

Working Group
on
Medical Negligence and Periodic Payments

Report (Module 3)



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THE HIGH COURT
FOUR COURTS
DUBLIN 7

The Hon. Ms. Justice Mary Irvine

The President of the High Court
The Hon. Mr Justice Nicholas Kearns
The Four Courts,
Inns Quay,
Dublin 7

25/04/13

Re: The Working Group on Medical Negligence and Periodic Payments (module 3)

Dear President,

The Working Group on Medical Negligence and Periodic Payments has now completed the third and final module of its deliberations, on case management in clinical negligence proceedings. I accordingly enclose the report herewith.

You will note that the report appends draft rules of court to give effect to its recommendations, which rules the Working Group envisages as operating in conjunction with the pre-action protocol recommended in its previous report. Subject to your approval of the report's recommendations, we would be very happy to provide any further assistance which may be required by the Superior Courts Rules Committee in considering them.

Yours sincerely,


Mary Irvine

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25th April 2013

Chapter 1: Introduction

Establishment and terms of reference of the Working Group

On the 18th February 2010, the President of the High Court established a Working Group on Medical Negligence Litigation and Periodic Payments, with the following terms of reference:

1. To examine the present system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify any shortcomings within that system.
2. To make such recommendations to the President as may be necessary in order to improve the system and eliminate the shortcomings.
3. To consider whether certain categories of damages for catastrophic injuries can or should be awarded by way of Periodic Payments Orders and to make such recommendations to the President as may be necessary.
4. To provide the President with such draft Legislation, Regulations, and Rules of Court as may be necessary to give effect to the Working Group's recommendations.

Ms. Justice Mary Irvine, Judge of the High Court has chaired the Working Group since February 2012, having succeeded Mr Justice John Quirke during the second module on his retirement from the Bench. In addition to its Chairperson, the membership of the Group for the purposes of Module 3 were:

Mr. Michael Boylan, Partner, Augustus Cullen Law, Solicitors

Mr. Ciaran Breen, Director, State Claims Agency

Mr. John Casey, CEO, Motor Insurance Bureau of Ireland

Ms. Tara Downes, Solicitor, HSE

Mr. Patrick Hanratty, Senior Counsel

Mr. James Kehoe, Fellow, Society of Actuaries in Ireland

Mr. Denis McCullough, Senior Counsel

Ms. Brídín Ní Dhomghaile, Civil Law Division, Department of Justice and Equality

Ms. Gráinne O'Loughlen, Registrar, Personal Injuries List

Mr. Justice Iarfhlaith O'Neill, Judge of the High Court

Mr Kevin O'Neill, Principal Registrar, High Court

Mr. Ciarán O'Rourke, Partner, Hayes, Solicitors

Ms. Máire Reidy B.L.

Mr. James Reilly, Patient Focus

Mr. Noel Rubotham, Courts Service

Mr. Brendan Savage B.L., Special Assistant

Ms. Kevin Thompson, CEO, Irish Insurance Federation

Ms. Marie Coady was Secretary.

Working method

The Working Group adopted a modular approach to its Terms of Reference. Module 1 concerned periodic payments, presenting its report on this Module to the President on the 29th October 2010. Module 2 was concerned with the conduct and management of clinical negligence on periodic payments and a pre-action protocol in clinical negligence proceedings, on which the Working Group presented a report to the President on the 14th March 2012. This report covers the third and last Module of the Working Group's deliberations on the case management of clinical negligence proceedings. The Group met on fifteen occasions for the purposes of Module 3.

Chapter 2: Managing the conduct of clinical negligence proceedings

Introduction

In its report on the second module of its deliberations, the Working Group drew attention to the problems of excessive cost, complexity and delay which have hampered the resolution of clinical negligence claims.¹

These difficulties are, of course, by no means unique to the area of clinical negligence, but they are particularly exacerbated by a traditional reluctance of the parties to clinical negligence actions to engage with each other at the earliest opportunity following an adverse incident or claim, to ensure the full extent of disclosure needed to identify all relevant issues as to causation, liability and the amount of damages which should be payable were the claim admissible. With a view to addressing this deficiency, the Working Group's second report concerned itself with the introduction – in the form of a Pre-action Protocol – of a set of obligations designed to incentivise prospective claimants and defendants to exchange such information with each other and explore the possibility of resolving the dispute without recourse to litigation.

As the Working Group has already observed, the Supreme Court has commented on the absence in Ireland of an effective regime for case management of clinical negligence litigation whereby “procedures can be simplified and costs kept to a minimum”², and the Working Group in this report makes detailed proposals, in the form of a procedure based in rules of court, for such a regime.

The requirement for a Pre-action Protocol

However, the Working Group is convinced that the absence of a pre-litigation protocol for clinical negligence claims would greatly hamper the effectiveness of any procedure for supervised preparation for trial of such claims once proceedings had commenced. Imposing on parties, after the writ has issued, an obligation to plead their respective cases and marshal their respective expert and non-expert evidence within a demanding timescale is an unrealistic expectation if, sufficiently in advance of the bringing of the action, both sides have not had the opportunity to inform themselves fully on the issues to which the claim gives rise. Thus, for example, a claimant's legal advisors should in the pre-litigation stage have been able to obtain from the respondent to the claim the necessary medical records and reports related to the incident and any relevant clinical procedures or practice. Equally, those advising the respondent's representatives should in that period have been in a position to procure relevant information on the claimant, including medical history, current medical condition, treatment and care needs, and loss of income or earnings.

We therefore consider it of the utmost importance that new rules of court facilitating case management should be introduced in conjunction with court rules prescribing the pre-action protocol already recommended. We accordingly reiterate our recommendation in the second report that legislation provide for the extension of the court rules committees' remit to prescribe pre-action protocols regulating the conduct of claimants and prospective defendants, and for the matters ancillary to such a protocol, including the prescribing of charges leviable for provision by a respondent to a claim of copies of documentation in response to a request made under a pre-action protocol, and the recovery of interest by a claimant on the amount of an offer to settle made by the claimant prior to commencement of an action.

¹ Report of the Working Group on Medical Negligence and Periodic Payments, Module 2, Chapter 1, page 4.

² *Payne v. Shovlin* [2007] 1 I.R. 114, at pp 124 to 125.

The purpose of case management

Procedures for management of the preparation of civil litigation for trial are now a well established feature of all leading common law jurisdictions. Case management involves the court -

“taking the ultimate responsibility for progressing litigation along a chosen track for a pre determined period during which it is subjected to selected procedures which culminate in an appropriate form of resolution before a suitably experienced judge. Its overall purpose is to encourage settlement of disputes at the earliest appropriate stage; and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration.”³

Case management has been defined as:

“a comprehensive system of management of the time and events in a law suit as it proceeds through the justice system, from initiation to resolution. The two essential components of case management systems are the setting of a timetable for pre-determined events and the supervision of the progress of the law suit through its timetable.”⁴

Case management should, it has been suggested, secure the following outcomes:

- achieving an early settlement of the case or issues in the case where this is practical;
- the diversion of cases to alternative methods for the resolution of the dispute where this is likely to be beneficial;
- the encouragement of a spirit of co-operation between the parties and the avoidance of unnecessary combativeness which is productive of unnecessary additional expense and delay;
- the identification and reduction of issues as a basis for appropriate case preparation; and
- when settlement cannot be achieved by negotiation, progressing cases to trial as speedily and at as little cost as is appropriate.⁵

Quite apart from the particular attributes of clinical negligence claims which render them especially in need of such a regime, active supervision by the court of the progress of litigation has, it is suggested, acquired greater significance in light of the jurisprudence of the European Court of Human Rights (ECtHR) concerning Article 6.1 of the European Convention. The case law concerned has established that a principle of domestic law or practice that the parties to civil proceedings are required to take the initiative with regard to the progress of proceedings – the traditional approach in jurisdictions within the common law tradition - does not dispense the State from complying with the requirement to deal with cases in a reasonable time.⁶ In *Doran v Ireland*,⁷ the ECtHR observed:

³ "Access to Justice" Interim Report (Woolf), Chapter 5

⁴ "Caseflow Management", Ministry of the Attorney General, Ontario 1993.

⁵ "Access to Justice" Interim Report (Woolf), Chapter 5, par. 17.

⁶ See e.g. *Mitchell and Holloway v. the United Kingdom*, No. 44808/98, 17/12/02, *Price and Lowe v. the United Kingdom*, No. 43185 ad 43186/98, 29.7.03, and *McMullen v. Ireland*, No. 42297/98, 29.7.04.

⁷ No. 50389/99, 31/10/2003.

“whether or not a system allows a party to apply to expedite proceedings, the courts are not exempted from ensuring that the reasonable time requirement of Article 6 is complied with, as the duty to administer justice expeditiously is incumbent in the first place on the relevant authorities”.⁸

The principle that the courts are ultimately responsible for ensuring that trials take place within a reasonable time has been repeatedly stressed by the ECtHR in its case-law, including in decisions in subsequent cases involving Ireland.⁹

⁸ At Par. 47 of the Court's judgment.

⁹ *Superwood Holdings Plc & Ors v. Ireland* No. 7812/04, 8.9.10; *McFarlane v. Ireland* 31333/06, 10.9.10.

Chapter 3: Court supervision of litigation in Ireland: the experience to date

The High Court Practice Direction (Personal Injuries) of June 1996

An early initiative to introduce case management was taken in June 1996 by the then President of the High Court, the late Mr Justice Declan Costello, by way of a practice direction concerning personal injuries actions in which liability was not in dispute. A case conference could be requested by the plaintiff by letter once an action had reached the waiting list for trial. The object of the case conference, which would be conducted by a judge, was -

- (a) to ascertain whether the parties had exchanged, or were willing to exchange, medical and other expert reports and witness statements, and
- (b) to require the parties, at the judge's discretion -
 - (i) to state concisely the nature of their claim and defence to enable the issues to be fixed,
 - (ii) to specify the exact amount of special damages claimed or admitted, and
 - (iii) to indicate the areas in which they were not in agreement.

A pre-trial check list had to be exchanged between the parties prior to the conference. The conference judge could make various interlocutory orders "for the speedy resolution of the remaining issues in the case", including orders for discovery, replies to particulars, and the delivery of and replies to interrogatories. The conference judge could also, with the parties' consent, "assist in effecting a settlement of the action". Where this did not succeed, the judge concerned would not preside at the trial.

The giving of an early hearing date at the end of the conference provided the incentive to parties to participate.

The practice direction preceded the introduction in 1997 of rules for the disclosure of reports or statements from experts in personal and fatal injuries proceedings (Part VI of Order 39 of the Rules of the Superior Courts), which prescribed time limits for the parties to exchange in advance of trial of lists of expert witness reports and of witnesses as to fact, and the reports themselves, as well as statements as to special damages and statements in respect of social welfare payments.

The practice direction provided for court intervention at a quite late stage in the proceedings, viz. at the point when the case was to be listed for trial. It did not provide a mechanism for the court to engage with the parties at the point when key issues in the case were being formulated through the pleadings, statements received by the parties advisors from witnesses as to fact, and expert reports.

The Working Group on a Courts Commission

In its report of July 1996, the Working Group on a Courts Commission noted that "[t]he litigant in Ireland today is enmeshed in a process that is costly, complex and subject to delays which are the cause of, at best, unnecessary stress and anxiety and, at worst, grave injustice"¹⁰. It recognised the need to investigate

¹⁰ "Management and Financing of the Courts", Working Group on a Courts Commission, First Report, April 1996.

the benefits of case management, and organised a conference of experts, judges and practitioners to examine the lessons to be learned from the experience case management in other jurisdictions.¹¹

The Case Management Group Report

In May 2001, the Case Management Group, which had been established under the chairmanship of the then President of the High Court, Mr. Justice Morris, to examine the merits of introducing case management in civil litigation in the High Court, delivered its report¹² to the Superior Courts Rules Committee. The conclusions of the group have, it is fair to say, influenced subsequent initiatives on case management in Ireland, and merit consideration in some detail.

The group expressed the object of case management as

“the processing of cases in a cost effective and expeditious manner, which is fair to all of the parties involved in the litigation and does not compromise the high standard and quality of judicial decision making which the court system aims to deliver”¹³

The group considered the changes to civil procedure in England and Wales on foot of the “Access to Justice” Reports effected by the Civil Procedure Rules of 1998,¹⁴ but declined to recommend a similar approach, taking the view that so radical a set of reforms was neither necessary nor appropriate for the Irish system of justice. While seeing a clear necessity for case management in appropriate cases, they were anxious that it should actually lead to increased efficiencies and reduced costs, and that extensive judicial involvement in management of cases at an early stage could, given the limited judicial resources available, adversely impact on trials and the delivery of reserved judgments.¹⁵

The group concluded that the inefficiencies in the current system of civil litigation would be addressed by (a) strict enforcement of the existing rules, (b) changes to specific rules and (c) active judicial case management where appropriate.¹⁶ They favoured placing the onus to progress the case mainly on the parties rather than the court, requiring the parties to exchange and file a standard questionnaire or check list in all cases, and to ensure that exchange of pleadings and pre-trial procedures were completed, issues identified and a chronology of key events prepared for the trial judge. Where a party failed to complete the questionnaire, the issues would be fixed on the basis of the questionnaire(s) filed by the other parties, and the party in default should be liable to a costs sanction.

Where case management by the court was desirable, the group felt that the degree of intervention by the court and the stage at which it should take place should be tailored to the level of complexity of the case, and that judicial intervention should be employed sparingly.

¹¹ The Working Group organised a conference on the subject in November 1996 in which leading commentators and exponents made presentations on case management models in major common law jurisdictions, as well as the Court of Justice of the European Communities. The papers from this conference are collected in "Conference on Case Management" Working Group on A Courts Commission, May 1997, available at www.courts.ie

¹² Report of the Case Management Group to the Superior Courts Rules Committee, May 2001.

¹³ Page 8 of the Report

¹⁴ The Civil Procedure Rules had come into operation on the 26th April 1999.

¹⁵ Section 1 of the Report (Case Management), page 8.

¹⁶ Section 1 of the Report, pages 8 to 12.

The Commercial Court

The High Court's Commercial List – or the Commercial Court, as it is known – came into operation in January 2004¹⁷ and has, it is generally acknowledged, been a remarkable success. The Working Group expresses its appreciation to Judge Kelly, the Judge in charge of the Commercial Court, for the most valuable insight he provided to the Group on the practical experience of operating case management in the Commercial Court. The procedural model settled upon for the Commercial Court involves a flexible approach to case management, allowing the Court's judges maximum discretion as to whether to apply case management, and where applied, as to the level of supervision to be imposed. The achievements of the Commercial Court warrant a closer examination of its pre-trial supervision procedures.

Conduct of proceedings before the Commercial Court

An important feature of the Commercial Court is that cases qualifying as commercial proceedings eligible for entry to the Commercial Court are not automatically entered to its list – an application to the Judge in charge of the Commercial Court must firstly be granted for admission. The key principles governing the conduct of litigation in the Commercial Court are that issues of law and fact should as far as possible be narrowed down in advance of trial, and that cases should be progressed in a manner which is “just, expeditious and likely to minimise costs”.¹⁸

Proceedings will be subject to case management in the Commercial Court where the court, on its own initiative or a party's request, considers it desirable by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason.¹⁹ A date is then fixed for a case management conference²⁰ chaired by the judge, the purpose of which is to ensure

- that the case is prepared for trial according to the criteria mentioned above, viz. in a manner which is “just, expeditious and likely to minimise costs”,
- that, as soon as possible prior to the trial date, the issues are defined as “clearly, precisely and concisely as possible”, and
- that all pleadings, affidavits and other documents or admissions are exchanged and all intended interlocutory applications are made.²¹

Case preparation is facilitated by three new types of hearing: an *initial directions hearing* at or following upon the hearing at which a case is entered in the Commercial List;²² a *case management conference* for those cases which by virtue of their complexity, the number of issues or parties, the volume of evidence, or for other special reason, are considered by the court to require case management,²³ and a *pre-trial conference*, for all cases, whether subject to case management or not.²⁴

Adjournments of hearings must be to a specific date: adjournments generally, with liberty to re-enter, are not permissible.²⁵ At the initial directions hearing, the court may give directions as to mode of trial and as

¹⁷ The procedural rules are contained in Order 63A, Rules of the Superior Courts. Footnote references which follow concerning the Commercial List Rules are to the rules of that Order.

¹⁸ Rules 5 and 14(7).

¹⁹ Rule 6(1)(xii); rule 14(8).

²⁰ Rule 14(1).

²¹ Rule 14(7).

²² Rule 4(5).

²³ Rule 6(1)(xii).

²⁴ Rule 16.

²⁵ Rules 14(3) and 18(2).

to whether formal pleadings should be dispensed with, fix issues of law or fact or facilitate the parties in defining them, and give various directions designed to advance preparation of the case for trial.²⁶

Timetables for the completion of such steps can be fixed, or approved on terms proposed by the parties.²⁷ The conference must be attended by solicitors for the parties sufficiently familiar with the case, and having the necessary authority to deal with matters likely to arise.²⁸ In cases of undue delay, or where dissatisfied with the conduct of the case, the judge can require a party or their solicitor to attend and furnish an explanation.²⁹

The key source of information for management of the case is the *case booklet*, containing –

- (a) a case summary, including a sequence of relevant events not in dispute, a list of the issues not in dispute and an agreed statement of the issues in dispute, and
- (b) pre-trial documentation, to be prepared and updated by the plaintiff or other party prosecuting the proceedings, in consultation with the other party or parties.³⁰

All Commercial List cases due for trial are listed for a pre-trial conference before the judge³¹, in order to address any steps remaining to be taken prior to trial, quantify the likely length of the trial and identify any special arrangements requiring to be made for the giving of evidence, use of technology, etc.³² Each party must lodge a pre-trial questionnaire in advance, and counsel (or the solicitors) leading at the trial must attend.³³

In cases listed for trial, the party prosecuting the proceedings is required, in consultation with the other party or parties, to lodge prior to the trial date a *trial booklet* containing copies of pleadings, affidavits, statements of issues, correspondence, and any documents, or extracts agreed by the parties, intended to be relied upon at the trial³⁴ and a *case summary*, containing an agreed outline of the case and sequence of relevant events not in dispute, a list of the issues not in dispute, a list of “*dramatis personae*” in the case, and a glossary of any technical terms likely to be used at trial.³⁵

Alternative dispute resolution (ADR)

Parties are encouraged – if necessary by the Court’s intervention – to explore at an early stage and within a timescale not exceeding 28 days all avenues open to them to settle the case by recourse to mediation, conciliation or arbitration.³⁶ To that end, the court is empowered to require information concerning any such options available to the parties.³⁷

The Commercial Court’s case management model was substantially followed on the creation of a special list for competition proceedings –introduced in March 2005³⁸ - and the Working Group is aware that draft

²⁶ Rule 6(1).

²⁷ Rule 15(a).

²⁸ Rule 14(4) and (5).

²⁹ Rule 15(c).

³⁰ Rule 14(10).

³¹ Rule 16.

³² Rule 19.

³³ Rule 18(3).

³⁴ Rule 20(1)(a).

³⁵ Rule 20(1)(b).

³⁶ Rule 6(1)(xiii).

³⁷ Rule 6(2)(d).

³⁸ The List was established by Order 63B, rules of the Superior Courts.

rules for the management of chancery and non-jury actions and other proceedings designated by the President of the High Court are currently being considered by the Superior Courts Rules Committee.³⁹

The Civil Liability and Courts Act 2004

This Act made important changes to the procedure for litigating personal injuries actions. It also imposed significant new obligations on the parties in disclosing the content of their case post commencement of proceedings, and the basis on which they are willing to settle the proceedings.

The Act also contained measures designed to influence the pace at which such actions were conducted. Section 9(1) provides that the courts shall have the function of ensuring that the parties comply with the relevant rules of court “so that the trial of personal injuries actions within a reasonable period of their having been commenced is secured.” Section 9(2) provides that, in the absence of the parties agreeing, the court may only grant an extension of time under rules of court if it considers that “in all the circumstances the extension is necessary or expedient to enable the action to be properly prosecuted or defended”, and “the interests of justice” require the specific extension contemplated. The court is given a discretion to make orders for costs so as to ensure compliance by the party with the rules of court.

Section 18 of the Act provides that, where the court considers it appropriate, it shall direct the holding of a pre-trial hearing to determine “what matters relating to the action are in dispute”. In the High Court and Circuit Court, the hearing may take place before a judge or certain court officers as the Presidents of those courts may decide.

Section 15 of the Act enables the court at a party’s request to direct that the parties to a personal injuries action attend a mediation conference chaired by a mediator, who must report back to the court on the outcome. The court may sanction in costs a party who does not participate in the mediation process.

It is fair to say that the aspirations, in legislating for these measures, to reduce delay and cost in personal injuries proceedings have not been substantially realised, especially in the area of clinical negligence actions. In particular, the pre-trial hearing under section 18 of the 2004 Act has not proved to be of effective use, with few if any instances of its being employed.

³⁹ A scheme of “case progression” is also in operation in the Circuit Court for family law cases, under which the county registrar carries out the case management function.

Chapter 4: A rules-based solution to the difficulties of managing clinical negligence claims

A draft set of court rules to facilitate pre-trial preparation and management of clinical negligence proceedings has been approved by a majority of the Working Group and is appended to this report. The procedural regime proposed shares with that employed for commercial litigation the goals of ensuring that a case is, consistent with the requirements of justice, prepared for trial expeditiously and cost efficiently, and that the issues in dispute are defined clearly, precisely and concisely at the earliest opportunity. However, the approach taken streamlines the hearing arrangements, as well as the documentation requirements to be met by the parties, and contains important new obligations concerning the disclosure pre-trial of expert and non-expert evidence. The salient features of the regime are set out below.

The Working Group was persuaded of the advantages – not to say the necessity – of a flexible approach to the application of case management as employed in the Commercial Court. In circumstances where availability of judicial resources in this jurisdiction is quite limited, blanket application of case management to all clinical negligence actions is simply not feasible. Case management should not therefore be automatic, but should be available on the parties' application or the court's own initiative where the case meets set criteria, viz. complexity, the number of issues or parties, the volume of evidence, or other special reason.

The Working Group has reduced the types of procedural hearing in pre-trial supervision of clinical negligence proceedings to a single type, viz., the case management conference – which will encompass the purposes served by the initial directions hearing, case management conference and the pre-trial directions hearing in the Commercial Court. The judge managing the case, when satisfied that the proceedings are ready to proceed to trial, would fix a trial date in consultation with the Judge in charge of the List – replacing the existing setting down procedure under which a notice of trial requires to be served by one or other party. The conferences could be conducted by telephone conference or live video-link, where appropriate. However, case management is resource-intensive, and the opportunity has been taken to draw on the skills of court registrars to relieve judges in the Personal Injuries List of the non-adjudicative work at the case management conference, in particular in ensuring compliance with case preparation timetables and directing exchange of information.

The parties would be required to complete a case booklet, case timetable and pre-trial questionnaire along the lines of those employed in the Commercial Court, modified to suit the particular requirements of clinical negligence actions. The Court could also request the parties to agree where possible on a list of the documents and extracts from documents intended to be relied upon at the trial in substitution for the case booklet.

Expert and non-expert evidence

The number and volume of expert witnesses employed by plaintiffs and defendants is a key contributor to the length and cost of trials in clinical negligence cases. The Working Group is of the view that any pre-trial preparation regime, to be effective, must ensure that the parties are respectively apprised of the non-expert and expert evidence they will have to meet at the earliest opportunity. As mentioned earlier, amendments to the court rules - introduced on foot of section 45 of the Courts and Court Officers Act 1995 – prescribe time limits for the exchange in advance of trial of lists of expert witnesses' reports and

of witnesses as to fact, and for the exchange of the reports themselves and statements as to special damages and any social welfare payments received.⁴⁰

However, these time limits are set to operate within periods fixed by reference to the setting down of the proceedings for trial – at a point far too late, in the Working Group’s view, to enable the issues raised by the expert and non-expert evidence of the respective parties to be identified and condensed to those areas of dispute – whether as to fact or law, and whether in respect of causation, liability or quantum – necessary to dispose of the claim at trial, or – preferably – on a settlement prior to trial.

To this end, it is recommended that the plaintiff’s non-expert evidence be provided by written statement within seven days of the delivery of the personal injuries summons and the defendant’s non-expert evidence be similarly provided within seven days of delivery of the defence. Expert evidence should be exchanged between the parties in the form of reports on an agreed date not later than twelve weeks from the delivery of the defence. Opportunities to exchange additional witness statements within specified time limits should also be afforded.

Following delivery of the expert reports, including any supplemental reports, the parties would be obliged, within four weeks from the time limited for furnishing of any supplemental expert’s report, to arrange for the experts in the same field of expertise to discuss in the absence of the legal representatives of the parties but without prejudice to the parties, the issues on which those experts are to give evidence and, without recourse to the parties or their legal representatives, prepare a memorandum for the Court identifying the areas on which they have agreed and those on which they have not.

A majority of the Working Group were of the view that, unless permitted by the court for special reason, each party should be limited to adducing evidence from one expert only in a particular field of expertise on a specific issue, and where there are two or more defendants, the co-defendants should be confined to offering jointly evidence from one expert only on any issue relating to quantum, the plaintiff’s physical condition, the plaintiff’s mental or psychological condition and the prognosis as to those conditions. These proposals are reflected in rule 15 of the draft court rules appended.

A minority of the Working Group did not share this view, being of the opinion that the restrictions envisaged by rule 15 may give rise to disputes as to what constitutes a particular field of expertise on a specific issue, that to remove parties discretion as to the number of experts and the precise issue or subject-matter on which a particular expert may give evidence might work an injustice on a party – in particular in depriving the court of the specific experience of a particular expert – and that excessive recourse to expert witnesses could in any event be sanctioned when determining liability for costs. The point was further made that a plaintiff bringing proceedings on a “no foal no fee” basis had no incentive to rely on more experts than were strictly necessary to the prosecution of his or her claim.

Similar arguments were considered by Lord Woolf in his seminal Interim and Final Reports “Access to Justice”, which led to the Civil Procedure Rules reforms in England and Wales – reforms which have

⁴⁰ Order 39 rule 46 provides that the plaintiff shall furnish to the other party or parties a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the Court. Within 7 days of receipt of the plaintiff’s schedule, the defendant or any other party shall furnish to the plaintiff or any other party a schedule listing all reports from expert witnesses intended to be called. Within 7 days of the receipt of the schedule of the defendant or other party or parties, the parties shall exchange copies of the reports listed in the relevant schedule.

The parties must exchange with the other party a list of witnesses as to fact and statements as to special damages and any social welfare payments within one month of the service of the notice of trial or within such further time as may be agreed by the parties or permitted by the Court.

influenced subsequent reforms in other common law and civil law jurisdictions.⁴¹ In the first of those reports, Lord Woolf noted to rely on more experts than were strictly necessary to the prosecution of his or her claim.

“The need to engage experts was a source of excessive expense, delay and, in some cases, increased complexity through the excessive or inappropriate use of experts. Concern was also expressed as to their failure to maintain their independence from the party by whom they had been instructed...”⁴²

In his Final Report, Lord Woolf noted that most respondents to his interim recommendations favoured retaining the full-scale adversarial use of expert evidence, and resisted proposals for wider use of single experts, whether court-appointed or jointly appointed by the parties. He observed:

“The basic premise of my new approach is that the expert's function is to assist the court. There should be no expert evidence at all unless it will help the court, and no more than one expert in any one speciality unless this is necessary for some real purpose. ...I do not recommend a uniform solution, such as a court-appointed expert, for all cases. My overall objective is to try, from the start, to foster an approach to expert evidence which emphasises the expert's duty to help the court impartially on matters within his expertise, and encourage a more focused use of expert evidence by a variety of means. We should avoid mounting a contest between opposing experts where justice (in the widest sense) can be achieved between the parties without it...”⁴³

These considerations, which informed the content of Part 35 of the Civil Procedure Rules (Experts and Assessors) and the accompanying Practice Direction, are no less valid in this jurisdiction.

Furthermore, the provisions of rule 15 are ultimately discretionary, and may be relaxed in exceptional cases where the court considers this necessary to do justice in the case concerned.

Quite apart, however, from the flexibility incorporated in rule 15 to ensure that justice is done between the parties, that rule speaks to two other concerns which were central to the civil procedure reforms in England, as reflected in the Overriding Objective of the civil procedure Rules⁴⁴ and Wales, and are directly pertinent to the manner in which clinical negligence litigation is currently conducted in this jurisdiction – proportionality of the costs and time invested in a case to the claim to which it relates, and the need to allocate the court system's resources fairly between litigants.

⁴¹ See, e.g. Dwyer, *The Civil Procedure Rules Ten Years On*, Part IV (The CPRs and Europe) (Oxford (2009)); *Chief Justice's Working Party on Civil Justice Reform* (Hong Kong), Civil Justice Reform: Final Report (2004).

⁴² Chapter 23, para. 1 of the Interim Report.

⁴³ Chapter 13, paras. 11 and 13 of the Final Report.

⁴⁴ Rule 1.1. (Overriding Objective) of the Civil Procedure Rules, which - provides:

“(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases;
and
(f) enforcing compliance with rules, practice directions and orders.”

The time expended in the giving of expert evidence is without question the single most significant factor contributing to the current length of clinical negligence trials. In circumstances where judicial resources available for the trial of clinical negligence actions, as with other types of litigation, are finite, and the annual volume of incoming clinical negligence actions in the High Court has been steadily increasing (from 482 in 2008 to 1039 in 2012⁴⁵), the length of such trials has in turn a direct impact on the length of time which parties must wait for a trial date – with the particular pressures and difficulties which this places on clinical negligence claimants.

For the above reasons, the majority of the Working Group consider that any new procedural regime for this area of litigation which does not enable the adducing of expert evidence to be effectively controlled by the court in a manner consistent with justice will not provide a solution to the key problems of excessively lengthy trials and delays in trials which motivated the decision to establish the Working Group.

ADR

The Pre-action Protocol recommended for clinical negligence claims envisages that the claimant and respondent to the claim would, prior to the initiation of proceedings, explore ADR options, and should proceedings issue, may be required by the court to provide evidence of what form or forms of ADR were considered. Where proceedings do issue, the Rules of the Superior Courts now facilitate reference to mediation, conciliation and, where this would be appropriate, arbitration⁴⁶, and the proposed rules would enable the Court to enquire of the parties as to whether they had, prior to the initiation of the action, availed of any mediation, conciliation or arbitration arrangements, and whether any such arrangements remained available to the parties.

⁴⁵ The numbers of incoming clinical negligence actions (viz. personal injuries actions in which no letter of authorisation for commencement of proceedings from the Personal Injuries Assessment Board is required) between 2008 and 2012 were as follows:

2008	2009	2010	2011	2012
482	529	672	785	1039

⁴⁶ See Order 56A rule 2, Rules of the Superior Courts in relation to mediation and other forms of ADR other than arbitration, and section 32, Arbitration Act 2010 and Order 56, rule 8 of those Rules in relation to arbitration.

Appendix: Draft Rules of Court for Case Management of Clinical Negligence Proceedings

RULES OF THE SUPERIOR COURTS (CLINICAL NEGLIGENCE) 201..

1. (1) These Rules shall come into operation on the day of 201..

(2) (a) Nothing in these Rules shall affect the validity of any step taken or any other thing done in clinical negligence proceedings (within the meaning of rule 1 of Order 63D inserted by these Rules) commenced before that date, and any such proceedings shall, save where the court in those proceedings otherwise orders, be continued and completed as if these Rules had not been made.

(b) The amendment to Order 39 rule 45(1) effected by these Rules shall operate without prejudice to any entitlement or obligation arising under Part VI of that Order and accruing to or, as the case may be, affecting a party to clinical negligence proceedings within the meaning of rule 1 of Order 63D inserted by these Rules, where such proceedings have commenced prior to the coming into operation of these Rules.

2. These Rules shall be construed together with the Rules of the Superior Courts 1986 to 20.. and may be cited as the Rules of the Superior Courts (Clinical Negligence) 20...

3. Order 1A of the Rules of the Superior Courts is hereby amended –

by the substitution for rule 2(2) thereof of the following sub-rule:

“(2) Save where otherwise expressly provided by this Order, in the event that any conflict shall arise between the provision of any rule of this Order and any other provision of these Rules except Order 63D, the provision of the rule of this Order shall, in respect of personal injuries actions, prevail.”;

by the substitution for rule 8 of the following rule;

“8. An appearance to a personal injuries summons shall be in the Form No. 5 in Appendix A, Part II of these Rules. A defence shall be delivered by each defendant in the Form No. 2 in Appendix CC -

(a) in the case of clinical negligence proceedings within the meaning of Order 63D, rule 1, within twelve weeks and

(b) in the case of all other actions to which this Order applies, within eight weeks

of the service on such defendant of the plaintiff’s personal injuries summons. Where any defendant makes a counterclaim, such counterclaim shall be in the Form No. 3 in Appendix CC and shall be appended to the defence.”

4. Order 22 rule 1 is amended by the substitution for sub-rule (7) of the following sub-rule:

“(7) A Defendant may once without leave and upon notice to the Plaintiff pay into Court a sum of money in satisfaction of any action to which Section 1 (1) of the Courts Act, 1988 applies, either

(a) at the time of the delivery of a Defence or

- (b) within a period of four months from the date of the Notice of Trial or
- (c) in clinical negligence proceedings within the meaning of Order 63D, rule 1 which are subject to case management under that Order, within a period of four weeks from the fixing of a trial date by the Judge chairing the case management conference.

A Defendant who has not made such payment within the time permitted or who wishes to increase such sum as has been lodged may only do so by leave of the Court and upon such terms and conditions as to the Court seem fit.”.

5. Order 39 rule 45(1) is amended by the substitution for paragraph (a) of the following paragraph –

““action” includes any claim for damages in respect of any personal injuries to a person howsoever caused (including a claim for fatal injuries brought pursuant to section 48 of the Civil Liability Act, 1961) but does not include –

- (i) clinical negligence proceedings within the meaning of rule 1 of Order 63D or
- (ii) an action to which section 1(3) of the Courts Act, 1988 applies so as to entitle a party to trial by jury in that action.”.

6. The Rules of the Superior Courts are hereby amended by the insertion immediately following Order 63C thereof, of the following:

“Order 63D

Clinical Negligence Proceedings

I. Preliminary

Definitions

1. In this Order, unless the context or subject matter otherwise requires –

[“case management order” means an order made under rule 6];

“case management conference” means a conference directed under rule 6;

“clinical negligence proceedings” means proceedings in respect of any claim by a person, or a personal representative or dependant of a deceased person, for damages for negligence, breach of statutory duty or breach of contract arising from any act or omission concerning -

- (a) the provision of a health service (including any dental service) to that person,
- (b) the carrying out of a clinical, medical or surgical procedure (including any dental procedure) in relation to that person,
- (c) the carrying out of a clinical or medical diagnosis, investigation or research (including any dental diagnosis, investigation or research) in respect of that person,

- (d) the provision of medical advice and information (including any dental advice and information) to that person,
- (e) the provision of clinical or medical treatment or care (including any dental treatment or care) to that person, or
- (f) implantation of, or a defect in, a device or material implanted in that person for medical or cosmetic reasons;

“Judge in charge of the List” means the Judge of the High Court for the time being assigned by the President of the High Court to carry out the functions of Judge in charge of the Personal Injuries List, or such other judge as may be assigned to carry out the functions prescribed by this Order for exercise by the first mentioned Judge;

“Judge” means any Judge of the High Court, including the Judge in charge of the List, assigned for the time being by the President of the High Court to hear and determine proceedings, or any application in relation to proceedings, in the Personal Injuries List;

“non-expert evidence” means evidence not being expert evidence;

“Registrar” means the registrar of the High Court for the time being assigned with the approval of the President of the High Court by the officer for the time being having the management of the Central Office to carry out the functions of Registrar conferred by this Order;

“written statement” shall be construed in accordance with rule 14(1) or (2), as the case may be;

“supplemental written statement” shall be construed in accordance with rule 14(2);

“further written statement” shall be construed in accordance with rule 14(4).

Application of this Order

2. (1) This Order applies to clinical negligence proceedings.

(2) Save where otherwise expressly provided by this Order, in the event that any conflict shall arise between the provision of any rule of this Order and any other provision of these Rules, the provision of the rule of this Order shall prevail.

II. Pre-trial procedure

General

3. A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of clinical negligence proceedings, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings.

4. Without prejudice to the preceding rule, a Judge may, prior to the trial of clinical negligence proceedings -

- (a) of his own motion and after hearing the parties, or

- (b) on the application of a party by motion on notice to the other party or parties –
 - (i) establish (and where necessary, amend and re-issue) a full or partial case timetable for the completion of preparation of the case (or specified issues in the case) for trial, and may for that purpose adopt any timetable proposed by any one or more parties or agreed by the parties if satisfied that it is reasonable,
 - (ii) direct the issuing of any notice of motion or other interlocutory application,
 - (iii) give any of the following directions and make any of the following orders:
 - (I) directions as to whether the proceedings shall continue –
 - (a) with pleadings and hearing on oral evidence,
 - (b) without formal pleadings and by means of a statement of issues of law or fact or of both law and fact,
 - (c) without formal pleadings and to be heard on affidavit with oral evidence;
 - (II) an order under Order 36, rules 7 or 9;
 - (III) directions as to the defining of issues by the parties, or any of them, including the exchange between the parties of memoranda for the purpose of clarifying issues;
 - (IV) an order fixing any issues of fact or law, including any issues as to causation or liability, to be determined in the proceedings;
 - (V) an order for the consolidation of the proceedings with another cause or matter pending in the High Court;
 - (VI) an order allowing any party to alter or amend his indorsement or pleadings, or allowing amendment of a statement of issues;
 - (VII) an order requiring delivery of interrogatories, or discovery or inspection of documents;
 - (VIII) an order giving liberty to serve a third party notice on consent of the plaintiff;
 - (IX) an order that the proceedings or any issue therein be adjourned for such time as he considers appropriate to allow the parties time to consider whether such proceedings or issue ought to be referred to a process of mediation, conciliation or arbitration, and where the parties decide so to refer the proceedings or issue, to extend the time for compliance by any party with any provision of these Rules or any order of the Court;
 - (X) an order to receive a consent and make the same a rule of Court.

5. Without prejudice to any enactment or rule of law by virtue of which documents or evidence are privileged from disclosure, to assist him in deciding whether or not to make any order or give any

direction under rules 3 or 4 of this Order or at a case management conference, a Judge may direct the parties, or any of them, to provide information in respect of the proceedings, including:

- (a) a list of the persons expected to give evidence;
- (b) particulars of any matter of a technical or scientific nature which may be at issue or may be the subject of evidence;
- (c) a reasoned estimate of the time likely to be spent in -
 - (i) preparation of the proceedings for trial, and
 - (ii) the trial of the proceedings;
- (d) whether the parties have, prior to the commencement of proceedings, had recourse, to any mediation, conciliation or arbitration arrangements, and whether any such arrangements are available to the parties following commencement of the proceedings.

Case management

6. (1) A case management conference may be directed in clinical negligence proceedings by order of the Judge in charge of the List -

- (a) on the application by motion of any party, on notice to the other party or parties -
 - (i) subsequent to the closing of pleadings, or
 - (ii) with leave of the Judge in charge of the List, prior to the closing of pleadings, or
- (b) of the Court's own motion, having heard the parties,

where the Judge in charge of the List is satisfied that it would be appropriate to do so, having regard to the complexity of the proceedings, the number of issues or parties, the likely volume of evidence, or for other special reason.

(2) Unless otherwise ordered by the Judge hearing such application, the costs of an application by a party for a case management order shall be costs in the cause.

7. (1) Where a case management order has been made, the Judge in charge of the List shall fix a date for a case management conference in the proceedings and may give any further directions for the completion prior to such conference of such, if any, steps in the proceedings (including the preparation of a case booklet in accordance with rule 9(2) of this Order) as he considers appropriate.

(2) Subject to sub-rule (3), the case management conference shall be chaired and regulated by a Judge.

(3) A Judge may direct that the case management conference be adjourned to proceed further before a registrar for the purposes of monitoring compliance by the parties with any order or direction given by the Judge

- (4) Where a direction is given under sub-rule (3) –

- (a) the registrar shall chair and regulate the case management conference,
- (b) the registrar, for the purposes referred to in sub-rule (3) –
 - (i) may require a party to furnish information or documentation to the registrar or another party within such time as the registrar may direct,
 - (ii) may adjourn the case management conference,
 - (iii) may refer any matter to the Judge for a direction,
 - (iv) may adjourn the case management conference to proceed further before the Judge and
 - (v) shall keep a note of the case management conference proceedings before the registrar, which note shall be available to the Judge and the parties.

(5) Where the case management conference is adjourned, it shall be adjourned to a specific date.

(6) The case management conference shall be attended by the solicitor or counsel appearing for each of the parties or, where a party, not being a body corporate, is not represented by a solicitor, by the party himself. Where the Judge chairing the case management conference considers it necessary or desirable, he may direct that party, or, where the party is a body corporate, the proper officer of a party, attend the case management conference, notwithstanding the fact that the party may be represented by a solicitor.

(7) Each solicitor or counsel attending the case management conference shall ensure that he is sufficiently familiar with the proceedings, and has authority from the party he represents to deal with any matters that are likely to be dealt with at the conference.

(8) Where a party is represented by counsel, the attendance of only one of such counsel at the case management conference, shall be allowed in the taxation or fixing of costs.

8. Where the Judge considers it just and convenient to do so, he may direct that the case management conference be conducted by telephone conference or live video-link, and sub-rules (6), (7) and (8) of the preceding rule shall apply to a case management conference so conducted subject to the modification that references in those sub-rules to attendance at the case management conference shall be construed as references to participation in the case management conference by telephone or video-link, as the case may be.

9. (1) The purpose of the case management conference shall be to ensure that the proceedings are prepared for trial in a manner which is just, expeditious and likely to minimise the costs of those proceedings, and in particular that, as soon as may be in advance of the trial:

- (a) the issues, whether as to fact or law, are defined as clearly, as precisely and as concisely, as possible;
- (b) all pleadings, affidavits or statements of issues have been or are served;
- (c) any applications by letter for particulars and replies thereto, any admissions, or requests for admissions, notices to admit documents or facts and replies thereto, and any affidavits

made in pursuance of any notices to admit facts or documents, have been or are served or delivered, as the case may be;

- (d) all written statements of witnesses (including expert witnesses) have been or are delivered, and
- (e) all applications for relief of an interlocutory nature intended to be made by any of the parties have been or are made.

(2) Save where the Judge otherwise directs:

- (a) the plaintiff shall, having met with the other party or parties for the purpose as soon as possible after the fixing of a date for the case conference, prepare a case booklet to be lodged with the Registrar and served on the other party or parties not later than four clear days prior to the first date fixed for the case management conference;
- (b) the parties shall prior to the case management conference consult with each other for the purpose of agreeing upon a draft case timetable in the Form No. 1 in Appendix XX or such other form as may be directed, and in the event of such agreement the plaintiff shall lodge the agreed draft case timetable with the Registrar prior to the first date fixed for the case management conference;
- (c) where the parties cannot agree upon a draft case timetable, each party shall lodge that party's proposed case timetable, in the form last mentioned, with the Registrar prior to the date last mentioned.

(3) A case booklet shall contain –

- (a) a case summary, comprising
 - (i) an agreed outline of the case;
 - (ii) a list of those issues and events which are agreed;
 - (iii) a list of those issues and events which are in dispute;
 - (iv) a list of the persons principally involved in the matters or events the subject of the proceedings, and
 - (v) where appropriate, a glossary of technical terms which are likely to be used in the course of the trial.
- (b) pre-trial documentation in chronological sequence, including (where appropriate) the letter of claim and response to the letter of claim referred to, respectively, in paragraphs 11 and 14 of the Pre-action Protocol (Clinical Negligence Claims), any notice served under section 8 of the Civil Liability and Courts Act 2004, copies of pleadings exchanged, affidavits filed (other than affidavits of service), statements of issues, orders made or directions given, written statements of witnesses, expert reports and any correspondence between the parties, not being expressed to be “without prejudice”, relating to the preparation of the case for trial.

(4) The case booklet shall, unless otherwise directed by the Judge, be produced and maintained by the party responsible for preparing the same in such form, if any, as the Judge in charge of the List may direct.

(5) The party responsible for preparing a case booklet shall –

- (a) revise or add to its contents from time to time as necessary in consultation with the other party or parties, or by direction of the Judge,
- (b) lodge the booklet with the Registrar on the trial date, or as may be directed by the Court, save where a booklet of documents and extracts has been agreed in accordance with paragraph (g) of rule 11 of this Order.

10. The Judge chairing the case management conference shall establish what steps remain to be taken to prepare the case for trial, the likely length of the trial and the arrangements, if any, for witnesses, information and communications technology (including video conferencing) and any other arrangements which require to be made for the trial, and may make any orders and give any directions in respect of arrangements for the trial as he considers necessary.

11. The Judge chairing the case management conference may:

- (a) fix a timetable for the completion of preparation of the case for trial, and may for that purpose adopt any proposed timetable agreed by the parties if satisfied that it is reasonable;
- (b) make any orders or give any directions which he may make or direct under rule 4 of this Order;
- (c) if he considers that there is undue delay in, or he is otherwise dissatisfied with, the conduct of the proceedings, and without prejudice to any powers conferred on the Judge by Order 33, rule 11, require the party appearing to be responsible therefor, or the proper officer of or solicitor instructed in the proceedings by that party, to attend before him to explain the delay or other conduct with which he is dissatisfied, and may thereupon make or give such ruling or direction as he may consider appropriate for the purposes of expediting the proceedings or the conduct thereof;
- (d) without prejudice to any powers conferred on the Judge by Order 99, rule 37, sub-rule (13), disallow the costs of any indorsement of claim, pleading statement of issues or other document in the proceedings which contains unnecessary matter, or is of unnecessary length, and award against that party the costs thereby occasioned to any other party;
- (e) without prejudice to any powers conferred on the Judge by Order 33, rule 11 and Order 99, rule 37, sub-rule (31), disallow the costs of any party occasioned by a delay or default by that party in complying with a time limit for doing any act or taking any proceeding, and award against that party the costs thereby occasioned to any other party;
- (f) direct each party, in consultation with their respective counsel, to complete and lodge with the Registrar a pre-trial questionnaire in the Form No.2 in Appendix XX to these Rules;
- (g) request the parties to consult with each other with a view to agreeing, where possible, upon a list of the documents and, as appropriate, any extracts from documents intended to be

relied upon at the trial in substitution for the case booklet referred to in rule 9(2) of this Order, such documents and extracts to be lodged in indexed booklet form with the Registrar on the trial date, or as may be directed by the Court.

12. When the Judge chairing the case management conference is satisfied that the proceedings are ready to proceed to trial, he shall, in consultation with the Judge in charge of the List, fix a trial date.

Preparation for trial

13. Where no case management order has been made in clinical negligence proceedings in which notice of trial has been served, before fixing a date for the trial—

- (a) the Judge in charge of the List may:
 - (i) establish what steps, if any, remain to be taken to prepare the case for trial, the likely length of the trial and the arrangements, if any, for witnesses, information and communications technology (including video conferencing) and any other arrangements which require to be made for the trial;
 - (ii) make any orders and give any directions in respect of arrangements for the trial as he considers necessary and for that purpose direct each party, in consultation with their respective counsel, to complete and lodge with the Registrar a pre-trial questionnaire in the Form No.2 in Appendix XX to these Rules;
 - (iii) request the parties to consult with each other with a view to agreeing, where possible, upon a list of the documents and, as appropriate, any extracts from documents intended to be relied upon at the trial, such documents and extracts to be lodged in indexed booklet form with the Registrar on the trial date, or as may be directed by the Court;
- (b) the Registrar may, where the Judge in charge of the List so directs, perform the functions respectively conferred on that judge in sub-paragraphs (i) and (ii) of the preceding paragraph.

III. Evidence

Non-expert evidence

14. (1) Where a plaintiff intends to adduce non-expert evidence from any person in support of his claim—
- (a) he shall not later than seven days after he has served the personal injuries summons, deliver to the other party or parties a written statement, signed and dated by the person concerned, containing a detailed statement of that evidence,
 - (b) each party to whom the written statement is delivered shall within seven days of such delivery furnish the statement to any person from whom that party intends to adduce non-expert evidence where the statement may be material to that evidence.
- (2) Where a defendant intends to adduce non-expert evidence from any person in support of his defence—

- (a) he shall not later than seven days after he has delivered his defence, deliver to the other party or parties a written statement, signed and dated by the person concerned, containing a detailed statement of that evidence,
- (b) the plaintiff shall within seven days of such delivery furnish the written statement to any person whose statement has been delivered by the plaintiff in accordance with paragraph (a) of sub-rule (1),
- (c) a co-defendant (if any) shall within seven days of such delivery furnish the statement to any person from whom the co-defendant intends to adduce non-expert evidence (whether or not that person's statement has at that time been delivered by the co-defendant in accordance with paragraph (a)),
- (d) the plaintiff may, within four weeks from receipt of the statement delivered by a defendant in accordance with paragraph (a), deliver to the defendant a supplemental written statement from any person whose statement has been furnished by the plaintiff in accordance with paragraph (a) of sub-rule (1),
- (e) a co-defendant (if any) may, within four weeks from receipt of the statement delivered by a defendant in accordance with paragraph (a), deliver to that defendant a supplemental written statement from a person referred to in paragraph (c).

(3) A supplemental written statement shall be confined to material facts in the statement referred to in paragraph (a) with which they are in dispute.

(4) Notwithstanding the preceding sub-rules, a plaintiff or defendant wishing to adduce additional evidence from -

- (a) a person who has signed a written statement or a supplemental written statement delivered by that party under this rule or
- (b) another person

in support of his case may, where the Court in the interests of justice so permits, and within such time as the Court may allow, deliver to the other party or parties a further written statement, signed and dated by the person concerned, containing a detailed statement of such further evidence.

(5) Where a written statement, supplemental written statement or further written statement of a person has not been delivered within the time prescribed by this rule, or such further time as the Court may, on application to it on notice to the other party or parties, allow, that person shall not be at liberty to give evidence in the proceedings save where the Court in the interests of justice otherwise permits.

(6) A Judge may direct that -

- (a) a written statement,
- (b) a supplemental written statement,
- (c) a further written statement
- (c) or any part of any such statement,

shall be treated as the evidence in chief of the witness concerned, but only after it has been verified on oath by such witness.

Expert evidence

15. (1) Save where the Court in exceptional circumstances so permits –

- (a) a plaintiff and a defendant may each offer evidence from one expert only in a particular field of expertise on a particular issue,
- (b) in proceedings where there are two or more defendants, the defendants shall jointly offer evidence from one expert only on any issue relating to -
 - (i) quantum of damages,
 - (ii) the physical condition of the plaintiff,
 - (iii) the mental [or psychological] condition of the plaintiff,
 - (iv) the prognosis as to the physical or mental condition of the plaintiff.

(2) Permission shall not be granted under sub-rule (1) unless the Court is satisfied that evidence of an additional expert is necessary in order to do justice between the parties.

16. (1) The plaintiff and the defendant shall, on a date agreed between them, being a date not later than twelve weeks from the delivery of the defence, deliver to the other party or parties a report of each expert (if any) on whose evidence they respectively wish to rely, signed and dated by each expert concerned, containing a detailed statement of the evidence of that expert.

(2) The report referred to in sub-rule (1), and any supplemental report referred to in sub-rule (5), shall have appended to it -

- (i) any unpublished reports, articles, papers or other materials,
- (ii) a list of any published articles, papers or other materials

on which the expert concerned proposes to rely in giving evidence.

(3) A plaintiff or a defendant shall furnish to any expert whose evidence that party intends to adduce in support of his claim a copy of any written statement, supplemental written statement, or further written statement the contents of which, or part of the contents of which, may be material to the preparation by the expert of that expert's report.

(4) A copy of a written statement, supplemental written statement or further written statement referred to in sub-rule (3) shall be furnished to the expert within a sufficient time to enable the expert concerned to consider fully its contents for the purpose of the preparation of his report, and in any event not later than two weeks before the expiry of the time limited by sub-rule (1) for the delivery of the expert's report.

(5) Where any expert who has provided a report to a plaintiff or defendant for the purposes of sub-rule (1) wishes to give evidence by way of comment on or reply to the report of another expert, or any part of that report, the party proposing to rely on the evidence of that expert shall, not later than four

weeks from the date of receipt of the report concerned from the other party, deliver to the other party or parties a supplemental report, containing such comment or reply, signed and dated by the expert making such comment or reply.

(6) A report or supplemental report of an expert shall contain a statement that the expert –

- (a) understands that he has a duty to assist the court on matters within his expertise and that this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.
- (b) has complied with that duty.

(7) Any report or other material in writing referred to in a report or supplemental report provided for the purposes of this rule shall be appended to the report or supplemental report concerned, unless the same has previously been appended to another report or supplemental report so provided.

(8) Where a report of an expert person has not been delivered within the time prescribed by this rule, or such further time as the Court may, on application to it on notice to the other party or parties, allow, that person shall not be at liberty to give evidence in the proceedings save where the Court in the interests of justice otherwise permits.

(9) A Judge may direct that the report of an expert referred to in sub-rule (1) , or any part of such report, and any supplemental report of that expert referred to in sub-rule (5), or any part of such report, shall be treated as the evidence in chief of the expert concerned, but only after it has been verified on oath by such expert.

17. Where the reports and supplemental reports referred to in the preceding rule have been delivered by the plaintiff and defendant -

- (a) the parties shall -
 - (i) within four weeks of the expiry of the time prescribed in rule 16(5) for the delivery of any supplemental report of an expert, arrange for the experts on whose evidence in, or in respect of, the same field of expertise those parties intend to rely, to discuss in the absence of the legal representatives of the parties, without prejudice to the parties, the issues in respect of which those experts intend or will be asked to give evidence, for the purpose of preparing the memorandum referred to in paragraph (b),
 - (ii) in advance of that discussion prepare a list of the issues referred to at paragraph (i) which list shall form the agenda for the discussion,
- (b) following the conclusion of the discussion referred to in paragraph (a), the experts concerned shall, without having recourse to the parties or their respective solicitors or counsel for the purpose, prepare a memorandum for the Court identifying, respectively, the areas relating to the issues concerned on which they have reached agreement and those on which they have failed to reach agreement,
- (c) the memorandum referred to at paragraph (b) shall, not later than two weeks after the conclusion of such discussion, be completed and jointly submitted by the experts concerned

to the Registrar and delivered by them to the parties, provided that the memorandum shall not be in any way binding on the parties.

18. (1) Subject to sub-rule (2), rules 14 to 17 shall, save where the Court, on application by motion on notice, otherwise directs apply mutatis mutandis to -

- (a) proceedings between a defendant and a third-party, reference to “third party notice” being substituted for the reference to “personal injuries summons” in paragraph (a) of rule 14(1), and
- (b) a claim for contribution or indemnity by a defendant against a person already a party to the proceedings.

(2) In a case to which paragraph (b) of sub-rule (1) applies, the periods within which a written statement, any supplemental written statement, any further written statement, an expert’s report or any supplemental expert’s report shall, respectively, be furnished shall, in the absence of agreement between the parties, be fixed by the Court on the application of the defendant making the claim for contribution or indemnity, on notice to the party against whom that claim is being made, which application shall be made within three weeks of service by the defendant of the notice of contribution or indemnity on that party.

Evidence by video link or other means

19. (1) A Judge may allow a witness to give evidence, whether from within or outside the State, through a live video link or by other means.

(2) Evidence given in accordance with sub-rule (1) of this rule shall be recorded by video or otherwise as the Judge may direct.

7. The forms in the Schedule following shall be inserted as Appendix ?? to the Rules of the Superior Courts.

APPENDIX XX

Order 63D, rule 9(2)

No. 1

(Insert title of proceedings)

DRAFT CASE TIMETABLE

(The form following is appropriate for plenary proceedings and should be modified as appropriate for other types of proceedings).

Step or event	Date or (as appropriate) estimated date
Any notice served under section 8 of the Civil Liability and Courts Act 2004	
Letter of claim under Pre-action Protocol (in Form 5 in schedule to Protocol) issued*	
Response to Letter of Claim (in Form 6 in Schedule in schedule to Protocol) issued**	
Have the parties, prior to the commencement of proceedings, had recourse to any mediation, conciliation or arbitration arrangements?	
Personal Injuries Summons issued***	
Personal Injuries Summons served on the defendant*	
Plaintiff's written statements of non-expert witnesses delivered	
Appearance entered*	
Any notice for particulars required of claim delivered*	
Any particulars of claim delivered*	
Plaintiff's written statements of non-expert witnesses delivered	
Defence delivered*	
Defendant's written statements of non-expert witnesses delivered	
Any notice for any particulars required of defence delivered*	
Any particulars of defence delivered*	
Plaintiff's request for discovery delivered	
Defendant's request for discovery delivered	
Defendant's response to Plaintiff's request for discovery delivered	
Plaintiff's response to Defendant's request for discovery delivered	
Any motion for discovery/inspection issued	
Affidavits as to documents to be exchanged	
Inspection of discovery to occur by	
Written statements of non-expert witnesses exchanged	
Supplemental written statements of non-expert witnesses – if any - exchanged	
Further written statements of non-expert witnesses – if any - exchanged	
Reports of expert witnesses exchanged	
Supplemental reports of expert witnesses – if any - exchanged	
Any further particulars (e.g. of special damages) delivered on	

Any notices to admit facts/documents to be delivered by	
Any replies to notices to admit facts/documents to be delivered by	
Meeting of experts from same field of expertise held	
Memorandum of experts lodged with Court	
Papers for trial ready to be lodged in Court	

Date _____

Signed _____

(Solicitor for the) Plaintiff

(Solicitor for the) Defendant

To: The Registrar, Personal Injuries List

*Note that under Part III, para. 17 of the Pre-action Protocol, proceedings should not be issued until after at least four months from the Letter of Claim, unless a limitation period for the commencement of proceedings for the claim would expire within that period or the commencement of such proceedings is otherwise necessary to protect the patient's interests. Under Part IV, paras. 2 and 3, where a party does not comply with a requirement of the Protocol, the other party is relieved of his or her obligations under the Protocol and, if a claimant, may, subject to any limitation period prescribed by law, thereupon institute proceedings in respect of the claim.

** Note that under Part III, para. 14 of the Pre-action Protocol, the healthcare provider should, within four months of the Letter of Claim, send a Response to the Letter of Claim in Form 6 in the Schedule, adapted as may be necessary.

*** only relevant where case management prior to the closing of pleadings has been ordered. Where any document requires to be verified by an affidavit of verification, it will be assumed, unless an indication to the contrary is included in the form opposite the reference to the relevant document, that the affidavit verifying that document has been completed and filed.

Note: In the case of (a) proceedings between a defendant and a third-party or (b) a claim for contribution or indemnity by a defendant against a co-defendant, the form shall be modified as appropriate.

No. 2

(Title as in Form No. 1)

PRE-TRIAL QUESTIONNAIRE

Section A: Pre-Trial Procedures

1. Pleadings and Proofs
 - (a) Notice under section 8, Civil Liability and Courts Act 2004 yes/no
 - (b) Are all Pleadings exchanged? yes/no

If not, what pleading was last exchanged?
2. Have proofs been advised? yes/no
 - (a) If proofs have not been advised, please confirm whether or not same will be sought and advised prior to pre-trial conference. yes/no
 - (b) If proofs have been advised, please confirm that you are in a position to comply. yes/no
3. Have all pre-trial procedures been fully complied with including:-
(Delete where not applicable)
 - (a) Discovery? yes/no
 - (b) Admissions; Notices to admit facts? yes/no
 - (c) Interrogatories? yes/no
 - (d) Service of third party notices? yes/no
 - (e) Service of notices of contribution and indemnity? yes/no
 - (f) Service of notice under section 17, Civil Liability and Courts Act 2004 by –
 plaintiff? yes/no
 defendant? yes/no
 - (g) Fixing of issues? yes/no
 - (h) Any other directions given by the Judge? yes/no
4. If any matters referred to at paragraphs 1-2 above remain outstanding, please set out reasons for same.
5. State which of the following issues remain in dispute, and as between which parties:

			Parties
(a) causation?	yes/no	
(b) liability?	yes/no	
(c) quantum	yes/no	
6. Are there any further directions required to prepare the case for trial? yes/no
 If yes, please explain the directions required and give reasons.

Section B: Trial

1. Set out your estimate of the likely duration of the trial.
2. Please attach chronology of the relevant events likely to be referred to in the course of the hearing.
Has this been agreed with the other parties and if not, why not?

((Un)agreed chronology attached)
3. Please furnish an agreed statement of the issues to be determined at trial or, insofar as such issues may not be agreed, a brief statement thereof as perceived by you.

((Un)agreed statement attached)
4. Do the parties intend to have overnight transcripts? yes/no

Section C: Expert and other Witnesses

1. List the witnesses you intend to call, indicating which of these are expert witnesses, and in the case of expert witnesses, stating their qualifications and field of expertise.

(Mr /Ms (expert – field of expertise:)
(Mr /Ms)
2. [*Where two of more defendants*] Have the defendants agreed on a single expert to offer evidence on any issue relating to -
 - (i) quantum of damages, yes/no
 - (ii) the physical condition of the plaintiff, yes/no
 - (iii) the mental [or psychological] condition of the plaintiff, yes/no
 - (iv) the prognosis as to the physical or mental condition of the plaintiff. yes/no
3. (a) Have the plaintiff's written statements of non-expert witnesses been delivered? yes/no
If not, why not?

(b) Have the defendant's written statements of non-expert witnesses been delivered? yes/no
If not, why not?
4. (a) Have the plaintiff's reports of expert witnesses been delivered? yes/no
If not, why not?

(b) Have the defendant's reports of expert witnesses been delivered? yes/no
If not, why not?
5. (a) Has the plaintiff delivered any supplemental or further written statements of non-expert witnesses?
If so, please identify each statement concerned
- (b) Has the defendant delivered any supplemental or further written statements of non-expert witnesses?
If so, please identify each statement concerned
6. (a) Has the plaintiff delivered any supplemental expert report(s)?
If so, please identify each report concerned
- (b) Has the defendant delivered any supplemental expert report(s)?
If so, please identify each report concerned

7. Have the parties' expert witnesses from the same field of experience met with each other and submitted to the registrar a memorandum in accordance with Order 63D rule 17?
[Identify each field of expertise and the related meeting required] yes/no
If not, why not?
8. Are special facilities required in the Court room to facilitate the giving of any expert evidence (including video-conferencing or other courtroom technology)?
If so, give details.
9. Does any witness require special facilities? yes/no
If so, give details.
10. Does any witness require an interpreter? yes/no
If so, give details.
11. Are any special information and communications technology facilities (e.g. digital audio voice-recording, video-conferencing) required in the courtroom to facilitate the trial of the case? yes/no
If so, give details.

Date _____

Signed _____

(Solicitor for the) Plaintiff

(Solicitor for the) Defendant

Continue any answers on separate sheets where necessary

To: The Registrar, Personal Injuries List

