be made to the current claims management process.

e) consider the impact of current tort legislation on the overall patient safety culture, including reporting on open disclosure.

The Expert Group may carry out its own analysis and research or commission research, if necessary. This would include examining how clinical negligence claims are managed in other jurisdictions.

The members of the Expert Group are:-

- Mr. Justice Charles Meenan (Chairperson)
- Greg Dempsey, Deputy Secretary General, Department of Health / Mary Jackson, Principal Officer as an alternative
- David Keating, Head of Patient Safety and Advocacy, Department of Health
- Conan McKenna, Assistant Secretary, Civil Law Reform and Courts Policy / Tracy O’Keefe, Principal Officer, Civil Law Reform Division, Department of Justice and Equality as an alternative
- Elizabeth Canavan, Department of the Taoiseach / Cillian Doyle as an alternative
- Niamh Duff, Health Vote / Eanna Hickey, Legal Advisor, Department of Public Expenditure and Reform
- Christine O’Rourke, Advisory Counsel, Office of the Attorney General
- Gavin Maguire, HSE Head of Operations, Assistant National Director, Quality Assurance and Verification
- Mark Molloy, Patient Advocate
- Catherine Tarrant, Head of Clinical Claims, State Claims Agency
- Kevin O’Neill, Principal Officer, Court Service
- Ernest Cantillon, Solicitor
- Sheila O’Connor, Patient Advocate

## **1. Introduction**

**1.1** Following the establishment of the Expert Group, the Chairman wrote directly to a number of bodies seeking submissions. In addition, an advertisement was placed in national newspapers on the 7<sup>th</sup> day of July, 2018 seeking submissions on or before the 7<sup>th</sup> day of August, 2018. A copy of this notice is appended to the Report.

**1.2** Some 41 submissions were received. Appendix I is a list of the submissions received together with a summary.

**1.3** Having considered the submissions, the first meeting of the Expert Group took place on 5<sup>th</sup> September, 2018. Further meetings took place on 11<sup>th</sup> October, 15<sup>th</sup> November and 13<sup>th</sup> December, 2018.

**1.4** At its first meeting on 5<sup>th</sup> September, 2018 various matters covered by the submissions were considered. In particular, it was noted that a number of the submissions received concerned pre-trial protocols and the management of clinical negligence claims. The Expert Group noted the considerable work that had been done by the “Working Group on Medical Negligence and Periodic Payments” which was established by the then President of the High Court in 2010. The first Module of this Working Group was chaired by Mr. Justice John Quirke with the latter two Modules being chaired by Ms. Justice Mary Irvine.

**1.5** The 2<sup>nd</sup> Module of this Working Group was completed on March, 2012. This Module concerned pre-action protocols and appended to it are Draft Pre-action Protocols (Clinical Negligence Claims).

**1.6** Module 3 of this Working Group was completed in April, 2013. This Module considered the management of clinical negligence claims. Appended to the Module are Draft Rules of Court for Case Management of Clinical Negligence Proceedings.

**1.7** The Expert Group also noted that the President of the High Court, Mr. Justice Peter Kelly, is currently undertaking a review on the administration of civil justice in Ireland. It was agreed that the work in the area of pre-trial protocols and case management of clinical negligence claims has now effectively been completed and what is required is implementation.

**1.8** The Expert Group decided to deal initially with consideration of a “no fault liability” legal regime. In furtherance of this, a paper was prepared and presented to the Expert Group on 11<sup>th</sup> October, 2018 by Ms. Nicola Carroll, B.L. This paper covered both an analysis of the constitutional rights of access to the courts, provisions in the Constitution concerning the legal limits on non-court Tribunals (as per Article 37) and an account of “no fault liability” regimes as they operate in other jurisdictions, in particular, in New Zealand.

**1.9** In considering “no fault liability” the Expert Group had presentations from Dr. Peter McKenna and Professor Denis Cusack, both of whom had served on an earlier Group that had been asked to consider this matter. This Group did not make a formal report but the Expert Group had the considerable benefit of their views and analysis.

**1.10** At its meeting on 15<sup>th</sup> November, 2018 the Expert Group was addressed by Mr. Ruary Martin. Mr. Martin is the father of a child who suffered serious injuries at birth by reason of clinical negligence. He gave the Expert Group a detailed account of his experiences in

dealing with the legal system and obtaining from the relevant authorities the necessary care and support which his child will need for life.

**1.10** “No fault liability” involves difficult issues of Constitutional Law, in particular the right of access to the Courts and equality before the law. These and other issues involved can be highlighted as follows:-

- (i) What would be the extent of a no fault scheme? Should it only cover birth asphyxia cases? Other serious injuries can occur during birth , e.g. shoulder dystocica.
- (ii) If the issue of liability were removed, would this unfairly discriminate against children who acquired cerebral palsy other than during birth?
- (iii) It was noted that in other jurisdictions which have a no fault liability regime causation is still required to be proven. The Expert Group was aware that in many cases the issue of causation was every bit as contentious as liability.
- (iv) Compensation awarded under a no fault scheme would have to be comparable with that awarded under the current court process. When the issues of the extent of a no fault scheme and equality are considered, this could make the costs prohibitive.
- (v) Concern was expressed that a no fault scheme could lead to lessons not being learnt. Where fault is identified this can lead to the prevention of such events occurring again. This is a benefit of the current liability based system.

The Expert Group will further consider the issue of “no fault liability”.

---

**1.12** At its meeting on 13<sup>th</sup> December, 2017, the Expert Group received a Report from the HSE on services it provides. The HSE provides support to children with complex medical conditions in the home, including those arising from catastrophic birth injury. These supports are based on need rather than on the cause of the injury and independent of establishment of negligence. However, what is provided is subject to funding limits and availability of services geographically. The bulk of supports that are provided are contracted out to external providers.

The most significant element of supports provided is nursing care and the HSE has in place a national standard approach to the assessment, delivery and funding of this nursing care. There are currently 286 Children with complex needs receiving nursing support in the home and this number is set to grow in the coming years. However there are challenges in sourcing nurses with the appropriate specialist skills, particularly in rural locations.

Occupational Therapists, Physiotherapists and Speech and Language Therapy supports are also provided to children with complex needs in the home from budgets held locally in each Community Health Office. There are significant gaps in what is provided due to budgetary limits and regional variations in availability of therapists.

The HSE is taking action to improve the consistency and volume of therapies provided and is developing Children's Disability Networks at local level. These networks bring together all the relevant experts by forming partnerships with local disability organisations, schools and parents. These networks, which are developing, seek to provide equity of access for all children with disabilities.

The HSE also provides Aids and Appliances and Medical Cards to Children with complex needs in the home.

A minority of cases of children with complex healthcare needs will be subject to clinical negligence claims. In these cases, the court may make an award that provides for the parent to contract privately for the healthcare and other support needs of their child and HSE support may be limited to the provision of a medical card and, where relevant, continuation of supports such as therapies to the child in school.

**1.13** The Expert Group received the “Report on an Alternative System for Dealing with Claims Arising from CervicalCheck”. The Group will consider this report in the wider context of clinical negligence claims and how they might be managed in the future.

## **2. Conclusion**

**2.1** At this stage of its work the Expert Group has received submissions and has had regard to Modules 2 and 3 of the “Working Group on Medical Negligence and Periodic Payments”. The Expert Group is completing its work on “no fault liability” and, in this context, has received a direct account from the parent of a catastrophically injured child of his experiences of the legal system. The Expert Group has also considered the HSE report on financial supports already referred to.

**2.2** The Expert Group will consider how best to deal with claims arising from vaccination programmes and will look at how schemes work in the United Kingdom. Issues of patient safety and open disclosure also remain to be looked at.

**2.3** Having considered these issues, the Expert Group will look at alternative mechanisms for resolving clinical negligence claims with due regard to the Constitutional rights of the parties involved including the possible establishment of a Medical Injuries Assessment Board like the Personal Injuries Assessment Board.

**2.4** Though a considerable amount of work has been done, and time had to be allowed for submissions to be received from interested parties, it is proposed that the Expert Group will produce its Final Report in June 2019.

---

The Hon. Mr Justice Charles Meenan

Chairperson

## **Appendix 1**

Member of the Public 1

Prof Seamus O'Reilly, Consultant Medical Oncologist, Cork University Hospital

Member of the Public 2

Ernest Cantillon Solicitors

Faculty of Pathology, Royal College of Physicians Ireland

Member of the Public 3

Irish Hospital Consultant Association

Member of the Public 4

Member of the Public 5

Callan Tansey Solicitors

Medical Defence Union

Edward M Kennedy Institute for Conflict Intervention, NUI Maynooth

Member of the Public 6

Dr. Peter McKenna, Consultant Obstetrician

Law Society of Ireland

Prof. Leo Lawler, Consultant Radiologist

Member of the Public 7

Medical Protection Society

Hayes Solicitors

Nursing & Midwifery Board of Ireland

Medisec Ireland

Personal Injuries Assessment Board

State Claims Agency

Allianz Ireland

William Fry Solicitors

Mason, Hayes & Curran Solicitors

Irish Medical Organisation

Chartered Institute of Arbitrators

Children's Hospital Group

Department of Justice & Equality

Health Service Executive

Eversheds Sutherland

The Bar of Ireland

Department of Health

Challenge

Member of the Public 8

Private Hospital Association

Sage Advocacy

---

The Group also received written submissions from Mr Bill Honohan, Enable Ireland and Ms Marie Daly Hutton and invited and heard from the following persons who made oral submissions:

- Dr Peter McKenna, Consultant Obstetrician and Clinical Director, National Women & Infants Health Programme, HSE;
- Professor Denis Cusack, Member of Advisory Group on No-fault Compensation;
- Mr Ruary Martin, Father of Milagros Martin (aged 6) born in December 2011 with quadriplegic cerebral palsy.

The Expert Group noted the receipt of submissions and calls for reform in the following key areas:

- The benefits of mediation and other alternative dispute resolution processes and the need for further incentives to pursue these systems
- Support for no fault compensation specifically in relation to catastrophic birth injuries
- Opposition to no fault compensation on the basis of costs, no increase in patient safety etc.
- Learning from mistakes and legal outcomes to improve patient safety systems and change medical practice
- Improvement of systems and resources for advising on risk within the HSE and State Claims Agency
- The need for reduction of adversarial nature of current medicolegal structure
- The need for patient trust in health care
- The need for reform of legal costs systems and for the avoidance of conflicts of interest
- The need for open justice
- The need for mandatory open disclosure and for enactment of the Patient Safety bill 2018 for which the Government has recently published a general scheme

- The need for reform of legal pleading and procedural rules
- The need for Pre-action protocols, in particular for the commencement of Part 15 of the Legal Services Regulation Act 2015
- Expert assessment and specialist input as part of the information obtained through alternative mechanisms to the traditional court procedure
- Resourcing of care packages and health services for persons affected by clinical negligence.
- Adoption of comparative procedural reforms made in the UK under the Access to Justice Act 1999
- Adoption of restorative practices
- Management of claims in-house with the State Claims Agency
- Consideration of the establishment of a Medical Injuries Assessment Board like the Personal Injuries Assessment Board (“PIAB”) or whether some classes of medical negligence cases could be assess by PIAB. The Group, however, also noted the receipt of submissions on the unsuitability of clinical negligence claims being dealt with through the PIAB system
- The need for specialist judges and case management procedures in the manner of the Commercial Court
- The need for commencement of section 219 of the Legal Services Regulation Act 2015 (statutory protection of the apology)
- The need for preservation of the Constitutional right of action to the courts
- Public education and adjustment of patient expectations, especially in relation to diagnostics
- Priority of limited judicial resources for case management of catastrophic injury claims and plaintiffs with a short life expectancy
- Joint experts for quantum appointed on a consensual basis
- Reform of section 17 of the Civil Liability and Courts Act 2004 offer process and lodgement / tender process modelled on the experience in the United Kingdom

- Provision for interim payments without consequential liability to Recovery of Benefits Assistance Scheme
- Extension of *ex gratia* scheme that is currently in place for those affected by vaccination programmes to clinical negligence claims
- Retention of medical cards for plaintiffs
- Amendment of Order 1 A, rule 6 of the Rules of the Superior Courts for the provision of particulars for medical negligence
- Quantum review – proposal for a Book of Quantum for clinical negligence claims