



**OPENING STATEMENT BY CIARÁN BREEN, DIRECTOR,
STATE CLAIMS AGENCY,
TO THE PUBLIC ACCOUNTS COMMITTEE
8TH NOVEMBER 2018**

Chairman and Members of the Committee,

I would like, at the outset, to thank the Chairman and the Committee for this opportunity to address you today in relation to the matters of:

- **Medical Negligence;**
- **Open Disclosure;**
- **CervicalCheck and Other National Screening Service Claims/Litigation;**
- **Thalidomide Related Litigation.**

I will keep my opening statement as brief as is possible and I will be happy, later, to reply to any questions and comments. I am joined by my colleagues, Pat Kirwan, Deputy Director; Jenny Foley, Solicitor/Clinical Claims Manager and Ann Duffy, Senior Clinical Risk Advisor.

The NTMA is designated as the State Claims Agency (SCA) when performing the claims and risk management functions delegated to it under the “*National Treasury Management Agency (Amendment) Act, 2000*”.

The SCA’s principle objectives are:

- Whilst acting in the best interests of tax payers, to act fairly and ethically in its dealings with people who have suffered injuries and who take legal actions against the State or State Bodies, and the families of those people; and
- To implement targeted personal injury and property damage risk work programmes to mitigate litigation risk in State Authorities and Healthcare Enterprises, in order to reduce the costs of future litigation against the State.

The SCA’s remit covers personal injury and third-party property damage risks and claims relating to 146 State Authorities, including the State itself, Government Ministers, the Attorney General, the Health Service Executive, the Voluntary Healthcare Sector, An Garda Síochána, the Irish Prison Service, the Defence Forces and Community and Comprehensive Schools.

The SCA's Legal Costs Unit handles costs claims in respect of litigation against the State and State Authorities/Agencies.

The SCA is currently managing 10,909 claims, comprised as follows:

General Indemnity Scheme (GIS)	7,544
Clinical Indemnity Scheme (CIS)	3,365
Total	10,909

The total estimated liability for both Schemes is €3.20bn, comprised as follows:

GIS	€0.81bn
CIS	€2.39bn
Total	€3.20bn

Medical Negligence Generally

The management of clinical negligence claims presents unique challenges on account of their complexity from a liability and causation perspective and the fact that such claims, frequently involving considerable trauma to plaintiffs and their families, arise from care in a clinical setting.

The SCA's approach to the management of clinical negligence claims is guided by a single principle – where it is just and proper, people who have suffered a personal injury as a result of a clinical negligence event must be compensated appropriately and as quickly as the circumstances of their cases allow.

The Agency is acutely conscious of the ordeal that individuals, and their families, suffer, following a clinical negligence event, and it takes every step it can to ensure that the resultant litigation is handled sensitively and that, wherever possible, such litigation does not add to the existing considerable distress suffered by such individuals.

There is a shared, widespread view that the current Tort system, as it applies to clinical negligence, requires reform and tweaking. That is why the SCA has been to the forefront of the reform agenda since 2009 when it, of its own initiative, pioneered the introduction of interim or periodic payments to compensate catastrophically injured victims in clinical negligence cases. This was done in order to alleviate their families' worries relating to guaranteed payment of their future care and other requirements throughout their lifetime.

Thus, the SCA welcomes the commencement, by the Minister for Justice, of Parts I, II and III of the Civil Liability (Amendment) Act, 2017. The relevant parts, which empower the Courts to make awards of damages in cases of catastrophic injury by way of Periodic Payment Orders (PPOs), came into operation with effect from 1st October 2018. This legislative provision will address the concerns, raised repeatedly by the Courts, particularly in clinical negligence cases, concerning the absence of litigation to enable PPOs in appropriate cases.

The Legal Services Regulation Act, 2015, Part 15, amended the Civil Liability and Courts Act, 2004. The 2015 Act states that there shall be (a) Pre-Action Protocol relating to clinical negligence actions and the Minister for Justice shall, by regulations, make provisions specifying the terms of the Pre-Action Protocol.

There is little doubt that if the Pre-Action Protocol was introduced it would lead to much needed improvement and reform of clinical negligence litigation by (a) reducing the current unacceptable delays and (b) removing the more adversarial elements of the current Tort system.

The SCA notes and welcomes the establishment and work of the Review of the Administration of Civil Justice Group, chaired by the President of the High Court, which, inter alia, will seek to improve procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure. The Group will also review the Law of Discovery which bedevils current litigation and adds considerably to legal costs.

The SCA also welcomes the establishment of the Expert Group to Review the Law of Torts and the Current Systems for the Management of Clinical Negligence Claims. The Expert Group, on which the SCA is represented, is chaired by Mr. Justice Meenan and is due to report to the Ministers for Health and Justice and Equality with its findings and recommendations within a six-month timeframe dating from the date of its establishment, namely 5th September 2018.

Open Disclosure

The Civil Liability (Amendment) Act 2017 was signed into law in November 2017 and was commenced on 22nd September 2018, following the development of prescribed forms which are to be used for the purposes of Open Disclosure.

The Patient Safety Bill will legislate for Open Disclosure to be mandatory. The Bill will provide a legislative framework for mandatory Open Disclosure of:

- Certain patient safety incidents;
- Mandatory external reporting of patient safety incidents;
- Clinical audit; and
- The extension of the remit of HIQA to private hospitals.

The Patient Safety Bill is currently at draft stage. The National Patient Safety Office of the Department of Health met with the SCA to consult on the draft bill on 8th October 2018.

The SCA partnered with the HSE in the development of the National Open Disclosure Policy and Guidelines which were both published in 2013. Responsibility for the implementation of Open Disclosure was handed over to the HSE in 2016. However, the SCA has continued to provide support to the HSE concerning some aspects of programme implementation and, in particular, training. To date 4,300 workshops on Open Disclosure have been delivered, 20,000 healthcare staff have received training and 400 trainers have been trained in acute and community settings.

The Scally Report, published in September, 2018, made a number of recommendations with regard to Open Disclosure. The Minister for Health subsequently wrote to the SCA on 12th September 2018, noting in relation to Open Disclosure that the HSE/SCA guidelines should be revised as a matter of urgency. He indicated that the Department of Health would engage with the SCA under the auspices of the CervicalCheck Steering Committee in this regard. The SCA has written to the Department of Health indicating its willingness to engage with the Department on this issue. Responsibility for the implementation of Open Disclosure lies with the HSE and the SCA is aware that the HSE is in the process of establishing a National Office for Open Disclosure. The HSE has invited the SCA to meet to discuss implementation and the SCA looks forward to doing so. The SCA has continued to support the HSE in the delivery of training relating to Open Disclosure and it has accepted an invitation from the HSE to sit on the interview panel for recruitment of staff for the National Office for Open Disclosure.

The SCA has undertaken or is currently undertaking the following activities in support of Open Disclosure:

- (a) On-going support to the HSE in the delivery of Open Disclosure training and the development of an e-learning module;
- (b) Liaison with the HSE on the development of mandatory fields on NIMS to ensure the recording on NIMS of Open Disclosure; and
- (c) Delivery of a session at the recent SCA annual risk conference on Open Disclosure.

CervicalCheck and Other National Screening Service Claims/Litigation (NSS)

CervicalCheck

As of 31st October 2018, there are 85 (NSS) CervicalCheck claims, comprised as follows:

Record Type	Number of Claims
Active Claim (not settled)	73
Settled Claims (3 Cases - Indemnities Received / 2 Cases - settled)	5
Closed Claim	1
Potential Claim	6
Total	85

The SCA is committed to the expeditious resolution of cervical cancer misdiagnosis cases in a sensitive manner, working co-operatively with the co-defendant laboratories, utilising Mediation whenever possible and placing a high priority on treating the people who have made claims and their families with the dignity and compassion they deserve.

The SCA welcomes the report by Mr. Justice Meenan which proposes an alternative system for the resolution of cervical cancer cases arising from the National Screening Service.

Other National Screening Services Cases and Litigation

Breast Check

This information relates to Breast Check cases with respect to misdiagnosis under the National Screening Service only.

Record Type	Number of Claims
Active Claim	6
Closed Claim	1
Total	7

Bowel Check

As of 31st October 2018, no claims have been notified to the SCA with respect to Bowel Check misdiagnosis under the National Screening Service.

Thalidomide-Related Litigation

Background to Current Litigation:

(1) Survivors of Thalidomide

There are 30 persons who have been in receipt of ex-gratia payments from the Department of Health in respect of their Thalidomide status. These are referred to as “*Acknowledged*” Irish survivors of Thalidomide and are now in their late 50s. Most live in Ireland although a small number (5) live abroad. The individuals were born with significant, physical, sensory and, in some cases, intellectual disabilities arising from their mothers’ ingestion of the drug Thalidomide during pregnancy in the period between 1958 and 1962. Most of the 30 survivors are members of the Irish Thalidomide Association (ITA). A smaller number are members of the Irish Thalidomide Survivors Society (ITSS). A small number of survivors are not members of either organisation.

It should be noted that the survivors have been in receipt of monthly payments and services since the early 1970s (initial lump-sum, monthly allowances for life, medical card on an administrative basis without a means test, provision of artificial limbs and appliances etc.).

From the 1st August 2013, the German Foundation substantially increased its monthly payments to Thalidomide Survivors, including Irish Survivors. However, the German Ministry confirmed that from 1st August 2013 onwards, any financial payments made by any Government to Thalidomide Survivors would be deducted from the newly increased German payments.

In the context of the conditions attached to the increased payments by the German Foundation and the effective date of 1st August 2013 for those increases, the SCA made an offer of €62,500, to ITA members, in full and final settlement of all monetary claims by such survivors against the State. 6 members of the ITA accepted the offer.

(2) Thalidomide Litigation

There are currently 17 personal injuries claims from “*Acknowledged*” survivors of Thalidomide against the State and two other parties – the German manufacturer of the drug, Chemie-Grünenthal, and the company which marketed Thalidomide preparations in Ireland, T.P. Whelehan and Company Limited. In addition, there are 12 claims from persons who are “*Unacknowledged*” Thalidomide claimants and 6 claims that are not presently active.

The table hereunder summarises the litigation:

Table -Thalidomide Litigation	
Acknowledged Thalidomide Survivors	
Personal Injuries Litigation Initiated	23
Payment of €62,500 Accepted	6
Number of Litigants in this cohort	17
Unacknowledged Thalidomide Survivors	
Personal Injuries Litigation Initiated	10

In addition to the numbers set out in the above table, two letters of claim have been received from “*Unacknowledged*” Thalidomide claimants and injuriesboard.ie have notified the SCA that it has issued an Authorisation to an additional claimant.

(3) Confidential Mediation Process

In 2013, the parties agreed to enter into a Confidential Mediation process in relation to the survivors’ personal injuries claims with Confidentiality Agreements signed by both parties, being the norm in a mediation process. The State is the only defendant party in the Mediation and the process is being managed by a Senior Counsel in his role as Mediator. Neither the Mediator nor the parties have formally terminated the Mediation process through the invocation of the relevant clause which permits this within the Mediation Agreement.

(4) High Court

The Thalidomide-related litigation is currently being case managed by Noonan J. (High Court) and all of the parties are currently involved in the exchange of Discovery.

Conclusion

My colleagues and I will be happy to take any questions you may have and will do our very best to answer them.