IN THE COUNTY COURT OF NORTHERN IRELAND

PRE ACTION PROTOCOL FOR CLINICAL NEGLIGENCE LITIGATION

[1] At all times during the course of civil litigation in this jurisdiction it is important to bear in mind the overriding objective set out at Order 58 Rule 1 to the County Court Rules (Northern Ireland) 1981. In order to enable the court to deal justly with litigation that objective requires the court, so far as practicable, to:

(a) ensure the parties are on an equal footing;
(b) save expense;
(c) deal with the litigation in ways which are proportionate to –
  (i) the amount of money involved;
  (ii) the importance of the case;
  (iii) the complexity of the issues; and
  (iv) the financial position of each party;

(d) ensure that the litigation is dealt with expeditiously and fairly; and
(e) allocate to the litigation an appropriate share of the court resources, while taking into account the need to allocate resources to other cases.

It should be the aim of all parties and their representatives in clinical negligence cases to ensure that, save in exceptional circumstances, the matter is fully resolved within 48 months of the date of issue of the civil bill.

2. The objectives of this protocol include;

(i) Early communication between patients and healthcare providers of any perceived problems, concerns or dissatisfactions about treatment.

(ii) The development by healthcare providers of early reporting and investigation systems.

(iii) Disclosure of sufficient information so as to enable patients and healthcare providers to understand the issues and encourage early resolution.

(iv) The early provision of relevant medical records by healthcare providers to patients or their legal representatives.

(v) Placing the parties in a position where they may be able to resolve cases fairly and early without litigation together with the promotion of mediation and/or other appropriate forms of Alternative Dispute Resolution.

(vi) The promotion of an overall "cards on the table" approach to litigation in the interests of keeping the amount invested by the participants in terms of money, time, anxiety and stress to a minimum, consistent with the requirement that the issues be resolved in accordance with the accepted standards of fairness and justice.

3. Where litigation is appropriate the requirement is that it should be conducted economically, efficiently and in accordance with a realistic and flexible timetable set by the court. Clinical negligence litigation frequently involves complex and technical issues that require time consuming and detailed investigation with the assistance of specialised expert opinion. It also has the potential to be particularly stressful and emotionally demanding upon the parties.

Medical Notes and Records

4. In respect of living patients section 7 of the Data Protection Act 1998 provides a right of access to health records by a patient or certain other parties on behalf of a patient and such requests should be as specific as possible about the records that are required. Article 5(1)(e) of the Access to Health Records (Northern Ireland) Order 1993 continues to apply in respect of deceased persons. An initiating letter on behalf of someone who is considering pursuing an action arising out of medical treatment, briefly outlining the facts and anticipated allegations of negligence, should be sent to the relevant healthcare provider requesting the disclosure of medical notes and records. The Law Society has prepared a template letter initiating a claim and requesting the disclosure of medical notes and records which may be accessed here http://www.lawsoc-ni.org/role-of-the-law-society/influencing-law-reform/policy-issues/clinical-negligence-protocol/.

5. Copies of any records sought should be supplied by the relevant healthcare provider within 40 days or such other relevant requisite period at the relevant fee specified in the 1998 Act or the 1993 Order.

6. In the event that a healthcare provider encounters difficulty in complying with the relevant timetable for disclosure of medical notes and records the provider should provide the patient and/or his representative with an explanation of the problem together with details of the resolution proposed by the provider.

7. It is important, in the interests of saving costs and time, that potential plaintiffs should be aware of and have recourse to the simplified statutory procedure available under the provisions of the 1998 Act or the 1993 Order and should be specific as to what records they seek, where relevant.[1] Healthcare providers should make arrangements to ensure that they are able to react positively and expeditiously to inquiries and requests in accordance with that procedure. As a last resort, in the event that the relevant healthcare provider fails to provide disclosure of the relevant hospital notes and records, the patient and/or his representatives should apply for disclosure in accordance with the provisions of section 31 of the Administration of Justice Act 1970 and Order 15 of the County Court Rules (Northern Ireland) 1981.

8. If either the patient or the healthcare provider considers that additional health records are required from a third party in the first instance these should be requested in writing by or through the patient or his or her representatives. The relevant third party health provider should reply thereto in writing within 40 days either disclosing the medical notes and records sought or, if a difficulty is encountered, providing a written explanation of the difficulty and the resolution proposed by the third party health provider.

9. It shall be the duty of the party affording initial disclosure to make available clear and complete copies properly paginated and indexed.

Medical Notes, Records and Literature

10. The parties to clinical negligence litigation must discuss, if necessary, exchange and agree bundles of medical notes and records to be relied on prior to the hearing. It shall be the duty of the plaintiff's solicitors to lodge with the court no later than 14 days prior to the hearing a bundle of medical notes , records paginated and medical literature to be relied on with index attached and certified by all parties as agreed. It is the responsibility of solicitors and barristers in the case to sift the documents available and produce a manageable core bundle relevant to the issues to be determined. Excessive and unnecessary documentation must be avoided. It shall be the joint responsibility of all the parties to ensure the presence of the originals of all such documents in court during the hearing.

11. The parties to clinical negligence actions must ensure that any medical literature to be relied on by the medical experts shall be exchanged and lodged with the court no later than 7 days prior to the trial, appropriately paginated and indexed.

12. In any clinical negligence action, where the trial bundle extends to more than 500 consecutively numbered pages, excluding transcripts, a core bundle extending to not more than 250 pages shall be prepared.

Commencement of Proceedings

13. Once a decision has been taken by the patient and/or his or her advisors that there are grounds for a claim, as soon as practicable, a letter of claim should be sent to the relevant healthcare provider/potential defendant. In appropriate cases the decision as to whether there are grounds for a claim may require a report from a relevant medical expert. Such letters should be informed by the disclosed medical records and the plaintiff's medical reports, and should set out in full both the nature of the torts alleged, the identity of all the defendants and an assessment of quantum, broken down into the various heads of damage or give reasons why this is impracticable. The Law Society has prepared a template letter of claim which is available here http://www.lawsoc-ni.org/role-of-the-law-society/influencing-law-reform/policy-issues/clinical-negligence-protocol/.

14. While the letter of claim is not intended to have the formal status of a pleading it should generally be drafted for the purpose of providing sufficient

information as is currently held by the plaintiff to enable the relevant healthcare provider to commence investigations. Circumstances may mean that it can include sufficient information to put an initial valuation upon this claim unless this is impracticable.

15. Unless there is a limitation problem or some other reason as to why the plaintiff's position needs to be protected by early issue proceedings should not generally be issued until after 4 months from the date of the letter of claim.

16. The relevant healthcare provider should acknowledge the letter of claim within 14 days of receipt and should identify the solicitor or other legal representative who will be dealing with the matter. No later than 4 months from the letter of claim the relevant healthcare provider should write to the plaintiff's solicitors stating whether liability, breach of duty or causation are denied or admitted. Thereafter it will be appropriate for the plaintiff to issue proceedings. This provision does not apply to cases where time is of the essence. The Law Society has prepared a template letter of response which is available here http://www.lawsoc-ni.org/role-of-the-law-society/influencing-law-reform/policy-issues/clinical -negligence-protocol/

Expert Reports

17. In clinical negligence cases reports from expert witnesses may be required in relation to –

- the allegations relating to negligence, breach of duty and causation;
- the plaintiff's post incident and subsequent condition and prognosis;
- quantification of the financial loss elements of the claim including care, equipment, structural changes to premises, loss of earnings, profits, prospects of employment etc.

18. Practitioners should have regard to the Commercial List Practice Direction No. 6/2002 relating to expert evidence for general guidance (available at http://www.courtsni.gov.uk). Copies of this documentation should be provided to each of the experts retained on behalf of the parties to the litigation. In particular, the attention of practitioners is drawn to paragraph 3 of this Practice Direction and they are reminded of the need 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 very substantial proportion of the costs incurred in the course of clinical negligence litigation.

19. Practitioners are also specifically reminded of the fundamental importance of maintaining the independence of expert witnesses which is reflected, in particular, at

paragraphs 1, 11, 12 and 18 of the Commercial List Practice Direction and the draft Expert's Declaration annexed thereto.

Health Service Complaints Procedure

20. Attention is drawn to the complaints procedures that exist with the healthcare providers. It is designed to provide patients with an explanation of what happened and an apology if appropriate. It is not designed to provide compensation for cases of negligence. However, patients might choose to use this procedure if their only, or main goal is to obtain an explanation, or to obtain more information to help them decide what other action might be appropriate.

Alternative Dispute Resolution

21. The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation and, if so, endeavour to agree which form to adopt. Different forms of alternative dispute resolution are available, and the guidance booklet "Alternatives to Court in Northern Ireland" is available on the Northern Ireland Courts and Tribunals Service website (www.courtsni.gov.uk). During the course of proceedings, both the plaintiff and the defendant may be required by the court to produce evidence that alternative means of resolving their dispute had been considered, for example by production to the court of the standard mediation correspondence, together with the parties' replies thereto. Generally the courts take the view that litigation should be a last resort and that claims should not be issued prematurely when a settlement is still being actively explored. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution.

22. This protocol shall come into operation on 25th February 2013.

D K McFarland

Presiding Judge of the County Courts

18th day of January 2013

[1] While a complete set of records may be required in some cases, a file may also contain records as to unrelated conditions. Legal representatives should use their

discretion in making requests for disclosure, bearing in mind the defendant's duty to make full relevant disclosure and the cost and delay caused by copying bulky files.