

# LAW SOCIETY SUBMISSION

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Interdepartmental Working Group to examine the rising  
cost of health-related claims

DEPARTMENT OF HEALTH

SEPTEMBER 2023

## Introduction

1. The Law Society of Ireland has been invited to make a submission to the Interdepartmental Working Group to examine the rising cost of health-related claims (the “Working Group”).
2. The Law Society is acutely aware of the problem of rising costs for the provision of healthcare in Ireland and understands that a balanced system of health-related claims is necessary to ensure the affordable provision of healthcare services, while protecting the rights of individual claimants.
3. The Law Society acknowledges that the introduction of changes to the threshold of amounts awarded by the courts correlates with a decrease by half in the value and volume of Circuit Court damages from 2021 to 2022, with significant declines in the total personal injury pay-outs in the High Court, Circuit Court, and District Court.<sup>1</sup>
4. This submission is prepared with the support of the Law Society’s Litigation Committee, which includes practitioners experienced in representing injured patients and in representing health care entities, relevant State Agencies and medical professionals in respect of medical negligence and personal injury claims.
5. The Law Society has previously provided submissions and contributions to the issue of medical negligence and clinical indemnity, including:
  - i. Draft Agenda items for the Review of the Administration of Civil Justice (2018)
  - ii. Response to the Medical Protection Society’s Report *Challenging the cost of clinical negligence – the case for reform* (2015)
  - iii. Presentation and attendance at the Joint Oireachtas Committee on Health and Children *Medical Indemnity Insurance Discussion* (2015)
  - iv. Submission to the Review of the Personal Injuries Assessment Board Act 2003 and the Injuries Board (2014)
  - v. Working Group on Medical Negligence and Periodic Payments (2010, 2012, 2013)
  - vi. Submission on Part 15 of the Legal Services Regulation Act and Pre-Action Protocol Regulations
  - vii. Submissions to the Expert Group to review the Law of Torts and the current system for Management of Clinical Claims (2018)
6. The Law Society continues to engage with stakeholders across the health and justice sector on clinical negligence issues, bringing the perspective of practitioners and the experience of private and institutional clients.
7. In presenting this submission, the Law Society has followed the 7 Terms of Reference by the provided by the Working Group.

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<sup>1</sup> The High Court made awards totaling €253,486,344 in 2022, down from €281,832,361 in 2021. The Circuit Court made awards totaling €15,041,482 in 2022, down from €21,949,204. The District Court made awards of €2,801,164 in 2022, down from €3,662,251 a year earlier. See Courts Service Annual Report 2022.

## A. Assess the reasons why costs of claims are continuing to rise

### 1. Costs and Damages

In order to consider this issue, the Working Group must distinguish between costs and damages. These terms have distinct meanings and implications, serving different functions within the legal process.

### 2. Costs in Claims:

Costs in litigation refer to the expenses associated with pursuing or defending a legal action. These expenses encompass a wide range of items. Costs can be broken down into several categories such as solicitor's fees, barrister's fees, court fees, witness expenses, independent expert witnesses, stenographers and other disbursements.

Health-related claims often involve complex medical and legal issues. Clinical negligence cases, for instance, require a thorough understanding of medical procedures, terminology, and standards of care. Legal professionals must invest substantial time and resources in researching and preparing these cases, which can contribute to higher costs when compared with other types of personal injury litigation.

To establish negligence in healthcare cases, expert witnesses are frequently required. These experts provide specialised medical knowledge and testify on behalf of either the plaintiff or the defendant. Engaging expert witnesses can be costly due to the time, and expertise required to analyse records and prepare reports on behalf of plaintiffs and defendants.

Further, loss investigations in health-related claims are also often complex and expansive given the wide array of potential care elements that can require in depth investigation and costing.

### 3. Damages in Claims:

Damages, on the other hand, refer to the monetary compensation awarded by the court to the successful party, which aim to provide redress for the harm or loss suffered as a result of the defendant's wrongful conduct. Damages can be further categorised into different categories:

- a. **General Damages:** These damages are awarded for non-monetary losses, such as pain and suffering, emotional distress, or loss of enjoyment of life. The introduction of the Personal Injury Guidelines in April 2021 brought about significant change in personal injury awards.<sup>2</sup> Claims for personal injury are now attracting lower awards for general damages.<sup>3</sup> Minor soft tissue shoulder injuries now attract damages of between €500 and €12,000 where the Book of Quantum allowed for up to €33,500

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<sup>2</sup> The Judicial Council, *Personal Injuries Guidelines*, 6 March 2021.

<sup>3</sup> *Ibid.* at note 1.

for a similar injury in the past. The Personal Injury Guidelines also raised the cap on general damages, which was increased by €50,000 to €550,000 for the most catastrophically severe injuries.

- b. **Special Damages:** Special damages are awarded for specific, quantifiable financial losses that can be directly attributed to the defendant's actions.

In health-related claims, the type of special damages awarded include, future and past care and assistance, medical expenses, loss of earnings, allied health therapies, assistive technology, travel expenses, home adaptations and equipment costs

#### 4. Why are costs continuing to rise?

- a. The adjustment in the Real Rate of Return in 2015 has had a significant impact on the level of damages being awarded. The courts are obliged to ensure that a Plaintiff is compensated appropriately and fully. The courts have therefore determined that the Real Rate of Return and damages must reflect that.
- b. Periodic Payment Orders (PPOs) were intended to be introduced to protect both the Plaintiff and Defendant in respect of over or under compensation.<sup>4</sup>
- c. The current PPO legislation ties any increase or decrease in special damages due to the plaintiff to the Harmonised Index of Consumer Prices (HICP). This has caused issues because healthcare wage inflation has risen significantly faster than the HICP.<sup>5</sup> Consequently, over time, the calculations for future care costs under PPOs fall behind the actual expenses, resulting in a potential shortfall. This misalignment between the chosen inflation index and the real cost increases in healthcare poses financial challenges for plaintiffs relying on PPOs to cover their ongoing care expenses. It is the experience of the committee that, because of this, the courts have determined that the current legislation relating to PPO's is not compatible with the principle of 100% compensation and have refused to compel a plaintiff to accept a settlement based on HICP.
- d. Given that PPOs are the most definite way of ensuring that future care costs are properly provided for (given that nobody can conclusively determine the life expectancy of the plaintiff), the Law Society submits that it is necessary to provide for a workable index to such payments.
- e. The courts are obligated to ensure that a claimant is not left undercompensated, thus it is the experience of Law Society members that courts are currently awarding full

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<sup>4</sup> Select Committee on Justice debate, Courts and Civil Law (Miscellaneous Provisions) Bill 2022: Committee Stage, 22 November 2022, transcript available at [https://www.oireachtas.ie/en/debates/debate/select\\_committee\\_on\\_justice/2022-11-22/2/?highlight%5B0%5D=2&highlight%5B1%5D=2](https://www.oireachtas.ie/en/debates/debate/select_committee_on_justice/2022-11-22/2/?highlight%5B0%5D=2&highlight%5B1%5D=2).

<sup>5</sup> Parliamentary Budget Office, *Health Spending in Ireland 2015-2023*, available at [https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2023/2023-08-15\\_health-spending-in-ireland-2015-2023\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/parliamentaryBudgetOffice/2023/2023-08-15_health-spending-in-ireland-2015-2023_en.pdf).

lump sum compensation payments. The courts are required to be prudent and cautious in ensuring that the plaintiff is cared for, for the remainder of their lives.

- f. When assessing the level of damages in health-related claims, the Working Group should appreciate that healthcare cost inflation is significant. There has been a persistent increase in the prices of medical services, treatments, and medications over time.<sup>6</sup> This inflation is driven by various factors, including advances in medical technology, rising demand for healthcare services due to an aging population, administrative costs, pharmaceutical pricing, and the cost of maintaining healthcare facilities.

## **5. How can these costs be limited?**

- a. The Law Society recommends the urgent implementation of the reforms proposed by the Working Group on Medical Negligence and Periodic Payments.
- b. The Law Society recommends that the index used by the courts be changed to reflect the reality of health-related claims. Making a lump sum calculation to cover a lifetime of expenses based on the current estimated Real Rate of Return is a challenging task with inherent uncertainties. Many variables can deviate from predictions made by experts at a hearing; a plaintiff's lifespan may exceed or fall short of expectations, and healthcare inflation could outpace projections.
- c. The Law Society acknowledges that pre-action protocols benefit both injured parties and healthcare providers, funders and indemnifiers. Crucially, they will enable the parties to identify the issues which are ultimately in dispute at a much earlier stage, thus assisting in the earlier resolution of claims. The earlier disclosure of patient records enables parties engage in mediation or alternative resolution processes in a meaningful way at an early stage. Part 15 of the Legal Services Regulation Act 2015, and more particularly Section 219 of the Act, provide for pre-action protocols. These provisions have not yet been commenced.<sup>7</sup> The Law Society recommends their commencement as soon as practicable.

## **B Examine best international practice in the area of health-related claims**

1. The Law Society notes that much consideration has been given to best international practice in previous reviews of healthcare litigation. The recent report of the Expert Group Report to Review the Law of Torts and the Current Systems for the Management of Clinical Negligence Claims in 2020 reviewed systems in a number of Jurisdictions.<sup>8</sup> The Law Society supports the conclusions and recommendations of that working group following its review of the international practice in the area.

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<sup>6</sup> *Ibid.* at note 5.

<sup>7</sup> Irish Statute Book Online, available at <https://www.irishstatutebook.ie/eli/2015/act/65/section/219/enacted/en/html>.

<sup>8</sup> Department of Health, Expert Group Report to Review the Law of Torts and the Current Systems for the Management of Clinical Negligence Claims, available at <https://www.gov.ie/en/publication/ffb23-expert-group-report-to-review-the-law-of-torts-and-the-current-systems-for-the-management-of-clinical-negligence-claims/>.

2. Effective case management, which has long been supported by the Law Society, is in place in other jurisdictions and should be implemented in Ireland. Module 3 of the Working Group on Medical Negligence and Periodic Payments (2013) identified extensive reforms which are available to the Expert Group for consideration.<sup>9</sup> The Law Society submits that these reforms should have the effect of streamlining clinical negligence cases, avoiding unnecessary costs, and easing the anxiety and tension experienced by claimants.
3. Draft rules for case management have been provided by the Working Group on Medical Negligence and Periodic Payments (2013) which, if embraced similarly to the operation of the Commercial Court, would optimise court resources and the timely progress of litigation. The recommendations of the Meenan Report regarding case management should be implemented.<sup>10</sup>

**C Develop a plan to implement risk management and other initiatives to reduce the occurrence of adverse incidents, particularly in the category of high value claims (>€4m), that could improve outcomes and reduce costs in the future (consider engagement with, inter alia, the National Neonatal Encephalopathy Action Group, which is a collaboration between SCA, NPSO and HSE and is examining strategies to mitigate risk relating to preventable birth injuries);**

The recommendations in section C were prepared by the Law Society's own internal Expert Group on Medical Negligence which included practitioners experienced in representing injured patients and in representing health care entities, relevant State Agencies and medical professionals in respect of medical negligence and personal injury claims. These recommendations were first presented to the Department of Health in August 2018, and are again presented to the Working Group.

1. It is the experience of practitioners that risk management is key to preventing medical accidents and learning lessons. Risk management also performs a key role in relation to the management of claims.
2. Greater ring-fenced resources should be provided to the Health Service Executive (HSE) to support it in carrying out a meaningful risk management function, to reduce patient harm and thereby minimise future claims.
3. In the absence of 'protected funding' and prioritisation for the risk management function, day-to-day service pressures (emergency department activity levels, bed crisis, waiting lists) will hamper its effectiveness.

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<sup>9</sup> Report of the Working Group on Medical Negligence and Periodic Payments (2013) (Module 3), available at <https://www.courts.ie/acc/alfresco/f1a6c388-8c78-46ea-87cc-b1d1da0b18af/Report%20of%20Working%20Group%20on%20Medical%20Negligence%20and%20Periodic%20Payments%20-%20Module%203.pdf/pdf>.

<sup>10</sup> Department of Health, Judge Meenan Report on an alternative system for dealing with claims arising from CervicalCheck, 15 October 2018, available at <https://www.gov.ie/en/collection/4ed476-judge-meenan-report-on-an-alternative-system-for-dealing-with-claims/>.

4. A systems-wide risk management training and development framework, coupled with appropriate IT reporting systems is vital to ensure a uniform quality and speedy response to claims investigations. It is also essential that all health care professionals and staff are allowed time within their work time to engage in this process.

**D. Recommend measures to address patient concerns following incidents, (e.g., disclosure procedures, trauma counselling, provision of supports) that will reduce the need for patients to initiate legal proceedings. In considering this, the group should give consideration to those measures suggested by Dr. Scally in his final implementation review report published in November 2022.**

### **1. Apology**

- a) Section 219 of the Legal Services Regulation Act 2015 has been enacted which will enable health care providers to provide apologies in connection with an allegation of clinical negligence by an injured party. Section 219 has not been commenced.<sup>11</sup>
- b) A statutory protection has also been incorporated within the provision insofar as an apology is not an admission of liability nor does it invalidate insurance. Such apologies are seen as part of a more sensitive and humane response. We acknowledge that this may prove difficult to work effectively in practice particularly in high value claims where serious liability issues arise.
- c) The issue of the form and parameters of an apology is fraught with difficulties, for medical professionals and healthcare providers. Insofar as the concept is advanced, issues remain with regard to the timing of apologies and also for staff training in this regard. The Law Society recommends the use of this protection by healthcare professionals to address patient concerns when commenced.

### **2. Open Disclosure**

- a) The Law Society notes that mandatory open disclosure of certain adverse events has been introduced. The Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 is still however, awaiting a Commencement Order.<sup>12</sup>
- b) Section 11 of the Civil Liability (Amendment) Act 2017 provides for a system of voluntary open disclosure. This Act compels health service providers to have a written procedure for making open disclosure of patient safety incidents in place.
- c) The Law Society acknowledges that the practice of open disclosure is complicated further in circumstances where third parties are contracted to provide health

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<sup>11</sup> Irish Statute Book Online, available at [https://www.irishstatutebook.ie/eli/isbc/2015\\_65.html](https://www.irishstatutebook.ie/eli/isbc/2015_65.html).

<sup>12</sup> Irish Statute Book Online, available at [https://www.irishstatutebook.ie/eli/isbc/2023\\_10.html](https://www.irishstatutebook.ie/eli/isbc/2023_10.html).

services or intermediate services within the broader delivery of the health services. The Law Society would welcome the implementation and enactment of the statutory protection of an apology. A system with both an apology and mandatory open disclosure should be initiated to ensure that both are meaningful without becoming disproportionately burdensome on the hospital system.

- E. Receive updates on the implementation of the recommendations set out in the Report of the “Expert Group to Review the Law of Torts and the Management of Clinical Negligence Claims” (the ‘Meenan Report’), and Civil Justice reform measures being undertaken in the Department of Justice where relevant to the issue of reducing the cost of HSE related claims and identify actions to accelerate these reforms and maximise their impact on health claims;**

The Law Society supports all of the recommendations set out in the Meenan report and welcomes the introduction of those recommendations.

- F. Examine the health system’s involvement in the claims process, in particular its role in the provision of evidence/medical records in the course of discovery with a view to streamlining processes that could reduce the administrative cost of claims, including but not limited to legal costs;**

The Law Society does not believe that this is an area within which it has the expertise to advise on.

- G. Consider the policy and health system approach to Mass claims, including examining whether there is scope for the Department/HSE to improve or standardise its approach when dealing with calls for redress and inquiries.**

a) The issue of an appropriate mass redress schemes has been mooted for a long time, the purpose of which is to avoid unnecessary litigation and, in theory provide a speedier resolution.

b) Legal issues of negligence still arise and the position of other parties with a potential liability must be borne in mind if this option is pursued. The Law Society believes that any redress scheme would have to be evaluated across a number of headings:

- scheme design – in particular measures to reduce litigation costs
- accountability arrangements
- qualifying criteria for eligibility
- imposition on a cap on damages or introduction of bands on damages
- expenditure forecasting methodology
- effectiveness in meeting intended objectives and outcomes and
- the Constitutional right of access to the courts.

c) Other aspects and reservations that may arise include the narrow interpretation of the concept of ‘justice’ and limiting factors contained in the grounding statute, the administrative costs and process in the establishment of a Board and Review Committee, and the range of



damages (General, Special, etc) that would have to be considered.

## **Conclusion**

We hope that our recommendations will assist the Interdepartmental Working Group in your consideration of these issues and would welcome the opportunity to engage further on the matter.

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