

EXECUTIVE SUMMARY

LAW SOCIETY PROPOSALS TO REDUCE THE COST OF PERSONAL INJURY LITIGATION IN IRELAND

This is not a report on everything to do with personal injuries in Ireland. Such a report would have to examine a very wide range of issues such as accident rates, prevention, availability and cost of insurance cover, etc.

This is the most comprehensive expert review, with detailed recommendations for reform, of the personal injuries litigation system in Ireland ever produced. Its foundation is the constitutional rights of every citizen to bodily integrity, access to the courts and compensation where injury has been caused to them by the negligence of others.

The report looks specifically at the current litigation system and how that could be improved with a view to making it more efficient and less costly to the benefit of everyone, while still retaining the essential fairness which must characterise the administration of justice.

The Society's suggestions have three key objectives:-

- (a) To encourage the settlement of cases as quickly as possible;
- (b) To encourage quick and efficient trials where trials take place and
- (c) To discourage fraudulent and exaggerated claims

(a) To encourage the settlement of cases as quickly as possible

The primary strategy to achieve this – both by the introduction of certain rule changes and by a change of culture involving the rigorous application of both new and existing rules – is to ensure information exchange by both sides to the fullest possible extent at the earliest possible time so that each side can know quickly and completely the case being made against them. The specific means to achieve this are:-

- Pre-action disclosure by letter of all then known information relevant to the case by both sides including details of the specific grounds upon which liability is asserted and denied
- Pleadings also should be comprehensive and fully informative with no known information of relevance omitted on either side
- Time limits for delivery of pleadings should be strictly applied by the courts
- Orders for discovery should be granted sparingly, be very specific in their scope and should be sought early rather than late in proceedings
- There should be much greater use of notices to admit facts and documents to reduce the issues of controversy at trial
- The Law Society and various organisations representing the medical profession should work to improve the consistency in form and quality of medical reports, which reports, like all expert reports, must be exchanged in advance
- Much greater use should be made by defendants of the lodgement system and it should be extended to plaintiffs, as has happened in England and Wales, so that a plaintiff can formally make a settlement offer placing the defendant on risk for costs if the court award is ultimately of a higher amount
- Judicial case management should be available for complex cases
- The level of court awards of damages and the facts of the cases that attracted those awards should be published more widely and systematically to assist parties to assess the level of damages appropriate to individual cases
- Systems should be introduced to provide in appropriate cases for interim awards and periodic (rather than lump sum) payments of damages

(b) To encourage quick and efficient trials where trials take place

Trials should be fewer and shorter if the above measures are put in place. In addition:-

- At trial no party should be entitled to call an expert witness unless leave for this was granted by a judge in an earlier court application where the need for that witness had been proved to the court
- Technology should be developed to allow for medical and other expert witnesses to give their evidence to the court by video-link

(c) To discourage fraudulent and exaggerated claims

Although completely invented claims are few in number, fraudulent and exaggerated claims are a serious problem which must be addressed by:-

- The creation by statute of a new specific offence of bringing, or assisting in bringing, a fraudulent claim with severe penalties on conviction, including imprisonment
- In addition, the evidence to be given by a plaintiff or defendant in a personal injuries case should be made on affidavit at the pleadings stage and, if a court subsequently discovers the evidence sworn to be false, penalties for contempt of court should be available and applied

INTRODUCTION

The purpose of this report is to examine and make recommendations for reform of an area of litigation that is very important to citizens' lives, namely the recovery of damages by persons for personal injuries suffered at work, on the roads or elsewhere. This review is not taking place in isolation.

In June 2000 the Law Society published a review paper on the management of civil litigation in the High Court¹. The report made a series of recommendations for improvements in civil procedures. Subsequently, members of the judiciary, representatives of the Society and representatives of the Bar took part in a review of High Court procedures and case management and submitted a report to the Superior Courts Rules Committee in May 2001². A similar review of practice and procedure should take place in all the civil courts.

This is a time of great change in the Irish courts. The setting up of the Courts Service has led to progressive modernisation of the courts' organisation in the last five years³. The transformation into a modern courts service of an organisation shaped 150 years ago has been remarkable. The establishment of the Courts Jurisdiction Commission⁴, headed by Mr Justice Fennelly, to examine all court structures in Ireland will be highly relevant to civil litigation, including personal injuries litigation. At present there are four levels of civil courts in Ireland, together with the small claims court, and the function of this Commission is to examine how these structures can be rationalised to improve access to justice and to promote the efficient hearing of cases. These developments promise improved court services and procedures to serve the Irish public in the years ahead.

¹ Discussion document – Judicial case management in the Irish Courts, Dublin, Law Society of Ireland 2000

² Report of Case Management Group to the Superior Courts Rules Committee, May 2001

³ The Board was established in 1999 following a series of studies and planning by the Working Group on a Courts Commission, which was set up in 1996

⁴ Working Group on the Jurisdiction of the Courts, established 10 January 2000

Furthermore, the government has announced measures in the Programme for Government⁵ which are intended to improve access to justice through reforms of procedural and substantive law and through administrative measures such as the setting up of a personal injuries assessment board.

This report emphasises the importance of personal injury litigation and the need for reform in this area as part of the changes in our courts. The report reflects the experience and ideas of a group of senior members of the solicitors' profession who mainly specialise in personal injuries litigation⁶. Some members of the group concentrate on acting for plaintiffs, and others defend claims on behalf of defendants and insurance companies. The group includes specialists in catastrophic injuries claims and in large-scale product liability cases. The common factor among members of the group however is many years of experience in handling cases of all types and sizes in courts across Ireland. The practical reforms suggested in this report reflect this experience. The Society hopes that this report will contribute to an informed debate and to beneficial changes in personal injuries litigation.

⁵ June 2002

⁶ Members of the Working Group are Roddy Bourke, Michael Boylan, Ernest Cantillon, Geraldine Clarke, Joseph Deane, Gerard Doherty, Stuart Gilhooly, Patrick Groarke, Michael Houlihan, Mary Keane, Elma Lynch (President of the Law Society 2001-2002), David Martin, Ward McEllin, Ken Murphy and Noel T Smith

Chapter One

PERSONAL INJURY COMPENSATION AND CITIZENS' RIGHTS

1. Under the Constitution of Ireland the right to bodily integrity is a constitutional right⁷. Furthermore the constitution guarantees access to the courts of Ireland to persons to vindicate their rights⁸. The common law, primarily through the tort of negligence, and statute law impose duties on organisations and persons not to cause injuries to others. These laws give rights of compensation where injury has been wrongfully caused.
2. The legal duty to take care and to obey the law, and the corresponding right to compensation for victims of breaches of that duty, is a fundamental protection to the health and safety of persons in our society. The deterrent effect of this system is an important protection. The knowledge that persons injured through carelessness or breach of statutory duty are entitled to sue is a powerful incentive for corporations, professionals and individuals to fulfil their legal responsibilities.

In Ireland there has been an increase in litigation claims in the past decades. This has arisen because of the increased willingness of persons to assert their legal rights, the availability of legal professionals to help them and also the dangers arising from industrialisation, heavy road transport and other aspects of modern Irish society. Personal injuries litigation has also exposed and given redress to innocent victims of some of the worst injustices of the past. The blood infection cases, vaccine defects, shortcomings in medical care and child abuse in institutions have been largely revealed through active legal representation by personal injury lawyers.

3. It is important to look at the causes of accidents which give rise to personal injuries litigation. These include:
 - poor training and sloppy practices at work
 - short cuts in safety standards on building sites

⁷ Article 40.3.1 Constitution of Ireland and relevant case law
⁸ Idem

- poor roads and inadequate policing for speeding and drunkenness on the roads
- abysmal maintenance of footpaths and other public places
- long waiting lists and overworked hospital staff with inadequate consultant cover.

These and other problems cause thousands of accidents every year. Due to litigation, increased safety standards and better enforcement, there has been some improvement in safety in our society, such as

- increased use of goggles preventing serious eye injuries,
- ear protectors preventing deafness,
- increased seatbelt use; and
- continuous foetal heart monitoring during labour and childbirth.

However enormous problems remain⁹.

In recent times there have been attempts to suggest that a significant proportion of claims are fraudulent. Without doubt, some persons bring fraudulent claims. (At the same time it should be said that some defendants put forward fraudulent defences against valid claims.) Important measures have been put in place in recent years to eliminate fraudulent claims. These include the thorough investigation of suspected questionable claims by defendants, their insurers and agents. The use of databases by defendants and their representative bodies (such as the Irish Insurance Federation) to identify parties making, or orchestrating, numerous claims has helped in monitoring such claims. Video monitoring of sites and other use of technology produces valuable evidence to combat fraud.

⁹ See for example Report of Health and Safety Authority “Eighteen individuals convicted following investigations by safety body”, 8 May 2002

4. The Law Society supports the strongest action (including criminal sanction) against any party making a fraudulent claim, or indeed lodging a fraudulent defence, and against any legal representative who knowingly connives in such fraud. The Law Society calls for the creation by statute of a new specific offence of bringing, or assisting in bringing, a fraudulent claim with severe penalties on conviction, including imprisonment. In addition, the Society believes that the evidence to be given by a plaintiff or defendant in a personal injuries case should be made on affidavit at the pleadings stage and, if a court subsequently discovers the evidence sworn to be false, penalties for contempt of court should be available and applied.
5. Changes in court procedures to require parties to detail their cases fully, as recommended in this report, will help to identify claims and defences which, although not fraudulent, are without merit. Procedures should be improved to make it less difficult to have such claims or defences struck out well before trial.
6. However, for the very large majority of accident victims, who have justifiable claims, the emphasis should be on achieving a fair balance between the parties, and doing so in a fashion that is cost efficient. In the following chapters of this report the claims process and its procedures are examined for the purpose of identifying areas where practical improvements can be brought about in this respect.

Chapter Two

PERSONAL INJURIES CASES IN IRELAND – THE EXISTING SYSTEM

Types and degrees of injury

7. Personal injuries vary in extent and type. These include:
- Road traffic accidents. These typically include accidents between cars, but may also include injuries to cyclists and pedestrians.
 - Injuries arising at places of work. These arise in factories, construction sites, farms, offices and other places where people earn their living. There are obvious dangers associated with physical work, such as construction and factory work, but the huge growth in service industries in recent decades has given rise to some increased risks for employees in offices and similar occupations.
 - Injuries due to dangers in public places such as footpaths (tripping injuries) and in shops.
 - Injuries caused by mistakes made by doctors and nurses, such as mistakes in the delivery ward leading to catastrophic brain injury, or by poor infection control within hospitals.
 - Product liability claims are claims by consumers against manufacturers and other suppliers of products that cause injury to health. The implementation of the European Product Liability Directive of 1985 has facilitated the recovery of damages against suppliers in this respect.
 - Assault and battery - apart from the criminal consequences of some forms of assault and battery, assault and battery usually makes a defendant liable to a civil claim for damages.

8. Injuries vary of course from those causing temporary localised pain to injuries which, while not crushing, may cause residual effects for many years, to catastrophic injuries that render the victim totally dependent on others for care for the remainder of his or her life.
9. The nature of the cause of the damage may also vary from case to case. In many cases, the cause may be relatively straightforward - for example, where a motor car runs into a pedestrian. In other cases it may be much more difficult to establish what caused the injuries. An example of this would be whether a pharmaceutical product caused neurological injuries - it may be very difficult to establish whether the product, or coincidental natural causes, was responsible¹⁰.
10. A further issue that may vary from case to case is proof of liability. In other words, whether the defendant is responsible in law for the plaintiff's injuries. Obviously, in many cases liability may be straightforward. For example, if a driver of a car travels at 80 miles per hour in poor weather conditions and skids and injures a pedestrian there will usually be no doubt about who is liable in law. As seen above however, other cases can be extremely complex. This is particularly so in product liability or medical negligence cases. Even in cases where the facts are relatively clear-cut, there may be issues of law in dispute. Another uncertainty may be if there is more than one defendant. Where it is unclear which defendant is responsible, the defendants make allegations against each other or against some third or fourth party about who is responsible for the accident. In some cases the defendant may allege that the plaintiff himself was negligent and in some way contributed to the accident. If this is proved, it would reduce the plaintiff's damages.
11. The investigation of many personal injuries accidents can be particularly difficult where they happened a long time ago. This may be especially so if some time has passed before a solicitor is instructed and if evidence relevant to the event is no longer in existence. In some cases, the injury complained of may not become apparent to the plaintiff for many years. This may increase the chance that evidence is lost and often

¹⁰ See judgment of Hamilton J. *Best v. Wellcome Foundation and Another* 11 January 1991 (and subsequent judgments of Supreme Court 3 June 1992)

may give rise to arguments that the case is statute barred or otherwise should not be allowed to proceed.

12. Some personal injuries proceedings result from an occurrence or a series of occurrences and have similar characteristics. The simplest example of this might be a bus crash where the occupants are injured. The allegations of negligence by these passengers against the party allegedly responsible for the accident probably will be similar, but there could be significant differences in the injuries suffered depending on the position in the vehicle where the passenger sat, his or her age and physical make-up.
13. A particularly complex type of litigation is where hundreds or thousands of plaintiffs with similar alleged injuries sue a defendant or a small group of defendants. These are called mass tort cases in the USA. Such persons may have suffered alleged injuries of differing extent and severity as a result of taking a medical or pharmaceutical product or from suffering exposure to dangerous materials or noises. Even though there may be significant similarities about the plaintiffs' cases, there may be great differences in the circumstances which gave rise to the alleged liability and to the injuries. The defendant may allege that some plaintiffs were negligent or ignored warnings, or indeed may say that the products could not have caused the injury alleged and that the occurrence of the injuries was a mere coincidence. Such allegations can be very complex and demand great care and attention over a lengthy period.

Court structures and levels

14. The degree of injury is usually relevant to the level of damages sought. Under current rules claims up to approximately €6,340 are brought in the District Court. The jurisdiction of the Circuit Court is from this figure up to approximately €38,090. The High Court hears cases above these levels. Changes included in recent legislation¹¹ to increase the jurisdiction of the District Court up to and including €20,000 and the Circuit Court up to and including €100,000 have not yet come into effect.

¹¹ ss 13 and 14 Courts and Court Offices Act, 2002

15. Most personal injuries cases are brought in the Circuit Court or High Court. The rules of the Circuit Court are in many respects very similar to those of the High Court. They include provision for pleadings and many procedures similar to those in the High Court rules.
16. Some cases conclude earlier than others. An important fact here is that often it can take several years for the pattern of symptoms to become apparent so that the doctors can measure for how long and at what degree of severity the symptoms may last in the future. This uncertainty applies to many forms of injuries and is an important reason why many personal injuries accident claims cannot be responsibly disposed of until some years after the accident.
17. Another reason why some cases take longer than others to come to hearing is due to levels of court business and the number of judges available. For example the waiting period between when a case is ready for trial and when it is called on for hearing in some Circuit Courts is extremely short, whereas in the High Court the waiting time can sometimes be lengthy, particularly for cases that are to be heard outside Dublin. At present though, once a case is ready to proceed to trial in the Dublin High Court, an early trial can be obtained without difficulty.

The litigation system

18. Our litigation system is based on an adversarial approach. This means that subject to obeying the ground rules set down by the rules of court and other legal rules, each party is entitled to act in its own interest and to advance its case in the best way that it can. The role of the judge is to adjudicate upon the dispute that the parties bring before the court. The responsibility for advancing the case, and defending it, rests wholly on the parties to the litigation.
19. The rules of court and of evidence require that each side must reveal to the other side a considerable amount of information about their cases prior to trial. Therefore the plaintiff must serve a written statement of his or her case and in the Circuit and High Courts, defendants must plead a defence. However, in practice the information

revealed in these documents can be minimal. Reform in this area is essential, as will be addressed later in this report.

20. The provision of discovery requires litigants to exchange with the other side copies of documents relevant to the dispute that are in their power or possession, even if those documents are damaging to their side of the dispute. Thus in a clinical negligence dispute, a hospital has to allow the plaintiff's representatives to see medical notes which may contain, for example, damaging admissions about responsibility for the alleged accident.
21. Recent rules of court require the exchange of reports of experts in High Court personal injuries cases in advance of trial where parties intend to rely on such experts' opinions at trial. This means that each side will see the other side's medical reports of the doctors it intends to call in evidence at trial¹².
22. The law entitles a party to demand rights of inspection of relevant physical evidence prior to trial. Thus if a machine is allegedly responsible for an industrial accident, the plaintiff's lawyers can require inspection facilities of the machine prior to trial. Furthermore, in High Court personal injuries cases, prior to trial parties must exchange details of the identity and addresses of the factual witnesses whom they intend to call to trial, and give vouched details of expenses claimed.
23. This exchange of information between parties is intended to reduce the element of surprise at trial and to encourage settlement of cases that need not proceed to trial. In practice however, the real issues in the case may not be revealed until late in the litigation because, for example, the defendant may simply deny everything. As recommended later, this requires reform to ensure that full disclosure of claims and defences is made early rather than late in a case.
24. The adversarial approach is a fundamental part of our system of justice. The philosophy of the adversarial system is that on each side the representatives use their best efforts to present their cases, and that the independent and impartial judge will be able to reach a conclusion in the case.

¹² See detailed provisions of Order 39 rule 45-51 Rules of the Superior Courts

Objectives of reform

25. Personal injuries litigation is important to a person bringing a case. The person, or his or her child if the person injured is a child, has suffered an injury. Often the injury is very serious and occasionally catastrophic. Every injured person is entitled to the careful professional handling of his case to completion. Also, as the defendants are usually insured and thus represented by well resourced insurance companies and their lawyers, it is important for plaintiffs to know that, if necessary, their case can be adjudicated on by an independent judge conscious of the need to ensure that justice is done in each case. This is an essential constitutional safeguard to ensure that the rights of each citizen are vindicated.
26. The vast majority of cases are settled. However they often settle too late, often at the door of the court. More cases should settle before proceedings are issued and most should settle well before trial. An important object of the system should be to facilitate the early settlement of as many cases as possible. By the same measure, if the parties are not able to settle a case, the trial should take place as soon as appropriate, consistent with fairness to both sides. Defendants must always be entitled to a fair opportunity to test a plaintiff's case, to identify fraudulent or unmeritorious claims, and to carry out such investigations as are necessary to come to an accurate assessment of whether there is a liability to the plaintiff and if so, how much should be paid to the plaintiff. By the same measure the plaintiff must be entitled to identify and expose a fraudulent or unmeritorious defence.
27. These reform proposals have been formulated primarily to address employment liability, road traffic and public liability claims, although problems relevant to other types of cases such as medical negligence and product liability cases are touched upon in this report.

Chapter Three

COMPARISONS WITH OTHER COUNTRIES – EASY ANSWERS?

28. In assessing any aspect of our litigation system, the experience of other countries, particularly those in the common law world, is often informative and potentially useful. In this report, reference is made to aspects of court procedure in England and Wales in particular, which if suitably adopted and implemented in Ireland could result in useful reforms. However, whole-scale implementation of another country's legal system could be counter-productive and indeed result in a failed experiment.
29. The system with which Ireland is most compared is that of England and Wales where a shared common law tradition, a similar language and physical proximity, give rise to substantial similarities between the legal systems of both jurisdictions. However, there are enormous differences between the litigation systems of both jurisdictions and particular care should be taken in attempting to draw conclusions from experience in England and Wales when reviewing the Irish system.
30. One important consideration is under the Irish constitution, there is a requirement that justice must be administered in public, save in limited exceptions provided by law¹³. This rule means that the vast majority of Irish court applications, whether trivial, routine or very serious, must take place in public. The principal exception is family matters. This can be inconvenient, inefficient and on occasions embarrassing for parties who would prefer aspects of their dispute to be dealt with privately before a judge. However, the rule does promote transparency.
31. In contrast, in England very many court applications (whether before the courts or the masters) are held in chambers, rather than in open court. This has considerable benefits in terms of efficiency. However, even if it were considered desirable to have more private hearings in Ireland to promote the efficiency of hearings, this might not be possible, short of a constitutional referendum, due to the fact that the Irish rule is enshrined in the Irish constitution. Such change probably would not be acceptable

¹³ Article 34.1 of the Constitution of Ireland

either, given the high value increasingly accorded to openness and transparency in modern Ireland.

32. Prior to the Woolf reforms, the system of civil litigation in England and Wales bore a substantial, although in parts superficial, resemblance to that of Ireland. In personal injuries litigation, both systems were adversarial systems and although the English courts had introduced reforms from the 1960s onwards which made practice substantially different, an Irish practitioner could see many similarities between the systems. Notable differences were that for many years there had been compulsory exchange of non-expert witness statements prior to trial in England (something that has never happened in Ireland). There were other provisions which tended to encourage greater pre-trial disclosure than happened in Ireland.
33. However, the implementation of the Woolf reforms since 1999 has led to fundamental divergence between the civil litigation systems and personal injuries practice in both jurisdictions.
34. Lord Woolf¹⁴ recommended that personal injuries and other litigation cases should be progressed speedily according to timetables and that procedures and the costs incurred should bear some relationship to the size and value of the case before the court. In all cases the rules stipulate strict deadlines for complying with court procedures.
35. Another aspect of the system is that before issuing proceedings, parties must follow pre-action protocols which are set down by the court rules and which provide for an exchange of information between the parties about the nature of the claim and the defence and other standard information with an aim to encouraging settlement before issuing proceedings. Severe limits on the use of expert evidence in cases have been imposed on the ground that there has been over-use and over-reliance on expert evidence in cases in the past with consequent wasted expense.
36. These reforms have had some striking results, the most notable of which has been a decline in the number of new personal injuries and other proceedings issued in the

¹⁴ Access to Justice: Final report of the Lord Chancellor on the civil justice system in England and Wales, July 1996, The Right Honourable Lord Woolf, Master of the Rolls

English courts¹⁵. It is too early yet to assess definitively whether the reforms have actually achieved their objective of reducing the costs of litigation and increasing access to justice. Examination of the effects of the Woolf system is under way by the Lord Chancellor's Department. The reforms have stimulated much interest around the world however, given their goals of seeking to reduce the cost of litigation and improving access to justice.

37. There are aspects of the Woolf reforms which might valuably be applied in Ireland. The emphasis on full disclosure and also the system of "Part 36" offers to encourage settlement (referred to later in this report) would be good reforms. However, given that the Irish personal injuries litigation system is very different in many respects to the English system which existed prior to the Woolf reforms, and given also that the benefits and drawbacks of the Woolf reforms have, in practice, yet to be assessed adequately, any whole-scale move to incorporate the Woolf reforms in respect of Irish personal injuries litigation would be unjustified and unlikely to work.

¹⁵ Emerging Findings – An early evaluation of the Civil Justice Reforms, Lord Chancellor's Department March 2001

Chapter Four

PROPOSALS FOR REFORMS

38. Before proceeding to examine details of recommended reforms it would be useful to summarise these briefly.

Early disclosure

39. Early disclosure of information should be compelled to allow the parties to come to the earliest possible assessment of the strengths and weaknesses of their case with a view to early settlement and, in default of that, to proceeding to trial in as focused a manner as possible. Such early disclosure should include full and detailed letters before action and responses to these. Relevant physical evidence should be preserved and available for inspection sooner rather than later in proceedings. Pleadings (setting out details of the plaintiff's allegations and the defendant's response to these allegations) should be detailed rather than containing bland and unfounded assertions, or blanket denials. Parties should be required to exchange at the earliest opportunity any expert evidence upon which they intend to rely with a view to identifying whether there is any dispute on such issues. The service of notices to admit facts and documents should be compelled to reduce the issues in dispute between parties.

Resolving cases speedily

40. Parties should be required to advance litigation to a conclusion with all reasonable speed, subject to the overriding requirement that there should not be unfairness to either party. Thus, although pleadings and other documents should normally be delivered within the time set out in the court rules, there should always be allowance made for circumstances where it would simply be impossible to do so because of the complexity of the case. Also if a plaintiff's symptoms are still unsettled, it would be wrong to force a case to a premature settlement or trial. Similarly where a defendant's investigations are ongoing in a complex matter, and if it could be shown that enquiries were being expeditiously undertaken, this would justify additional time to deal with the case.

Enforce court rules

41. Parties should be forced to obey court procedures, particularly those intended to encourage early disclosure, early settlement and focused trial. At present it can be quite easy for parties and their advisors not to comply with such procedural requirements and mere exhortation or encouragement will not cure this.

Case management

42. In complex cases only, that is cases with a multiplicity of issues and parties or with numerous proceedings, or with an enormous volume of documentation, there should be court orders to rationalise and manage such litigation where necessary. Such orders might include the appointment of one judge to deal with interlocutory applications in the litigation. The purpose of this is to rationalise complex litigation so that it can proceed to resolution by way of settlement or trial in an orderly way.

Improving ways of delivering compensation

43. Where liability is not an issue, there should be a means for plaintiffs to obtain accelerated assessment of damages and if necessary, interim payments of damages. Often plaintiffs who clearly are entitled to damages have to wait considerable time to get any payment and in the meantime may suffer hardship. Structured awards should be facilitated in catastrophic injuries cases. Provisional awards of damages should be permitted in serious cases where the medical prognosis is unclear, subject to strict criteria.

Limit expert evidence

44. No experts should be permitted to give evidence at trial unless there is a demonstrable need, such as where there are material issues between the parties which can only be resolved with the aid of such expert evidence at trial. This is to avoid unnecessary and over-cautious calling of experts to attend trial and incurring significant costs by way of standby fees and lengthening of trial.

Increased use of technology

45. There should be optimal use of information and data communications technology consistent with the needs of justice. Given the increased use of these facilities in courtrooms around the world and the prevalence of such technology in our society, their use in litigation should be encouraged where possible to promote efficiency. An obvious example would be setting up video links with large hospitals where necessary consultant expert evidence could be given by video link to the courts. Similarly, the use of databases and word processing has become increasingly widespread and if managed properly, could facilitate the orderly presentation of documentation at trial.

Rationalise discovery and other interlocutory procedures

46. Discovery can be a vital means of establishing facts relevant to a case. The relevant court rules for discovery and other interlocutory procedures should be revised and updated. Subject to the requirements of justice, the courts should be given greater discretion to limit discovery where it is not necessary or where it is disproportionately burdensome.

Consistency in and information about damages

47. There should be the maximum possible consistency in the level of damages awards and ease of access of information to legal practitioners about recent levels of awards made by the courts for different types and degrees of injuries. This would facilitate early valuation of cases and encourage early disposal by settlement of such cases where possible.

Informing clients about fees

48. Solicitors should continue to ensure that they have spelt out to all clients the risks inherent in undergoing litigation. The Law Society will enforce compliance with the requirements of section 68 of the Solicitors (Amendment) Act, 1994.

Chapter Five

LETTERS BEFORE ACTION – AN IMPORTANT OPPORTUNITY

49. The vast majority of personal injuries actions and other litigation commence with a letter before action from the plaintiff's solicitor. This is addressed to the defendant and usually provides details of the claim and invites the defendant or defendants to admit liability and provide an offer of compensation, failing which proceedings will issue. The letter invites the intended defendant to pass the letter to their insurance company. A variation of such letter is a letter written to two intended defendants where it is unclear which one is responsible for the accident. Both are invited to admit liability and the letter typically makes it clear that if no admission is forthcoming, in the event of one defendant being successful at trial and the other being unsuccessful the plaintiff will look for an order from the court requiring the unsuccessful defendant to indemnify the plaintiff as to the successful defendant's costs¹⁶.
50. In some cases, letters before action give insufficient information to the intended defendants and their insurance companies to form a view in the case. Exceptionally the letter before action may contain such minimal details that it may be quite unclear as to how, when, where and why the alleged accident occurred, or even what was the nature of the accident. This may not matter where the accident occurred recently and the intended defendant is well aware of the details of the claim. However if a letter before action is received months or sometimes some years after the accident by, say, a large company or institution such as a hospital, it may be quite unclear as to what accident is referred to. This may lead to delays of weeks or months as the recipient of the letter attempts to find out what accident is referred to and who in their organisation may be able to provide details of what happened and what records exist. Such delay may also cause the loss of relevant documents and the evidence. In the meantime, there is less opportunity for the claimant and the intended defendant and its insurance company to discuss the claim and to try to settle it.

¹⁶ Known as an O'Byrne letter

51. Sometimes of course the plaintiff and his solicitor may themselves have limited information about the accident and who may be responsible for it. Nonetheless the greatest detail possible should be provided in a letter before action to enable the intended defendant to:

- provide details to insurers, so that they in turn can adjust their reserves
- enable early investigation of the claim to take place
- enable the intended defendant to inform other possible parties or witnesses who may be involved of the existence of the claim, so that they in turn may evaluate the claim
- enable preservation by defendants of relevant evidence, both documentary and, where applicable, physical evidence, such as plant or other relevant equipment
- enable the intended defendant to point out to the plaintiff, if applicable, that it had no involvement in the accident or that in some other way the claim is misconceived
- enable the intended defendant to seek to settle the case at an early opportunity.

52. The rules of court should be amended to require plaintiffs, three months before initiating personal injuries actions, to write a detailed letter before action to the intended defendant to enable the intended defendant to take the steps listed above. The rules should include model lists of matters that should be addressed in such letters. Exceptionally it will be reasonable for a plaintiff not to provide these details if where, for example, despite all reasonable efforts very little is known about the accident. However, in such circumstances the letter before action should make it clear that only such limited information is in fact available. It may also be reasonable not to write a detailed letter before action if, for example, the solicitor only receives instructions to issue proceedings on the last day before the expiry of the statute of limitations. A detailed letter should follow the issue of such proceedings and before they are served.

53. The rules should provide the means for a defendant to apply to court for an order against the plaintiff who fails to serve a detailed letter before action. This mechanism could be similar to the mechanism discussed later in this report for failure to provide adequate details in the statement of claim. The subsequent order could provide for staying of the action pending provision of adequate details of the claim and if appropriate, a costs penalty to reflect the seriousness of the omission.
54. By the same measure, more often than not, responses from defendants to even quite detailed letters before action are merely a stark denial of liability. This may be justifiable if there are not sufficient details of the claim to enable the defendant to form a view in the case. In many cases this may be the fact. The response to the letter before action should, however, actively address any points that may assist in the resolution of the litigation. For example, if inadequate information is provided about the case, the response should set out what information is required in order to deal with the case.
55. As with the intended claimant, an inadequate response of the intended defendant to the claim, including its initial letter of response and its formal defence, should be evaluated by the court and, if appropriate, penalised in costs either following a motion by the plaintiff or in assessing costs if an award is made at trial. As with other reforms, a critical attitude of the courts to failure to comply with court rules and to inadequate preparation of cases will be essential to ensure that all parties and their representatives fulfil their obligations.
56. There should be provision for payment of costs in cases that settle after the letter before action and before proceedings issue. This would be to encourage early settlement. At present costs are not recoverable before proceedings issue. To encourage settlement before the issue of proceedings, the successful claimant should be entitled to receive, as well as damages, a payment from the defendant to reflect the necessary and reasonable legal and other costs involved in bringing the claim.

Chapter Six

PLEADINGS – AN END TO THE RITUAL

57. There are minimal pleadings in proceedings in the District Court but in the Circuit Court and High Court each side sets out its allegations in writing by way of pleadings before cases proceed to discovery and trial. In the High Court the plaintiff's case in a personal injuries claim is set out in the statement of claim and the defendant files a defence. In the Circuit Court, the allegations are contained in a civil bill and the defendant's response is also called the defence. Strictly speaking, a plaintiff's pleadings must set out the plaintiff's factual allegations and details of the plaintiff's claim, and the defence must set out the defendant's case.
58. There are several very unsatisfactory aspects to pleadings in litigation in Ireland at present. The first is that in many cases parties can delay significantly in delivering pleadings, which in turn can lead to delay in the case progressing to settlement or trial. Sometimes of course this delay is justified, as the party may not have enough information at that stage to deliver pleadings. For example the plaintiff's claim may be complex and may require some months of investigation and research before it can be properly set out in a pleading. This often occurs in complex pharmaceutical cases. By the same measure, the defendant may legitimately require fuller details of many of the allegations made before drafting and serving a defence. However, other than when justified, parties should be required to deliver their pleadings within the time set out in the court rules. In all cases where parties expect not to be able to serve pleadings in time, the scope for unjustified delay should be limited. For example, the time for delivery of a defence in the High Court is 28 days from service of the statement of claim. (A 21 day warning letter follows this before a motion is issued. Therefore in practice, defendants have 49 days in which to file their defence.) A defendant wishing to obtain more details of the plaintiff's claim before serving the defence should be required to serve a notice for particulars within that 28 day period and on receipt of such written particulars, serve their defence within 28 days in default of their opponent's agreement to an extension of time.

59. Another striking feature of pleadings is that they can be very uninformative. In the case of plaintiff's claims, this means that the details set out in the form of pleading, whether the statement of claim or the civil bill, may not be adequate to enable the defendant to assess the claim properly. Of course there may be aspects of the plaintiff's claim which by the time of pleading may not be certain. The plaintiff's injuries may not be yet settled and so it may be necessary to reserve the plaintiff's position about all consequences of the injury until later in the process. Similarly the plaintiff may need to incur ongoing medical and other expenses and these may not be finally quantifiable until some time in the future. Nonetheless pleadings should contain all information about the plaintiff's allegations that is available to the plaintiff and that is necessary to put the defendant on full notice of the allegations that are made. Furthermore the allegations should be as precise and specific as possible and give full particulars of the allegations made. As seen above, a process in the court rules exists by which a party can get further details of his opponent's allegations through notices for particulars¹⁷, but these should only be necessary to clarify rather than to get basic information that is relevant to the allegations.
60. An even more widespread feature of pleadings, and an equally unsatisfactory feature, is the lack of information in defences that are currently pleaded in many personal injuries cases. More often than not defences simply consist of a series of straightforward denials, including denying matters that are beyond any dispute. Court rules permit such "negative" pleadings which are intended to put the plaintiff on notice that the defendant intends the plaintiff to prove all its allegations. This militates against early resolution of litigation, as it means that the plaintiff is often unsure about what the defendant in fact disputes in the claim. By denying everything, defences are almost meaningless. It is essential that the rules of court be amended to require defendants to plead more specifically, with clear provision for costs penalties where a defendant fails to do so unreasonably.
61. All parties should be required to sign their claim or their defence, as a means of certifying that the document is truthful.

¹⁷ Order 19 rule 7 Rules of the Superior Courts

Chapter Seven

DISCOVERY – A POWERFUL WEAPON FOR JUSTICE

62. The discovery process is an essential means of disclosure of evidence in an adversarial system. In discovery, parties must reveal to each other all relevant, non-privileged documents in their power, control or possession. This means that documents that damage a party's case, as well as helpful documents, must be disclosed to the other side well in advance of any trial. Discovery is relevant both to liability (documents that may throw light on who is responsible for the accident) and quantum (documents that may be relevant to the proof of damages, losses and expenses). It is a key means to ensuring justice, but because of its expense and size in some cases, it must be controlled carefully.
63. In Irish civil procedure there is no rule providing for automatic discovery in litigation. Parties have to ask the other party for discovery, and if such request is refused, the party or parties seeking discovery must apply to the court. If the court finds that discovery was unreasonably refused, the offending party may be ordered to pay the costs of the application¹⁸. Discovery can also be ordered against persons or institutions that are not a party to the dispute but have documentary evidence relevant to it¹⁹.
64. The system where discovery has to be sought, rather than automatically ordered in proceedings, is on balance better than the alternative. To have automatic discovery in all cases would be excessive as in many cases discovery is not necessary or, at least, could be dispensed with without affecting the justice of the case. The provisions of the rules permitting requests for voluntary discovery by correspondence is a welcome development insofar as it avoids the necessity in most cases of having to apply to court for discovery.

¹⁸ Order 31 rule 12 Rules of the Superior Courts

¹⁹ Order 31 rule 29 Rules of the Superior Courts

65. The provisions of the High Court and Circuit Court rules, which require parties seeking discovery to stipulate the categories of documents they seek, are an important attempt to limit discovery to documents that are material to the dispute. By requiring parties to focus on categories of documents that are relevant, this helps to ensure that the parties consider issues in litigation at an early stage and also helps to avoid unnecessarily large discoveries. The alternative is a general order for discovery, where every document, no matter how marginally relevant, must be disclosed. The court may also limit discovery on grounds that discovery is not necessary either for disposing fairly of the case or for saving costs.
66. The rules of court should be amended further, however, to enable the court to further limit discovery in cases where such discovery could be wholly disproportionate and expensive relative to the issues and money at stake. Such provision should take into account factors such as the degree to which it is likely or not that relevant admissible evidence may emerge from the proposed discovery, and the extent of the evidence that may be available on less expensive discovery. First and foremost though the court must be guided by the interests of justice.
67. More informative pleadings and greater, and earlier, use of notices to admit facts (see next chapter) will also help narrow down the scope of discovery and attendant expense in cases.
68. To make discovery more efficient, the rules should set out standard protocols for categories of documents that are relevant to different categories of cases in personal injuries litigation. The protocols set up for fast track disclosure in the pre-action protocols for personal injuries claims in the new Woolf regime in England provide a helpful description of categories of documents that are relevant to different types of personal injuries cases²⁰. The protocol identifies categories of documents in respect of road traffic accident cases, highway traffic claims and work place claims. These lists form a checklist that help both the plaintiff in seeking discovery and the defendant in giving discovery to identify the documents relevant to the dispute in question in a

²⁰ See Practice Directive Protocols Civil Procedure Rules May 2001

systematic way, and help to minimise the risk that relevant categories of documents might be inadvertently overlooked, destroyed or lost.

69. The creation of such standard protocols for discovery in more common types of personal injuries actions in Ireland would not be an enormous task given the knowledge within the insurance industry, local government, Health and Safety Authority and other sectors about categories of documents that are relevant to safety maintenance and prevention of accidents, risk management, compliance with statutory obligations, regulations and other issues. The protocols in the English Civil Procedure Rules would also be of assistance in helping to formulate appropriate rules for Ireland.
70. Special considerations apply to the preservation and provision of discovery documentation held by medical service providers. These considerations are relevant to medical negligence claims and in many other forms of personal injuries actions, where the medical and treatment records of the patient may be relevant to liability and to the assessment of the extent of his personal injuries.
71. Because of the loosely structured nature of medical services in Ireland, with many different medical service providers providing services under different types of contractual and other arrangements, particular difficulties arise in this area. There has also been a long tradition of independent hospitals providing public as well as private services. Although there has been increased rationalisation of hospital and medical services in recent years, and attendant rationalisation and efficiencies in the management of data and records by medical service providers (the Freedom of Information Act has stimulated this), there is still a wide diversity of practices and procedures, and sometimes lack of procedures, in place among different medical service providers. Even within hospitals, different practices and standards apply in different areas of the institution.
72. The practical effect of this is that when suing a medical service provider, or simply seeking evidence from a medical service provider relevant to a personal injuries claim, there is often great difficulty in obtaining early and comprehensive release of relevant records (whether by way of discovery or voluntary agreement). Such

difficulties lead to increased delay and expense in litigation. Vital records may be lost or mislaid²¹. There is an urgent need for rationalisation and efficiencies in this area by medical services providers.

73. Parties in personal injuries litigation should be entitled to obtain a comprehensive set of their medical records from doctors and from hospitals at a reasonable administrative cost and without delay. This objective is consistent with proper clinical management of patients. Medical service providers who do not have a reliable and effective system for document management and storage may cause gaps in information about patients' histories which may be relevant to patients' future treatment. At the same time there should be an onus on claimants and their advisers to notify medical service providers of complaints or claims, or simply requests for documents that are relevant to litigation at the earliest opportunity. The passage of time can inevitably increase the risk that documents will be harder to retrieve or will be lost or destroyed. The provision of protocols for seeking documents at an early stage would assist this, as would the delivery of accurate and detailed letters before action.
74. Similar considerations apply to any organisation holding documents that may be relevant to health and safety, such as employers in respect of work accidents. The work of the Health and Safety Authority and others has improved standards of record keeping and retention in relation to health and safety, but here again early notification of possible claims and provision of details about accidents to likely defendants and others will help to ensure that organisations holding such documents are aware that the documents are relevant and must be preserved.

²¹ See report of the Information Commission 2001

Chapter Eight

ADMITTING THE OBVIOUS

75. Irish rules of civil procedure require in most circumstances that the party alleging a fact in civil proceedings must prove that fact. Similarly, parties seeking to rely on a document must normally prove the authenticity of the document. It can be costly and time-consuming to prove a fact or the authenticity of a document. A relevant witness may live abroad or may have to be subpoenaed to attend to give evidence to prove a fact. Given that there may be many facts and documents in a case, the expense of proving all facts and documents may add greatly to the expense and time of trial. Court procedures enable one party to serve a notice on the other requiring that party to admit (or not require proof of) stipulated, and usually uncontroversial, facts and documents. If the other party unreasonably refuses to admit such documents, that party is usually obliged to pay the costs of proof of those facts or documents irrespective of whether or not that party wins the case. These procedures are designed to reduce the number of facts and documents that have to be proved at trial and to ensure that only essential items have to be proved.
76. Unfortunately these procedures are very under-used in Ireland. An explanation for this is that parties and their legal advisers know that most cases settle and thus there is little risk in failing to serve or respond to such notice. Also even if a case proceeds to trial, formal proof may not be required in respect of uncontroversial matters or the judge may grant an adjournment to enable necessary witnesses to be called.
77. There will be definite benefits in increasing the use of notices to admit facts and documents in Irish personal injuries and other litigation. A means of doing this would be to automatically require parties in every case to serve a notice to admit facts and documents at a reasonable time before proceeding to trial, and preferably as early as possible before discovery. This requirement would require parties and their advisors to assess what issues and facts are truly at issue and what facts and documents can be admitted. Where a party has judged that no facts or documents should be admitted, they would say so in the notice but the process of having to complete and serve such

notice would concentrate advisors' minds. They would know that if the matter proceeded to trial they would have to account for such assessment.

78. A requirement to serve notices to admit would be very valuable in medical negligence cases where there can be large volumes of records. To prove these formally can be an enormous task, requiring the calling to the witness stand of possibly dozens of witnesses. Forcing parties in such cases to admit all such records that are not genuinely in dispute would be an enormous advance.
79. The court rules should be amended to require service of notices to admit setting out respectively the facts and documents sought to be admitted. The rules should stipulate a period of time within which the replies to these notices must be given and provide that where a party fails to respond to a notice within the time limit, it will be possible to bring a notice of motion to compel a response. In their response the party can either admit the facts or documents, or refuse to do so, or admit them subject to stated qualifications.
80. The existing rules should be reformed to allow adequate time to respond to a notice to admit (the present six day period is too short) and there should be scope to serve such notice or notices at any reasonable time in the litigation. The rules should also be reformed to clarify the grounds upon which cost penalties may be applied for failure, without excuse, to serve or respond to a notice.
81. A thorough revision of the rules relating to notices to admit facts and documents at all court levels, together with revision of other procedures intended to reduce the issues of controversy at trial (such as the interrogatories procedure), would encourage parties and their lawyers to identify what matters are truly at issue in the litigation, thus reducing the cost and length of trial and waste associated with witnesses having to attend court to prove uncontroversial matters

Chapter Nine

THE ROLE OF EXPERTS

Introduction

82. Experts, particularly medical doctors, feature prominently in Irish personal injuries litigation. Doctors are essential in most cases, and other experts have an important role in some cases. However there is over-use of such experts at the time of trial, with resulting cost and expense.
83. Experts provide advice to the parties in litigation about technical issues relevant to the claim. For example in a road traffic accident, an engineer may advise the parties on the impact on the vehicle, which may be relevant to the assessment of the angle at which the crash occurred and of who is responsible for the accident. In turn, the plaintiff's doctors will advise on the plaintiff's injuries, their extent and the prognosis. If the accident is serious and the plaintiff is seriously incapacitated as a result, other experts such as physiotherapists and occupational therapists may advise on the extent and costs of therapy necessary to rehabilitate him or her in the future. Occupational experts often advise on loss of income and job opportunities that have been foregone as a result of the plaintiff's injuries. Architects advise on the extent of costs of adaptation to a plaintiff's house where a plaintiff, due to his injuries, has or may become wheelchair bound. Actuaries provide expert guidance on the calculation of the present value of the capital sum (amount of damages) that will be necessary to generate a specified income through the future. These and other experts may provide expert assistance to a plaintiff's representatives to formulate details of both the liability allegations and quantum sought in an action.
84. Usually, in more simple accidents, expert involvement consists of the plaintiff's doctors and perhaps an engineer, but each case depends on its own facts. The defence representatives will typically wish to engage their own expert to test the allegations made on behalf of the plaintiff.

85. The second function of experts is to give their expert opinion at trial on issues in dispute between the parties. In the formal sense this is the most important role of experts in litigation. In giving such evidence, experts owe a duty to the court to give their frank opinion on all expert issues in question that are within their area of competence and expertise. Expert witnesses are unique as, unlike other witnesses, they are entitled to give evidence as to *opinion*, provided that they are truly expert in the area upon which they are giving their opinion. Most cases settle before trial however, so in fact most work by experts in litigation is done in preparing expert reports for their client and in advising the client and the client's lawyers on the merits and weaknesses of the case in relation to the expert issues.

Doctors' medical reports

86. As mentioned above, medical experts are central to personal injuries litigation. In the vast majority of cases the person injured will attend a doctor, either a GP or more often a hospital for treatment. Whether the treatment is short term and relatively limited, or extensive over a number of years, the doctor(s) involved should be in a position to express expert views on the plaintiff's condition from when he or she first presented as well as the diagnosis and prognosis in respect of the injuries. Thus the plaintiff's lawyers in most cases must obtain reports from the treating doctors. Critical in these reports would be the prognosis, so that the plaintiff's legal advisers can consider (i) the full extent of the injuries both physical and psychological, if any and (ii) future treatment that will be necessary. The plaintiff's legal advisers may also require guidance from the doctors as to other medical experts who should be consulted, perhaps for a specialist opinion on an aspect of the plaintiff's symptoms that is outside the area of expertise of the doctors retained. Again, on the defence side, experts other than the experts on behalf of the plaintiff may have to be retained to form a view as to the extent of the injuries and the consequences of the symptoms. The need for both sides to retain experts could be greatly limited by full and frank pleading.
87. Most medical doctors in the course of their practices write medical reports for these purposes. The party retaining them pays them a fee. A standard recommended fee was agreed in the past between the medical representative bodies and the Law Society for

examinations and medical reports. However despite this agreement, individual doctors are perfectly entitled to assess and charge a fee for an examination and report that is reasonable in the circumstances. Many doctors write very thorough and helpful reports but the standard of reports varies. Increased education in writing expert reports for litigation would help greatly doctors, clients and the courts. Although a well prepared and written report probably takes more time to write than one that is not so well prepared, it avoids the lawyer having to revert to the doctor and to seek clarification of issues arising in the report. Furthermore it best serves the client because his or her legal advisers can most reliably come to a view on his injuries and symptoms. Moreover it may be to the advantage of the doctor as doctors' reports intended to be used at trial are subject now to compulsory exchange in High Court personal injuries litigation. If a report is inadequate and the case goes to trial the doctor may find it difficult to justify and stand over his report in evidence. All these factors point to the need to ensure that medical reports, even on less complex matters, are written with care and professionally. The majority of doctors aim to this standard but a surprising number of reports are inadequate, and some are grossly inadequate. Such reports add to delay and to the cost of litigation.

88. The responsibility for poor quality reports can be placed in some cases on inadequate briefing of the doctor by the patient or his legal representatives. This may occur simply because the briefing materials are insufficient. Comprehensive medical notes may not be available from the hospital for some other reason outside of the doctor's control. On other occasions the blame for delay, or for providing an inadequate report, lies clearly with the doctor.
89. All of these factors point to the need for ongoing continued education of doctors and lawyers about the provision of expert reports. The development in recent years of training courses to teach professionals to write expert reports is welcome. Both the medical organisations and the Law Society should encourage participation in these courses and indeed promote these courses themselves.

Doctors giving evidence at trial

90. When a doctor may be called to give evidence at trial, it can be a source of much inconvenience to the doctor and cause great expense to litigants. In very many non-minor personal injuries actions that go near the stage of trial, parties' representatives ask the doctors to be on standby in case it is necessary to call them to give evidence. Standby arrangements mean that if the case is called to trial, the doctor will be contacted and he will attend court within hours to give his evidence. The court and parties usually make all reasonable efforts to fit in with the doctor's requirements when he or she is practising but the arrangement can create considerable inconvenience for all.
91. The costs charged by doctors for court standby and attendance are considerable. Although there will always be a need for doctors to give evidence in relation to disputed matters in some cases at trial (particularly in medical negligence cases or in complex product liability cases), it would be in the interests of litigants to seek to minimise the occasions where doctors have to be on standby and attend to give evidence. This persistent problem can be largely overcome by adequate pleadings and insistence on the exchange of expert reports in adequate time before trial (see below) so that the parties can see what, if any, aspect of the medical issues is seriously in dispute. Other steps to encourage settlement before cases get near to trial will also reduce the need to have doctors on standby or to be called as witnesses.
92. The problem of over-reliance on doctors' attendance at court can only be cured if the courts actively discourage such evidence other than where essential. This could be done by insistence on full and timely compliance with the regime for exchange of experts' reports and not permitting experts to be called to give evidence at trial without the permission of the court (see next chapter).
93. A means that may be used to reduce inconvenience and cost in connection with doctors who are needed to give evidence would be to avail of video access and other technological advances to enable doctors to give evidence from their hospital. Many large hospitals in Ireland now have access to video links and this will be an increasing feature in the future. As the courts become technologically more advanced, hopefully

it should be possible to benefit from these developments as is the case in other countries. These comments will of course apply to other experts also.

94. In 1992 guidelines as to the use of medical legal reports were agreed between the Law Society and the medical representative bodies. These guidelines are intended to assist lawyers and doctors in understanding the involvement of medical experts in giving evidence in court and to ensure that doctors in writing reports and giving evidence at trial understand their role. The Law Society has prepared a revision of these guidelines.

Engineers

95. Engineers are much employed in litigation as experts. Their role is primarily relevant to liability. They may give evidence, for example, in road traffic cases about the physical impact of crashes upon vehicles, which can assist in determining who is liable for the crash. Other examples of evidence may concern machinery involved in an accident, allegedly unsafe premises and other areas where an expert assessment of physical items involved in an accident may be relevant to determining responsibility. With this category of witnesses there are fewer logistical conflicts than with medical doctors because many consulting engineers concentrate largely on acting as experts. As it is a central part of their professional services, they usually have considerable experience in writing expert reports and in giving evidence in court. Here too however, substantial expenses are incurred in having experts on standby in cases where evidence may be necessary if the case is not settled at the door of the court and proceeds to trial. Reforms similar to those relevant to medical experts that reduce such expense are relevant to engineers too.

Actuaries

96. Actuaries are highly qualified professional experts who advise on the present value of future expenses and losses. Such figures represent future expenses incurred by or on behalf of the injured person in dealing with the consequences of his injury, or loss of income by that person due to his injury. Actuaries' calculations are very relevant to the valuation of such damages in serious personal injuries cases. If the calculation of losses and expenses is wrong, the client may suffer considerable loss. Payment in a

settlement of a case or following a verdict at trial is a once off event. In other words the plaintiff cannot ask for more in the future but must rely on the “once off” sum of damages that he or she is awarded or paid by settlement. Various factors need to be taken into account in assessing what sum, when invested, will produce a stream of income in the future that will enable a plaintiff to pay for necessary expenses incurred in the future, and will compensate for loss of income. There are standard actuarial tables published by the Institute of Actuaries in the Ireland and the UK which enable the calculation of the present day value of a stream of income in the future.

97. The use of an actuary to advise legal representatives about the proper calculation of these sums is usually necessary in complex cases. However there is too much use of such experts in more routine cases. With publication of judicially approved actuarial tables, most solicitors would adequately be able to calculate more straightforward claims. There would be no justification in the large majority of cases to have actuaries on standby to give evidence in court as there should be no controversy in such cases about actuarial calculations. Furthermore, as mentioned, standardised actuarial tables could be adopted by the courts and applied easily in the majority of cases at trial by the judge. In cases of exceptional complexity where there are significant differences between the partys’ experts, actuarial evidence could be given in court but this should only be in exceptional cases.

Nursing Experts

98. These experts advise in more serious cases where injuries result in the need for long-term nursing assistance or care. Such experts advise on the likely extent of such needs in the future and the cost of these.

Architects

99. Like nursing consultants, these experts tend to give evidence in cases where plaintiffs have suffered very serious injuries and require adaptation of their homes. Architects advise on the likely cost of such adaptation.

Vocational Rehabilitation Consultants

100. These experts advise in cases where, due to injuries, plaintiffs may be unable to work for a period or for the rest of their lives or may have to work in a different type of work that suits their injuries.
101. Vocational rehabilitation consultants advise on opportunities in the job market and wage levels that are likely to be applicable to categories of work.
102. Whilst instruction of vocational consultants and other experts such as nurses and architects may be necessary in very large personal injuries cases involving catastrophic injuries and long-term incurring of medical and other expenses, in the future, their use at, or on standby for, trial should be actively discouraged save where clearly necessary.

Scientific Experts

103. This category includes a wide range of experts in different scientific disciplines who may advise in cases where there is a scientific issue in dispute. Examples of such disputes may be in cases involving vaccines or other pharmaceutical products, neonatal brain injuries, alleged radiation injuries and ill health allegedly caused by toxic contamination. Such litigation is increasingly common in the industrial world as more information becomes known about adverse side effects of products and industrial processes. Among the most commonly used experts in this category are toxicologists (experts on the toxic effects of substances), pharmacologists, epidemiologists (experts on the study of diseases in populations) and statisticians. Scientific experts are used in cases where there is a scientific dispute about the cause of an alleged injury. This may arise particularly in cases where there are two or more possible causes of an injury and only one of which may have been caused by the defendant. If the case goes to trial the court will hear scientific evidence on both sides as to the likely cause of the injuries. In this sort of case, expert reports can be complex and lengthy, with voluminous supporting evidence. The early exchange of such expert reports in these cases, giving full details of the expert's qualifications, experience and opinions based on the facts of the case and the state of knowledge in the field, is critical to ensure that issues can be narrowed down to the points that are

really in dispute, and so that each side and their experts can adequately test the other side's contentions. In this and other areas, pre-trial meetings of experts should be encouraged by the courts to reduce differences further.

Chapter Ten

PRE-TRIAL DISCLOSURE OF WHAT WITNESSES WILL SAY

Witnesses of fact

104. In most personal injuries cases there will be witnesses of fact starting usually with the victim of the accident whose recollection, if any, of the accident will be relevant evidence to the case. Any other witnesses to the accident, or persons who give personal evidence of witnessing matters that may have caused or contributed to the accident, will be relevant witnesses of fact. An example of this would be persons who have responsibility for maintenance of machinery in a factory and who can give evidence to the condition of the machinery before the accident. In Irish personal injuries litigation, each side may call witnesses of fact to court to prove facts which are relevant to the case. Where an essential witness of fact is in the jurisdiction and may not come voluntarily, that witness can be subpoenaed by a party to attend to give evidence. Each witness may be subject to examination and cross-examination which enables the judge to assess the accuracy and reliability of the witnesses' evidence, its relevance to the issues in dispute and its value in supporting or undermining the claim. An important factor in oral evidence is the ability of the judge to assess the witness's demeanour and the witness's frankness and truthfulness in giving his or her evidence.
105. In Irish civil litigation a party calling a witness of fact does not have to provide a copy of that witness's statement to the other side or to the court at any time. The first time that the other side in the court may become aware of the witness's evidence is when the witness gives that evidence in court.
106. In contrast, in some countries, notably in England and Wales, it has been the practice for many years that the parties must exchange, well in advance of trial, statements of evidence of the witnesses that the parties intend to call at trial. The objective is to ensure disclosure of such evidence to the other side so that each side in turn can best assess the strength and weakness of their case in light of the evidence that may be

brought by other witnesses. The objective is to encourage early settlement of cases and narrowing of issues at trial with the objective of shortening the length of trial.

107. Indeed, in the English courts, a witness of fact at trial is very often not asked to give their evidence-in-chief but rather to simply undergo cross-examination on the basis of their written statement which has been supplied to the other side. This leads to a shortening of hearings as examinations-in-chief can be lengthy, particularly in complex cases.
108. Despite such benefits, there is nonetheless a strong case for not having compulsory exchange of statements of witnesses of fact in civil litigation in Ireland. The preparation of such witness statements would be time-consuming and costly. It would inevitably be done by the parties' lawyers. The process of preparing such statements could unwittingly shape or affect the witnesses' recollections. Inevitably, in the interests of their clients, lawyers would spend much time in attempting to ensure that the statements are as favourable and supportive as possible of their client's case. This is not to suggest that the statements would contain incorrect or misleading evidence. Rather the statements might simply tend to emphasise or articulate evidence in a way that would be most favourable, in the knowledge that such statements would be exchanged with the other side and a favourable witness statement would help a party in settlement negotiations.
109. Another relevant factor is that the giving of evidence-in-chief by witnesses in court can provide important insights to the court into that party's evidence and the truthfulness and weight to be put on the evidence.
110. All these factors favour not having compulsory exchange of factual witness statements in personal injuries or other litigation in Ireland.

Expert witness statements

111. The same does not apply to statements of expert witnesses. Expert witnesses are professional persons who are giving evidence as to their professional opinion based on facts presented to them. Their evidence is usually of a technical or scientific nature.

112. The major advantage of having compulsory exchange of witness statements, as occurs under the current rules of the High Court, is that it will increase the knowledge of the parties and their experts about their opponent's case and this can encourage settlement or at least narrow the issues in dispute. In contrast to the statements of witnesses of fact, there is less risk that exchange would influence or shape the evidence of experts. Other advantages are that expert evidence can be complex, dealing with scientific and technical or medical issues. It would be impossible to deal properly at trial with such expert evidence without advance notice of what the expert will say to enable evaluation of the evidence in light of published material in the field and the views of other experts.
113. Elsewhere in this report there is reference to concerns about too many experts being called to give evidence in court. Steps have been taken in other countries, particularly in England, to reduce this. Under Woolf procedures, there are stringent controls on whether a party may call any expert evidence in a case²². Parties are not entitled to call an expert or put in evidence an expert's report without the court's permission. The policy objective underlying this is "that of reducing the incident of inappropriate use of experts to bolster cases" where the issue in dispute "is factual and "obvious" and the court is unlikely to benefit from expert evidence"²³. The English rules provide that a party can instruct experts without waiting for the court's permission but they may not recover the costs of such experts if the court subsequently decides that the expert evidence is not necessary. Under the rules, the court may direct that evidence on an issue be given by one expert, jointly instructed by the parties, although this is unusual.
114. Such a level of judicial supervision over the involvement of experts in litigation is in stark contrast to current Irish procedure where broadly speaking parties are entitled to call whatever number of experts on whatever topics relevant to the case as they wish. Earlier in this report, proposals are made as to means of encouraging parties to advance only necessary expert evidence.

²² See provisions of Rules of Civil Procedure (White Book) Vol. 1 Autumn 2000 and particularly at 35.4
²³ Idem at 35.4

115. The current procedure on exchange of experts' reports in personal injuries litigation in Ireland is not working as effectively as might be hoped. Under this procedure, parties are required to exchange any documents (including drafts) received from an expert containing the substance of the expert's opinion. This may be why there is a failure to exchange, or a delay in exchanging expert witness reports in many cases. A means of encouraging compliance with the current rules would be to restrict exchange of reports only to final versions of the reports. This would mean that draft reports would not be exchanged. It could be argued that drafts *should* continue to be exchanged so that the other side can see the development of the expert's thinking on a case. However, this is an idealist aspiration as compulsory exchange of drafts simply leads to delay and a reluctance to write any reports until experts reach a concluded view on an issue or issues.
116. Essential to the success of a system for the exchange of experts' reports is a strict requirement that once exchange of reports has taken place, evidence from further experts may not be exchanged or introduced to trial save with the agreement of the parties or by order of the court. The court should make any such further exchange of expert evidence subject to such conditions as the justice of the case requires. These provisions are calculated to ensure that parties observe both the letter and spirit of the regime for exchange of expert reports and to deter one party from providing a brief, inadequate report in exchange for the other party's comprehensive and more thorough report. Any such breach should be subject to penalty by the court, either at the motion of the other party or in the course of trial.
117. In addition to ensuring exchange of experts' reports, the rules should deem the contents of all reports to be admitted by the other side without proof at trial, with a proviso that where there is a material dispute about the accuracy or validity of the contents of a report, that a party or parties may seek permission from the court to call a relevant expert or experts to give evidence at trial about this matter. These provisions would reduce the amount of expert evidence called at trial thus shortening trials and reducing expense.

Chapter Eleven

TAKING OFFERS SERIOUSLY

118. The system of civil justice in every country depends fundamentally on the fact that the vast majority of cases are settled before trial. If even thirty or forty percent of civil claims went to trial, the courts system would be swamped. Judges and practitioners know that even though a large number of personal injuries cases may be listed for trial each day, most settle before the start of the trial or just within a day or two of the trial starting. Although a significant proportion of civil cases will inevitably settle late in the day, an insufficient number of cases settle earlier. Earlier settlement would mean that the court system could concentrate on the cases that are very likely to go to trial and considerable expense would be saved. Court procedures should include more measures that are designed to encourage early settlement.
119. In addition to the rules which require earlier disclosure of certain facts and allegations, the lodgement and tender procedures in the courts are intended to encourage plaintiffs to accept reasonable offers of settlement. Different rules apply to lodgements in different court levels in Ireland but these may be broadly described as follows. A lodgement is a payment into court some time before trial by the defendant of a sum of money which the defendant calculates is sufficient to meet the plaintiff's claim. If the plaintiff decides not to accept the lodgement - acceptance would mean taking the money lodged in court and ending the proceedings - and proceeds with the case and is not awarded more than the lodgement, he will be responsible for the costs of the action from the date of the lodgement to trial. The financial consequences in such circumstances could be serious for the plaintiff as the costs up to and including trial from the date of the lodgement when assessed will be payable by him, usually out of his damages.
120. The rules for making lodgements were previously quite inflexible but rule changes made in recent years have enabled lodgements to be made nearer a trial than heretofore. Further changes have enabled certain categories of insurance companies and large publicly owned companies to tender money, rather than lodge money in

court. The tender carries essentially the same effect as the lodgement. The judge at trial is not supposed to know that a lodgement has been made until after he has given his verdict.

121. Lodgements are made only in a minority of personal injuries actions. One reason for this is that where there has been any doubt about whether the defendant was responsible for the accident, defendants generally have preferred not to make a lodgement, as making a lodgement could be regarded as a sign of weakness. The calculation for this is that by not making a lodgement and continuing to deny liability a greater discount might be obtained in settlement negotiations. Insurance companies and defendants should use the lodgement system more frequently.
122. A striking absence in the present system is the absence of the equivalent of a lodgement that could be availed of by a plaintiff to encourage a defendant to settle the case. A defendant who wishes to prolong a case, or who through inefficiency fails to take steps to move a case to completion as soon as possible, at present faces no exposure other than the risk that the levels of damages and costs may have risen by the time of trial.
123. Recent reforms in England have enabled plaintiffs to make early offers of settlement which, if ignored by the defendant, can lead to penalties against the defendant if the plaintiff is awarded at trial a sum equal or greater than the settlement offer²⁴. Such penalties may be a payment to the successful plaintiff of additional interest or, in some cases, indemnity level (full reimbursement) costs.
124. These English rules extend to offers of settlement made by a prospective plaintiff or defendant before the issue of proceedings. The offers of settlement must be made in conformity with procedures set out in the relevant court rules, and provide a suitable incentive for parties to consider settlements of claims or litigation at an early stage. A similar system should be adopted in this country. Also it would be advisable to make it as trouble free as possible to evoke these procedures provided that basic procedural rules are followed.

²⁴ See Part 36 of the Rules of Civil Procedure (The White Book) Autumn 2000

Chapter Twelve

OBEYING COURT RULES

125. This topic is the key to ensuring more efficient and cost effective litigation. The major difficulty in seeking to bring about more and earlier settlements is that in most cases, particularly where there is no lodgement, the risk of an adverse consequence for settling late or allowing the case to go to trial is remote. Most cases settle shortly before trial and so, irrespective of the diligence or otherwise with which a party has prosecuted or defended a case, the settlement does not take into account these factors. In other words, there is rarely a cost penalty in a settlement or judgment that takes into account the efficiency or otherwise with which the party proceeded with the litigation. Even if a case goes to trial and judgment is awarded, the party responsible for delay will know that irrespective of the inefficiencies which may have occurred earlier on, usually there will not be a penalty for these in the judgment. Therefore there needs to be a means by which parties throughout the course of litigation realise that, in the absence of progressing the case with reasonable diligence, there is a risk that penalties will have to be paid.
126. There is no justification for extreme penalties in most circumstances. Extreme penalties, such as striking out a case, should only be imposed as a last resort, as procedural requirements should not, other than in extreme cases, deprive the litigant of his rights. It is true that litigants so deprived may have a right to seek recourse from professional advisers, if such professionals were at fault for failure to take steps. This would be a heavy burden for the client to carry however, as it would necessitate making a negligence claim against such advisors, leading to delay and expense.
127. Costs orders should be made where there have been significant breaches of the rules, particularly repeated breaches. These costs orders should be in two parts. The first should be an ordinary costs order where the party at fault will have to pay costs of the motion or other wasted costs to the other side. As is usual, these costs would be measured at taxation and payable after that. The court should not, where possible, reserve costs. The other form of cost penalty should be the payment of court costs.

These would reflect the costs of the court time lost by a significant breach of the court rules by a party. There is an economic cost to running our courts. These include the costs of work buildings and infrastructure, the costs of employment of the judge and court officers and administrative costs. These are substantial, and all delays resulting in the need to apply to court result in wasted valuable court resources. The cost of court time should be calculated according to hourly or half day units. Where a party's serious breach of the rules has led to the waste of court time, that party should be penalised by an order to pay a unit or units of court costs forthwith, in contrast to the costs payable to the other side (which should be measured and payable after taxation). These court costs should be payable immediately as the judge could simply order the appropriate figure for the wasted time, either an hour, a half day or whatever. These court costs should be payable to the Courts Service immediately. If the client's lawyer was at fault and was the cause of the delay, the client would be entitled to require the lawyer to pay those costs. While such powers would have to be implemented with caution, as there may be extenuating circumstances in very many cases, the absence of immediately effective penalties means that in effect procedural rules can be ignored by some litigants and their lawyers.

Chapter Thirteen

JUDICIAL CASE MANAGERS IN COMPLEX CASES

128. Judicial case management is a process where the court takes the ultimate responsibility for progressing litigation with a view to encouraging settlement of disputes at the earliest possible stage or, where trial is unavoidable, to ensure that cases proceed as quickly as possible to final hearing of limited duration²⁵. The Law Society believes that there should be judicial case management in procedurally complex personal injuries cases, such as cases involving large numbers of plaintiffs with related causes of action against one or a group of defendants. Some medical negligence and pharmaceutical cases involving much documentation and complex scientific and technical issues would also benefit from this process. However, case management should only be ordered where necessary. Thus where the parties are managing their complex litigation efficiently and speedily, judicial intervention will be unnecessary.
129. Judicial case management was among the topics discussed at a conference held in Dublin by the Working Group on a Courts Commission in November 1996. Although aspects of case management apply in practice in the Irish courts (for example, in respect of judicial review applications in recent years), in practice the Irish system of civil procedure leaves the management of cases in progress through the courts largely to the initiative of the parties involved. A wholesale move to comprehensive judicial case management in civil litigation would be a fundamental change in the philosophy of civil litigation in the Irish courts and would have enormous implications both for the management of cases and resources needed, in order to ensure that such a system was effective and worked.
130. Judicial case management applies in many other countries other than England. There is a long history of such case management, particularly in complex litigation, in the

²⁵ See definition paragraph of chapter 5 of the interim report to the Lord Chancellor on the Civil Justice System in England and Wales (June 1995)

United States²⁶. Some systems are highly programmed, leaving most major decisions in the litigation to the court, whilst others appear to be more collaborative by placing emphasis on the parties' representatives agreeing and adhering to a plan for the efficient conduct of the litigation under the supervision of the court.

131. Common features in such systems are pre-action protocols, early disclosure of information, pre-set or judicially determined timetables for steps in the litigation and case management conferences where a judge assigned to the case reviews progress of the case to settlement or trial in the presence of the parties' representatives and makes directions for steps needed to bring the matter to trial. In particular these latter features – a judge determining the pace and giving directions as to procedures in individual cases and the timing of these procedures – would be a fundamental change to Irish litigation. In the vast majority of cases before the Irish courts, the first time that a judge considers a case is at the commencement of the trial.
132. As concluded by the Law Society in its discussion document issued in 1999 on this topic, considerable caution should be exercised in respect of moving to judicial case management on a comprehensive scale. The benefits of such a system could easily be outweighed by the costs and other drawbacks, particularly in smaller to moderate size cases or even large cases where there are no complex procedural issues. An improvement in current rules of procedure, and strict enforcement of these rules, would probably avoid the need for judicial case management in the vast majority of cases.
133. However, there is a strong case for some form of judicial case management in very complex litigation. In the personal injuries area, an example of this might be in particularly complex pharmaceutical cases with a large number of parties, including defendants, voluminous documentation and complex issues of fact requiring lengthy evidence from many witnesses of fact and experts. Such cases would probably benefit from active judicial case management from an early stage in the litigation.

²⁶ See Manual for Complex Litigation (3rd edition), Herr, published by Federal Judicial Centre/West Group 1999.

134. In fact there has been some experience in this area in Ireland in practice in recent years. The army deafness cases were in essence managed by one High Court judge and in a number of other complex personal injuries cases involving numerous parties, a single judge has handled interlocutory applications in relation to such cases. Such pragmatic management of complex litigation may deliver as much benefit as a more elaborate system. There is a compelling case, however, for the rules of court to be adapted to recognise the need for *some* form of judicial case management in complex litigation, whether called for by the parties involved or directed by a judge at his own motion. An overriding consideration is that in all such mass or complex litigation, the court should evaluate whether a form of judicial case management should apply. This should be done in the interest of avoiding the swamping of the courts with unnecessarily lengthy and costly litigation, to the detriment of the parties and also to the detriment of the court system.
135. Probably the most appropriate means of identifying cases suitable for case management would be to place an onus on the parties to such complex litigation to raise the issue before the court at an early stage in the litigation with provision for cost penalties if there is a failure to do so. Senior court registrars should also be empowered to bring to the attention of the court such cases which could be listed for consideration for case management.

Chapter Fourteen

MAKING DAMAGES PREDICTABLE

136. Assessment of damages is a key part of personal injuries litigation. Indeed where responsibility for an accident is clear, assessment of damages is the most important part of a case. In most cases, the sooner the damages (or value of the case) can be assessed, the greater the chance of an earlier settlement or shorter trial. In many cases it will not be possible to assess a fair value for damages for pain and suffering at an early stage as a person's symptoms may be unsettled. The claimant's doctors may not be sure about whether there will be long-term pain or other disability. Damages in a case where a person gets well soon and has no long-term pain will be much less than damages payable to a person who suffers persistent pain and disability throughout the rest of their lives. It is often cases in the middle – where the patient is getting better but where there is a possibility that there will be long term-pain – that are most difficult to assess.
137. Central to these difficulties is uncertainty about the future. As seen above, when the plaintiff obtains damages either by settlement of the case or by judgment of the court, the case is concluded in respect of that claim. The plaintiff cannot receive any further damages in the future from the defendant in respect of that injury. If the plaintiff's condition unexpectedly worsens after settlement he cannot go back and ask for more damages to reflect this. This factor makes it critical to try to predict the future as accurately as possible.
138. Even if the future physical effects of injuries can be assessed with confidence, other critical uncertainties remain. An example might be as follows. A 51-year-old man is injured through defective machinery at work. His doctors advise him that he can no longer do heavy work but they believe that he may be able to do light work. His earnings in doing that work, if he can obtain employment in his area that is suitable, will be less than he earned before he lost his job. He would normally have retired at 65 and thus there are 14 years before then. His solicitor has to ensure that he gets adequate compensation to reflect the fact that his income will be lower in the future

due to the accident. In trying to negotiate a settlement, or if the case goes to trial, among the uncertainties that must be resolved is the fact that there is no guarantee that he will be able to do or continue to do even light industrial work for the 14 years to normal retirement age or that he will be able to secure the appropriate job.

139. Another complication in settling damages is that there are so many different types and degrees of damages. For example the plaintiff may have suffered injury to one part of his body due to whiplash, whilst a person involved in the same accident such as a passenger in the car may have suffered multiple injuries such as fracture to the leg, dislocation of the hip and stiffness. Also injuries to different organs and bones will vary in severity.
140. Another factor is the possible pre-existence of existing injuries or disease, which may be or may not be exacerbated by the accident. A claimant may be entitled to recover compensation for any worsening of an earlier injury as a result of the accident.

Assessing Damages

141. Damages fall into two broad categories. The first category of damages is for financial loss in the past and into the future as a result of the accident. The second is compensation for pain and suffering and other non-financial consequences of an accident.
142. Calculation of loss of earnings and financial outgoings suffered since the date of the accident (i.e. already incurred expenses and losses) is not usually complex. It is important that the solicitor obtains adequate details from his clients of these losses and has supporting evidence of them when putting forward the claim. Usually these details will be obtained from employers, medical services providers and other persons involved in the care and treatment of an injured person.
143. The calculation of future loss and expenses is more complex due to the uncertainties about the future outlined above. Compensation under this area can be broken into two distinct categories.

144. The first is the loss of earnings, benefits in kind and pension rights resulting from the person having to give up his work, or taking a lower paid job or foregoing opportunities for promotion. This necessitates the careful examination of the plaintiff's circumstances, his past employment record and how it will be affected in the future. In such cases it is necessary to gather evidence from present or former employers. The assistance of experts with knowledge of the job market and rehabilitation may be relevant to assessing the claimant's likely earnings in the future. If the claimant has to retire earlier than normal, this would have to be taken into account as part of his loss, as it will mean less income and lower pension.
145. Particular complications arise in the case of a self-employed individual who, but for the accident, may have been fully involved in his business. The drop in profits and earnings from his inability to work fully in the business may require specialist guidance from accountants and economists to ascertain the likely loss.
146. Claims by the estate of persons wrongfully killed in accidents, or claims by a deceased person's dependants (such as his or her family), will take into account the loss of income that would have accrued in the future but for the victim's death.
147. The assessment of these factors leads to calculation of a figure for a yearly financial loss. Another important exercise is the calculation of future expenses. This is particularly so in very serious accident cases where a plaintiff may be partly disabled after an accident or indeed may be totally dependent for the rest of his or her life on outside care. Even moderately severe injuries may require adaptation of the plaintiff's house and additional future care that would not have been incurred but for the accident. In very serious cases, these categories of expenses can be very high. A person with catastrophic injuries who may be a quadriplegic will be dependent for all his or her needs. If the person lives in a two-storey house the house may have to be adapted or replaced by a house more suitable to a person of his or her disabilities. Care for the rest of the person's life may have to be provided by nurses and other persons and a range of recurring expenses may arise throughout the person's life. These may include replacement every three or four years of a specially adapted car and important aids to living such as special medicines, dressing and other necessities for day to day care of persons with severe disabilities. The assessment of future

expenses of persons with disabilities whether mild, moderate or severe, can be complex and difficult. The assistance of experts in nursing and rehabilitation may be necessary to ensure that all essential needs are considered and included in the claim.

148. Once this exercise has been carried out, the claimant's lawyer will be in a position to assess the yearly net loss of income and expenses for the rest of the plaintiff's life. A plaintiff would not be entitled to be awarded the simple total of all these damages multiplied by the number of years of the predicted length of the plaintiff's remaining lifespan. To award the plaintiff simply the sum of all these losses would mean that the plaintiff would obtain a windfall because the fund, if invested, could grow and provide more to the plaintiff than needed. Actuarial techniques have been developed which enable the present value of such sums to be calculated which if invested in government bonds will yield a stream of income in the future, to the time of the predicted death of the plaintiff, which would be equal to the total of the plaintiff's assessed loss and expenses. The calculation of these sums requires considerable skill and great care, as mistakes could under or over compensate a plaintiff.
149. Tables have been developed in other jurisdictions (in the United Kingdom called the Ogden Tables²⁷) to enable practitioners to assess the value of future losses that would be incurred over the likely time of the plaintiff's life. The Ogden Tables are accompanied by a detailed guide on how to calculate the present value of sums necessary to compensate a plaintiff for future loss and expenses. An important figure necessary to calculate these losses is an estimate of the plaintiff's predicted life span. Such estimate is of course a matter for medical guidance.
150. Whilst the preparation and promulgation of Irish versions of the Ogden Tables and related statistical indices and information would be a very substantial task, involving collaboration of the government, judges, actuaries, legal professionals and other bodies, and adequate resources, it would lead to substantial savings in costs and expenses. These steps would help to avoid the calling of unnecessary expert evidence at trial. Increased and continuing training in actuarial issues both for practitioners and judges would also help in this respect. Standardisation in Ireland of actuarial tables in

²⁷ Published by The Stationary Office 29 September 2000

the form of the equivalent of Ogden Tables and compilation of other statistics relevant to loss of income (such as average yearly wages in different occupations and at different grades), medical and other relevant inflation rates and expenses would help practitioners in the assessment of damages for financial losses at an earlier stage. Although in any complicated case reliance on an actuary's and other relevant experts' reports may be advisable, greater appreciation of actuarial and other statistic information will help practitioners make their own calculations earlier in less complex cases and would help to dispense with the need for much expert evidence prior to or at trial. Judicial notice should be taken of standard special damages statistics published by government agencies, including the Central Statistics Office, such as figures for average earnings for different categories of employment.

151. The assessment by the defence of claims for financial damages can be a difficult task. The legal advisors to the defence must assess the assumptions from which the claims for future damages are made and examine the reasonableness of the individual headings of claim. An examination of the actuarial basis for the figures claimed is often necessary.
152. An unsatisfactory element of many claims for future losses is that these are too often provided very late in the litigation process. Often they are provided just some weeks before trial. The plaintiff may be claiming large sums for these headings. The late provision of these details does not facilitate early settlement of cases. Of course, as in assessing damages for pain and suffering, there may be some uncertainty about the extent of necessary future expenditure or loss. For example if the plaintiff's medical prognosis is still uncertain after a year or two of the litigation, it may not at that point be possible to assess future loss of income with any confidence. However where the plaintiff's prognosis is known with a reasonable degree of certainty, estimates of expenses and loss of income should be calculated and details provided by the other side either in the statement of claim or as soon as possible after that.

Damages for non-financial losses

153. These damages are best known as damages for pain and suffering and loss of amenity. Within these are many differences in degree and nature. Pain can be mild to extremely severe, short-term to life long.
154. Suffering can include fear, anxiety, depression, embarrassment, lack of enjoyment in life and other symptoms of sickness whether physiological, psychiatric or physical.
155. Loss of amenity is the loss and restriction of activity that once gave the person satisfaction in life. This could range from the ability to exercise to the enjoyment of normal family relations.
156. There is a huge variety of circumstances and of reaction to pain and suffering on the part of plaintiffs. The same accidents and the same injuries may affect plaintiffs in different ways. Some plaintiffs may previously have been strong and robust and thus the pain and suffering would be less than in the case of somebody that was, through no fault of their own, less robust.
157. This emphasises that in assessing cases, individual circumstances are very important. It is not sufficient simply to refer to a broad category of damages for different physical injuries.
158. There is a compelling case that parties should be able to cite at trial awards made in other cases similar to the case before the court. At present this is generally not permitted at trial and this can result in inconsistencies in award levels. Permitting such citations would encourage more consistent awards which would be used as precedents in personal injury cases.
159. Furthermore such precedents should be recorded in an accessible form by the Courts Service listed under headings according to the type and extent of injury. This should be updated regularly. By making this available to a wide number of practitioners throughout the country in the most accessible way possible, with a suitable warning about the need to assess each case on its merits, it would assist lawyers to assess the value of cases earlier. This would encourage early settlement discussions, particularly

in those cases where there is no dispute about who is to blame for the accident. The cost of preparing and updating such compilation would be easily recouped by the Courts Service given that it would be a vital tool to all lawyers dealing with personal injuries litigation.

Chapter Fifteen

IMPROVED MEANS OF PAYING COMPENSATION IN SERIOUS CASES

Dealing with uncertainty

160. It is impossible to predict the future with 100% accuracy. Our legal system assesses damages in personal injury cases by weighing up possibilities and probabilities. The amounts of damages that may be awarded for the cost of future care to a seriously injured individual is based on an assessment of the likelihood that person will require care at a predicted cost over an estimated number of years, based on his estimated life span, and the seriousness of the injuries. The award of damages is a “once off”. If the predictions turn out to be wrong, the plaintiff may have received too much or, as likely, too little to compensate for his losses. The advantage of the “once off” payment of damages however is that the successful plaintiff gets his award of damages in one lump sum and is free to invest it or to use it as appropriate. Most plaintiffs would prefer to receive damages in this way.
161. However in a minority of cases payment of a “once off” sum may lead to enormous hardship. These case are typically cases where the plaintiff has suffered very serious and often catastrophic injuries which leave him/her totally dependent on nursing and other care. These awards of damages are usually very high, taking into account the estimated cost of future care. However because of plaintiff may require this care for many years to the future, and may live longer than expected, this increases the chance that the award of damages may be inadequate in the long term and may leave the plaintiff dependant on the state and charity for care when the money runs out. Similarly if the plaintiff dies earlier than predicted, a windfall may be inherited by his or her relatives from the damages that have not yet been spent.
162. A different problem is when a plaintiff’s doctor cannot rule out the possibility that the plaintiff may suffer in the future a very serious condition or deterioration as a result of the injuries. If the plaintiff accepts an award of damages in full settlement of his claim and subsequently unexpectedly suffers a worsening of his health due to the possibility happening, he or she may have been under-compensated for the loss.

Provisional Awards

163. These considerations have led to examination of possible means of overcoming such problems. Provisional awards would enable a court to make an award of damages based on then known probabilities but leaving open the right of the plaintiff to apply to the court in the future again for further damages if a serious, although unlikely, deterioration in the plaintiff's medical condition occurred. Provisional damages are catered for in the rules of the courts of England and Wales and also are provided for in the scheme for compensation in the Hepatitis C Tribunal²⁸.
164. The obvious advantage to plaintiffs of provisional awards is that it would enable them to receive additional compensation in the unlikely event that a serious medical condition as a result of the accident actually occurred in the future. The drawback from a defendant's/insurer's prospective is that it means that the claim file for the case may not be closed for many years because of the uncertainty about whether the possibility may actually occur and that further damages might be payable. Because of this factor there is a strong case that provisional damages should be limited to cases above a certain value and subject to strict criteria. The availability of provisional damages would result in awards of damages meeting more appropriately the needs of some plaintiffs in very serious cases. The Law Society supports the introduction of such damages.

Structured settlements

165. Another means of reducing uncertainty for plaintiffs particularly in catastrophic injury cases would be to facilitate the making of structured settlements. Structured settlements are a means by which a plaintiff receives, instead of once of payment of damages, a stream of income (an annuity) over the course of his or her life. The advantage of a structured settlement is that irrespective of how long a plaintiff lives he or she will be guaranteed an income by an insurance company to meet ongoing expenses and needs. The advantage over a lump sum payment of damages is that such lump sum is based on the plaintiff's likely life expectancy and thus if the

²⁸ See sections 5(7) of the Hepatitis C Compensation Tribunal Act, 1997.

plaintiff lives longer than expected, as seen above, the plaintiff could be without funds for a large part of his or her life.

166. This subject was reviewed in a discussion paper on compensation in personal injuries cases issued by the Law Reform Commission in 1993²⁹. As set out in detail in that report, this is complex area. There is very little use of structured settlements in Ireland at present and there is no provision in the court rules which would enable the courts to award payment of compensation in the form of a structured settlement. The Law Society believes that such settlements should be facilitated and encouraged by appropriate changes in the law. Structured settlements could benefit the most vulnerable type of accident victim, namely persons with catastrophic brain and other injuries.

Interim Damages

167. The Irish courts should also be given power to award interim damages where liability is not an issue and where there is a strong case for making payment to the plaintiff on a interim basis before the award of the damages or settlement of the case. In practice some insurance companies will make interim payments where there is no dispute on liability and where hardship can be demonstrated. However claimants should have a right to seek such payments.

²⁹ See chapter 7 of that report – Structured Settlements and other reforms, and chapter 16.

Chapter Sixteen

THE SOLICITORS' ROLE IN PERSONAL INJURIES CASES

168. The involvement of legal professionals is central to the litigation process. It ensures that parties receive expert legal advice in total confidence in relation to all aspects of proceedings, including the possibility of settlement. Where cases proceed to trial, legal professionals provide advocacy services to a high standard. Throughout the process clients are represented by professionals accountable to the court and to their professional bodies. These professional bodies stipulate exacting standards of ethics and competence from their members, with the ultimate sanction of disbarment or striking off. In any review of personal injuries litigation, however, it is essential to look at the delivery of legal services, as well as all other aspects of the system. This chapter considers the role of solicitors in personal injuries litigation and makes recommendations as to how solicitors' services might be provided in the future.

What solicitors do

169. There are over 6,500 practising solicitors throughout Ireland. In every town, large and small, in every part of Ireland there are at least several solicitors in different practices offering their services to clients. Many towns may have half a dozen or more separate practices. Some solicitors' practices specialise in litigation, whether for plaintiffs or defendants, but most offer a general service as well as litigation. This abundance of choice and the willingness of practitioners, both solicitors and barristers, to act in personal injuries cases without significant funding or any guarantee that they will be paid ensures that such legal services are open to all without recourse to state legal aid.

170. The role of solicitors in personal injuries litigation is well known. In lower value cases the solicitor usually handles the case by him or herself from start to finish. This work includes taking detailed instructions, drafting a claim, receiving expert advice from doctors and others, and settling the case or presenting the case at trial.

171. In higher value cases counsel is usually instructed. It is worthwhile examining the role of the solicitor in such circumstances, whether the cases are in the Circuit Court or the High Court. A plaintiff's solicitor's role can be described as follows:
- (a) Taking detailed instructions and conducting a preliminary investigation to evaluate whether the client may have a claim;
 - (b) Writing a letter before action to the defendant;
 - (c) Preparing written instructions for counsel to draft proceedings, reviewing such draft proceedings, issuing them and serving them on defendants;
 - (d) Interviewing witnesses and preparing statements;
 - (e) Continuing with the evaluation of the case, including obtaining expert evidence and discussing this with clients and counsel;
 - (f) Providing further particulars of the claim requested by the defence;
 - (g) Pressing the defendants and their solicitors for service of the defence and other correspondence;
 - (h) Evaluation of defence and seeking discovery;
 - (i) Preparing and delivering discovery;
 - (j) Reviewing the case in light of discovery and expert evidence gathered to date;
 - (k) Considering any offer made to settle the case and any lodgement made in court, if at all;
 - (l) Preparing and issuing brief to counsel for trial;
 - (m) Preparing books of documents for the court and setting down the case for trial;
 - (n) Monitoring court list;
 - (o) Making all arrangements for trial, including securing attendance of witness;

- (p) Organising any settlement discussions and, if the case proceeds, attending trial;
 - (q) Dealing with issues after settlement or trial such as costs, taking up of lodgements and other matters.
172. This is an outline of the main steps to be taken in a personal injuries action. However there may be many variations and additional steps depending on the nature and facts of the case.
173. Throughout the process the client will look to the solicitor for guidance as to what steps the client should take, such as whether to accept an offer of settlement or to proceed further. As a solicitor will often be the plaintiff's general or family solicitor, the solicitor may be well placed to discuss the implications of settlement or proceeding to trial on the plaintiff's financial position.
174. The solicitor for the defendant usually has a dual role in so far as he represents the defendant but usually on the instructions of the defendant's insurance company. Therefore the solicitor, whilst primarily acting in the interest of the defendant, is usually obliged to report to and accept instructions from the defendant's insurance company. This is because of the contract of insurance between the defendant and the defendant's insurer which usually stipulates that the defendant vests conduct of the defence in his insurers. The defendant's solicitor nonetheless has a primary obligation to ensure that the defendant's interests are not neglected in the litigation and this is a professional responsibility that the defendant's solicitor must at all times bear in mind.

Solicitors as advocates

175. As seen above, solicitors often act as advocates, in particular in the District Court. However, in the vast majority of cases in the Circuit Court and in the High Court counsel are instructed.
176. The principal reason for this is a historic one, being the division between the solicitor's and barrister's profession. The bar evolved as advocates, whilst the role of

the solicitor's profession has traditionally been focused on general legal advice and handling the office and management side of litigation.

177. The separation continues to have logic for several reasons.
178. The availability of the bar enables the vast majority of solicitors to carry out general practice in locations throughout Ireland. This can be done in the knowledge that no matter what type of legal case is presented, the solicitor can instruct appropriate counsel with experience and expertise in advising and acting as advocate in such type of litigation.
179. In addition, the economics of most solicitors' practices mean that solicitors carry a caseload of hundreds of cases at any time for which they have the responsibility of maintaining files and progressing the cases to completion. If solicitors dealt with all aspects of legal services in their cases from start to finish, including advocacy, this would mean that they could only carry a lower case load and thus provide a more limited service to their clients.
180. More complicated cases would in fact be very difficult for one lawyer to handle from start to finish in any event. In the United States where there is one unified profession, it is usual for non - routine cases to have more than more one lawyer on each side (so-called second chairs) and in larger cases there is specialisation among litigation lawyers, namely those who concentrate on management of litigation cases and those who concentrate on trial. Therefore there is a strong case for continuation of the solicitor/counsel division of roles in Ireland, given the general nature of most solicitors' practices and the value of having a further corps of independent lawyers, who concentrate on trial advocacy and in many cases provide specialist advice.

Responsibility of solicitors in resolving litigation

181. The solicitor has an obligation to make use of all legitimate means available in the litigation to advance the client's case to the earliest and most favourable conclusion. Desired reforms to the litigation process in the near future should include procedures that will lead to greater disclosure of information by both sides earlier in litigation and thus enhance the process of earlier settlement and lead to shorter trials on issues that

are really in contention. Such reforms will underline the responsibility on the solicitor as manager of the case. They will also enable solicitors to settle cases earlier.

Education

182. Clients have rightly become more conscious of their interests and wish to advance litigation with all reasonable speed. Solicitors also wish to conclude cases and get paid. At the same time, rules and practices of court are becoming increasingly complex and demanding. All these factors point to the need for continuing and increasing education facilities for solicitors in personal injuries litigation. The Law Society for many years has been the main provider of continuing education courses in personal injuries litigation. These efforts should be continued to ensure that solicitors throughout the country can update their training and knowledge of practice and procedure in this area of law.

Solicitors' role in reforming court practices and rules

183. There must be adequate consultation with all interested parties in personal injuries litigation before rules and procedures are changed. This is to make sure that changes really achieve their objective. The rules are made by courts' rules committees (the Law Society has representatives on these committees) with the approval of the Minister for Justice and sometimes by primary legislation. Thus the Law Society has limited power to influence change in court rules. However every effort should be made to ensure that the Society's voice is heard in striving for modernisation of rules and practices that improves the litigation process.

184. The Law Society believes that draft rules and proposed changes to rules of court should be published on the Courts Service website so that the public, interest groups and all members of the legal profession receive advanced notice of proposed rule changes and can offer comments and suggestions to the relevant rule making committee on these.

185. Once new rules and procedures are promulgated they should be adequately communicated to the profession by the rule making body and by the Law Society. This process can be facilitated by modern technology such as the internet and also by

the monthly Law Society Gazette. There should also be adequate lead in time before new rules have effect, to enable practitioners to prepare for implementation of the new rules.

Chapter Seventeen

COSTS

186. Legal and other services in litigation are provided by trained professionals. The practice of law entails heavy overheads, including office accommodation, professional and other staff and technology. Every litigation case requires detailed attention and heavy time commitments, often over several years. The retention of experts, such as doctors, and other persons to assist in the case is expensive and is often funded by the solicitor. The solicitor carries a heavy professional responsibility to his or her client. Not surprisingly therefore, legal costs and disbursements, together with VAT at 21%, can be significant. Typically, the majority of these are recoverable by a successful party from the other side.
187. Costs in the District Courts to the successful party against the unsuccessful party are measured according to a scale of costs. In the Circuit and Higher Courts if an unsuccessful party does not agree to the amount of the costs that are payable to the successful party, the costs due are measured and assessed (in the Circuit Court) by the county registrar or (in the High Court) by a taxing master. Both the county registrar and taxing masters are independent court officials.
188. The system of scale costs in the District Court awards a winning party costs against the opposing party based on a percentage of the damages. The costs awarded under the scale generally are low and have become lower in real terms over the years due to recurring failure to update scales to take into account inflation. This means that costs awarded in cases where damages are low are usually far too low to pay the successful party's lawyer and the party thus has to pay more than usual to his or her own solicitor. This underlines an important point. Every client has to pay his or her own solicitor irrespective of what he or she recovers from the other side. The client must pay the market rate for such services. A system that awards substantially less than a successful litigant has had to pay penalises persons in seeking to assert and defend their legal rights.

189. In contrast the system of taxation of cost in the Circuit Court and High Court ensures an independent expert carries out an assessment of the costs due. By considering the details of the case, the registrar or the taxing master, as the case may be, can assess the work that was carried out in the case and the extent to which that was necessary and reasonably incurred. Where work was necessary and reasonably incurred an appropriate level of costs is measured to ensure that the successful party is substantially (although rarely completely) reimbursed for such costs and expense.
190. However, the system of measuring costs on taxation has been little reformed over the years and many of the procedures and terminology employed are, as a result, difficult for even lawyers to understand and apply. A thorough review of the system with a view to simplifying procedures and terminology is overdue. Such review should also look at the resources available to the county registrars and taxing masters to ensure that costs in personal injuries and other actions can be measured as speedily as possible. Details of costs awarded in different types of cases should be published so that there is more information about costs levels awarded. This would help solicitors settle claims for costs on behalf of their clients earlier.

Chapter Eighteen

COURTS STRUCTURES AND ADMINISTRATION

191. As outlined in the foreword, this is a time of change in the Irish courts. The setting up of the Courts Service Board following a major review of court structures by a group headed by Ms Justice Denham has brought about fundamental change in court administration. The work, commenced last year by Mr Justice Fennelly, of reviewing criminal and civil court structures in this country will be of fundamental importance to the structures of the courts in Ireland in the future. Revisions of rules of the Superior Courts in case management and other areas are expected and the recommendation of the Committee on Court Practices and Procedure that a commercial court be established in Dublin is expected to be implemented shortly³⁰.
192. The deliberations of the Fennelly committee on the civil courts will be highly relevant to the organisation of personal injuries litigation. That committee is charged with examining all aspects of court structures with a view to making recommendations on how they can be rationalised and made more suitable to serving the public in this century. In light of the ongoing work of this group, it is premature to make comprehensive recommendations concerning the detail of court organisation and structures in relation to personal injuries. However certain observations and recommendations may be of assistance.
193. There is a strong case for simplifying court structures in personal injury cases. One such change would be simply to have two courts dealing with the hearing of personal injury cases, namely the Circuit Court and the High Court. (Relatively few such cases are heard in the District Court in any event.) The jurisdiction of the Circuit Court should be for all cases up to €75,000, with the High Court jurisdiction for all cases above that limit. The advantage of increasing the jurisdiction of the Circuit Court in

³⁰ 27th Interim Report of the Committee on Court Practice and Procedure “The Courts of E Government – meeting the E Commerce Challenge Commercial Ireland establishing connections to domestic and international arbitration centres (27 February 2002)

this way is that it would mean that fewer cases could be heard in the High Court, with resulting savings in legal and other costs. Concentrating all personal injury cases other than larger cases in the Circuit Court would, subject to adequate resources, increase efficiencies and result in 90% of cases being heard locally in the Circuit Court. Experience has shown that costs in the Circuit Court are significantly lower than in the High Court. Additionally costs in smaller cases in the Circuit Court that previously were in the District Court should be measured at a level to reflect their smaller size, so as to ensure that costs were moderate.

194. Personal injuries claims comprise a very large portion of the civil litigation in our courts. Given the importance of this litigation, both in respect of the lives of injured citizens and as regards the financial consequences of such litigation to defendants and insurers, a senior judge at every court level should be nominated by the president of each such court with responsibility first, for reviewing and keeping under review rules of practice and procedure relevant to personal injuries litigation and, secondly, for making recommendations to the president of each court and to the courts rules committee relating to desirable court practice directions and rules changes.. The review by a nominated judge at each court level would be a yearly process continuing into the future. Such a process of reviewing and keeping under review the rules of practice and procedure would not render unnecessary the need for an immediate comprehensive review now of all court rules and practice in relation to personal injuries.
195. A fundamental requirement of an efficient system of justice is adequate funding of such system. A Chief Justice once correctly pointed out on a television programme that there are no votes for politicians in building better courthouses. This observation neatly reflects the reality that there are many competing demands for government funds. Improving court facilities and devoting resources to increasing efficiencies in the courts may understandably be a less high item on the agenda than addressing hospital waiting lists and improving infrastructure. Nonetheless, as a review of the reports of the Courts Service shows, enormous progress had been made in improving the court system in the past five years due to investment in court buildings and facilities, as well as information technology.

196. A thorough review and the implementation of the recommended reforms in court practices and procedures, along with the provision of adequate resources, would lead to substantial improvements in personal injuries litigation and lower cost of dealing with compensation claims.
197. In addition, continuing rigorous attention to court listings by the presidents of each court, in conjunction with the Courts Service, so as to ensure that cases come to trial at the earliest possible opportunity, will help enormously. Attention is also necessary to ensure that court cases that are listed as waiting trial are in fact waiting and have not been settled. This is to avoid a distorted picture of the volume of court business in hand.

CONCLUSION

198. Until the latter part of the 1990's, there had been very little change in court practices, procedures and court structures in Ireland for decades. In recent years the process of updating and improving our courts has commenced. The changes made to date by and large have been successful. There is a need for the personal injuries litigation process to be reviewed and updated and this should be undertaken without delay alongside other work being done by, for example, the Fennelly commission. Enormous expertise in and experience of personal injuries litigation exist among the judiciary, court staff and legal profession and with appropriate consultation, changes made to the personal injuries litigation system will benefit this centrally important part of the administration of justice in Ireland.

LIST OF RECOMMENDATIONS

1. There should be the strongest action (including criminal sanction) against any party making a fraudulent claim, or lodging a fraudulent defence, and against any legal representative who knowingly connives in such fraud.
2. Court procedures should be changed to make it less difficult to have unmeritorious claims or defences struck out.
3. Claimants should be required to write a detailed letter to the proposed defendant before issuing proceedings, giving full details of the claim.
4. A culpable failure to provide pre-action details should be penalised.
5. The proposed defendant or insurance company responding to the letter before action should respond in detail.
6. An unjustified and inadequate response to a letter before action by the intended defendant or insurance company should be penalised.
7. Claims should be adequately pleaded to put the defendant on full notice of all allegations that will be made.
8. Culpable failure to plead claims adequately should be penalised.
9. All defendant should be required to plead in full detail their defences so that the issues in the litigation are clear after service of the defence.
10. Meaningless or inadequate defences should be penalised.
11. The court rules on discovery should be restated and revised to reduce the cost of discovery where consistent with the interests of justice.

12. The court rules should include standard protocols for categories of discoverable documents that may be relevant to different categories of cases, in order to reduce costs and to make discovery more effective.
13. The provision of medical records in litigation by hospitals and doctors should be improved, to reduce costs and to avoid loss or destruction of records.
14. Early notification of claims to hospitals or other organisations holding relevant medical records should be required to avoid destruction of documents and to save costs.
15. Court procedures for admitting facts in documents should be revised, to require all parties to make admissions of matters and documents that should not be disputed.
16. Special provision should be made for notices to admit to be served in respect of medical records in medical negligence cases.
17. The time requirements for serving notices to admit and admitting facts and documents should be revised to give adequate time to enable meaningful responses to be given to such notices.
18. Failure to serve notice to admit or to make admissions should be penalised.
19. Steps are recommended to improve the quality of medical reports in litigation.
20. Contents of experts' reports should be deemed to be admitted by the other side without proof at trial, subject to conditions.
21. Doctors and other experts should be on stand-by or attend court only where essential.

22. Steps are recommended to reduce the need for other experts such as engineers, nursing experts, architects, and vocational rehabilitation consultants to attend court. This would reduce costs.
23. Costs unnecessarily incurred in calling experts should not be payable on a party and party basis.
24. Video communication links with hospitals should be instituted to enable experts to give their evidence to court by such links. This would be particularly useful in dealing with experts in foreign countries and would reduce costs.
25. Revised guidelines as to the use of medico-legal reports should be agreed between the Law Society and medical representative bodies.
26. Judicially approved actuarial tables should be published to facilitate the calculation of damages and to reduce the need for actuarial evidence in court.
27. It should not be compulsory to exchange factual witness reports, as exchange of such reports would lead to increased costs.
28. The system for exchange of expert reports should be revised to confine exchange of experts reports to final reports, to be served an adequate time before trial.
29. Failure to adhere to the rules for exchange of experts reports should be penalised.
30. The court rules should be revised to make offers of settlement more effective. The lodgment procedure should be further simplified.
31. The plaintiff should be able to make an offer to a defendant in litigation which, if unreasonably refused, should lead to penalties. This would encourage early settlements and reduce costs.

32. There should be increased enforcement of court rules to ensure that parties comply with necessary procedures for advancing cases to early settlement or trial.
33. Cross orders should be made in all cases of unjustified breach of court rules.
34. As well as requiring the party at fault to pay costs to the other side, a new form of costs – called court costs – should be payable immediately by defaulters to the Courts Service. Such costs should be a contribution to the economic cost of court time and facilities wasted by parties in default.
35. There should be judicial case management in all complex cases where the parties are not progressing the cases expeditiously and efficiently.
36. Procedures should be put in place to enable cases suitable for case management to be identified at an early stage.
37. Full disclosure of loss of earnings and other items of loss should be required in every case.
38. Parties should be able to cite awards and damages made in comparable cases in submissions made to the court.
39. The Court Service should provide a digest of summaries of awards and damages made in cases, listed under headings according to the type and extent of injury.
40. The Court should be able to award provisional damages.
41. The Court Rules should be changed to facilitate the introduction of structured settlements and awards in catastrophic injury cases.
42. The Court should be able to order interim damages where there is no dispute on liability and where hardship can be demonstrated.

43. There should be emphasis on continuing education and other professional courses in personal injury litigation so as to maintain high standards of practice.
44. There should be adequate consultation with the Law Society and other interested bodies to ensure that court rules relevant to personal injuries litigation are reviewed regularly.
45. A senior judge at each court level should be given responsibility for monitoring and keeping under review relevant rules of practice and procedure relating to personal injury litigation in that court.
46. Proposed court rules changes should be published on the Courts Services website.
47. The rules and procedures for taxation of costs should be modernised.
48. There should be only two civil Courts dealing with trials of personal injury actions, namely the Circuit Court and the High Court. The jurisdiction of the Circuit Court should be for all cases up to €75,000.
49. There should be adequate funding of the courts so as to improve efficiencies and to lead to lower costs in litigation.
50. Continuing rigorous attention should be given to court lists so as to ensure that cases come to trial at the earliest possible opportunity.