

October 2022

MPS response to the Lady Chief Justice's Office consultation on Draft Clinical Negligence Protocol and Practice Directions

Opening Remarks

Medical Protection Society (MPS) welcomes the opportunity to comment on the Lady Chief Justice's Office proposals on the Draft Clinical Negligence Protocol and Practice Directions. (County Court)

MPS is the world's leading member-owned, not-for-profit protection organisation for doctors, dentists and healthcare professionals with over 300,000 members around the world, more than 8,000 of which are in Northern Ireland. Our in-house experts assist members with the wide range of legal and ethical problems that can arise from their professional practice.

MPS believes that the starting point for any claims litigation is pre-action resolution through the use of a pre-action protocol. A pre-action protocol should encourage the fair, just and timely settlement of disputes by facilitating early communication between plaintiffs and defendants. This can be achieved through early and full disclosure of information, early investigations and response to allegations as well as early offers of settlement.

We believe that the introduction of a Pre-Action Protocol will be helpful in reducing delays and cost for both parties involved in litigation and it will also considerably reduce the stress that doctors and patients go through when involved in a claim.

Comments on the proposals

Draft Practice Direction for Clinical Negligence Litigation in the County Court

MPS does not have anything further to add to the Practice Direction and note that it broadly adopts the same wording as the Practice Direction for the High Court.

Draft Pre-Action Protocol for Clinical Negligence Litigation in the County Court

MPS notes that the draft Pre-action Protocol for the County Court broadly adopts the same wording as the Practice Direction for the County Court. Our observations and suggestions may also be applied to the Protocol for Clinical Negligence Litigation in the High Court.

Alternative Dispute Resolution

Paragraph 6 (page 24) of the Pre-Action Protocol deals with the issue of "Alternative Dispute Resolution". It reads as below:

6.1 Parties should inform their clients of the options available to resolve disputes by alternative dispute resolution and in particular that it is voluntary, confidential and impartial. A form of alternative dispute resolution might be more suitable than litigation, and if so the parties may consider which form to adopt and pursue in a timely manner.

6.2 During the course of proceedings, both the plaintiff and defendant may be required by the Court to produce evidence that alternative means of resolving their dispute had been considered, for example by production of the standard mediation correspondence, together with the parties' replies thereto. The parties need to be mindful that the Court takes 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. If pursuing a means of alternative dispute resolution would assist in achieving a settlement, then this should be fully explored if the parties agree. Whilst it is recognised that no party should be forced to take part, representatives are reminded to advise their clients of this option for dispute resolution.

MPS interpretation of Paragraph 6.1 is that Alternative Dispute Resolution (ADR) should be considered prior to litigation. We support ADR and the vision of the Protocol that litigation should be a last resort.

In our view, the introduction of ADR would be beneficial to all parties if it was widened to also include this provision during litigation. If a responsibility on all parties to consider the appropriateness of ADR was introduced, this would save court time and expense, reducing unnecessary delays and cost.

We believe that it would be helpful if the Protocol clearly stated the timeframe for when a party should respond to an invitation for ADR as well as what the consequences may be for a party should they fail to consider or respond to ADR. For example, an expert's failure to comply with the County Court Rules may lead to the expert being held responsible for wasted costs.¹

It would also be helpful for the Protocol to set out what is considered to be Alternative Dispute Resolution to avoid a narrow interpretation being applied. It should be clear that ADR can simply be a telephone call between parties' solicitors. The England and Wales "Pre-Action Protocol for the Resolution of Clinical Disputes" sets out some of the options for resolving disputes without commencing proceedings². Something similar could be adopted in the Northern Ireland Pre-Action Protocol.

Commencement of Proceedings

Paragraph 9.1 (page 26) of the Pre-action protocol deals with the issue of "Commencement of Proceedings" and states the below:

¹ Para 7, Draft Practice Direction in the County Court in Northern Ireland, Clinical Negligence, Expert Evidence. "Experts should be aware that any failure to comply with the County Court Rules or the directions of the court or this Practice Direction, or any excessive delay for which they are responsible, may result in the parties who instructed them being penalised in costs, or debarred from relying upon the expert evidence. In addition, the expert may be held responsible for wasted costs and may have some or all fees and expenses disallowed."

² Some of the options for resolving disputes without commencing proceedings are—

- (a) discussion and negotiation (which may or may not include making Part 36 Offers or providing an explanation and/or apology)
- (b) mediation, a third party facilitating a resolution ;
- (c) arbitration, a third party deciding the dispute;
- (d) early neutral evaluation, a third party giving an informed opinion on the dispute; and
- (e) Ombudsmen schemes.

9.1 Once a decision has been taken by the patient and/or his or her advisors that there are grounds for a claim, after consideration of the notes and records and normally after the obtaining of a report from an appropriate medical expert/experts”

9.2 While the letter of claim is not intended to have the formal status of a pleading it should, in the majority of cases, be prepared based on expert evidence [...]

MPS understands that it should be standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported by a relevant professional with the necessary expertise. However, we continue to receive a high number of Letters of Claim from Plaintiff solicitors which have been prepared without the Plaintiff first obtaining supportive expert evidence. As a consequence, many claims are brought without merit. In addition, allegations will often substantially change between the Letter of Claim and Statement of Claim, as only the latter is supported by expert evidence. This only incurs unnecessary costs and delays in the resolution of the claim.

We suggest that the terms “normally” and “in the majority of cases” which are highlighted above are removed from paragraph 9.1. We suggest that Paragraph 9.1 states that the Letter of Claim “must” state the discipline of expert(s) which has (have) been instructed. If no expert has been instructed, then the reasons for not doing so should be included in the Letter of Claim.

About MPS

MPS is the world’s leading protection organisation for doctors, dentists and healthcare professionals with more than 300,000 members around the world.

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.

MPS is not an insurance company. We are a mutual non-for-profit organisation and the benefits of membership of MPS are discretionary as set out in the Memorandum of Articles of Association.

Contact

Should you require further information about any aspects of our response to this consultation, please do not hesitate to contact us.

Patricia Canedo

Policy and Public Affairs Manager

patricia.canedo@medicalprotection.org



The Medical Protection Society Limited
Level 19, The Shard
32 London Bridge Street
London SE1 9SG
United Kingdom

Tel: +44 (0)20 7399 1300

Fax: +44 (0)20 7399 1301

info@medicalprotection.org

medicalprotection.org

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