

● Medico-legal advice

Managing medical negligence claims



Aisling Gannon, Beauchamps Solicitors, looks at the task that lies ahead for the recently established Working Group on medical negligence litigation

The President of the High Court, Mr Justice Nicholas Kearns recently established a Working Group on medical negligence litigation. It will examine the present legal and related systems of managing medical negligence claims and make recommendations for improvement as well as draft legislation to give effect to its recommendations.

It is to look at all aspects of the process, from pre-action procedures, pleadings, discovery or disclosure and video-link evidence from experts/witnesses, to other forms of resolution such as mediation.

It will also consult with the Law Society, solicitors, barristers, insurance representative bodies, indemnifiers and insurers and is due to report by the end of November 2010.

Judicial case management

The Group is to consider how case management and other



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streamlining measures may improve arrangements for progressing medical negligence claims as these cases can be arduous, hugely time consuming and very 'blame' driven for both plaintiffs, defendants and medical and nursing practitioners. It

is intended that the group will assess the current court rules to ensure that medical negligence cases are better managed in the courts.

Case management by judges would represent a fundamental change in the conduct of litigation, taking it out of the hands of the parties and placing it in the hands of the court.

For example, the appointed trial judge could call a pre-trial case management conference to narrow down the issues and/or specify dates for the mutual exchange of documents, and set a trial date and timetable, which would then be controlled by the court.

In theory, it could facilitate the possibility of practical meetings between each side's independent expert witnesses. These types of measures, which have been in place in England and Wales since 1999, are likely to bring greater focus on important issues at an early stage if introduced.

Damages and periodic payments

Another issue to be considered by the Group is the question of introducing an optional or mandatory periodic payment order. Damages in all person-

al injury actions are currently paid on a one-off or single lump-sum basis. There are two types of damages in personal injury actions: general damages and special damages.

General damages are not easy to quantify and are to compensate for pain and suffering to date and into the future. Special damages should be more easily quantifiable – for example, cost of care expenses, loss of earnings and so on.

It is easy to see why general damages, damages for economic losses and care costs up to the date of the trial or agreement are suitable for payment on a lump-sum basis.

It is arguable, however, that care costs and economic losses into the future would benefit from periodic payment orders due to their uncertain nature and this is being considered by the Group. This is because there is an apparent substantial risk of under-compensation as 'guesstimates' as to the plaintiff's life expectancy in each case is not an exact science and the funds, therefore, may not be utilised annually in a needs-assessed manner.

This contrasts with the regime in England, where the courts are legally obliged to

consider whether or not a periodic payment order should be made in all cases in which an award of damages for future pecuniary loss is made and can make such an order without the consent of the parties to the action.

From the perspective of insurers of the private clinical sector, that is those insuring clinical practitioners/clinics who are not covered by the Clinical Indemnity Scheme, periodic payment orders are simply an unacceptable prospect. From an insurer's perspective, as Dr Richard Ward, CEO of Lloyd's, recently put it, "If you cannot value and quantify the loss, you cannot write the risk."

What next?

The radical review that the Group envisages will hopefully benefit all parties who are involved in medical negligence claims and ensure that patient safety and clinical best practice are the core issues and factors considered when assessing medical negligence claims before the courts.

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