

Tribunal Statement in relation to Pre-claim Protocols

Background

Under s.25 of the CervicalCheck Tribunal Act 2019 (“the 2019 Act”) the Tribunal is empowered to provide for a pre-claim protocol. S. 25 provides that such a pre-claim protocol may be introduced in order to:-

- (i) promote timely communications between potential parties to claims which may be determined by the tribunal;
- (ii) facilitate the early identification of potential parties to such claims;
- (iii) facilitate the early identification of issues which the Tribunal may be asked to determine and
- (iv) facilitate the hearing and determination of such claims as may be made to the Tribunal in a just and expeditious manner.

The Tribunal is mindful of the fact that the Report on an Alternative System of dealing with Claims arising from CervicalCheck outside of the Court Process, which led to the establishment of the Tribunal, highlighted the possible procedural advantages of a pre-claim protocol in the context of claims to be determined by the Tribunal. In so concluding, its author, Mr Justice Charles Meenan, had regard to the Report of the Working Group on Medical Negligence and Periodic Payments, published in 2012 (“the Report of the Working Group”), which recommended the introduction of pre-action protocols in all clinical negligence proceedings.

Reasons against the adoption of a pre-claim protocol in Tribunal proceedings

There are, however, a range of reasons why a pre-claim protocol in terms similar to the pre-action protocol referred to in the Report of the Working Group may not be as valuable or effective a tool in claims intended to be pursued before the Tribunal as it would be in complex clinical negligence litigation intended to be commenced in the High Court.

First, the time limit for the commencement of a claim under the 2019 Act is significantly curtailed. Thus, to require compliance with such a protocol prior to the commencement of a claim before the Tribunal would have the potential to jeopardise the ability of a claimant to commence her claim before the Tribunal within the time provided for by statute.

Second, the Tribunal cannot require a respondent to a claim to agree to that claim being determined by the Tribunal. This is to be contrasted with the position of parties to intended litigation in the High Court, where, regardless of the view of the intended Defendant, he/she/it cannot refuse to engage with the intended proceedings. Faced with a demand by an intended claimant for compliance with a pre-claim protocol, the intended Respondent to a proposed claim before the Tribunal would be entitled to indicate that they would not comply because they are unwilling to have the Tribunal determine the proposed claim.

Third, where the parties are agreed that the Tribunal may hear and determine any given claim, it is likely that the issues to be decided by the Tribunal will be more limited and readably identifiable than in other types of clinical negligence claims, particularly given the limited class of persons entitled to bring such a claim. Thus, the benefit of a pre-claim protocol in claims of the type likely to be determined by the Tribunal, would, in any event, be of lesser significance, than would be the case if deployed in the type of complex multi issue clinical negligence claims commonly heard before the High Court.

Conclusion

For these reasons, the Tribunal will **not** require the intended claimant and/or respondent to comply with a pre-claim protocol as a prerequisite to the commencement of a claim.

Nonetheless, the Tribunal is satisfied that, in relation to any proposed claim (i) which is not already the subject matter of High Court proceedings and (ii) where the intended claimant or the intended respondent having been notified of an intended claim, consider that they do not have the documentation necessary either to advance or defend such a claim, justice will best be served if parties who intend to consent to the Tribunal hearing a particular intended claim make available any materials relevant to the claim in advance of the discovery process provided for in the Tribunal's Rules.