The early resolution of clinical negligence actions will become a real possibility with the introduction of a pre-action protocol.

Recent amendments to the Civil Liability and Courts Act 2004 provide for the introduction of a pre-action protocol in clinical negligence actions. The amendments were made by the Legal Services Regulation Act 2015, which was signed into law on 30 December 2015.

The Civil Liability and Courts Act 2004 now requires the Minister for Justice to make regulations setting out the terms of a pre-action protocol. The intention is that the pre-action protocol will reduce the number of clinical negligence actions that are brought before the courts and will encourage the early resolution of clinical negligence actions where proceedings are instituted.

The relevant amendments will not become operative until the Minister for Justice makes a commencement order.

WHAT WILL THE PRE-ACTION PROTOCOL DEAL WITH?

The pre-action protocol will set out the requirements that parties must comply with before bringing clinical negligence actions, and will include provision for:

» the disclosure of medical and other records relating to persons enquiring into or alleging possible clinical negligence;
» the giving of notifications of enquiries into, and allegations of, possible clinical negligence, the acknowledgement of notifications of enquiries and the giving of responses to notifications of allegations;
» the time within which records must be disclosed and notifications given and acknowledged or responded to;
» the form of requests for disclosure or notifications of enquiries and allegations and acknowledgements of and responses to such notifications;
» the disclosure of material relevant to allegations and responses; and
» agreements to submit issues for resolution otherwise than by a court.

WHAT WILL HAPPEN IF PARTIES DO NOT COMPLY WITH THE PRE-ACTION PROTOCOL?

If the steps which are required by the pre-action protocol are not taken, the court will have the power to direct that the clinical negligence action not proceed any further until the necessary steps are taken. The court may also order the defaulting party to pay the costs, or part of the costs, of the other party.

Of particular note is the consequences for defendants who fail to comply with the pre-action protocol.

If a defendant does not comply with the
WILL THE COURTS BE ABLE TO HAVE REGARD TO THE TERMS OF AN OFFER OF SETTLEMENT MADE BEFORE THE BRINGING OF PROCEEDINGS?

If a party offered to settle the claim before court proceedings were initiated, but the offer was refused, he or she must lodge a copy of the offer in court. The judge hearing the action will not be informed of the terms of the offer until judgment is delivered.

The judge will, however, be able to have regard to the terms of the offer when considering the making of an order for costs. The court will also be able to take into account the reasonableness of the conduct of the party in making the offer.

This does not replace the facility to make a lodgement or tender in proceedings.

If a defendant rejects an offer to settle for an amount equal to or less than that ultimately awarded by the court, the court can order the defendant to pay interest at a higher rate than would otherwise apply.

WHAT WILL BE THE EFFECT OF AN APOLOGY?

An apology made in connection with an allegation of clinical negligence will not constitute an express or implied admission of fault or liability and evidence of an apology will not be admissible as evidence of fault or liability. Furthermore, an apology will not invalidate or otherwise affect any insurance coverage that is available, even if the contract of insurance provides otherwise.

This will only apply to clinical negligence actions where the cause of action arises after the commencement of the relevant section of the legislation.

WILL THERE BE ANY CHANGE TO THE LIMITATION PERIOD IN CLINICAL NEGLIGENCE CASES?

Yes, the limitation period in respect of clinical negligence actions (not personal injuries actions generally) will increase from two years to three years (as it was before the 2004 Act was implemented). This change will not affect cases where the cause of action accrued, or the plaintiff became aware of the cause of action, before the commencement of the relevant section.

WHEN WILL THE PRE-ACTION PROTOCOL BE PUBLISHED?

The Minister for Justice indicated late last year that the text of the pre-action protocol is expected to be finalised and in operation within a short time of the relevant section being commenced. She also confirmed that she has already commenced a consultation on the terms of the pre-action protocol with interested parties, as she is required to do under the legislation.

Nothing will happen until the relevant sections of the legislation are commenced. At this stage, we do not know when this will be.