Submissions to the Review of the Administration of Civil Justice
- a joint submission by the Irish Hotels Federation and by BLM

This joint submission to the Review draws on a December 2017 report entitled *"Insurance and Claims Issues in Ireland"* which was commissioned by the Irish Hotels Federation from BLM, a leading insurance litigation firm with significant practice in personal injuries work in Ireland and in the UK[1]. The report was submitted to the Government's Cost of Insurance Working Group (CIWG). IHF's key concerns, and the BLM report, are referenced at page 165 of the *"Report on the Cost of Employer and Public Liability Insurance",* published by the CIWG on 25 January 2018 .

BLM's experience of civil procedure reform in other jurisdictions is that ownership or sponsorship by senior judicial figures is absolutely critical to its success. Such a feature has been a key element in England & Wales (with the Woolf and Jackson reviews), in Scotland (Gill and Taylor reviews) and in Northern Ireland (Gillen review).

We therefore very much welcome that this Review is being led by Mr Justice Kelly and that the Review Group involves judges from all levels of the Irish court system. [Mr Justice Kearns' leadership of the Personal Injuries Commission is to be welcomed for the same reason.]

The request for submissions to the Review identified five *"broad topical areas"* on which views are being sought.

(a) *Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure;*
(b) *Reviewing the law of discovery;*
(c) *Encouraging alternative methods of dispute resolution;*
(d) *Reviewing the use of electronic methods of communications including e-litigation and possibilities for making court documents (including submissions and pleadings) available or accessible on the internet;*
(e) *Achieving more effective outcomes for court users, particularly vulnerable court users.*

This joint submission, set out in the pages which follow, focuses in the main on topic (a).

It is however noted that these five topics sit within *"an overall context of improving access to justice and reducing costs of litigation"*. We fully support this overall theme and would point out that it complements the cost control, in terms of insurance claims and premium, which lies at the core of both reports of the Government's CIWG.

Given the similar focus of this Review and of the CIWG - and in the personal injuries field at least it could be argued that litigation cost is a subset of liability insurance claims cost - it struck us as that the Review Group does not appears to include a representative from either of the insurance or business sectors in Ireland. Consideration might therefore be given either to co-opting a representative from these sectors or otherwise to securing firm engagement from these stakeholder groups.

[1] https://www.blmlaw.com/about-us

Improving procedures and practices and removal of obsolete, unnecessary or over-complex rules of procedure[2]

1. Introduction of active judicial case management

Active case management puts the timetabling of the case in the hands of the court, rather than the parties, to drive efficient and timely resolution of claims and/or narrowing of issues in dispute. It relies on judges or Masters being empowered to control case timetables and to issue binding directions to parties with regard to procedural steps and, where necessary, the nature and extent of lay and expert evidence required. It also requires clear and consistently-enforced sanctions (for non-compliance with case management tasks) which could take the form of penalties by way of costs and/or prohibitions on pursuing the point(s) in default.

Judicial case management as a concept in England & Wales was initially introduced in the late 1990s in reforms sponsored by a senior judge, Lord Woolf. His recommendations were taken forward in what was then a new procedural code: the Civil Procedure Rules 1999[3].

The system which existed before its introduction was described in the following terms[4] in 1997.

> *"The court system is fundamentally adversarial in nature. Issues are resolved by argument before a judge. The system is thorough. It is also expensive. Cases take a long time to argue out. Large numbers of professionals are involved - two or more solicitors; two or more barristers; two or more expert witnesses; and a judge. Issues are debated at length, subject to rules that vary among different courts. The procedure itself can be subject to extensive argument in interlocutory proceedings.*
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> *Moreover, the system is difficult to manage. The timetable is largely in the hands of opposing professionals - the lawyers. There is high order unpredictability about when a case will be ready for a hearing; and how long that hearing will then take. So the only form of management actually practised is to ensure that the time of judges is fully used."*

The overarching solution which Lord Woolf adopted to address these problems was one of judicial case management, in which there is a much greater degree of control by the court over how cases progress and are dealt with.

Case management is a very wide field and one in which different types of claim and different values of claim may be subject to different approaches. However, it was clear that by the time of Lord Justice Jackson's report in 2010 that it properly could be said that:

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[2] For the avoidance of doubt, the use of "we" or "our" in the body of this submission refers to BLM's views as practitioners, based on our experience of handling civil litigation - and personal injuries claims in particular - in Ireland, Northern Ireland, England & Wales and Scotland.

[3] http://www.justice.gov.uk/courts/procedure-rules/civil

[4] At Chapter 2 of the Middleton report: http://webarchive.nationalarchives.gov.uk/20040722114243/http://www.dca.gov.uk/middle/chpt2.htm

> *"Case management by the court, with the assistance of the parties, was one of the cornerstones of the Woolf reforms. It is clear from the submissions and seminars during the costs review that in some areas case management works extremely well, for the benefit of all parties."*

In a recent interview in the Business Post[5], Chief Justice Frank Clarke appeared to give a firm endorsement of the greater use of active judicial case management to improve the administration of justice and the speed of case resolution. Although he did not use the exact term 'case management', it is suggested that he very clearly has the concept in mind. His remarks about the relative numbers of High Court masters are particularly striking.

> *"Noting the success of experiments such as the Commercial Court, which drastically reduced court waiting times, he is hopeful a root and branch review of civil procedures could eradicate some outdated practices that are no longer fit for purpose. His ambitions tie in with the review work on civil procedure currently being undertaken by a committee chaired by his High Court colleague Peter Kelly.*
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> *I think it needs a root and branch review but, as I said yesterday, some things that you could change would take up back up resources to be able to do them right as well. It's not just a matter of changing the rules. For example, I made the point that in the North, they have six masters of the High Court who can do administrative things before cases get to court to make sure they run smoothly. We have one."*

Although this section refers to England and Wales, judicial case management was also introduced in Scotland and in Northern Ireland in broadly similar timescales and, critically, it was also sponsored by a senior judicial figures in those jurisdictions[6].

Further work will be required to develop the nature and detail of judicial case management that would be appropriate to civil litigation in Ireland. We submit that additional Masters (as hinted at by the Chief Justice in the passage above) are required to service and properly deliver case management. However, we firmly believe that implemented effectively it will deliver efficiency in case resolution and in controlling costs and therefore meet the Review's *"overall context of improving access to justice and reducing costs of litigation*[7]*"*. Please refer to section 6 below for further comments on Masters' reviews.

2. Introduction of Pre-Action Protocols

It a trite observation that a relatively small percentage of claims end in litigation. Nevertheless, to a very great extent the Court system controls only those cases in which proceedings are commenced. The introduction of appropriate and clearly defined Pre-Action Protocols (PAPs) would in our view allow for greater efficiency in resolving cases, greater predictability from the outset for the parties involved and for flexible judicial control to be brought to bear at these pre-action stages.

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[5] Business Post 1 October 2017: "Holding Court: Chief Justice Frank Clarke" https://www.businesspost.ie/news/holding-court-399134 (subscription required)

[6] Their names are mentioned in the introduction to this submission.

[7] It should be noted that this phrase is strikingly similar to the very brief foreword adopted by Lord Justice Jackson in his 2009 review: *"In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice."*

The case for adopting such an approach in Ireland has already been accepted in the clinical negligence field. Amendments to the Civil Liability and Courts Act will (when commenced) require the Minister for Justice to make regulations detailing the terms of a Pre-Action Protocol.

It is our very firm view that the principled arguments in favour of this approach in the clinical negligence field in Ireland are equally persuasive in 'mainstream' personal injury claims, typically road traffic, employers' and public liability cases. We are therefore extremely encouraged that the introduction of PAPs is very clearly on the agenda of the CIWG and we would make particular reference to headings 10.5 and 10.6 of its January 2018 report. The report indicates that:

> *"It is envisaged that, subject to Government approval, the General Scheme of a Bill extending Pre-Action Protocols to personal injury cases will be published in early 2018."*

Examples of the PAPs which apply in other jurisdictions are readily available on line via these links:

- all PAPs applying in Northern Ireland
- all PAPs applying in England & Wales

We would draw the Review's particular attention the personal injuries protocols in both these jurisdictions and to the comparatively recent personal injury PAP introduced in Scotland. BLM would be pleased to meet with members of the Review Group to set out more comprehensively our experiences of running claims and litigation under the provisions of these various PAPs.

3. Early notification of claims in accordance with section 8 of the Civil Liability and Courts Act 2004

The two month period in section 8 for notifying personal injury claims is covered in detail in the second report of the CIWG, which states the following at page 103:

> *"… what has become clear to the Working Group is that, particularly for public liability claims, prospective defendants are regularly not informed within two months of a claim and that in such cases the appropriate balance between the rights of the claimant and defendant may be at issue."*

We recognise this state of affairs and the difficulties that defendants (and their insurers) can face due to late notification. We therefore fully support the recommendations of the CIWG to improve compliance with the section.

The CIWG also recognises that claim notification will be an integral part of any Pre-Action Protocol and it makes the point that requirements regarding letters of claims in an operational PAP will supersede the section 8 provision:

> *"… when Pre-Action Protocols are provided for in personal injury actions, and are shown to be effective and fully embedded in the overall process, a case can be made that section 8 is no longer relevant. However, the Working Group still believes that there is value in strengthening the wording of section 8 and for it to continue to apply for as long as it remains relevant."*

4. Integration of PIAB timescales and activities with PAPs

This is an important matter which arises from the consideration of PAPs and the section 8 notification period above. The essence of the point may be stated relatively briefly: it is that the greatest efficiencies of time and cost should be realised if the PIAB assessment process is properly aligned to any Personal Injury Pre-Action Protocols.

The PIAB process need not necessarily be integrated into the PAP because certain cases will not, by their nature, be suitable for the Board. However, what is required in our view is that there should be clear procedural pathways and specified timescales for appropriate cases to move from the PIAB to the PAP (or, if appropriate, in the other direction). However, without sight of the PAP currently under development (it is mentioned at the top of page 106 of the CIWG report) we are unable to offer detailed comments as to what these might comprise.

5. Introduction of fixed recoverable costs

Fixed recoverable and/or scale costs are used throughout England & Wales, Scotland and Northern Ireland in personal injuries litigation. Further proposals have been very recently published[8] seeking to introduce fixed recoverable costs in clinical negligence claims in England & Wales.

In our view, the introduction of fixed or scale legal costs merits serious consideration in Ireland. That said, the issue was side-stepped by the recent CIWG report: *"It is not in the terms of reference of the Working Group to make recommendations that determine or cap the level of solicitor or barrister fees."*[9]

We do however note that the CIWG report appears not to have received any data from Insurance Ireland which might have corroborated the observed *"stronger emphasis on legal costs in this phase* [ie in respect of employers' and public liability cases] *of its work."* The report also records the Law Society's view that *"costs have reduced over the past five years"* but it appears that here also, as with Insurance Ireland, data may not have been provided in support.

Although it is difficult to see how progress can be made on fixed costs in the absence of data from key stakeholders, we would recommend that consideration be given by the Review to a data collection or sampling exercise to inform further work. Academic / statistical support to the Review Group may need to be considered in that regard. It is worth noting that Lord Justice Jackson's review group received academic advice on fixed costs issues from Paul Fenn, Emeritus Professor, Nottingham University Business School.

It is very clear that the drivers of legal costs in England & Wales and in Ireland are entirely different and that the solutions to tackling high legal costs in Ireland - which the CIWG reports put at around 40% of the amount of compensation - will inevitably differ in detail from those adopted elsewhere. Nevertheless, we believe that the high-level arguments articulated by Jackson in his 2017

[8] https://www.gov.uk/government/consultations/fixed-recoverable-costs-for-clinical-negligence-claims
[9] Penultimate paragraph of section 7.7 at page 74.

supplemental report[10] on fixed recoverable costs (set out below) are should resonate in Ireland and are worth very serious consideration by this Review.

> *1.4 Why only restrict the recoverable costs, not the actual costs? Given the multifarious kinds of litigation it is not feasible to preordain how much clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs. This incentivises lawyers (who are in competition with one another) to keep the actual costs down, so that the client's shortfall in costs recovery (if it wins) is as low as possible.*
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> *1.5 Why is it important to control the recoverable costs in advance? For two reasons. First, this is necessary to impose discipline. The traditional approach of parties doing what they see fit, then adding up the costs at the end and recovering as much as they can from the opposing party is a recipe for runaway costs. Secondly, parties need certainty. They need to know at the outset what costs they will recover if they win and what costs they will pay out if they lose.*

6. Discrete procedural changes

This final section may touch on all five broad topical areas on which the Review has requested submissions. It is something of a 'catch all' and we have only outlined these ideas very briefly in bullet point form. We would be very pleased to develop them more fully if that were thought to be helpful.

- Greater use of telephone hearings, particularly in interlocutory matters.

  In Northern Ireland, all High Court cases are the subject of a review by the Master nine months after entry of Appearance (please refer to the PAPs noted above at section 2). The parties can attend in person, or by solicitor or counsel, in the Master's Chambers or by telephone by separate appointment with the Master's office. This latter option adds very significant efficiency, in particular to solicitor practitioners based outside Belfast. The Master reviews the case, gives directions as to further conduct, sets timetables and follow up reviews to monitor and ensure progress. When the review process is exhausted, he orders the Plaintiff to serve Notice of Trial.

- Handling of interlocutory matters by Masters rather than judges.

  It seems to us that this is an obvious point. Judges should not be hearing motions on judgment, discovery and replies to particulars. These should be dealt with by Masters to ensure that the Court system's resources are properly and efficiently deployed. Judges would be freed to hear the main personal injury actions, free to sit on Mondays, thereby reducing significantly the backlog of the heavily-loaded personal injury list.

- Electronic filing of court documents by parties.

[10] https://www.judiciary.gov.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf

- Plaintiffs' and defendants' solicitors should be required to inform the Court electronically how long applications/hearings are expected to take so that a judge (or master) can be allocated in advance. This should lead to more efficient allocation of judicial resources and to fewer short notice adjournments.

- Call-over list.

  We submit that the efficiency of the call-over list should be significantly improved[11] over the medium term by the implementation of reforms already mentioned, notably: Masters handing interlocutory matters, the use of telephone hearings and the introduction of PAPs which feature a review / 'stock take' stage. In the meantime, we would be very interested in discussing ideas for shorter term improvements in the call-over process with the Review Group.

- Expert evidence in professional negligence claims.

  We recommend introducing a mandatory requirement for plaintiffs to serve an expert report prior to the commencement of the proceedings, or at the latest, with their statement of claim setting out the essential supporting evidence for the allegations contained in it. As a matter of balance and fairness, defendants should also have to serve an expert opinion with their defence. At very least there should be a mutual simultaneous exchange by way of e-mail so that no party is taken by surprise.

- Discovery.

  This topic could easily be the subject of a full separate submission[12]. It is submitted that the discovery process in personal injury actions is unnecessarily cumbersome. Plaintiffs and Defendants are obligated to write long letters seeking discovery of obvious documents. Discovery is often agreed by way of lengthy exchanges of correspondence which it is submitted is time consuming and wasteful of costs. In other jurisdictions, the process is automatic, and is ordered by way of exchange of Lists of Documents after the close of pleadings. It is also captured in PAPs (which we reference above). If either party is unsatisfied with the opposing party's List, then they may apply for "specific discovery"; although in very many cases this is unnecessary as the PAP and exchange by List captures the obligatory categories. In addition, any default or evasion can be reviewed on application to the Master as part of the review process and neatly dealt with in that arena. This adds efficiency, saves on costs, and reduces case time lines.

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[11] It could also be addressed as part of introducing active judicial case management, as recommended above.
[12] As is clear from its inclusion as a separate topic at (b) in the Review Group's request for submissions.