Submission to the Review of the Administration of Civil Justice

1. We the undersigned being the Judges of the High Court at present assigned to the Personal Injury Lists in the High Court make the following submissions to the President of the High Court.

(a) Improving procedures and practices and the removal of obsolete, unnecessary and over complex rules of procedure.

2. In relation to all of the issues to be address by the Review, it is the opinion of the undersigned that the core consideration in reviewing cost efficiency and reform in the conduct of litigation and especially Personal Injuries litigation is to ensure that the case proceeds to trial as speedily as possible. The Review should be weary of measures that require court time to attempt to *"narrow the issues"*. It is, of course, flattering for the judiciary to assume that every aspect of litigation is better handled by a judge whereas, in fact, the Parties and their legal advisers are usually best place to perform this task themselves rather than complex procedures of *"case management"*. Any unnecessary delays or over elaborate procedures adopted by parties can and ought to be penalised in costs. Courts and judges should be slow to *"second guess"* the Parties as to the real issues to be tried and indeed a just determination of such matters would require, of itself, a *"mini trial"*, which would have the consequence of further delay and further costs being incurred. The appalling vista of Applications to deal with Submissions as to a future Motion dealing with the Mode of Trial of a Preliminary Issue must be avoided. Complex pre-trial procedures, which may be entirely justified in other lists, serve to increase the costs, volume and time consumed

in Personal Injury cases would result in litigation becoming more and more the monopoly of a few larger firms who could carry such pre-trial procedures.

3. Practices and procedures should not be adopted in Personal Injury litigation that increase the amount of paperwork or preliminary applications prior to the matter being set down for trial. The existing system in Personal Injury cases is reasonably efficient subject to certain possible improvements set out hereafter. A significant majority of all cases listed for trial settle prior to a determination. A considerable number of cases do not settle until after the case is listed for trial. A significant number of cases do not settle until a judge is assigned. We do not see that this practice is going to change. At the moment, once a Personal Injury case is set down for trial in Dublin, a trial date can be obtained without delay on application. The most efficient use of court time is Trial and not Pre-Trial procedures.

4. The delays that do still occur in Personal Injury cases are usually because a case is not ready to proceed to trial as, for example, the medical situation has not stabilised or the parties cannot be aware as to the extent of a loss of earnings claim. These delays are unfortunately probably unavoidable. The second major cause of delay is due to often unnecessary preliminary applications by way of motions for discovery, further particulars or motions to compel compliance with S.I. 391 when plainly it is not possible to do so. These delays can still occur notwithstanding the relative simplicity of present procedure in Personal Injury cases but may be alleviated by some of our recommendations in relation to discovery *etc*.

5. The review of administration of civil justice should be very wary of importing under the guise of *"case management"* rules which have not necessarily been successful in other jurisdictions where they have been introduced. This is certainly the view of the undersigned in relation to Personal Injury litigation. Cases are

decided by the examination and cross examination of witnesses and testing of evidence in court and the undersigned do not support arbitrary attempts to limit the number of witnesses including expert witnesses prior to their hearing. Effective sanctions against unnecessary expert witnesses should exist in judges disallowing costs even for successful parties should the case be unnecessarily prolonged or should an unnecessary number of witnesses are called. In medical negligence cases, a practice developed of more than one expert witness giving evidence on the central issue due to the constraints of the decision of *Dunne v. National Maternity Hospital* and the difficulties plaintiffs have in establishing professional negligence. The limits imposed by statutory instrument as to the number of expert witnesses could result in an injustice given what a plaintiff must prove in Medical Negligence cases. To exclude an expert *a priori* because their expertise is apparently covered by another witness prior to hearing that expert is, it seems, fundamentally unfair and to attempt to hear an expert in a *"voir dire"* application would be to add a further layer of costs to litigation.

6. It is not the experience of the undersigned that trials are unnecessarily prolonged due to an unnecessary number of witnesses being called. Expert reports are exchanged and that system is working well. To seek to compel experts, for example, to meet as a matter of course in order to *"narrow the issues"* is unreal and likely to add further costs to litigation. These meetings all have cost implications. What is in issue in Personal Injury actions is almost always clearly apparent from the experts' reports without the need for such meetings.

7. Accordingly, the undersigned recommend that the rules in relation to the number of expert witnesses be altered in the case of personal injury litigation and substituted by emphasising the power in the rules to disallow costs even to successful

parties in the event of an unnecessary number of witnesses. Further, submissions in relation to the rules of procedure will be dealt with under the headings of discovery and Alternative Dispute Resolution.

8. At present, in the Dublin Personal Injury List, a party can set the matter down for trial and have the matter listed for trial without delay. The one significant area of possible delay is in relation to Specially Fixed actions. A maximum of two Specially Fixed actions are listed in any one day. These cases have, at least, as great a propensity to settle as any other case but on occasions due to the unavailability of judges Specially Fixed cases have not been reached at the end of the week in which they are listed and consequently, a new date has to be arranged. This is an issue to be met, if possible, by the allocation of extra judges to the Personal Injuries List. On occasion, when each of the judges in the Personal Injury List on a particular day is engaged in a case already at hearing, the only possibility of cases being determined is if they are settled which is, of course, not satisfactory.

9. There are delays in trials of Personal Injury actions in Circuit venues. These delays are partially self-fulfilling as due to the known fact of delays, cases are set down for trial before they are actually ready in order to obtain an advantageous place in the queue. It is possible that a system of *"certificate of readiness"* could be introduced in Personal Injury cases in order to prevent cases being set down for hearing prior to readiness but it is unclear whether there will be any real advantage to such a proposal.

(b) Discovery

10. A significant problem causing delay and extra costs in the Personal Injuries litigation is that there are too many needless applications for discovery of documentation.

11. It is suggested that there ought to be a general obligation without court order for all parties to make discovery of any relevant documentation which may assist their case or be harmful to their opponent's case within a certain time, say eight weeks of service of the notice of trial or in the alternative, within a certain time after the defence.

12. Furthermore, a plaintiff in a Personal Injuries action should be obliged without Court Order to make discovery of their pre-accident medical records of any relevant injuries for a period of say three years prior to the accident when initiating proceedings. At present, most plaintiffs consent to making such discovery but usually motions are required which could be avoided.

13. There should, of course, also be a procedure to enable any party to seek bespoke discovery i.e. for specific and focused requests.

(c) Mediation

14. The benefits of mediation are well established. The law in relation to mediation is now contained in the Mediation Act 2017, which came into force on 1st January, 2018, which imposes on a solicitor prior to issuing proceedings a duty to advise the client to consider mediation *etc*. and allows a court to invite the parties to consider mediation as a means of resolving disputes.

15. It is not necessary in most Personal Injuries actions to advocate mediation as the parties or their legal representatives are best place to settle the issues between

them and avoid costs of mediation. However, mediation is an area of great benefit for some medical negligence actions in which the parties or their representatives, themselves, have difficulty in compromising. At present, a significant number of medical negligence cases are subject to mediation and such mediation has produced a considerable number of settlements. The requirements under the 2017 Act for a plaintiff's solicitor to advise the option of mediation prior to the initiation of proceedings is probably of little value in relation to medical negligence actions especially in relation to birth injuries. The nature and extent of the injuries suffered is usually not quantifiable for a number of years after birth and frequently for a number of years after the action is initiated. In medical negligence cases, it would be of some assistance if the obligations to advise mediation prior to the initiation of proceedings were, as a matter of law, required to be repeated by the solicitor for both plaintiff and the defendant upon the service of the notice of trial of the matter.

(d) Electronic Communications

16. Subject to the proviso that under the Common Law litigation is generally conducted by the witnesses giving oral testimony, the undersigned agree that the rules should allow service of documents electronically and indeed the filing of documents electronically subject to hard copies being available for the court at trial.

(e) More effective and less costly outcomes for court users

17. In the realm of personal injury litigation, the general practice of solicitors and barristers is that litigation from the plaintiff's point of view is funded on a no foal no fee basis. Similarly, the vast majority of cases from the defence point of view are funded by indemnifiers. Accordingly, problems of access to the court, caused by

excessive costs do not generally arise in Personal Injuries litigation. Assuming our proposals in relation to obligations of discovery are enacted, the number of pre-trial motions will be reduced, the speed of litigation increased and the costs reduced. The number of pre-trial motions can also be reduced if the parties seeking further and better particulars abided by the decision of Hogan J. in *Armstrong v. Moffatt*. A third unnecessary area of pre-trial motioning is a practice of Parties, usually but not always the defendants have of motioning in respect of S.I. 391. The timescale envisaged by S.I. 391 is in the view of the undersigned NEVER followed, and probably COULD NEVER BE followed. Clearly, cases in which there has been no compliance with S.I. 391 cannot proceed to trial should one party object, but there is little to be gained other than a cost gathering exercise by a party motioning to have compliance of S.I. 391 when they are aware that the other side is, for example, awaiting up to date medical reports and that compliance is impossible. The Rules of the Superior Courts should expressly discourage the bringing of such unnecessary motions by penalising in costs the bringing of such motions in the absence of wilful default, even if the other side is technically in breach of its time obligations. These motions serve to increase the costs and do not result in any advance of a trial date.

18. In relation to the general cost of litigation, it is the view of the undersigned that the cost of litigation could be reduced if the practice of *"scale fees"* for pleadings and motions and briefs *etc*. could be reintroduced. These scales could be fixed and subject to regular review, by consultation between the Taxing Master and the Bar Council and Law Society and, of course, would not prevent by agreement higher fees being chargeable. The situation at the moment is that the free market operates to push up the cost of litigation as those at the top of the profession can, even in personal

injury litigation, set the market price which is then, in effect, followed by the rest of the market.

19. We are aware that the above proposal runs counter to some *"competition"* ideology but if there were scale fees adopted the cost of litigation would be considerably reduced, the practice can be justified in the interests of the Common Good.

20. It is accepted, of course, that certain litigation e.g. medical negligence may necessarily attract higher fees and in the case of particularly difficult litigation, the Taxing Master would be free to allow fees substantially greater than the *"scale"* or to introduce special scales of fees for such actions.

Mr. Justice Kevin Cross
Mr. Justice Michael Hanna
Mr. Justice Anthony Barr
Ms. Justice Bronagh O'Hanlon
Mr. Justice Bernard Barton