

Medical
Protection



The human and financial cost
of clinical negligence claims:
The case for pre-action protocols

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Introduction

A patient who experiences avoidable harm in Ireland today will wait much longer to receive compensation than is necessary.

The healthcare professionals and patients involved in the claim will likely be dragged through an unnecessarily long and stressful process that has a significant impact on their mental wellbeing.

And both parties will incur much higher legal costs than would be the case if the claim was resolved sooner.

Our international experience shows that it does not have to be this way; Ireland is an outlier.

The human cost

Medical Protection data, that we are publishing for the first time in this report, shows that claims against members in Ireland take longer to conclude than all other countries where we have members.

An average claim in Ireland takes 1,462 days, which is;

- **14% longer** than in South Africa (1,279 days)
- **56% longer** than in Hong Kong (940 days)
- **56% longer** than in the UK (939 days); and
- **56% longer** than in Singapore (938 days)

This means that patients and healthcare professionals are being dragged through a painful process that is longer and therefore more costly than it needs to be.

The impact on healthcare professionals is demonstrated in the results of a survey of 200 Medical Protection members who experienced a claim in the past five years. These findings confirm that the claims process is incredibly stressful for healthcare professionals and their families, often resulting in anxiety, depression and for some, withdrawing from practice.

This adds to other recently published research into the impact on patients, which describes a system that is 'overburdened [and] deeply traumatic'¹, leaving patients 'worn down' going through a process that is 'excruciating [...] painful, [and] adds insult to injury'².

The human impact of this on the patients and healthcare professionals involved is clear.

The financial cost

The financial impact of the claims processes for the Irish government and for healthcare professionals is clear too.

Medical Protection data shows that claims against members in Ireland incur higher legal costs than all other countries where we have members.

The average legal costs for a claim in Ireland are €34,646³, which is;

- **26% more expensive** than in Singapore (€27,449),
- **56% more expensive** than in Malaysia (€22,158)⁴; and
- **191% more expensive** than in the UK (€11,911)

¹ Forrest, C., O'Donoghue, K., Collins, D.C. and O'Reilly, S. (2023) 'Current Irish medicolegal landscape: an unsustainable trajectory', *BMJ Open Quality*, 12(3). Available at: <https://doi.org/10.1136/bmjocq-2023-002433>

² Tumelty, M.E. (2021) 'Exploring the emotional burdens and impact of medical negligence litigation on the plaintiff and medical practitioner: insights from Ireland', *Legal Studies*, 41(4), pp. 633–656. Available at: <https://doi.org/10.1017/lst.2021.20>

³ Statistics are averages of data from over a 10-year period (1st January 2013 – 31st December 2022). Length of proceedings is calculated from notification to settlement, and legal costs are the costs associated with defending the claim. All conversions from GBP to EUR use the rate of 1.1466 (correct as of 22nd November 2023) and may not reflect inflationary changes over the full period the data is taken from.

⁴ Legal costs in some countries, such as Malaysia and South Africa, may be influenced by economic differences.

The legal costs built up by both parties throughout the process is often much higher than would be the case if the claim was resolved sooner. This impacts on the money the state could otherwise make available to the HSE and also on the cost of indemnity incurred by healthcare professionals.

The solution

The reforms we propose in this paper are not new. They are well documented and widely accepted as needed. None are revolutionary and all are well tested across many other countries.

Our hope in publishing this report is that we can provide the final pieces of evidence to ensure reform is rapidly delivered.

As priority, we recommend:

- Pursuing the regulation to introduce pre-action protocols
- The introduction of proactive court-led case management
- Specialist Courts and Specialist Judges.

Why is change needed?

Stress of claims

In a survey of Medical Protection members in Ireland who had faced a clinical negligence claim in the past five years, 44% of respondents said the claims process was much more stressful than they imagined it would be.

“It was very stressful, even writing the report as it was the first significant case against me. A work colleague was supportive, just talking it through and encouraging me as I wrote the detailed report. The time scale was long. I went to a horrible barrister meeting. Broke down in front of the MPS advisor afterwards, albeit in a private room, cried for over 2 hours on the bus home.”

“There remains significant fear, stress and consequent deterioration in the doctor’s wellbeing associated with medicolegal cases. Any recognition or support from the employer is often absent.”

Other recently published research demonstrates that the process is also very stressful for the patients concerned. An article in the *Legal Studies Journal* published in 2021 concludes that the elements of litigation that cause “psychological and emotional damage”⁵ include “the adversarial nature of litigation; and the length of the litigation process”.⁶ The study included quotes from patients who stated how stressful the process was:

“Years of trauma and uncertainty, because again while it’s business as usual for the other individuals, it’s there with you 24/7... years of that trauma and uncertainty. (Patients for Patient Safety).”⁷

“[Litigation clearly becomes] a joust between two legal people... It’s not really right [but] it’s how it is. (Patients for Patient Safety).”⁸

⁵ Tumelty, M.E. (2021) ‘Exploring the emotional burdens and impact of medical negligence litigation on the plaintiff and medical practitioner: insights from Ireland’, *Legal Studies*, 41(4), pp. 633–656. Available at: <https://doi.org/10.1017/lst.2021.20>

⁶ *Ibid*, 649

⁷ *Ibid*, 651

⁸ *Ibid*, 650

Impact on wellbeing

The experience of undergoing a claim is not easy in any country. However, in Ireland this is made worse by a slow process where delays are rife and without mechanisms, such as pre-action protocols or case management, to allow for early resolution of a claim.

Litigation has often been seen as a process which can have ‘painful psychological consequences’⁹. As such, it is not surprising that one of the clear messages from the survey was the impact that the claim had on doctors’ wellbeing.

78% of respondents to our survey rated their wellbeing as ‘worse’ while the claim was ongoing compared to before and 91% said they were worried about their wellbeing. 70% were worried about the wellbeing of their loved ones. Some healthcare professionals told us they needed psychotherapy and professional help, and others even mentioned having suicidal thoughts while undergoing a claim.

Doctors were also naturally worried about the trial itself – whether the claim would actually proceed to trial (84%) and giving evidence (83%) - but also about their future in medicine with 92% citing reputational damage and 56% citing detriment to career prospects as some of their worries.

“It was horrendous. I had to leave medicine after it. I developed severe anxiety during the course of the claim and PTSD. I lost my career in medicine and I am devastated about that. I knew I could never go through the same again.”

“It has significantly affected my enjoyment of working as a GP and I am seriously considering retiring.”

Some of our members also said they experienced lower self-esteem (53%), a negative impact on their family/private life (54%), negative media or social media coverage (20%), verbal or physical abuse from the claimant or their relatives (16%) and a negative impact on career progression (10%).

“It was just so slow, so awful and the newspaper humiliation was terrible for my wife and family.”

While doctors were naturally worried about themselves, their family and their careers, even throughout this very tricky process, they remained compassionate and worried about their patients.

72% of respondents said they were worried about the wellbeing of the patient involved in the claim and/or their loved ones; some cited the wellbeing of the rest of their patients as a concern while they had to dedicate time to defend themselves.

Naturally, patients also see their wellbeing being negatively impacted by this process. Research published in 2021¹⁰ explores the impact of the Irish litigation process on claimants, finding that the system has ‘a destructive emotional impact on participants’ and susceptes them to anger, anxiety and depression.

“People have sleepless nights...emotionally, physically, intellectually, you are in a mess.”

Barristers and patient groups agree with the rhetoric from the research, with them also noting the distress caused to claimants and their families, describing this as ‘considerable grief’.

“I’ve never seen a plaintiff [celebrate] when they win. They usually start crying when they win the case ... I don’t think I’ve ever seen a plaintiff come out and say ‘God, that was really worth it’.”¹¹

⁹ Halleck, S.L. (1997) ‘Perils of being a plaintiff: impressions of a forensic psychiatrist’, *Clinical Orthopaedics and Related Research*, (336):7, pp. 2-8. Available at: <https://doi.org/10.1097/00003086-199703000-00011>

¹⁰ Tumelty, M.E. (2021) ‘Exploring the emotional burdens and impact of medical negligence litigation on the plaintiff and medical practitioner: insights from Ireland’, *Legal Studies*, 41(4), pp. 633–656. Available at: <https://doi.org/10.1017/lst.2021.20>

¹¹ Ibid, 640

Delays of process

Claims in Ireland take longer to resolve than in any other country where Medical Protection has members (Figure 1).

It is therefore unsurprising that one of the biggest worries of our members was the length of time the process will take from being notified of the claim until they could consider it resolved.

88% of respondents said they were worried about the length of time it took and 49% said that the conclusion of their claim took much longer than they anticipated.

“I am dismayed at the length these processes take and think there needs to be a complete overhaul of the medical negligence culture in this country. I am afraid I have become quite cynical about it all.”

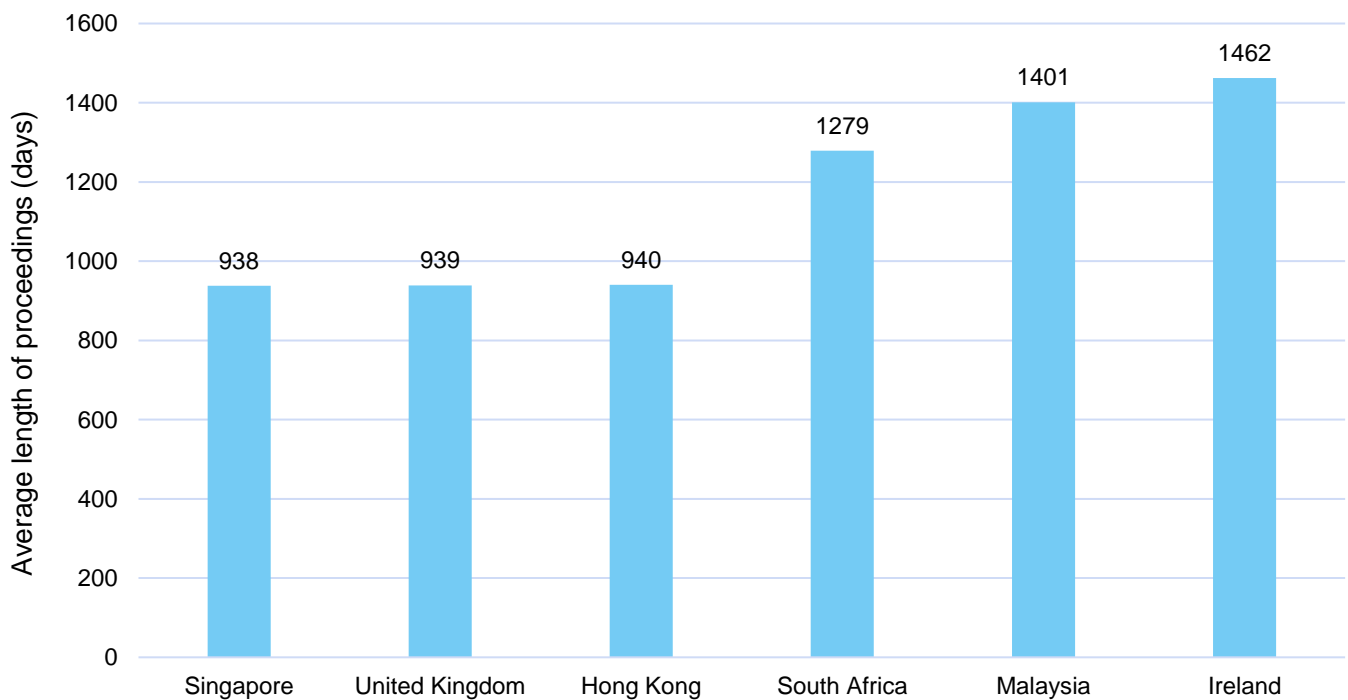
“The inordinate length of time taken by the legal process. Surely, mediation could be used initially.”

“Not even sure I am experiencing a claim, as apart from being served 4 years ago, nothing else has happened.”

“The process takes far too long. My case has been hanging over me and negatively affecting my life for years.”

The delays caused by the current system are negatively impacting both patients and doctors and making the process more stressful and expensive than it needs to be. More importantly, the delays also mean that injured patients have to wait longer to receive compensation.

Figure 1: Average length of proceedings for medical claims over 10 year period (2013 - 2022)



Cost of the claims process

Costs in Ireland, particularly legal and expert costs, are incredibly high.

In 2022, the State Claims Agency, the organisation with delegated responsibility from the Government for resolving personal injury and third-party claims against the State, paid out €374.1 million to resolve and manage ongoing clinical negligence claims¹². This was a 4.67% increase on the 2021 total of €357.4 million¹³.

Legal fees make up a large proportion of this cost; in 2022, legal and expert costs represented 22.7% (€84.9 million) of the costs of clinical claims¹⁴. This is a 11% increase from 2021, where legal and expert costs represented 21.4% (€76.5 million)¹⁵.

Looking at our own data, legal costs in Ireland are considerably higher than in other countries where we have members.

The average legal costs for claims in Ireland are €34,646, which is **26% more expensive** than in Singapore (€27,449), **56% more expensive** than in Malaysia¹⁶ (€22,158), **191% more expensive** than in the UK (€11,911) and **250% more expensive** than in South Africa (€9,895) (Figure 2).

A factor in why legal costs are so high is the lack of a clear process for claims which means lawyers are involved extensively over a longer period of time. We explore this further when discussing the reforms that will assist in improving the claims system.

These high legal costs impact both on the amount of public finances that could otherwise be available to the HSE and also on the cost of indemnity incurred by healthcare professionals to protect themselves from claims.

Figure 2: Average legal costs for medical claims over 10 year period (2013 - 2022)



¹² National Treasury Management Agency (2022) *Delivering Long-Term Sustainable Value*. Available at: <https://www.ntma.ie/uploads/publication-articles/NTMA-Annual-Report-2022-English.pdf>

¹³ *ibid*, 53

¹⁴ *ibid*, 54

¹⁵ *ibid*

¹⁶ Legal costs in some countries, such as Malaysia and South Africa, may be influenced by economic differences.

The reforms that are needed

Medical Protection's three key recommendations are:

1. Pre-Action Protocols
2. Case management of litigated claims
3. Specialists Courts and Judges.

Pre-Action Protocols

Pre-action protocols are designed to encourage the early exchange of information. They are a set of guidelines, laid out through legislation, which explain the conduct and steps a court expects parties to take before claims proceedings can commence. This encourages claims to be settled outside of the court and litigation and reduces the time the claims process takes.

As we have outlined previously in this report, healthcare professionals experience high levels of stress when they are party to a claim, greatly exacerbated by how long the litigation process often takes.

Medical Protection believes that the starting point for any reform is pre-action resolution through the use of a pre-action protocol. A pre-action protocol would encourage the fair, just and timely settlement of disputes by facilitating:

1. Early communication between claimant and defendant
2. Early and full disclosure of information about any dispute
3. Early investigation of circumstances
4. Proportionality.

Streamlined pre-action resolution benefits both healthcare professionals and patients by reducing unnecessary waiting times for compensation. Resolving more claims at this stage enables patients to access much-needed financial support promptly.

This reform was backed by the Review Group chaired by Peter Kelly, which recommended that the Minister for Justice give early attention to the introduction of the regulations prescribing the pre-action protocols in clinical negligence cases. This was accepted in the Justice Plan 2022 and Justice Plan 2023. Pre-action protocols had also been recommended earlier in 2012, by the Working Group on Medical Negligence and Periodic Payments, established in 2010 and chaired by Ms Justice Mary Irvine, former President of the High Court. Most recently, in 2020, the Expert Group report to review the law of torts and the current systems for the management of clinical negligence claims, chaired by Mr Justice Charles Meenan, called for pre-action protocols to be implemented. While the Government has accepted in full the recommendations from Mr Peter Kelly, change is yet to happen.

There is also strong support for pre-action protocols amongst medical and dental organisations. In November 2021, we coordinated a joint letter to the Minister of Justice calling for pre-action protocols to be introduced as soon as possible. This was signed by the Irish Hospital Consultants Association, Royal College of Surgeons of Ireland (RCSI), Royal College of Physicians of Ireland (RCPI), Irish College of General Practitioners (ICGP), Irish College of Ophthalmologists (ICO), Irish Dental Association (IDA), Faculty of Dentistry of RCSI and the Medical and Dental Consultants Association (MDCA).

In our survey, doctors also expressed support for pre-action protocols. An unsurprising 96% of respondents would support the earlier resolution of claims by having legislation for pre-action protocols.

Recommendation: Medical Protection recommends the introduction of pre-action protocols without further delay using the provisions in section 219 of the Legal Services (Regulation) Act 2015.

Case Management

Medical Protection encourages the introduction of proactive court-led case management to ensure that claims are appropriately progressed without undue delay.

Doctors also back this implementation, with 96% of those who responded to our recent survey supporting the introduction of a case management system in the High Court where parties are obliged to adhere to a reasonable timescale.

We would recommend that case management should include:

1. A court timetable setting out key steps/deadlines.
2. Case management hearings (if necessary) to ensure parties are complying with the timetable and any orders made by the judge.
3. A pre-trial meeting to narrow issues in dispute and assess readiness for trial. This could also be used as an opportunity for parties to meet to explore settlement.
4. Costs penalties for failure to comply with deadlines/directions with consideration that costs can be recovered directly from the plaintiff's solicitors where they have unreasonably impaired the defendant's ability to investigate and resolve a claim.

Recommendation: Medical Protection recommends the introduction of proactive court-led case management to ensure claims are progressed without delays.

Specialist Courts/Judges

Medical Protection is calling for the introduction of a specialist professional indemnity/clinical negligence Court with specialist judges and procedural rules designed to ensure early engagement of parties and adequate case management. This Court could also deal with motions relating to discovery of medical records etc. in clinical negligence cases.

We believe that this approach could lead to useful precedents for clinical negligence lawyers and legal practitioners and bring consistency in approach, particularly regarding awards of damages. This has been the case in Scotland following the introduction of the All-Scotland Personal Injury Court which has reduced the reliance on the court system in personal injury claims¹⁷, and encouraged adherence to procedural rules and timetables for swifter resolution¹⁸

Recommendation: Medical Protection recommends the introduction of a specialist clinical negligence Court with specialist judges and procedural rules.

Conclusions

The recommendations made in this paper are not exhaustive, but they aim to establish some clear changes that could be made to reduce the cost of clinical negligence in Ireland.

We believe, based on our research in this paper, and our experience in Ireland and other jurisdictions, that the recommendations set out will be useful in reducing the cost of clinical negligence claims in Ireland by allowing claims to be resolved quicker and more efficiently. This will undoubtedly benefit patients who have been harmed, while ensuring doctors are able to practice without unnecessary stress caused by years in protracted litigation.

¹⁷ Donachie, K. (2018) 'ASPIC finds its feet', *The Journal of the Law Society of Scotland*, 63(4). Available at: [lawscot.org.uk/members/journal/issues/vol-63-issue-04/aspic-finds-its-feet/](https://www.lawscot.org.uk/members/journal/issues/vol-63-issue-04/aspic-finds-its-feet/)

¹⁸ Hart, C. (2020) 'PI cases: behind the headlines', *The Journal of the Law Society of Scotland*, 65(6). Available at: <https://www.lawscot.org.uk/members/journal/issues/vol-63-issue-04/aspic-finds-its-feet/>

About MPS

Medical Protection is a registered trademark and a trading name of The Medical Protection Society Limited (“MPS”). MPS is the world’s leading protection organisation for doctors, dentists and healthcare professionals. We protect and support the professional interests of more than 300,000 members around the world. Membership provides access to expert advice and support and can also provide, depending on the type of membership required, the right to request indemnity for any complaints or claims arising from professional practice.

Our in-house experts assist with the wide range of legal and ethical problems that arise from professional practice. This can include clinical negligence claims, complaints, medical and dental council inquiries, legal and ethical dilemmas, disciplinary procedures, inquests and fatal accident inquiries.

Our philosophy is to support safe practice in medicine and dentistry by helping to avert problems in the first place. We do this by promoting risk management through our workshops, E-learning, clinical risk assessments, publications, conferences, lectures and presentations.

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