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REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE

(a) IMPROVING PROCEDURES AND PRACTICES AND REMOVAL OF OBSOLETE, UNNECESSARY OR OVER-COMPLEX RULES OF PROCEDURE

1. INTRODUCTION

The Medical Protection Society (MPS) welcomes this opportunity to provide comments on the Irish Government's Review of the Administration of Civil Justice. MPS is the world's leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Our benefits include access to indemnity, expert advice and peace of mind. With more than 16,000 medical and dental members in Ireland, MPS has an in depth knowledge of the medico-legal environment for healthcare professionals, and significant experience of the Irish civil litigation system.

2. PRE-ACTION RESOLUTION

MPS believes that the starting point for any Civil Justice Review is pre-action resolution through the use of a pre-action protocol. A pre-action protocol would encourage the fair, just and timely settlement of disputes by facilitating:

1. Early communication between claimant and defendant.
2. Early and full disclosure of information about any dispute.
3. Early investigation of circumstances.
4. Proportionality.
5. The narrowing of issues to be determined through litigation in cases which do not reach settlement under the protocol.

This can only be achieved through transparency and a willingness from both sides to lay their cards on the table. For example, when sending a Letter of Claim the claimant should be required to provide:

1. Details of any alleged negligence and harm suffered and whether supported by expert evidence.
2. Details of all heads of loss being claimed together with vouching.
3. A detailed index of all hospitals attended and practitioners that provided treatment.
4. A list of all records that they hold or are trying to recover.
5. All relevant medical records held by the claimant.

The deadline for any Letter of Response under a pre-action protocol should run from the date of disclosure of all relevant records, rather than service of the Letter of Claim, in order to allow the defendant to properly investigate and, where appropriate, make an offer to resolve the claim.

If the claimant commences proceedings in the absence of full disclosure, the defendants should be able to stay proceedings to allow for recovery of records, and sufficient time to investigate / provide a Letter of Response.

The use of pre-action protocols in Scotland, Northern Ireland and England & Wales has been very successful. However, MPS believes that pre-action resolution has the greatest prospects of success

when costs sanctions are applied where parties fail to comply with the requirements set out under the protocol. It is MPS' position that all reasonable steps should have been taken to achieve resolution before legal proceedings are commenced.

3 PROCEEDINGS

In circumstances where pre-action negotiation has been exhausted without achieving resolution, MPS would make the following recommendations:

3.1 Commencement of proceedings

If not already provided under the proposed pre-action protocol, the Summons should include details of all hospitals/practitioners that provided relevant treatment. In addition, the Plaintiff should be required to serve a condition & prognosis report together with the Summons.

3.2 Case management

MPS would favour the introduction of proactive Court-led case management to ensure that claims are appropriately progressed and without undue delays. We would recommend that case management should include:

1. A Court timetable setting out keys steps/deadlines.
2. Case management hearings to ensure parties are complying with the timetable and any orders made by the judge.
3. A pre-trial meeting to narrow issues in dispute and assess readiness for trial.
4. Costs penalties for failure to comply with deadlines/directions with consideration that costs can be recovered directly from the plaintiff's solicitors where they have unreasonably impaired the defendant's ability to investigate and resolve a claim.

3.3 Specialist Courts/judges

MPS would welcome the introduction of a specialist PI/clinical negligence Court with specialist judges and procedural rules designed to ensure early engagement of parties and adequate case management. This Court could also deal with motions relating to discovery etc. in clinical negligence cases.

MPS believes that this approach could lead to useful precedents for clinical negligence practitioners and bring consistency in approach, particularly regarding awards of damages. This has been the case in Scotland following the introduction of the All-Scotland Personal Injury Court.

3.4 Introduction of judicial guidelines

The 2016 version of the Book of Quantum was a welcome update. However, a range of views have already been expressed by the Irish judiciary about the figures it contains. Some judges have made awards in line with the Book of Quantum and noted the importance of using it to ensure greater certainty regarding likely outcomes to, in turn, reduce unnecessary litigation and the associated expense for all concerned. Other judges, however, have been reluctant to rely on the figures in the Book of Quantum given that they are based not only on Court and Injuries Board awards but also settlements, so will include compromised claims.

MPS would welcome the introduction of the equivalent to the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases. The purpose of the Guidelines is to provide a clear and logical framework for the assessment of damages in personal injury cases and the Guidelines are consistently relied upon by the courts. As noted in the foreword by Lord Donaldson of Lymington "whilst no two cases are ever precisely the same, justice requires that there be consistency between awards." [1]

3.5 Applications, motions and return dates

MPS would favour a simplified approach to applications and motions. There are currently 15 motion lists in the High Court and return dates can vary between 1 to 12 weeks. The average return date is 10 weeks from the date of service of the motion or application. This can impede parties' ability to progress cases towards early resolution (for example, delays in obtaining orders for discovery and delivery of updated particulars).

MPS would favour the following:

1. Shorter and more clearly defined return dates for different categories of motion i.e. an automatic 28 day return date for discovery motions.
2. Clerks of court should have authority to consider and grant motions of a routine and straightforward nature.
3. Default use of electronic motions to allow prompt disposal of motions on an 'opt out' basis for legal firms.

Implementation of the above proposals would facilitate more proactive and efficient case management whilst alleviating the current administrative burdens on the court.

3.6 Pre-trial meeting

It is undesirable that so many cases settle in the week before trial. MPS believes that it would benefit all parties to have a compulsory meeting 8 weeks before trial to focus parties' minds on the issues in dispute, including quantum.

All relevant documents, valuations and reports which will be relied on at trial must be available to all parties at the meeting. Parties should discuss issues in dispute and seek to find consensus where possible. If resolution cannot be achieved then a minute should be produced and signed by counsel for all parties confirming what has been agreed and what remains in dispute. This will allow the Court to limit valuable court time and avoid trial by ambush.

4 EXPERT EVIDENCE

Currently, our efforts to resolve claims early are frequently frustrated by the claimant refusing to disclose expert evidence or agree to a meeting of the experts to limit the issues in dispute.

MPS would like to see the Court take a proactive approach in determining the appropriateness of expert witness instructions in clinical negligence cases. For example, it is not uncommon for parties to lead two experts from the same discipline to comment on similar issues. Both parties should be expected to give careful consideration to the question of whether evidence from a particular expert is both necessary and appropriate bearing in mind that expert evidence is likely to represent a

[1] Foreword to the first edition of the Judicial College's Guidelines for the Assessment of General Damages in Personal Injury Cases 1992

significant proportion of the cost of clinical negligence litigation. If the expert evidence obtained is not necessary to determine the issues in dispute then the instructing party should not be entitled to recover the cost of that expert.

In the absence of a Court timetable dictating the requirement for a meeting of the experts, MPS believes that the Court should have the authority to order that the experts meet before the trial date in order to discuss the issues in dispute and which they have not agreed upon. This meeting could take the form of a telephone discussion rather than a face-to-face meeting, with the experts working to an agenda pre-approved by the parties. In addition, the experts should be required to produce a joint minute setting out the matters on which they agree disagree, including the reasons for disagreement.

5 OFFERS, TENDERS AND LODGEMENTS

MPS would welcome the introduction of processes and procedures that encourage parties to make, properly consider and respond to settlement offers, in order achieve earlier resolution of claims, curtail legal costs and free up court time.

5.1 Pre-action

At the pre-action stage, MPS would favour the following:

1. The use of formal written offers, containing a schedule of loss/vouching, and, where relevant, a counter-schedule in order that both parties can properly quantify claims.
2. Time limits put in place for claimants to: accept offers, consider whether any of the offers under each head of loss can be accepted to narrow the areas in dispute, request any additional information required in order to consider the offer, and issue a reasoned response.
3. A requirement that, in any reasoned response issued, the claimant must: reject the offer outright, giving reasons for the rejection; or reject the offer and make a counter-offer, giving reasons.
4. A requirement for parties to consider whether it is appropriate to arrange a settlement meeting or engage in any other form of ADR if an offer of settlement has been made.
5. The requirements for claimant's solicitors to put all settlement offers made to their client.

5.2 Lodgements/tenders

In circumstances where pre-action negotiation has been exhausted without achieving resolution, MPS is keen that the court process encourages pre-trial resolution. For example, it is unhelpful that the defendant is only able to tender/lodge at particular points during the litigation process.

Applications to lodge outside these windows are often opposed which wastes court time, delays resolution and increases costs. Increased flexibility, similar to that of the Circuit Court, i.e. to allow lodgements/tenders to be made as soon as proceedings are commenced and at every stage thereafter, would be preferable. It would also be useful to have clarification on whether there is any restriction on the number of lodgements/tenders that can be made in a case.

Plaintiffs should be given 'reasonable time' (not exceeding 14 days) to consider any lodgement/ tender, with shorter time periods routinely allowed in the 14 days immediately pre-trial when all investigations should be complete.

In addition, MPS would like to see the introduction of inter-party cost-protective offers/tenders which would enable a defendant to settle with the plaintiff irrespective of the approach taken by any co-defendant(s) or put a co-defendant who fails to engage in agreeing quantum/apportionment at risk in respect of costs. This approach is taken in both Scotland and England & Wales with great effect and has been shown to significantly reduce the number of claims settled on the steps of the court.

In order to simplify the process, MPS also suggests the following:

1. Allowing pre-approved defendants such as MPS, to tender.
2. Allowing defendants who are not able to tender to make lodgement payments directly to the court by means of electronic bank transfer.
3. Abolishment of stamp duty on lodgements to simplify the process regarding lodging/ uplifting funds.

5.3 Formal written offers

Another approach could be to allow parties to make formal written offers similar to other jurisdictions, where they are made in a prescribed form with the aim of encouraging early resolution. The costs and other consequences that a party will face if it refuses a reasonable offer to settle are set out.

To be compliant with the rules of Court, such offers should be:

1. A genuine offer to settle.
2. Made "without prejudice except as to costs" (it cannot be referred to the judge having conduct of the proceedings until the conclusion of the matter).

Such offers can be made by both a plaintiff and a defendant at any stage of a dispute, including before or after proceedings have commenced and in appeal proceedings.

6 CONSIDERATION OF INTERIM PAYMENTS

MPS is keen that plaintiffs be obliged to reasonably consider any offer of interim payment made by a defendant to allow them to access appropriate remedial medical/dental treatment once liability has been accepted. This could apply to, for example, psychiatric care/therapy or replacement of missing teeth to limit ongoing pain and suffering or restore function.

Where plaintiffs are alleging ongoing injuries, direct payments could be made by defendants to treating practitioners to ensure prompt treatment is accessed. Such payments would be of benefit to all parties in ensuring losses and continuing pain and suffering are mitigated.

If the plaintiff has unreasonably refused to avail themselves of such an offer, the court should take this into account in assessing both general and special damages.

7 COUNSEL / EXPERTS / FEES

7.1 The role of counsel in civil litigation

The Bar of Ireland website indicates that, 'although solicitors have a right of audience before all courts, they tend to call on the services of barristers to present their clients' cases. This is mainly because advocacy requires distinct skills and expert knowledge that barristers are trained to provide.'[2] The investigations of the Department of Justice and Equality[3] noted that the reason for 'this greater reliance on counsel (compared to England and Wales) was a lack of confidence on the part of solicitors in dealing with cases before the courts coupled with an overly cautious approach on the part of solicitors to giving advice without the benefit of counsel's opinion.'[4]

MPS believes these issues could be addressed by the following:

1. A Specialist Accreditation Scheme for solicitors with significant experience in certain areas of legal practice. This would recognise specialist solicitors and assist the public in choosing a solicitor with the necessary expertise. This would assist the public in making an informed choice regarding their representatives, without restricting their options. Specialist Accreditation has been widely adopted in UK jurisdictions.
2. A specialist qualification in Solicitor Advocacy would ensure a high standard of advocacy when solicitors are appearing before the High Court.
3. Legislative restriction on instructed counsel to one senior or one junior, except for complex matters as sanctioned by the District Court Rules Order 53 Rule 29. This provides that 'a fee for counsel may not be included unless the Court certifies that, in its opinion, the employment of counsel was necessary for the attainment of justice or for enforcing or defending the rights of the party concerned.'
4. Cost sanctions for over-instruction without cause both before and after proceedings are served. Costs sanctions could be through voiding the fees of one counsel, or reduction of the solicitor's instruction fee for their over-reliance on counsel.

7.2 Cost of counsel / solicitor instruction fees

The most significant cost in the instruction of counsel are the brief fee and refresher fees. Similarly, the most significant costs in a Bill of Costs are both counsel fees and the solicitor instruction fee.

In 2007, the Department of Justice and Equality recommended the abolishment of such fees, to be substituted by an hourly or daily rate, as appropriate, and that solicitors and counsel be obliged to use time recording in the preparation and compilation of charges.[5] The counter-argument to this suggestion is that a 'time and line' system would become a 'plodder's charter'.[6] As stated by the Department of Justice and Equality, 'it seems eminently reasonable to require those charging for legal work to systematically itemise costs by reference to the various stages of the litigation process.'[7]

MPS would favour:

[2] https://www.lawlibrary.ie/About-Us.aspx
[3] Department of Justice & Equality, ' Report of the Legal Costs Working Group' 1 January 2006 http://www.justice.ie/en/JELR/Pages/Legal-costs-working-group-report
[4] Paragraph 3.18
[5] Department of Justice & Equality: Report of the Legal Costs Implementation Advisory Group,' 1 March 2007, paragraph 3.3 http://www.justice.ie/en/JELR/Pages/Legal-costs-implementation-report
[6] Paragraph 2.3
[7] Paragraph 3.3

1. The introduction of a legislative scale for settlement of costs in low value cases including both pre-action and litigated claims.
2. Legislative court costs based on chargeable time and procedural landmarks, such as motions, lodgements, and trials.
3. Costs sanctions for non-compliance, through partial recoverability of costs.[8]

7.3 Junior counsel fees

Where a junior counsel is instructed, together with a senior counsel, it is an established practice for the junior counsel to charge two-thirds of the fee marked by senior counsel. While the Legal Services Regulation Act 2015 has dismissed this approach[9], the practice persists. According to the Department of Justice and Equality, 'no justifiable rationale for this practice appears to exist.'[10] Both the Fair Trade Commission and The Competition Authority referred to the on-going practice as 'anti-competitive' and 'anti-consumer'.[11] The Competition Authority recommends that consumers are made aware that junior counsel need not charge a fee at two-thirds that of the senior's in a case.[12]

Junior counsel fees should be determined on a case by case basis and entirely dependent on work done.

8 COSTS

There are often lengthy delays in plaintiffs producing their Bill of Costs following resolution. MPS favours a requirement for Bill of Costs to be produced within 3 months of case conclusion, with costs sanctions for non-compliance.

MPS is often frustrated by the plaintiff's refusal to negotiate reasonable costs. With plaintiff costs tending to be around 3-4 times higher than defence costs, defendants are left with no costs protection despite making reasonable attempts to settle. MPS would like to see the introduction of a tender/lodgement system whereby any unreasonable refusal by the plaintiff to accept an offer of costs could result in them being liable for any additional costs consequently incurred by the defendant.

Plaintiffs should be required to produce a draft Bill of Costs before applying for an interim payment in respect of costs. They should evidence that they have meaningfully engaged with the defendant's Costs Accountant in an attempt to settle costs. If an interim payment is made, a time limit should be put on the plaintiff setting the matter down for taxation. The defendant should also be able to recover any over-payment and interest on interim payments made/ordered by the court.

[8] Recommended by the Legal Costs Implementation Advisory Group, paragraph 4.7
[9] Section 149(1) states, 'a legal practitioner shall not charge any amount in respect of legal costs if they purport to set the legal costs to be charged to a junior counsel as a specified percentage or proportion of the legal costs paid to a senior counsel'
[10] Department of Justice & Equality, ' Report of the Legal Costs Working Group' 1 January 2006 http://www.justice.ie/en/JELR/Pages/Legal-costs-working-group-report - paragraph 3.19
[11] The Competition Authority, 'Competition in Professional Services: Solicitors & Barristers', December 2006, paragraph 7 and 29 https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/03/Exec-Summary.pdf
[12] paragraph 33

(b) REVIEWING THE LAW OF DISCOVERY

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2. DISCOVERY

The current rules around discovery impede defendants' ability to investigate and resolve cases at the earliest possible stage. It is common for plaintiffs to refuse disclosure of relevant evidence including clinical records until after delivery of the defence despite legal precedent[13] confirming that plaintiffs are not entitled to impede access to the relevant material.

If defendants are to be able to accurately quantify claims in order to make early settlement offers, then full disclosure of all relevant evidence including up to date clinical records are crucial to allow defendants to reach a view on breach, causation, condition and prognosis and quantum.

If the plaintiff does not hold all such clinical records and will not obtain/provide same (or mandates for same), the defendant should be able to make a pre-proceedings application to direct disclosure and be awarded costs if successful.

In circumstances where the plaintiff tries to restrict access to their records, they should be required to release all uncontroversial records and lodge the proposed restricted records at court, marked confidential. The court should then be asked to determine whether any redactions or restrictions are justified. Only exceptionally should restrictions be justified.

[13] Power v Tesco Ireland Limited [2016] IHC390; McGrory v ESB [2003] 3 I.R. 407

(c) ENCOURAGING ALTERNATIVE METHODS OF DISPUTE RESOLUTION

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2. ALTERNATIVE DISPUTE RESOLUTION

MPS welcomes the Mediation Act 2017 as a means of achieving fair but swift resolutions to what can be complex disputes between parties. MPS believes that in order for the Act to achieve its purpose, the court should impose costs sanctions against any party unreasonably refusing to engage in the mediation process.

Particularly in clinical negligence actions, mediation can be particularly useful in order to create a forum for the plaintiff to seek an explanation from the clinicians involved as to what happened and to seek an apology, where appropriate.

(d) REVIEWING THE USE OF ELECTRONIC METHODS OF COMMUNICATIONS INCLUDING E-LITIGATION AND POSSIBILITIES FOR MAKING COURT DOCUMENTS (INCLUDING SUBMISSIONS AND PLEADINGS) AVAILABLE OR ACCESSIBLE ON THE INTERNET

1. INTRODUCTION

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2. E-LITIGATION

MPS believes that increased use of technology, where appropriate, would have a positive impact for all parties involved in court actions and the court system itself. Increased use of e-litigation would reduce the need for parties to travel to court thereby reducing costs, saving time, and increasing access to justice. Unnecessary procedural delays, environmental impact and use of court time would be prevented.

The Scottish government produced a report in 2014[14] providing a digital strategy for the Scottish court system (including civil justice). There were a number of 'E-Litigation' procedures recommended to streamline procedure and make justice more accessible. Measures which have already been implemented include:

1. Digital recording of evidence, reports, decisions and judgements.
2. Live video conferencing to allow agents to speak with clients or evidence to be given without requiring personal appearance in court, where appropriate.

MPS would like to see consideration given to the use of electronic motions, digital recording, video conferencing, creating a digital platform in which to store case information and the ability to make lodgements by electronic bank transfer, in order to create a much more user-friendly system for all.

[14] http://www.gov.scot/Resource/0045/00458026.pdf