

# LAW SOCIETY SUBMISSION

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## **MEDICAL INDEMNITY INSURANCE DISCUSSION**

JOINT OIREACTHAS COMMITTEE ON HEALTH & CHILDREN

JANUARY 2015

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#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## 1. Introduction

- 1.1. I thank the Committee for inviting the Society to attend and for giving us an opportunity to make this short presentation.
- 1.2. The Society represents almost 14,000 members who in turn are entrusted to represent defendants and plaintiffs. In the context of today's discussion, solicitors represent the best interests of injured patients and the best interests of health professionals, hospitals and indeed the State. We are thus uniquely positioned to comment on the matters that are of concern to this Committee.

## 2. Why the Society is before you today

- 2.1. The MPS report on the cost of medical indemnity contained a number of statements that the Society believes are erroneous and misleading. Furthermore, we are here to outline our commitment and active engagement on reforms that seek to create a culture of fairness, equality and justice.
- 2.2. The Society was struck by the witnesses last week and the relegation of the patient in their presentations. The economic interests of the MPS and consultants working in private practice must be measured against the welfare and rights of patients.
- 2.3. Crude discussions on economic costs fail to encapsulate the human cost of medical negligence. The consequences for a plaintiff and their family arising from a catastrophic medical injury must always be at the forefront. The trauma, anxiety and financial impact must be acknowledged, appreciated and addressed.
- 2.4. The root cause of medical negligence claims, quite clearly, is medical negligence and error. Clearly, where a patient has been a victim of medical negligence they are entitled to seek redress. The Oireachtas Committee members are to be congratulated for drawing attention to the impact of hospital resourcing on patient safety.
- 2.5. On behalf of patients and indeed legal advisors on all sides, a focus on minimizing these occurrences and creating a culture of safety is to be welcomed.

## 3. Examining the evidence: a case for balance.

- 3.1. The access to insurance on the part of doctors in the private sector should never trump the access to justice of patients. It is the Society's view that a balance must be struck between the commercial interests of insurance companies and medics, and a fair and just system for patients who have suffered harm.

- 3.2. The State Claims Agency confirmed that the increase in the cost of claims handled by them in recent years was attributable to
- The expanding remit of the Agency, which now oversees the claims of 117 agencies and bodies.
  - The spike in clinical claims in recent years arising from a number of specific actions.
  - The effect of 2,500 consultants joining the Agency's Clinical Indemnity Scheme from February 2004.
  - The effect of the judgment in *Yun v MIBI [2009]*, which increased the cap level of general damages in catastrophic injuries to €450,000.
- 3.3. Other contributory factors that the MPS, IHCA and the IMO omitted within their presentation include:
- what level of market penetration does MPS have in Ireland, as opposed to other territories and how does this impact on their exposure?
  - The extent of private medical care cover in Ireland as opposed to other territories.
  - The expanding range and complexity of medical procedures now been undertaken by their members in recent years resulting in a higher risk profile.
  - Unlike the SCA, the MPS chose not to disclose their own claims outcomes, recovery of costs or their litigating strategies. Nor did they clarify their distribution of claims by specialty.
- 3.4. While it might seem counterintuitive to many commentators, litigation can be a force for good. Professor Crown touched on this when he noted that there is such a thing as 'constructive litigation'. The transformative impact of litigation – whilst the injury should have been avoided – creates a more responsive and safe healthcare setting. Efforts to stifle or prevent claims from being taken serve no one, including doctors.

## 4. Costs, Claims and awards.

- 4.1. Less than 3% of CIS claims are resolved through the courts. The cases that do go to court are generally those involving infant cerebral palsy or other catastrophic injuries.
- 4.2. The SCA have in recent years reduced the fees paid to solicitors and barristers by 25%. For solicitors working on behalf of plaintiffs, there have been similar fee pressures, with many reducing their fees by between 30 – 50% in the past number of years.
- 4.3. Other factors that impact on total cost include level of activity, VAT, the extensive number of expert reports required in medical negligence litigation and the increasing complexity of cases.

- 4.4. In 2014, the SCA reported a saving of €97m, inclusive of third party recoveries against projected costs. In 2013 these savings were €34.3m.
- 4.5. In respect of the MPS's proposal to cap general damages, the MPS is cherry picking from various sources. It is worth noting that in Northern Ireland the guide figure for general damages for a quadriplegic injury is between £400,000 - £575,000 sterling, which is much higher than the €450,000 cap on general damages for catastrophic cases in this jurisdiction.
- 4.6. Also suggested by the MPS, and endorsed by the consultant representative groups, is the proposal to cap Special Damages, in particular future earnings and future care costs. On behalf of the patient the Society asks: why should a patient, who has already suffered immeasurably due to medical negligence, be penalized once more?
- 4.7. In addition, neither the MPS, nor the consultant representative bodies, referenced the 'deteriorating' impact that lower interest rates and bond yields have on premia income returns.

## 5. Medical Negligence reforms

- 5.1. The Society supports the proposed reforms of the Working Group on Medical Negligence and Periodic Payments.
- 5.2. Reforms in the area of open disclosure promote a culture of openness and trust, where communication is the first step in resolving a claim.
- 5.3. Delay does not suit either side, especially the patient who is seeking to move on from a traumatic period in their life, in so far as possible. Delay can arise in respect of securing medical opinions, tracing medical statements and teasing through the complex issues of causation. In that regard the Society supports the recommendation of Pre Action Protocols, where issues in dispute are identified much earlier in the process
- 5.4. Calls for shortened limitation periods (that is the period within which a claim should be initiated) have a clear economic benefit: namely more claims run the risk of being barred. The rights and circumstance of the patient should be carefully considered in any discussion on reducing periods.
- 5.5. Access to justice, for all parties, is paramount. In this case, barriers in accessing the courts system underscore the need for increased judicial resourcing and supports.

## 6. Conclusion

- 6.1. The Society appreciates the tension that might naturally occur between the parties to a claim, and the impact claims have on the parties. The role of the courts and an ethical,

professional approach on the part of respective legal teams must seek to ensure a fair outcome in accordance with the law.

- 6.2. The Law Society supports the existing judicial reasoning for both General and Special damages, with a particular focus on the rights for the patient who has been injured through medical negligence to adequate and fair damages.
- 6.3. The Society wishes to reiterate its support for improved education and training, the roll-out of open disclosure policies and other reforms that operate to reduce medical errors and injury. In this regard, we support the duty of candour as a professional and ethical one.

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**Kevin O'Higgins,**

**President of the Law Society of Ireland**

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For further information please contact:

Law Society of Ireland  
Blackhall Place  
Dublin 7  
DX 79  
Tel: 353 1 6724800