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EJC/NW/C1431(misc file)

11th May 2018

Hon. Mr. Justice Peter Kelly,
President,
High Court,
Four Courts,
Dublin 7.

Re: Review of the Courts Civil Procedures

Dear President,

I trust this letter finds you well.

I wrote to you on the 3rd October 2017 (copy attached). I hope that you found it useful.

The more I reflect on this matter, the more I am convinced that reform in Pleadings are urgently required. Media reports suggest that a work shop was held in the recent past, and that, amongst the ideas mooted, were the following :-

1. Querying the necessity for discovery and the costs thereof.

2. The high costs of litigation and the possibility of putting a cap on costs.

Firstly, may I respectfully make an observation in relation to discovery. I have to say that, I have found the discovery process extremely useful. It is particularly useful in medical negligence cases, where you get protocols, risk management reports, the patients' records and the like. I also find, if I can put it crudely, that it puts 'manners' on a Defendant who knows that discovery has been obtained, and they are a bit more circumspect about what they say and what they do not say.

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I have often heard it said that big Corporations are oppressing litigants with a tsunami of discovery. As someone who has acted for Plaintiffs in complex litigation from time to time, I have never had this experience, and I wonder, in a rather preserve way, is this a complaint of the large well financed Defendants purporting to speak on behalf of Plaintiffs, who may be taking them on.

Turning to the second issue, may I observe as follows. Recent events (particularly the Vicky Phelan case) have got people to focus on the necessity for mandatory disclosure. As you know, the Francis Inquiry in the UK investigated the adverse events that occurred in the Mid Staffordshire area. Mr. Francis QC unequivocally recommended mandatory disclosure to be backed up by criminal sanctions if in default. I cannot understand why we cannot have a similar obligation in relation to pleadings by Defendants. The State Claims Agency indicate that well over 90% of their cases settle, but they are a bit coy about saying at what stage in the process they settle. I think that lawyers know that the cases settle very late in the day. From speaking to defence lawyers, and from my own experience, it is quite clear that the reason that they settle so late in the day, is because lack of focus is brought to bear on the case, until the prospect of a Court date looms, when of course focus is then necessary. If the time to focus could be brought forward to the time of filing the Defence, there would be a lot of unnecessary trials (and discovery) avoided. If a Defendant had to plead, with particularity, what happened and why it happened, and if such a pleading had to be backed up by an Affidavit of Verification, together with penalties for a false pleading, then focus would indeed be brought to bear on the content of a Defence. At the present time, we have nothing but blanket denials (notwithstanding S12 of the Civil Liability and Courts Act 2004). The high point of a positive plea, is to the extent, in medical negligence cases, that it might be pleaded that the Defendant followed recognised practice, without giving any further information. That type of generalised pleading and general traverses, in my respectful view, has no place in a modern developed system of justice.

Clients of mine wait, with a sense of expectation, for the Defence to be filed, so that they can see what the Defendant is saying about their adverse incident. Unfortunately when a Defence is served, the clients are no wiser.

The evils that you have correctly identified of high costs and problems with discovery could be removed by a pen stroke if such a reform was put in place. I would urge you to give serious consideration to this proposal.

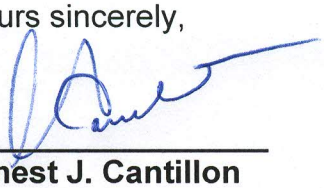
I should add that I recognise problems with the proposal for a Defendant to plead truthfully. One of the most apparent problems that might be cited against it, is that it

offends against a perceived right against self-incrimination. If there is such a right, then it comes at too high a cost, and we just cannot afford to indulge it. That is the answer to it, if there be such an obstacle. Further, of course, if a Defendant wishes to defend a case, he is going to as a minimum, have to put in cross examination of the Plaintiff (and his witnesses) his case and further may well have to go into evidence. In reality, all one is doing by requiring truthful specific pleadings is bringing forward in time, the point at which the Defendant has to put his cards on the table, as it were.

I can elaborate on this matter if you wish.

Kind Regards,

Yours sincerely,



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EJC/NW/C1431

3rd October, 2017

Hon. Mr. Justice Peter Kelly,
President,
High Court,
Four Courts,
Dublin 7.

Re: Review of the Courts Civil Procedures

Dear President,

At the outset, may I wish you every success in this long awaited review. I would like to make two brief observations (which I can elaborate on if necessary).

(A) **Contents of the Defence**

One of the reasons I believe that cases take so long to settle, is because of the inability (or failure) of Defendants to face up to the matter at issue, in a meaningful way. At the present time, by virtue of the manner in which Sections 12 and 13 of the Civil Liability & Courts Act 2004 is interpreted, a Defendant continues to put in mere traverses by way of Defence. One has no idea, from reading a Defence, as to what a Defendants position is. Defendant Lawyers are under no pressure to find out what their true position is, until they come to Court. That is when the case settles. I believe that, if one can bring forward in time, the focus that needs to be brought to bear on the issue by the Defendant, there is a greater prospect of cases resolving earlier and cheaper, with the consequent benefit to the public.

On reading Defences, one can say that perhaps, strictly speaking, a Defendant has complied with Section 12 of the 2004 Act. He / She will:-

1) Specify the allegations that do not require proof (usually the name of the parties!).

2) The allegations that he / she requires proof of (usually every allegation).

3) The Defendant will set out the grounds for which he / she are not liable, usually because it is set out that they have no liability! Hardly illuminating.

4) One may get some flavour of the Defence, if there is an allegation of contributory negligence, but that often is a generalised plea, such as "*failure to mitigate*".

If a Defendant had to set out what his / her position was with particularity, that would require focus to be placed at the time of the Defence, particularly when such a Defence has to be verified by Affidavit.

I appreciate that the traditionalists will suggest that the Plaintiff carries the burden of proof. That is undoubtedly so, and I do not think that that position should be altered. Traditionalists will also say that one has a right against self-incrimination. That is also so, but I think that, unfortunately, that right has come at too high a cost, in terms of the expense that is now associated with litigation, which expense can be removed, if a Defendant has to set out their stall with some particularity.

At a practical level, it is very difficult to try and explain the position to a victim of a tortfeasor. Such a person may be a patient who has been the victim of medical negligence, or indeed a victim of a hit and run. Such persons often anxiously await the Defence, which they anticipate will tell them what the position of the Defendant is. They are perplexed when informed that the Defendant is declining to set out the position. They cannot understand that a society should tolerate such a process, and I cannot justify it.

May I respectfully draw attention to the obligations on a Plaintiff to plead, with considerable particularity, his / her case, and the (some might call draconian) provisions that apply if he / she oversteps the line by exaggerating the case.

(B) **Time Limits**

The time limits set out in the Rules of the Superior Courts are universally ignored. The time limits set by the Court for filing of pleadings are largely ignored. There is little or no penalty imposed upon a party in default. The Plaintiff invariably has to chase and pursue a dilatory Defendant. In fact, some State Departments are the

most egregious offenders. It is as if, at times, different Rules apply to the State, and they seem to be indulged. One would have thought that it is the State who should be setting the standard, but that is not the position. It strikes me as being fundamentally unfair whereby one goes through the bureaucracy of having to send various warning letters, and then bringing a Motion, for example in default of Defence, and then a Defendant is given a further 6 weeks, and that time limit is just ignored. The Plaintiff then has to return to Court, when the defaulting Defendant may, yet again, get further time, and this 'merry go round' can be perpetuated, until ultimately Judicial patience will be lost. However, it seems to me to be fundamentally unfair that a defaulting Defendant should be indulged to this extent. Should the tables not be reversed, so that the party in default has to come back to Court if they want further time. In other words, that if a Motion for Judgment is brought that the standard Order should be that Judgment should be granted, unless the Defendant files their Defence (or whatever pleading is in default) within the period. If they want further time, the onus should not be on the innocent party (in terms of time) to have to continually hound a defaulting Defendant. The times set out in the Rules, and / or the times Ordered by the Court, should mean something. They will only mean something if there is a sanction that is meaningful. There is no meaningful sanction at the moment.

In short, Unless Orders need to be the norm, and the obligation placed on the defaulting party to look for time, rather than the obligation being placed on the innocent party to pursue the defaulter.

I hope these thoughts are helpful to you in your deliberations.

Yours sincerely,

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