

**Lourdes Hospital Payment Scheme**  
**Final Report**

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## **Lourdes Hospital Payment Scheme Overview**

In November 2013 the Minister for Health, Dr James Reilly, TD, announced that approximately 35 women who had undergone bilateral oophorectomy procedures and who had been excluded, on age grounds alone, from the original Lourdes Hospital Redress Scheme in 2007, would be provided with ex gratia awards, subject to the appropriate proofs required under the Scheme.

The Lourdes Hospital Payment Scheme provided compensation to former patients of Dr Neary who underwent a bilateral oophorectomy, or the surgical removal of a remaining single functioning ovary, when they were 40 years or over. In order to be compensated, each applicant to the Scheme had to have had an immediate menopause consequent upon the procedure and they had to show that the procedure was medically unwarranted.

The Government approved the terms of the Lourdes Hospital Payment Scheme in July of 2013 and the State Claims Agency was requested by the Minister for Health to draft and administer the Scheme. The Commencement Date was Tuesday the 12<sup>th</sup> of November 2013; the closing date was Wednesday the 11<sup>th</sup> of December 2013. The State Claims Agency had discretion, in exceptional circumstances, to extend this time period. However, this was not necessary.

## **Legal, Administrative and Scheme Costs**

The Lourdes Hospital Payment Scheme was run by a Clinical Claims Manager (CCM) and a legal assistant at the State Claims Agency. It was run by the CCM, as part of a portfolio of claims; no costs were incurred by the Department of Health in administering the Scheme.

The Legal and Scheme Costs payable to applicants or their solicitors amounted to €131,846. This cost represented only 4.5% of the total cost of the awards made and compared very favorably with the costs of conventional medical litigation where the costs are significantly higher as a % of the award/settlement.

## **Summary of Payment Scheme Applications, Awards, Scheme & Legal Costs**

<b>Applications</b>	100
<b>Awards</b>	47
<b>Refusals</b>	38
<b>Intimated but not pursued/Withdrawn</b>	15

**Summary of Payment Scheme Applications, Awards, Scheme & Legal Costs Cont....**

<b>Awards</b>	
43 x €60,000	€ 2,580,000
2 x €80,000	€ 160,000
2 x €100,000	€200,000
<b>Total</b>	<b>€2,940,000</b>

<b>Scheme Costs</b>	
Out of the 47, 32 successful applicants employed Solicitors and/or paid for expert reports. The application costs amounted to:	€84,020.16
Two applicants required MRI scans due to unavailability of medical records/theatre register:	€400.00
<b>TOTAL</b>	<b>€84,420.16</b>

Five of the 47 successful applicants had issued proceedings and this was added to the legal costs:

<b>Legal Costs</b>		
<b>LHPS</b>	<b>Professional Fees</b>	<b>Outlays in connection with proceeding</b>
700315	€7,380	€7,248.84
696794	€3,690	€4,020.60
699301	€3,690	€1,154
701042	€7,380	€2,566.30
700628	€7,933.50 <sup>(1)</sup>	€2,363.23
<b>Total</b>	<b>€30,073.50</b>	<b>€17,352.97</b>

<sup>(1)</sup> This figure includes a small sum for disbursements paid in connection with the proceedings.

## Awards of Redress

Awards of redress of €60,000, €80,000, or €100,000 were made to successful applicants. The amount awarded to each applicant was calculated as follows:-

Where an applicant at the time of the unwarranted oophorectomy had:

- 2 or more children, she got 1 point.
- 1 child, she got 2 points.
- No children, she got 3 points.

Applicants **also** got 1 point for being over 40 years of age at the time of the unwarranted oophorectomy.

The levels of awards were made based on the total number of points each applicant accumulated and were as follows:

Applicants with	
2 points got	€ 60,000
3 points got	€ 80,000
4 points got	€100,000

Awards totaling €2,940,000 were made to successful applicants in the following denominations:

Awards	
43 x €60,000	€ 2,580,000
2 x €80,000	€ 160,000
2 x €100,000	€200,000

## Missing Records

In a small number of cases the applicants' medical records could not be found. The Scheme was drafted to accommodate these applicants and provided that they could still apply to be admitted into the scheme. These applicants did not have to furnish the Scheme with a Gynae report detailing whether the operation was warranted but they had to prove that they had had the index operation. We assisted these applicants by:

- Writing to the Hospital and requesting a copy of the theatre register detailing the procedure which they underwent,
- Obtaining from the Hospital copies of the pathology records detailing the specimens excised.

Where these records were not available we sought:

- Copies of the Applicant's GP records.

In a small number of cases we sought confirmation of the absence of ovaries by way of ultrasound/MRI. SCA absorbed the costs of the MRI scans (€200 per applicant x2).

### **Determinations**

Each application, together with the supporting documentation, was considered and reviewed by a Senior Member of the Clinical Claims Team, the Head of Clinical Claims and the Director of the State Claims Agency. In a small number of cases the Applicant or her legal Advisors were asked to submit further evidence before a decision was made, the final decision was made on the 'balance of probabilities'.

### **Refusals**

Of the 100 applications, 38 applicants were refused for the following reasons:

The qualifying operation was warranted/ "not unwarranted"	<b>16</b>
Non Qualifying Operation/Procedure	<b>7</b>
Non Qualifying Operation/Procedure <u>and</u> Applicant under 40 years of Age	<b>7</b>
Non Qualifying Operation/Procedure <u>and</u> Operation/Procedure not performed by Dr Neary	<b>2</b>
Non Qualifying Operation/Procedure, Operation/Procedure not performed by Dr Neary <u>and</u> Applicant under 40 years of Age	<b>1</b>
Qualifying Operation was not performed by "Dr. Neary"	<b>2</b>
Applicant not eligible on Age Grounds alone	<b>3</b>

### **Scheme Costs**

It was not intended that applications to the Scheme would be contentious in nature; however, provision was made for applicants who wished to consult with a solicitor for legal advice/assistance in applying for payment under the Scheme. The Scheme allowed for a sum up to, but not exceeding, €5,000.00 (five thousand euro) plus VAT to be paid over and above the award for professional assistance and/or advice in connection with applications to the Scheme. This sum included all costs incurred in the making of the application whether for legal fees, medical opinion, advice or otherwise, including any cost incurred in consulting counsel on the adequacy of such award.

<b>Scheme Costs</b>	
32 successful applicants employed Solicitors and/or paid for expert reports. These costs amounted to:	€84,020.16
Two applicants required MRI scans due to unavailability of medical records/theatre register:	€400.00
<b>TOTAL</b>	<b>€84,420.16</b>

Considerable cost savings were negotiated with applicants' solicitors. Savings of over 55% were achieved over what had been provided for.

At the conclusion of the Scheme six applications remained incomplete. We wrote and called each of the six on a number of occasions. We confirmed to each that the Scheme was nearing completion. We offered each Applicant assistance to complete the application and told them that financial provision was available for them to retain legal assistance etc. if they wished to retain a solicitor. Despite this none of the remaining applicants made any effort to complete the process. We believe that none of these applicants will have grounds to Judicially Review our decision to finalise the Scheme without their applications being complete.

### **Legal Costs & Outlays Associated with Proceedings**

Provision was also made for Applicants who had already incurred legal costs in proceedings arising from the unwarranted oophorectomy performed by Dr. Neary. These costs were only paid to applicants whose application was successful; furthermore, the proceedings had to have been commenced, or the Defence delivered, prior to the 9<sup>th</sup> March 2011 the date the Government came into office.

The sums awarded were:

- Not more than €3,000 plus VAT for solicitors' professional fees in respect of proceedings,

- Not more than €6,000 plus VAT for solicitors' professional fees in respect of proceedings where a **Defence** was delivered,
- Vouched and reasonable outlays arising prior to 9 March 2011.

Five successful applicants had proceedings in being on the cut of date of the 9<sup>th</sup> March 2011.

The following Legal Costs were paid to successful applicants solicitors:

<b>LHPS</b>	<b>Award</b>	<b>Professional Fees</b>	<b>Outlays</b>
700315	€60,000	€7,380	€7,248.84
696794	€60,000	€3,690	€4,020.60
699301	€60,000	€3,690	€1,154
701042	€60,000	€7,380	€2,566.30
700628	€80,000	€7,933.50 <sup>(1)</sup>	€2,363.23
<b>Total</b>		<b>€30,073.50</b>	<b>€17,352.97</b>

The applicant Solicitors were **also** entitled to Scheme costs, only 3 of the applicants' solicitors sought both Scheme and Legal Costs.

<sup>(1)</sup> This figure includes a small sum for disbursements paid in connection with the proceedings.

## Judicial Review

S. 11 (9) of the Lourdes Hospital Payment Scheme provided that

*“All determinations of the Agency shall be final”*

In four cases, applicants, through their solicitors, threatened to issue Judicial Review proceedings in relation to the refusal of the Agency to award redress to the Applicants. The Agency sought the assistance of Junior Counsel and sent a further letter to each of the applicants who had threatened to take the JR proceedings arising from the decision of the Agency. In each case, the applicants argued that the operations must be deemed “medically unwarranted” on the basis that no informed consent was granted.

In turn, the agency wrote to each of the Applicant’s in the following terms

*“any determination on the nature and quality of consent is **outside the scope of this Scheme** and is not, ... an appropriate matter for consideration by the Claimant’s medical expert but rather is a matter for determination by a Court having heard all the relevant evidence in respect thereof”*

It was also indicated to the Applicant’s solicitors that:-

*“It is always open to your client to challenge the performance of her operation on the basis of an absence of informed consent by way of court proceedings against Dr Neary and the existence of this ex gratia scheme does not in any way preclude or prejudice this course of action”*

Thankfully, in each of the below listed cases, the threatened Judicial Review proceedings did not materialise.



The issue of Judicial Review arose in the following cases:-

LHPS	Solicitor	Reason For Refusal
696067	MacGeehin Toale	The Plaintiff's expert had concerns in relation to the consent process. He neither expressly nor implicitly implied that Dr Neary's decision to perform the BO was "medically unwarranted".
696352	MacGeehin Toale	The Plaintiff's expert had concerns in relation to the consent process. He neither expressly nor implicitly implied that the Dr Neary's decision to perform the BO was "medically unwarranted".
697202	MacGeehin Toale	The Plaintiff's expert had concerns in relation to the consent process but he neither expressly nor implicitly implied that the Dr Neary's decision to perform the BO was "medically unwarranted". In fact he wrote that <i>"logic dictated that, in a woman of forty eight years old, bilateral oophorectomy was the most prudent course of action"</i>
699747	Thornton & Co.	The Plaintiff's expert was very critical of Dr Neary's decision to perform the BO without consent but this did not amount to a finding that the BSO was "medically unwarranted".

### Applications deemed “Warranted” or “Not Unwarranted”

(In most cases the retained experts were critical of the pre-operative consent/counselling process)

	<u>LHPS No.</u>	<u>Reason for Refusal as per Expert Report Furnished by Applicant</u>
1	696264	Operation not “unwarranted” but expert was critical of the consent process
2	698565	Operation not “unwarranted” but expert was critical of the consent process.
3	696682	Operation not “unwarranted”.
4	696352	Operation not “unwarranted” but expert was critical of the consent process
5	696634	Operation not “unwarranted” but expert was critical of the consent process
6	697202	Operation not “unwarranted” but expert was critical of the consent process
7	697275	Operation not “unwarranted”.
8	698616	Operation was warranted.
9	698093	Operation not “unwarranted” but expert was critical of the consent process
10	701526	Operation was warranted
11	696067	Operation not “unwarranted” but expert was critical of the consent process
12	699747	Operation not “unwarranted” but expert was critical of the consent process
13	701590	Operation not “unwarranted” but expert was critical of the consent process
14	700296	Operation not “unwarranted” but expert was critical of the consent process
15	701562	Operation not “unwarranted” but expert was critical of the consent/counselling process
16	700923	Operation not “unwarranted” but expert was critical of the consent/counselling process
17	701778	Right salpingo oophorectomy = not a qualifying operation/procedure
18	701727	Hysterectomy = not a qualifying operation/procedure
19	701681	Left salpingo oophorectomy = not a qualifying operation/procedure
20	700449	Left salpingo oophorectomy = Non qualifying operation/procedure
21	701854	Poor outcome from the delivery of her baby by Dr. Neary = not qualifying operation/procedure

22	701761	Sub Total Hysterectomy, ovaries conserved = not a qualifying operation/procedure.
23	701628	Left salpingo oophorectomy/procedure

**Non Qualifying Operation/Procedure and Applicant under 40 years of Age**

24	701724	Left salpingo oophorectomy = not a qualifying operation/procedure. Applicant 37 years of age.
25	701396	Left salpingo oophorectomy = not a qualifying operation/procedure. Applicant 38 years of age.
26	701260	Right salpingo oophorectomy = Not a qualifying operation/procedure. Applicant 35 years of age.
27	701428	Sub Total Hysterectomy = not a qualifying operation/procedure. Applicant 36 years of age
28	701471	Left salpingo oophorectomy = not a qualifying operation/procedure. Applicant 29 years of age.
29	701872	Third Degree Tear = not a qualifying procedure. Applicant 36 years of age
30	699429	Left salpingo oophorectomy = not a qualifying operation/procedure. Applicant 36 years of Age

**Non Qualifying Operation/Procedure and Operation/Procedure not performed by Dr Neary**

31	699531	Left salpingo oophorectomy = not qualifying operation/procedure. Not performed by Dr. Neary.
32	701324	Sub-total hysterectomy = not a qualifying operation/procedure. Performed by another doctor.

**Non Qualifying Operation/Procedure, Operation/Procedure not performed by Dr Neary and Applicant under 40 years of Age**

33	698180	Hysterectomy = not qualifying operation/procedure. Performed by another doctor. Applicant was 39 years of age.
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**Operation/Procedure not performed by “Dr. Neary”**

34	700494*	Operation/procedure was <b>unwarranted</b> <u>but</u> was not performed by Dr. Neary
35	701578	Operation/procedure not performed by Dr. Neary but was warranted.

\*This was a very tragic case where the Applicant was relatively young at the time of the operation and Dr. Neary's locum was directed by him to perform a BSO. The Applicant's expert opined that there was no clinical or surgical necessity to perform this operation. Unfortunately, the Applicant could not succeed under the terms of the Scheme as Dr. Neary did not perform the operation.

**Applicant not Eligible on Age Grounds alone**

36	700734	Bilateral Salpingo Oophorectomy was not warranted but applicant could not qualify on age grounds. 38 years of age at time
37	701548	Caesarean Hysterectomy & Bilateral Oophorectomy when applicant was 39 years of age.
38	699452	Removal of last remaining ovary when applicant was 34 years old

**Intimated but not pursued/Withdrawn**

	<u>LHPS</u>	<u>Age at Surgery.</u>	<u>Surgery</u>	<u>Status</u>
1	699913	48	Hysterectomy	File Closed
2	701214	56	Vaginal Hysterectomy	File Closed
3	699261	46	TAH & BSO & Imp	File Closed
4	700245	40	TAH & BSO	File Closed
5	696320	45	TAH, BSO, Imp	File Closed
6	696619	45	TAH, BSO, Imp	File Closed
7	699410	41	TAH, BSO, Imp	File Closed
8	699365	40	TAH, BSO	File Closed
9	701278	46	TAH, BSO	File Closed

10	696957	40	Hysterectomy	File Closed
11	700663	49	TAH, BSO	File Closed
12	698211	51	Hysterectomy	File Closed
13	700259	51	Hysterectomy	File Closed
14	701735	50	Hysterectomy	File Closed
15	701770	41	Hysterectomy	File Closed

- \*     TAH = Total Abdominal Hysterectomy  
        BSO = Bilateral Salpingo Oophorectomy  
        Imp = Implanon, a medical device to provide HRT