INSURANCE IRELAND SUBMISSION TO THE REVIEW OF THE ADMINISTRATION OF CIVIL JUSTICE – IMPROVING PROCEDURES AND PRACTICES

15th February 2018

INTRODUCTION

Insurance Ireland is the representative association for insurance companies in Ireland. Our members are major providers of cover against liabilities incurred by Irish individuals and businesses. As such, our members are regular and major users of the legal system and courts and have a keen interest in the review of the administration of civil justice in the State. We therefore thank the Review Group for the opportunity to make this submission on improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure.

GENERAL COMMENTS ABOUT RULES

We believe that the Rules of Court should be streamlined and consolidated. Court jurisdiction specific rules are not necessary. Generic cross jurisdictional rules would be preferable with specific case management rules for designated areas like personal injury.

The rules should be a live document annotated and updated with interpreting caselaw and incorporating amendments rather than piecemeal amendment.

CASE MANAGEMENT AND PRE-ACTION PROTOCOLS

The High Court Working Group on Medical Negligence and Periodic Payments (of which Insurance Ireland was a member) produced a report (Module 2) in 2012 on pre-action protocols followed by a report on case management (Module 3) in 2013. Draft rules of court for case management of clinical negligence proceedings were appended to the latter report, which the Working Group envisaged as operating in conjunction with the pre-action protocol recommendation in the Module 2 report. While these reports dealt with clinical negligence specifically, many of the recommendations of these reports could equally be applied to personal injury claims in general.

We note the recent statutory consultation on pre-action protocols for clinical negligence actions following on from these reports. We also note the Rules of the Superior Courts (Conduct of Trials) 2016(SI 254 of 2016) and the Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016(SI 255 of 2016). There is merit in ensuring that all existing case management/pre-action protocols introduced to date such as these Statutory Instruments are made fully effective by applying them to personal injuries actions.

The High Court Working Group Report on case management (Module 3) recalled the 2001 Case Management Group report, which concluded that the inefficiencies in the system of civil litigation at that time could be addressed by "…. (a) strict enforcement of the existing rules, (b)

changes to specific rules and (c) active judicial case management where appropriate." One could argue that this conclusion is equally true today.

In theory, litigation in personal injury claims could be avoided if pre-action protocols were introduced. Their introduction would encourage more pre-action contact between the parties, there would be better and earlier exchange of information and the parties would be more likely to settle claims without litigation. If litigation were to become a last resort as a result of pre-action protocols, there would be savings in terms of legal costs.

Where cases are litigated, case management would have a significant effect on the speed of resolution of disputes as the timetable of claims would be more tightly controlled. Alternative methods of dispute resolution should be encouraged within case management.

Case management combined with pre-action protocols in civil actions would be very welcome. The template is there in the above-mentioned High Court Working Group reports. We accept that substantial changes of this nature would take time to implement and are to a large extent dependent on judicial resources. In the meantime, strict enforcement of the existing rules combined with some rule changes would improve procedures and practices to the benefit of all.

PERSONAL INJURY SUMMONS AND REQUEST FOR PARTICULARS

When issuing a personal injury summons there should be a requirement to provide all medical reports, medical records for five years pre-accident and since the accident, expert reports and supporting documents for any claim made on which the summons is based.

There would then be less need for particulars on the basis that details of loss of earnings, potential loss of earnings, special damages and details of previous accidents and medical conditions would have been provided from the outset. If not, then the defendant should be entitled to all of that information in replies to particulars.

Ideally, exchange of information should be streamlined, and reports should be exchanged which would remove the need for further particulars.

AFFIDAVITS OF VERIFICATION

The Affidavit of Verification procedure has some disadvantages:

- Additional expense on both sides
- Delay in the process of swearing and filing Affidavits which is a burden on both sides
- Additional storage space required in solicitors' offices and presumably court offices
- Failure to distinguish between assertion of fact and assertions of law.

Four or five affidavits may be required in each case. The multiplicity of "rubber-stamping" affidavits takes away from the solemnity and care that should be taken with a sworn document. It produces a tension between the necessary procedures, (personal attendance at the office of an independent solicitor, swearing on the Bible, production of ID) on the one hand, and the necessity to produce multiple routine Affidavits. Any issues arising out of the Affidavits of Verification, such as errors or inconsistencies, will not emerge until the hearing.

In short, Section 14 Affidavits do not work very well in practice. Instead we suggest that each party to litigation should be obliged to file a declaration that they approve of the pleadings in their case when the Notice of Trial is served.

DISCLOSURE IN PERSONAL INJURIES ACTIONS

Our view is that there should be increased transparency in all litigation and a culture of disclosing information and documents should be fostered. To this end all litigation could be modelled on the District Summons for a debt, which requires a list of all documents being relied on to be included in the pleadings.

The SI 391 of 1998 rules, if enforced, would remove the ambushing of Defendants in the run-up to a trial and ensure no further delays or adjournments are required. It would also enable the defendant to consider all relevant pertinent factors when considering an offer to be made that is fair and appropriate for the claimant's loss. The rules specifically state that, within one month of service of a Notice of Trial, the Plaintiff must provide the Defendant with their Schedule of Witnesses (to include expert witnesses), and their Schedule of Special Damages. The Defendant must then, within 7 days of receipt, provide their Schedule of Witnesses (to include expert witnesses). 7 days thereafter there should be a mutual exchange of reports. This rarely occurs, and the norm is to receive reports the day before or day of trial, or in other circumstances a listing of special damages with TBC assigned. The rule could be that all reports have to be furnished within 60 days of receipt and if not done so costs and other penalties follow. The same disclosure rules should apply in the District, Circuit and High Courts.

We would suggest that before a case can be listed for trial by application for a date in Dublin or at a provincial High Court call over, there should be evidence of full compliance by the parties with SI 391 of 1998 to include disclosure of expert reports and a full statement of special damages duly vouched being produced. This would also stop the practice of last minute medical reports, necessitating last minute adjournments and would allow the defence to properly prepare for trial. It could be open to a Court to impose a costs penalty on parties who have confirmed compliance with SI 391 of 1998, but who then subsequently amend their schedule or make an additional claim for special damages. Cases should not be listed for trial unless the parties have certified compliance with SI 391 of 1998 in all respects and that no amendment to same is foreseeable by either party.

Sharing of Court booklets digitally should be the norm. One set of agreed booklets should be used for every Court hearing and application. The party calling the case on or moving the application should produce the book.

EXPERTS AND WITNESSES

We believe that report(s) from a single independent expert (medical, engineering etc) should suffice for a set of proceedings. The adversarial aspect of involving two sets of experts in a case is a cause of major cost and delay.

We note that independent medical experts for assessing injuries are commonplace across Europe and we believe independent experts would assist the assessment of injuries in a non-adversarial manner. It is noteworthy that a similar system exists for the Department of Social Protection's Disablement Benefit Scheme.

The Personal Injuries Commission (on which Insurance Ireland is represented) considered this matter in its December 2017 report. Rather than recommend the use of an independent medical panel in court proceedings, the Personal Injuries Commission(PIC) recommended the promotion of training and accreditation of medical professionals as the PIC felt that an independent medical panel would give rise to constitutional issues.

Insurance Ireland obtained Senior Counsel's opinion on the matter, which we shared with the PIC. This opinion outlined how a system of independent medical experts could work without giving rise to constitutional issues. The starting point would be that the issue of expert evidence would be dealt with by a single medical expert appointed by the court but that either party could nonetheless apply for liberty to call expert evidence. Our view is that the balance between the effective management of the litigation process and the rights of all parties would be achieved through such a mechanism.

The PIC noted in its report the recommendations of the Law Reform Commission(LRC) in relation to expert witnesses in the LRC's 2016 Report on Reform of the Law of Evidence. In particular, the PIC noted the LRC's recommendations to the effect that it be set out clearly in statute that the duty of an expert witness lies to the court and not to the party who has hired them. The PIC stated that it would see progress on many of these key recommendations as central to improving the effectiveness of expert witnesses in terms of their value in assisting the courts. Insurance Ireland would agree with this conclusion.

We would say that, prior to the trial date, all expert reports should be agreed – only in exceptional circumstances should reports be submitted where not agreed. The expert reports should be accompanied by a signed statutory declaration from the expert recognising their obligation to the court and not the parties. A costs implication should apply where the court deems that the non-agreed report ought to have been signed.

Where a witness is to give evidence, we suggest that evidence is taken on commission (similar to depositions) and this evidence is compiled in a booklet for presentation to the court. This would reduce the court time at hearing and reduce the costs for parties having to pay for witnesses. There should be a penalty for failing to serve all reports prior to the service of Notice of Trial (or other stage).

Oral depositions are commonplace in the USA. An oral deposition could even be captured on camera so that a judge can later view the footage if necessary. Oral depositions could assist in reducing the length of certain trials or even eliminating them. Such depositions could be accompanied by certain consequences for a plaintiff who fails to answer satisfactorily the net points that are raised in the deposition, e.g. a plaintiff should be at risk of a security for costs application.

SETTING DOWN FOR TRIAL

Compliance with SI 391 of 1998 on disclosure of expert reports and supplying a statement of special damages duly vouched is essential to ensure that cases are ready when listed for trial. Many Plaintiffs set down cases for trial in circumstances where a trial is perhaps 18/22 months away and so there is no incentive to comply with SI 391 of 1998.

There is merit in introducing a system of parties/plaintiffs completing a Certificate of Readiness in personal injury cases before a list number or court date is assigned. There is often a huge delay in getting cases listed for trial before a judge who has the time to hear them. The greatest factor in getting a case resolved is to have it listed for trial before a judge with some certainty that it will be heard. We currently operate a system where many cases are listed with no reality of many of them being heard and resolved (unless they are settled by the parties). Many hours are wasted, and much cost is expended in preparing cases for trial when in fact they are not going to be reached or listed and inevitably have to be adjourned, only to be rearranged on the next occasion.

A case should not be permitted to be called on for hearing without full compliance with SI 391 of 1998. Without such compliance a Certificate of Readiness should not be issued.

LIST MANAGEMENT

We believe that the way in which the Courts Service list cases for hearing could be improved. Often, a day long liability case is listed for hearing together with a back-up list which can often contain a number of liability cases. As these cases are listed for trial they need to be prepared and costs are incurred, even when they often have no chance of being reached.

The lottery system for the hearing of High Court cases in Dublin should be reformed. A case might be one of 10 cases which could be heard on a given day, and this rolls over all week with the list getting longer. It is necessary to go through the work of preparing for a hearing including putting witnesses on standby at significant expense, often without any realistic prospect of the case being heard. We would suggest that medical negligence cases should be put into a list separate to the ordinary Personal Injuries list. Specially fixed cases should also be put into a separate list. Cases which are expected to run for a considerable period of time (we suggest longer than four days) should be required to be specially fixed. Cases which have been settled should be notified to the court office well in advance of the court date so that lists can be up to date and accurate by the date of hearing..

We would advocate that more judges be appointed to deal with court lists in arrears in venues throughout the country. Where there are significant arrears, rather than assigning two High Court judges on Circuit, four High Court judges could be assigned per provincial sitting. In certain venues, there are sufficient courtrooms to accommodate this suggestion. If the system becomes more efficient and cases listed have a reasonable chance of getting heard and concluded, this will provide a more effective outcome for court users. For Circuit Court cases a permanent Civil Circuit judge should be appointed to sit on a continuous basis on circuits with significant arrears. At present, not all Circuits have a permanent civil judge.

From a practical point of view there is a wide divergence between how High Court cases are listed and dealt with in provincial venues. For example, at Galway High Court there is no delay once Notice of Trial is served and the case is listed at the next session. In other provincial venues there is often a delay of 18 months from service of Notice of Trial to actual trial on circuit before the High Court. This delay could even be as high as 22 months in some venues. There should be no bar to a party setting down cases for trial at a different provincial venue where the list is shorter and where the parties agree. Currently it is possible to have provincial cases listed for trial in Dublin if the parties agree and this is of some assistance, although inevitably it brings one into the lottery system that currently operates at Dublin High Court for personal injury cases.

COURT SITTING TIMES

The working hours of the courts and court offices should be extended to 9am – 5pm. The legal terms in the High, Circuit and District Courts should be uniform and should be extended to complement normal working hours. It should be possible for the parties to make an application for early or late court sittings. Cases are usually heard between 11:00 am and 1:00 pm and then 2:00/2:15 pm to 4:00 pm. However, there is a big difference between one day's costs and two days' costs if a case runs into a second day, even by an hour or so. It should be possible for any party to make an application that the court sit earlier or later, and the parties should be encouraged to do so when in all likelihood the case will run and all it requires is hearing time. Then the case that might finish in five/six hours of hearing time will only yield one day's costs and so result in a saving in terms of costs.

TENDERS AND CALDERBANK TYPE OFFERS

The tender process in the High Court should be the same as in the Circuit Court. A Defendant should be able to tender at any point in the litigation process. The current rules around tenders mean that a Defendant can tender with their Defence or 4 months after service of the Notice of Trial. If the Defendant does not know the full extent of the Plaintiff's claim (sometimes because the Plaintiff has not complied with SI 391) the tender is unlikely to be accurate and will not prompt the Plaintiff to seriously consider it before proceeding further down the litigation process. Bearing in mind that a Defendant can only tender twice in any claim, putting in a strong tender becomes a "shot in the dark" as opposed to a well thought out figure.

We would also suggest that the parties should be allowed to make Calderbank type offers at any stage and as often as they like, and cost penalties should follow.

A system should be designed whereby a formal offer can be made by insurers post authorisation from the Personal Injuries Assessment Board and prior to issuing proceedings. Where the offer is not exceeded by the court award there should be negative cost implications. There should also be judicial buy-in to Book of Quantum updates – this would reduce problems in this area.

A tender system should be introduced for High Court taxations. There is currently no sanction for a plaintiff who proceeds to taxation.

ENDS