Medico/Legal recommendations

Law Society of Ireland

Medical examinations and reports of claimants/plaintiffs on their own behalf

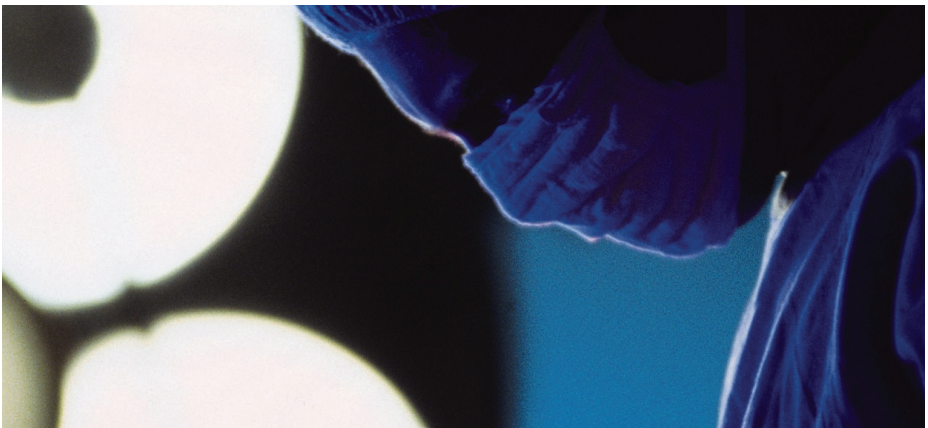
1. The solicitor, when writing to the doctor, should state that he or she is authorised by the client to request the medical report and should provide to the doctor:

   (a) The client's full name and surname;
   (b) the full address of the client at the date of the accident;
   (c) the present surname or address (if different);
   (d) the client's date of birth;
   (e) the name of the hospital (if any) and the date of admission.

   To ensure that the doctor can provide the report as soon as possible, solicitors should provide all of the above information accurately at the time the report is sought.

2. When making an application to the Injuries Board (previously known as the Personal Injuries Assessment Board or PIAB), it is not necessary that the report be in the form of the template prescribed by the Injuries Board. While many doctors find this format helpful and use the template accordingly, others do not wish to do so and it is not necessary to insist that the doctor use this format.

3. When communicating with the doctor or hospital, solicitors should request details of fees due by the client/patient to the doctor(s) or hospital so that these can be included in the claim. The doctor or hospital should give fee details in a separate letter i.e. fee details should not appear in the report sought. However, it should be explained to the doctor or hospital that seeking such details and including them in the claim is not a guarantee that the fees will be recovered, as this is a matter for the court to decide.



Protocol for direct referral to consultants by solicitors

A solicitor has a professional duty to his client and to the court hearing the client's case, to fully present every aspect of the client's claim to the court. This is to ensure that the court is fully aware of all of the relevant details of all personal injuries suffered by the client which are the subject-matter of a claim and what effect these injuries have had on him to date and into the future.

This information is crucial in order for the court to do justice between the parties.

A medical witness is an expert witness who gives evidence to assist the court in determining the issues in dispute between the parties.

There will be occasions when the client's treating doctor (who is often a general practitioner) will not have the expertise of a specialist and will not, by reason of that, be in a position to provide expert specialist evidence to the court.

In those circumstances, where the client who has not already been referred to a specialist with the relevant expertise continues to complain of symptoms and sequelae from his injuries, it is in order for a solicitor, having regard to the professional duties already referred to, to advise his client to request his GP to refer him to a consultant who specialises in the relevant area or areas.

If a GP is unwilling to make such a referral, the solicitor should then adopt the following procedure:

1. Write to the GP setting out the ongoing symptoms of which the client complains and requesting the GP to refer the client to an appropriate specialist;

   and

2. Request a response from the GP confirming referral within a period of 21 days and advising the GP that if confirmation of a referral is not received within 21 days, the solicitor intends writing directly to an appropriate consultant.

3. In the event that the GP refuses to confirm a referral to a specialist within 21 days, then the solicitor may write directly to an appropriate consultant requesting an appointment.

Of plaintiffs on behalf of defendants

1. A Plaintiff is obliged to submit to a medical examination by a doctor on behalf of the Defendant at any stage of proceedings, if requested. Such examinations are usually expressed to be "on the usual terms and conditions". For the avoidance of doubt, these "usual terms and conditions" are:-

   (a) Such examinations should take place in consultation with the Plaintiff's doctor. The Defendant's solicitor should inform the examining doctor of the identity of the Plaintiff's doctor in the speciality (if any) relevant to the opinion sought. The Plaintiff's solicitor may inform the Plaintiff's doctor of the examination by the Defendant's doctor in advance of that examination. The Defendant's doctor should inform the Plaintiff's doctor either orally or in writing of the examination. In the past, if the Plaintiff's doctor was located within 25 miles of the surgery of the examining doctor, then he/she would endeavour to be physically present at the examination. While this may still be done, it now very rarely occurs in practice and should only be insisted upon where very good reason can be shown. In the event that it does occur, the Defendant or his insurance company should guarantee the Plaintiff's doctor's reasonable costs and expenses.

   (b) Prior to examination of the Plaintiff by the Defendant's doctor, the Plaintiff's doctor should provide to the Defendant's doctor a summary of the Plaintiff's medical notes relating to the injuries sustained (see paragraph relating to discovery/disclosure of medical records). The Plaintiff's doctor is entitled to charge a reasonable fee for providing this service.

   (c) It is not reasonable for a Plaintiff's solicitor to insist that the independent medical examination should take place at the rooms or practice of the Plaintiff's doctor unless it is completely inexpedient to do otherwise.

   (d) During the course of the examination, the Defendant's doctor should not ask any question regarding who was responsible for the accident, nor should the medical report refer to such matters. The doctor can, however, properly ask the client how the accident occurred if that is relevant to establishing the physical cause of the alleged injury.

   (e) The Defendant or insurance company, as the case may be, is also to be responsible for the reasonable costs and expenses of the Plaintiff's solicitors in co-ordinating the independent medical examination.

2. It is very important to note that the obligation to attend the examination by

the Defendant's doctor exists only where proceedings have been issued. No such requirement exists for a claimant prior to the issue of proceedings, either before or during the Injuries Board process. Up to this point, submitting to examination is entirely a matter for the claimant. This point was confirmed in the High Court decision of *Domican -v- AXA [2007] 2 IR 682.*

Of claimants on behalf of the Injuries Board

The Personal Injuries Assessment Board Act 2003 ("the 2003 Act") sets out the circumstances in which a doctor nominated by PIAB's (now the Injuries Board) own medical panel may examine a claimant.

If either the Respondent does not accept that the medical opinion furnished by the Claimant in relation to his/her injuries is correct, or if the assessors otherwise consider it appropriate to do so, then they may arrange a medical examination from a panel of doctors of their choosing. In practical terms, this occurs in the vast majority of cases.

While no obligation exists for the Claimant to attend this doctor, Section 25 of the 2003 Act makes clear that there are consequences for failing to do so. Essentially, the assessors will assess the claim on the basis of the information in front of them and will proceed on the basis that, where the Respondent has asked for the examination, he is correct in not accepting the medical opinion furnished by the claimant, or, where the Injuries Board itself requests the examination, they will proceed in the absence of the information that the examination would have garnered.

It should further be noted that no provision exists for the Injuries Board to provide expenses upfront for attendance at the examination by the panel doctor although such expenses may be claimed as an expense reasonably and necessarily incurred in accordance with the provisions of Section 44 of the 2003 Act. Such expenses may then be allowed, at the discretion of the Injuries Board, as part of the assessment.

Contents of medical reports

Whether a doctor writes a report on behalf of a Plaintiff or a Defendant/Insurance Company, the format of the medical report (unless dealing with a medical negligence action) concerning the nature, extent of, and prognosis for a Plaintiff's injury, will be similar. The medical report should, among other things, set out the following basic information:

a) The date of birth of the Plaintiff;
b) The occupation of the Plaintiff (setting out where necessary or desirable the nature of it);
c) A brief history of the accident, including the date of the accident;
d) Details of the doctor's findings on examination;
e) The nature of the treatment received by the Plaintiff for those injuries;
f) The results of any X-rays, blood tests or other relevant examinations or investigations;
g) Details of the Plaintiff's complaint at the date of the examination;
h) Details of all relevant pre- and post-accident history;
i) An opinion as to the then condition of the Plaintiff;
j) The prognosis (including the likely duration of any symptoms and any additional treatment recommended and the likely effects on the patient's working capacity);
k) Details of other doctors to whom the Plaintiff has been referred.

Other observations about medical reports

- Facts relevant to who may or may not have been responsible for the accident should not be included in the report.

- Questions relating to the issue of negligence/liability should not be asked by the doctor of the Plaintiff during the course of the examination and/or included in the medical report prepared by the doctor.

- A doctor has a duty to provide a written medical report, sought on behalf of his or her patient within a reasonable time. As to what constitutes a reasonable period of time, guidance can be derived from the Medical Council's Guide to Ethical Conduct and Behaviour (6th Edition, 2004, paragraph 8.3) which states:

  "Undue delay in furnishing a medical report may amount to professional misconduct if such a delay results in the patient being disadvantaged. The report should be supplied within 2 months of the examination or receipt of a written request, whichever occurs last."

- As the Statute of Limitations in respect of most personal injury actions will now be a period of two years from the date of the injury, in cases where there is an undue delay in a medical report being provided by a doctor, the solicitor has a duty to draw this to the attention of the doctor so as to endeavour to avoid any prejudice occurring.

- Reports should be factual and true and should not be influenced by the fee or by pressure from anyone to omit some details or to embellish others and strict accuracy must be observed. Reports should focus on the relevant medical issues only.

- Solicitors must be careful to avoid influencing the contents of a doctor's medical report (or whatever evidence the doctor may give in Court if he or she is called to give evidence).

- The doctor has a duty to provide his or her independent medical opinion on the matters the subject of the report. However, where there is a manifest error or misunderstanding on the facts in the doctor's report, it is proper for the solicitor to bring this to the attention of the doctor.

The implications of the Civil Liability and Courts Act, 2004

- Consideration should be given to, in appropriate cases, alerting the doctor to the obligations on the parties to swear a verifying Affidavit attesting to the accuracy of the alleged personal injuries set out in the Personal Injury Summons. In very many cases the allegations of personal injuries that are contained in the Summons will be based mainly, if not entirely, on the contents of the doctor's medical report.

- The severe sanctions specified in the Act, which could be imposed particularly on a Plaintiff for including inaccurate details of personal injuries in the Summons, make it imperative that the contents of medical reports are as accurate as possible.

Disclosure of medical reports

Disclosure pursuant to S.I. 391/1998

These Rules apply to High Court actions only (they do not apply to Circuit Court actions) and require compulsory exchange of experts' reports by both parties, within specified time limits.

A report in this context includes reports of a doctor, including reports in the form of a letter, or written statements from a doctor intended to be called to give evidence in relation to an issue in an action and containing *"the substance of the evidence which is intended to be given"* and includes any maps, drawings, photographs, graphs, charts, calculations or other like matter

referred to in any such report.

The meaning of the phrase *"substance of the evidence which is intended to be given"* has been the subject of consideration by the Supreme Court in *Payne –v- Shovlin [2007] 1 IR 112* where the Court held that a preliminary report which was explicitly expressed to be not intended for disclosure and to be subject to review/modification of the doctor's opinion whenever other specialist reports were to hand, was nevertheless captured by the Disclosure Rules and had to be disclosed along with the doctor's later final opinion.

The following are also deemed to be reports for the purposes of the Disclosure Rules: any report, including a report in the form of a letter, copy statement or copy letter, however made, recorded or retained and any originating document from any such doctor referred to above, the original of which has been concealed, destroyed, lost, mislaid or is not otherwise readily available.

The rules for exchange are detailed and solicitors should always consult the text of the relevant statutory instrument before advising on their effect. When in doubt, a doctor should assume that the medical report and his correspondence with the solicitor commissioning the report may be subject to disclosure in some circumstances.

Disclosure otherwise than pursuant to S.I. 391/ 1998

- In some cases it may be a matter of legal professional judgment as to whether the report or any or all of its contents should be disclosed by a solicitor to his client. In such circumstances the doctor should advise the solicitor at the time of, or prior to, providing his report, of matters that in his opinion should not be disclosed to the client/patient. However, such cases would very much be the exception and a decision not to disclose the contents of the medical report to the client would need to be justified by strong, coherent, clear and logical reasons.

- No medical report or copy medical report should be provided by the doctor to any third party other than with the consent of the Plaintiff/patient or otherwise as required by law or directed by an Order of the Court.

- Where the court rules for compulsory disclosure and admission of reports do not apply, it is a matter for the individual professional judgment of the Plaintiff's solicitor in each case whether or not he/she wishes to provide a medical report to the opposing side. If the solicitor decides to do so, he or she should take account of the following matters:

a) Reports handed over by a solicitor to a solicitor on the opposing side on a "Without Prejudice" basis are not intended to be shown to the court. "Without Prejudice" should be written by the solicitor at the top of such reports as well as on the covering letter forwarding the report to ensure that the report is not mistakenly included in a book of bound medical reports presented to the Judge without the Plaintiff's or Defendant's solicitors' knowledge. Note, however, that the provisions of Statutory Instrument 391/1998 may require the disclosure of such a report (see below);

b) In recent times, a practice has developed whereby reports are handed over and it is then sought to have these reports admitted in evidence without formal proof. Essentially, this means that the report is admitted without the doctor being called to give evidence on the report. It should be borne in mind that the entire contents of the medical report are admitted in those circumstances.

Disclosure/discovery of medical records

A request for disclosure of a client's medical records often arises in circumstances where the Defendant's solicitor has sought to have the Plaintiff medically assessed by the Defendant's own medical team.

The protocol between the Law Society and the Irish Medical Organisation known as "examination on the usual terms and conditions" referred to previously, did not cover this situation.

The position was addressed in the Supreme Court decision in *McGrory –v- ESB [2003] 3 IR 407* from which the following principles can be drawn:

1. The Plaintiff who sues for damages for personal injuries, by implication necessarily waives the right of privacy that he/she would otherwise enjoy in relation to his/her medical condition.

2. The Defendant can seek sight of the relevant medical records prior to the pleadings being closed, regardless of their right to obtain same on discovery subsequently.

3. The court can stay proceedings where the Plaintiff refuses to submit to medical examination or disclose medical records to the Defendant or permit the Defendant to interview his/her treating doctor.

4. The judgment does not alter the position that medical reports that are cov-

ered by privilege may not be disclosed to the other side.

5. The judgement also does not absolve the solicitor of responsibility to obtain his client's consent to furnish medical records to the Defendant's solicitor.

6. Only medical records relevant to the claim should be furnished and this requirement should be read in conjunction with the provisions of S.I. 311/1999 relating to discovery, setting out the essential criteria of necessity and relevance.

Professional negligence claims against doctors and hospitals

Similar considerations to those above arise when a doctor is writing a report as an expert in a medical or clinical negligence action. An obvious difference arises in that the doctor may be asked to advise not only on the injury and prognosis but also on whether the treatment or care provided was of a sufficient standard. Given the typical inherent difficulty of such cases, it is critical that the information provided by the solicitor when requesting the report be as comprehensive as possible.

When a Plaintiff is being medically examined by a doctor instructed by the Defendant's solicitor, care should be exercised by the Plaintiff's solicitor to warn his client not to answer questions which directly relate to issues of liability as it is inappropriate that questions should be asked or answered during the medical examination which bear directly on the issue of negligence/breach of duty.

Issue of subpoenas on medical attendants

It is important to be aware of the important function that the medical profession performs in society and, therefore, every effort should be made to accommodate medical practitioners in standby and attendance arrangements. However, there are certain circumstances in which it will not be possible to reach an agreement with respect to attendance in court and on such occasions, in the event that a medical practitioner refuses to attend, or refuses to confirm that he will attend, a subpoena will have to be served.

On these occasions, a medical practitioner is entitled to the usual attendance fee as would be payable on taxation.

Fees

(i) General

As practitioners will be aware, all previous scales of fees and agreements brokered by the Law Society between the insurance industry and the medical profession have long since ceased to exist due to competition legislation considerations. As a result, the fees charged by different doctors who are members of different medical organisations is a source of continuing difficulty for solicitors. The principles of law governing the payment of these fees are those of "principal and agent". This means that if a solicitor writes for a medical report on behalf of a client or requests the attendance of a medical practitioner at court to give evidence on behalf of the client, then the client, not the solicitor, is the person responsible for payment of the fees. The solicitor should not agree otherwise.

The fee for the medical report must be a reasonable one reflecting its importance, length, complexity and any other relevant factors. Doctors must, however, take cognisance of their ethical duty to provide such a report at a reasonable cost, taking account of what their colleagues consider to be reasonable and what the Taxing Masters/County Registrars regard as reasonable.

In practice, medical practitioners will usually write to the Plaintiff's solicitor stating that a medical report is available upon payment of the prescribed fee. In order to obtain the report, the solicitor will usually pay the prescribed fee and later bill the client for the costs of the report or may make his/her own arrangements with the client for the payment of outlays to discharge any medical report fees. It is not improper for the doctor to seek payment of his medical report fee in advance.

If a medical practitioner issues a medical report upon request and later provides a bill for the cost of the report, the solicitor who requested the report should arrange with his or her client for payment for the report to be made within a reasonable time thereafter. The suggested period is 14 days.

Some members of the medical profession now require solicitors to provide an undertaking to the effect that the solicitor will be responsible for the doctor's standby and court attendance fees (see below). The Society does not recommend that such undertakings be given and no obligation exists to provide one.

However, where such an undertaking is given, the solicitor will be personally liable and failure to honour its terms is prima facie evidence of professional misconduct.

(ii) Standby Fees

Where a doctor agrees to be on standby for court on a given date, this means that if called upon to attend court on that date, he or she will travel to attend court on that date if necessary. In the event that the case may take more than a day or may not be reached on the day it is listed, doctors should be asked to remain on standby until the case has been concluded. In those circumstances, it is essential that a doctor be informed immediately a case has been concluded, whether by settlement or otherwise, in order to ensure that no further unnecessary standby fees are incurred. Such standby arrangements mean that the doctor has to schedule his or her workload to take into account the possibility that it will be necessary to attend court at short notice. In accordance with the current practice of the Taxing Masters, an appropriate availability or standby fee should be payable in such circumstances, as follows:

(a) For a court within 5 miles of the doctor's surgery, 25% of the day's usual court attendance fee;
(b) For a court more than 5 miles from the doctor's surgery or hospital, 50% of the day's usual court attendance fee.

(Exclusive in both cases of reasonable travelling expenses.)

It is not required that a solicitor agree to a doctor charging for the cost of a locum where he/she is asked to be on standby as this fee is highly unlikely to be recovered on taxation. However, with the agreement of the client, such an arrangement may be made, on the understanding that the client will be liable for any balance due.

(iii) Court Attendance Fees

Court attendance fees are the daily fees charged by doctors for attending court to give evidence on behalf of a party. The amount of such fees is a matter for negotiation between the solicitor and doctor in each case. However, the solicitor must inform the client that where an attendance fee is charged which is in excess of what may be recovered on taxation, the client may have to be responsible for any balance due to the doctor.

(iv) Responsibility for Treatment Fees

Unless the solicitor acting for the Plaintiff expressly undertakes responsibility for the payment of treatment fees (whether out of his or her client's damages or otherwise), the liability for payment of such fees remains with the Plaintiff (i.e. the client/patient who received such treatment from the medical practitioner claiming payment of such fees). The same applies in respect of fees due to a hospital.

(v) Cost of Medical Reports

The full cost of medical reports are often not recoverable either from the Injuries Board or on taxation. The Injuries Board frequently refuses to allow the full cost of some medical reports and often will not allow any costs where multiple reports have been obtained. Equally, while the Taxing Masters will generally allow a certain amount towards each report, it is often not the full amount paid for the report. Therefore, clients need to be made aware that they may be liable for any balance due in those circumstances.

Frequently asked questions

Q: Is there currently a Law Society/medical profession/insurance industry agreed fee scale for medico-legal reports, stand-by, court attendance, provision of medical records?

A: No. The Society brokered an agreement between the IIF and the IHCA (the IMO was not party to the arrangement) some years ago but this was abandoned due to Competition legislation considerations. The Society advises that practitioners make enquiries regarding fees in advance of seeking reports etc.

Q: What are doctors generally charging for medico-legal reports at present?

A: Anecdotal evidence would suggest that a standard report is charged out at €245-400. Specialist reports (e.g. psychiatric reports) cost more, and highly specialised reports e.g. neurological, Hepatitis C, will cost substantially more again.

Q: What can be done about a doctor who delays in producing a report?

A: Write to the doctor, quoting the relevant section of the Medical Council's Guide to Ethical Conduct and Behaviour (6th Edition, 2004, paragraph 8.3) regarding furnishing of medical reports. In certain circumstances, consideration should be given as to whether the client's doctor should be asked to refer the client/patient to another Consultant. Ultimately, it may be necessary to consider whether a complaint should be made to the Medical Council and the doctor advised accordingly.

Q: Can the Society liaise with the Medical Council on behalf of a solicitor to resolve complaints informally without the need for a formal complaint being made by the solicitor?

A: The Medical Council will only deal with complaints that are lodged through the formal complaints system.

Q: Can a doctor insist that a solicitor (rather than a client/patient) pay for a medical report? Is a solicitor duty bound/obliged to pay for the report, given that the solicitor requested the report?

A: No. There is no obligation on a solicitor to fund a client's case. A solicitor requesting such a report does so as agent for a disclosed principal. Therefore, liability for the fee rests with the client. However, if a solicitor gives an

undertaking to be responsible for the fee, then the solicitor is committed to doing so and breach of an undertaking is prima facie evidence of misconduct.

Q: Can a doctor insist that a solicitor give an undertaking to pay his stand-by/court attendance fee? Is there any legal or professional obligation on a solicitor to do so?

A: The Society does not approve of the giving of such undertakings (see Practice Note in July/August 2002 Gazette). If a solicitor decides to give an undertaking, breach of it is prima facie evidence of misconduct. Solicitors should also be mindful of their duty to their clients to have all necessary witnesses present at the hearing of the action. Ultimately, although not desirable, it may be necessary for the solicitor to subpoena the doctor if there is any doubt as to whether the doctor will be in attendance.

Q: Can the Freedom of Information legislation be used to obtain medical records from a doctor who is tardy in supplying them?

A: No. The Freedom of Information provisions apply only to designated public bodies.

Q: Can the Freedom of Information legislation be used to obtain a client's medical records from a hospital?

A: Yes. The HSE and the voluntary hospitals are designated under the Act.

Q: Where a client is involved in an RTA and is treated by a Consultant as a public patient in a public hospital and a medical report is requested from the Consultant, can the Consultant insist that the medico-legal report fee be made payable to him, not the hospital?

A: The Society sought clarification from the Dept. of Health on this issue. In its view, "a distinction should be made between cases where the Consultant has been responsible for the treatment of a public patient and is asked, for whatever reason, to produce a medical report and those cases where the Consultant has not treated the patient but is asked for an expert opinion. In the former case, the hospital should be paid the fee, in the latter case, the Consultant should retain the fee." The Consultants' General Contract is silent on the issue but existing custom and practice holds that all medico-legal work may be regarded as private practice. Therefore, it is a matter for the hospital to decide whether to adopt the view expressed by the Dept. of Health or to accept custom and practice and allow the Consultant to claim the fee.

Q. Where a hospital seeks an undertaking from a solicitor to (a) include the hospital's costs in a personal injuries claim and (b) discharge the costs from the proceeds of the claim, are solicitors under an obligation to furnish such undertakings?

A. The Society does not recommend the giving of undertakings to third parties whilst a claim is still within the PIAB process as, where proceedings have not issued, the solicitor cannot say with certainty that the proceeds of the claim will come into his/her hands. Thereafter, it is a matter for the solicitor to decide in the circumstances of each individual case whether he/she will furnish an undertaking and in what terms he/she is willing to do so. Solicitors may opt to undertake to include the hospital's costs in the claim but may decline to undertake responsibility for the discharge of same from the proceeds of the claim, as the discharge of such costs is a matter between the client/patient and the hospital.

Notes

Notes

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