AVIVA

MEMORANDUM

To: Review Group, Review of the Administration of Civil Justice

From: John Mark Downey, Aviva Legal Services Manager

Date: 14 February 2018

Subject: **Comments for Insurance Ireland submission on the Review of the Administration of Civil Justice.**

As requested on your website, please note that the submission is primarily directed at these areas that are to be reviewed by the Review Group: (a) improving procedures and practices and removal of obsolete, unnecessary of over-complex rules of procedure, (c) encouraging alternative methods of dispute resolution.

Word count: 3,198

1. Introduction:

I have been asked by John Farrell, Head of Claims in Aviva, to respond on behalf of Aviva to the request for submissions.

References to "Delaney" in what follows are references to "*Civil Procedure in the Superior Courts*" by Delaney and McGrath 3rd ed. 2012.

Because the existing litigation process is cumbersome, I have supposed that the Review Group may be interested in considering *novel* proposals for making the system more efficient (as well as considering revisions to the existing system). I have suggested one novel idea at 2.9 below – that the Review Group consider recommending the introduction of a limited form of taking evidence on oral deposition. Oral depositions have been used in the USA since the 19th century.

I have benefited from a discussion with Michael Corrigan of the firm of Corrigan & Corrigan, solicitors. Proposals 2.4 and 2.6 are his. I also benefited from a discussion with Rhona McGrath of BLM solicitors and proposal 2.3 is hers.

I see from the Courts Service annual report 2016 (the most recent one available) that there were 53,287 cases filed in the Circuit Court in that year. Of those, 12,230 were personal injury cases. In the High Court, 48,132 cases were filed. Of those, 8,510 were personal injury cases. So the insurance industry funds a considerable amount of the business of the courts. Overall, the number of personal injury cases increased by 15% in 2016.

2. Our proposals:

Our proposals are:

2.1. **Adversarial nature.** In general, we believe that the litigation process is too adversarial in nature and this causes delay and cost.

2.2. **Ambush.** Because evidence can ordinarily only be given at the main trial of an action, litigation is conducted by ambush. Our proposals at 2.8 and 2.9 are designed to address this.

2.3. **Case reviews/ case management.** We wish to endorse a proposal (that we understand will be made in a separate submission by BLM solicitors) that there be a case review within 6 weeks of the serving of a summons. At the case review, the presiding administrator or judge can establish what expert reports are needed, if liability is in issue, whether discovery is required, and so on.

A second or further case review should take place at a later stage.

2.4. **Witness statements.** All witnesses should have to provide statements. This will remove an ambush element.

2.5. **Disclosure of witnesses.** After the Notice of Trial is served, the parties are supposed to exchange their lists of witnesses. Plaintiff solicitors in personal injury cases will often introduce a loss of earnings claim at this late stage and an actuary's name and a vocational injury assessor's name will appear on the list as a result. This is claim exaggeration which has been a feature of personal injury litigation for some time.

A case that looked like a straightforward personal injury has now morphed into a situation where the insurer is being told (for example) that the claimant will not work again and the claim is on a scale that is quite different from the one originally pleaded.

Also, the plaintiff's list, when received will often include the words "(to follow)" after the names of 2 or 3 medical or other experts' names.

What is the advantage in delaying delivery of the reports? It makes it difficult for the defendant insurer to bring experts into the matter to combat the evidence introduced at such a late stage. It is an aspect of ambush litigation.

Case review would assist with this. A penalty for failing to serve all reports prior to the service of Notice of Trial (or other stage) would assist with this.

2.6. **Mediation should be compulsory.** Under the recent Mediation Act 2017, a solicitor is obliged merely to indicate to his/her client that mediation is an option.

2.7. **Single independent expert.** Report(s) from a single independent expert (medical, engineering etc.) should be all that is required 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. It is also damaging to the professions involved. It is unedifying to find, for example, a "plaintiff medical expert" opining that a person is gravely injured while a "defence medical expert" opines that there is nothing wrong with the same person.

I am aware that the Attorney General's office has given advice on this (to the Cost of Insurance Working Group or the Personal Injuries Commission, I believe). I have not seen it, but I understand that it concludes that obliging both sides to rely on a single expert would be a breach of the constitutional right of access to the courts.

I wonder if it simply a question of how a revised procedure is framed. Revised rules could perhaps state that in the first instance a single expert will be used. If a party is not satisfied with that, he/she can then opt to obtain a separate expert report. However, some sort of onus could perhaps be placed on the person seeking additional reports to show why they are required – they should perhaps have to have leave of the court to obtain them.

A single medical report is permissible in England & Wales under a pilot scheme as I understand it. England & Wales has a constitution with much the same rights as ours, albeit that its constitution is not codified in a single document as ours is.

2.8. **Interrogatories.** The rules relating to interrogatories should be relaxed. This proposal 2.8 should be read in conjunction with point 2.9.

Kelly J in his judgment in Anglo-Irish Bank v Browne 2011 noted that interrogatories are superior to discovery in some respects. They ask a direct question which must be answered under oath and once answered, they may be utilised as evidence in the trial thereby avoiding the necessity to call witnesses. (Delaney 12-04.)

However, the use of interrogatories is restricted.

(a) Unless the case involves fraud or breach of trust or is a Commercial List case, leave of the court is required before interrogatories can be served.

(b) The questions must be framed so that the answer is "yes" or "no". The accepted formula is a "*Did not …?"* or "*Has not …?"* (Delaney 12-06.)

(c) The answers are given on affidavit, so the recipient and his/her solicitor have time to formulate responses.

(d) The facts in dispute between the parties should have been crystallised as much as possible before interrogatories are delivered (Delaney 12 – 16), so the pleadings have to be closed and any discovery already concluded.

(e) A string of cases establishes that leave to serve interrogatories will only be given on an exceptional basis.

For the reasons given in point 2.9 below, I consider it would be helpful to relax the rules on interrogatories.

2.9. **Giving evidence by way of oral deposition.**

My assumption in writing the proposals in this paper is that the Review body is interested in ways to make the system more efficient. So I now canvass a procedure that is novel in the Irish context – oral depositions of the kind used in US litigation.

2.9.1 Why evidence is ordinarily given at a main trial.

Because justice is administered in public, because the trier of fact should be able to see the demeanour of a witness, and because cross-examination may be necessary, evidence is ordinarily only given at the main trial of an action. There are probably many other reasons.

Sometimes, a case can turn on some net point of fact or evidence. When the other side inquires about that point (in a Notice for Particulars or in another way), the reply will come in that this is a "*matter for evidence*". This is unsatisfactory.

My proposal is that if the principle of evidence being given at a main trial were modified to permit evidence on specified points to be taken in advance of trial by way of oral deposition, certain advantages might accrue.

2.9.2 Oral depositions in the USA.

You can read a description of USA-style depositions in Wikipedia and elsewhere. Depositions of this kind have been in use in the USA since the 19th century. I found an article by Stimmel, Stimmel, & Smith P.C. (the "Stimmel article") helpful. You can find it by doing an internet search against: "*Depositions in US litigation*" or by using this link:
https://www.stimmel-law.com/en/articles/depositions-american-litigation

The opening paragraph of the Stimmel article reads:

"*It is a unique aspect of United States litigation that the attorneys are empowered to compel both parties and witnesses to come to the attorney's office or other convenient location and examine them before a court reporter. During this process, the attorneys will have the witness sworn in as in a court of law, and question them under oath asking any and all questions remotely connected to a case and compelling the witness to answer under oath or face sanctions."*

The article continues:

"*Most civil cases are won or lost not in court but during depositions. Experienced counsel, reviewing a deposition transcript, can normally predict the likely outcome of a trial and can make recommendations for settlement accordingly."*

The writer of the article adds:

"One brilliant attorney quipped that since most cases settle before trial, most American attorneys no longer are experienced at trying cases, only in taking depositions."

The Stimmel article mentions an aspect of the procedure that seems unattractive:

"*Thus the party or witness finds him or herself being cross examined by the opposing party's attorney under oath, with all documents produced for examination, and the deposition may last hours...or days...or even weeks. This writer has known of a deposition in a major case that lasted over two months."*

2.9.3 Possible benefits of oral depositions:

Cases of insurance fraud often make it all the way to an expensive trial because the claimant cannot be challenged on his/her story prior to trial. Dozens of witnesses may have to be assembled for the trial.

Here is an example: an insured person whose business is in financial difficulty is shown on CCTV leaving his business premises at 3 a.m. five minutes before it burns down. He does not report the fire to the emergency services.

We have examples of such cases. You might suppose that the insurer will refuse indemnity and that will end the matter. Not so. The claimant often brings the claim at no risk to himself/herself. Security for costs is not usually granted against individuals who reside in the State. If the claimant loses, he/she is often not a mark for costs.

Aviva has a case of this kind running in the High Court at the moment. It will run for 3 weeks, we have 32 witnesses on our side, and the costs for our side will be €1 million. The claim is for several million Euro because we refused to reinstate the building and this has led to a large business interruption claim. It is not, of course, a typical claim, but it illustrates the issues.

Claimants of a certain stripe are calculating that the enormous costs and uncertainties (due to the aforementioned ambush element) of litigating in Ireland will cause an insurance company to make the decision to settle on economic grounds.

If the claimant in a case of the kind described above were obliged to undergo cross-examination by way of oral deposition, I believe that certain benefits would accrue. If the person has a valid explanation, that assists the insurance company to come to a decision in the matter and agree to indemnify the claimant.

If the person does not have a valid explanation, that is likely – I submit – to emerge from an oral deposition that is captured on camera so that a judge can later view the footage if need be. Of course, the person may tell lies and so it might be said that the procedure will therefore be rendered ineffective. However, if a claimant tells lies, the examining solicitor or counsel can challenge the claimant on any inconsistencies in his/her story. The claimant will not have time (as with interrogatories) to come up with answers. (There is a risk of prosecution for perjury and fraud, of course, but so far, that has not been a grave risk in this jurisdiction.)

Also, in a fraud case, it could happen that the claimant (as in the arson example above) might answer a question in oral deposition by saying that he/she refuses to answer it on the ground that it may incriminate him or her. It could be argued that this, too, could make the procedure ineffective. However, such an answer would actually be useful to an insurance company trying to decide whether to grant indemnity or not.

2.9.4 <u>Investigation difficulties:</u>

As it is, insurance companies are hampered in investigating claims. If the claimant is the insurance company's own customer, the policy will oblige the customer to cooperate fully with the investigation. It can happen that if the customer retains his/her own solicitor, the solicitor may advise the customer not to answer the insurance company's questions. (Example: the customer is a motorist who has collided with someone causing serious injury.) The insurance company can deal with that by insisting that the policy terms are complied with.

If the claimant is a third party, the situation is different. (Example: John Doe, insured by Aviva, collides with a car driven by Richard Roe. Roe, who is not insured by Aviva, sues John Doe and Aviva handles the claim.) If the claimant is legally represented, the insurance company cannot contact him/her without consent of his/her solicitor.

To the man on the street, this must seem odd. The insurance company is going to pay to sort the matter out. The company has a number of questions to ask about what happened. How did the collision occur? Who was in the car? What side of the road were you on? Do you know the other driver? And so on. We may be able to get the policy holder's view on all that, but not the third party claimant's view. (The policy holder may be in hospital or otherwise unable to give an accurate account.) Or not until a considerable time has passed. Oral depositions might assist in this area.

2.9.5 Pressure not to reveal one's hand

It is possible that some parties to litigation are compelled for tactical reasons to prolong certain sets of proceedings and that oral depositions might cure the difficulty.

If an insurance company has e.g. video evidence that is damaging to a claimant, it generally will not produce it until the trial. After the Notice of Trial is served, the parties exchange a disclosure list of the witnesses to be called. The insurance company's list will include the name of a private investigator. So the claimant may know that the private investigator has evidence to give, but no more than that.

The insurance company will not disclose the video evidence until trial so as not to afford the claimant the opportunity of finding ways to explain away the evidence. However, this means that the insurance company has made a strategic decision not to settle and a full trial with a full complement of witnesses will have to take place.

However, if the video evidence were put to the claimant at an earlier stage in an oral deposition, the surprise factor would not be lost. In the USA, as I understand it, oral depositions can be recorded on camera. Certain wholly unmeritorious claims would die at that point, I believe. The videotape of the oral deposition can be given to the Gardai – it is sworn evidence – to aid a criminal investigation.

2.9.6 Suggested parameters for revised rules permitting oral depositions:

As my proposal is novel (or so I believe), I do not know how best it may be incorporated into an Irish legal context and that is something the Review body may wish to explore.

My outline thoughts are:

(i) Leave of court is not required in the USA. However, as with interrogatories, one might consider making leave of court a requirement in Ireland but without excessive restriction.

(ii) I don't want to make an industry out of oral depositions. I am conscious of the remark in the Stimmel article that some depositions can continue for a long time. That does not necessarily make them a bad thing. However, for present purposes, I will assume that the principle that evidence should normally be given at the main trial still holds good. So the relevant rules of court should possibly limit the deposition either to (a) a net issue or to related net issues, or (b) a maximum period of time or (c) both.

(iii) It should probably not be necessary for the pleadings to be closed before one can request an oral deposition. The aim would be to allow a party to find out the essence of the other party's case at an early stage.

(iv) I don't know that permitting expert witnesses to be called to attend oral depositions would be a good idea. Obliging medical consultants to attend at oral depositions could be quite onerous for them. I think the usefulness of the procedure would mainly lie in compelling the actual named party or parties (and any key witness as to the facts) to an action to confirm or deny certain key elements of their claim or defence.

(v) I don't intend this to be available only in personal injury cases or insurance fraud cases.

(vi) I don't think it would be particularly suitable in employment cases. An accepted method for resolving workplace disputes is for an investigator to shuttle between the parties. Accordingly, at least in the early stages, the warring parties are kept apart and that is often a good thing. If an employee could oblige (drag) other employees or the employer into oral depositions that could be counter-productive unless it was agreed that an investigator would question one side at a time.

(vii) The objective of permitting oral depositions will be to eliminate or shorten the length of certain trials. Therefore, the introduction of it should be coupled with certain consequences for a claimant who fails to answer satisfactorily the net points that are raised in the deposition.

My thought is that a claimant who fails to make a persuasive case on deposition should be at risk of a security for costs application. Currently, an *individual* is not really at risk of a security for costs order, as I understand it, unless he or she is resident outside of the jurisdiction.

I hope these proposals assist.

Regards,

Yours faithfully,

John Mark Downey
Solicitor, Legal Services Manager
Aviva Insurance Limited.