

**BELFAST SOLICITORS ASSOCIATION**

**LITIGATION SEMINAR 2011**

**FRIDAY 27<sup>th</sup> May 2011**

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**Campbell Fitzpatrick Solicitors**

**Slide 1 Introduction**

**Belfast Solicitors' Association – Litigation Seminar 2011**

I am now in my 26<sup>th</sup> year of practice as a Solicitor in Northern Ireland.

I am a litigation specialist. I cut my teeth practicing in the County Court before moving to High Court, initially acting for Plaintiffs. I developed a particular interest in clinical negligence.

My role as a Solicitor then developed into defence litigation and for the last 15 years I have been involved in High Court litigation acting primarily for the defence instructed by Insurers.

For perhaps 23 of those 26 years of practice changed came slowly and was predictable and manageable. Some memorable changes come to mind :-

- The abolition of juries for civil cases;
- Order 25 requiring exchange of medical evidence with the Statement of Claim;
- Increase in the County Court Jurisdiction to £5,000.00 and then up to £15,000.00;
- Introduction of Judicial Case Management, first the Commercial Court and then in Queen's Bench Litigation;
- I could add on the business side acquisitions and mergers within the Insurance industry starting about 12 years ago.

Within the last three years however there has been and are ongoing fundamental changes to the rules, processes and procedures in High Court litigation. It seems that barely a term goes by without further change, consultation and proposed reform with consequent challenges for Solicitors.

You will all be aware the County Court Jurisdiction limit is to be increased again, it would appear to £30,000.00. We have watched the appointment of a Northern Ireland Justice Minister who has invoked a review of justice in Northern Ireland. This is being conducted in association with the gradual run down and likely withdrawal of Legal Aid for civil litigation in this jurisdiction.

Challenges indeed lie ahead for the next few years.

Time therefore in my view for some introspection, we each need to look at the structure of our practice, that is our personal practice and of the general approach to litigation in the firm we work in.

Are we as a profession prepared for these challenges? Are you as an individual ready to embrace change? What kind of service will you be offering your clients? Will that meet their expectation? Will you be able to satisfy their demands?

## **Slide 2            Reforms/Proposals**

- **The Jackson Report in E&W**
- **NI Minister for Justice Access Review**
- **Review of NI Legal Services Commission**
- **Proposed changes to the County Court Jurisdiction**

I suggest that a common theme of the ongoing reviews both in England and Wales and in Northern Ireland relate to cost of litigation, delay in litigation and providing certainty of cost and timescale to the public and business community.

## **Slide 3            The Jackson Report**

- **Jackson LJ report: January 2010**
- **Abolition of recoverability of CFA success fee**
- **Recoverability of ATE Insurance abolished**
- **Greater use of fixed fees encouraged**
- **Cap of 25% of damages as a success fee**
- **General damages to be increased 10%**

Lord Justice Jackson was asked to prepare a report on costs in civil cases in England and Wales and he completed his final report in January 2010. This lengthy report highlights the growing cost of civil litigation in England and Wales and sets out a series of proposals designed to attack costs and improve proportionality, namely the balance between the cost of the process and the damages recovered.

Commentors have highlighted that there have been over 600 responses to a consultation period which ended in early February of this year. The majority of replies were critical of many of the proposals.

However on the 29<sup>th</sup> March of this year the Lord Chancellor Kenneth Clarke addressed the House of Commons and revealed that despite the majority of respondents opposing Jackson's main thrust; ending the recovery of success fees and after the event insurance in conditional fee arrangements from the losing side, and capping the success fee at 25% of damages - the Government now plans to push ahead and at the earliest opportunity. Kenneth Clarke said the following:-

“Most people dread going to Court because of all the costs and anxiety it involves. We must change that by helping them to avoid Court where possible and cutting costs where that is unavoidable”

He went on:-

“With no major reforms for 15 years the Civil Justice system has got out of kilter. People who have been sued can find that spiralling legal costs, slow Court process, unnecessary litigation and the “no win, no fee” structures, which mean greater payments to the Lawyers than to claimants, are setting them back millions of pounds a year”.

The Government has made it clear that they intend to introduce the Jackson Reforms including a new test to ensure that overall costs are proportionate.

We have neither CFA success fees nor ATE Insurance therefore the Jackson proposals are arguably of limited interest.

We have a fixed fee system which looks likely to be increased and principles of proportionality are now enshrined in High Court practice as will be discussed.

Nevertheless I find the discussion on Jackson relevant to the degree that it provides a litmus test of the public's expectation of Civil Justice and the Civil Justice system and the role of lawyers in that.

#### **Slide 4            Justice Review Northern Ireland**

- **Justice Minister David Ford**
- **Speech: Justice for all – Access to Justice – 07/06/10**
- **Review of Access to Justice announced 13/09/10**
- **Discussion paper published November 2010**
- **Submissions invited by 31<sup>st</sup> January 2011**
- **Progress report published March 2011**

On the 7<sup>th</sup> June 2010 the Minister of Justice, David Ford MLA outlined to the Assembly his intention to commission a fundamental review of the Justice system in Northern Ireland. His speech headed Justice for All – Access to Justice focused on the Legal Aid budget which the previous year cost more than £100M.

I have extracted the following comments:-

- And Justice for All: means more. It means making justice accessible for all, and ensuring that we remove any barriers that prevent that. Much attention has been paid to the very necessary efforts that are being made to bring the costs of our Legal Aid system under control, and if that was necessary last year it is all the more necessary in the current financial climate.
- “The objective of the Review will be to go back to first principles, and to decide how best to help people secure access to justice”.

The Minister places emphasis on assisting people solve their legal problems outside Court, with less emphasis on fighting cases inside Court – with all the expense and stress that gives rise to.

A further statement on Access to Justice was released on the 13<sup>th</sup> September 2010, again to the Assembly. The following extracts are noteworthy:-

- “I want to build a system of justice in Northern Ireland that will meet the needs of everyone”.
- “We also need and deserve a Civil Justice system that provides an effective and accessible way of resolving many different kinds of legal disputes – and of course both criminal and civil cases need to proceed without delay”.
- “In civil cases provide adequate, appropriate, efficient and cost effective mechanisms for resolving legal disputes, whether by action in the Courts or otherwise”.

- “I particularly want the review to consider new ideas; new ways of doing this, thinking that is radical and innovative. I want to look at how we help people solve problems and disputes without necessarily bringing those disputes into the Courts, and how we can support people through the Justice system”.

The Minister goes on to refer to the stress and cost of the adversarial system and indicates favour for alternative methods of resolving disputes.

It is fair to say that the discussion paper focuses largely on the Criminal Courts, Human Rights, Legal Aid, Family Law and Administrative Law.

Civil legal services are however discussed in a separate section and there is a review of money damages cases, negligence and personal injury and also some consideration of ADR.

Proposals to increase the jurisdiction of the County Court are discussed briefly and the latest procedure developments in High Court practice are highlighted with positive comment. The approach to civil litigation in England and Wales and the Jackson review is acknowledged.

The progress report published in March 2010 confirms that the Justice Review is ongoing and has all the features of a work very much in progress. Resourcing is clearly to the fore. Looking at the guiding principles set out in Chapter 2 the inescapable conclusion for civil practice is that cost, proportionately, efficiency and speed of resolution are primary concerns. These are actual words taken from the list of main principles.

It is clear from the document that a fundamental review of Civil Legal Aid is ongoing and for money damage cases a number of alternative options are being looked at. They include:-

#### **Slide 5            Legal Aid Money Damages cases**

- **Conditional fee (no win, no fee)**
- **Insurance based scheme**
- **Contingent Legal Aid Fund (CLAF)**
- **Self certification Legal Aid**
- **Clinical negligence and accreditation: separately considered**

#### **Slide 6            County Court Jurisdictional Limit**

- **Increase from £15,000.00 to £30,000.00**

- **DJ limit increase from £5,000.00 to £10,000.00**
- **Small Claims increase £2,000.00 to £3,000.00**
- **Timetable: 1<sup>st</sup> January 2012?**

You should all be aware of an ongoing review by Northern Ireland Court Service of the current jurisdiction limit of the County Court. A consultation paper was published on the 3<sup>rd</sup> March 2010 with submissions canvassed from interested parties within 12 weeks.

A summary of responses was published on the 20<sup>th</sup> December 2010 and the Minister of Justice appeared to be proposing:-

- An increase in the County Court Jurisdiction limit from £15,000.00 to £30,000.00
- An increase in the District Judges' Court Jurisdiction limit from £5,000.00 to £10,000.00
- A Small Claims Court Jurisdictional limit increase from £2,000.00 to £3,000.00
- The timetable for implementation was rumoured to be September 2011
- The Secretariat to the County Court Rules Committee then published a discussion paper on how County Court costs should be approached assuming a jurisdictional increase as indicated by the Minister. A series of seven questions were asked with submissions invited from user groups and interested parties. The closing date for submissions was the start of this month (May 2011).

Before looking at cost implications it seems to me that if new scales are to be introduced coupled with a change to the County Court Rules there is hardly sufficient time for full implementation of the proposed changes by September 2011.

My view and that of a number of those appointed to the Contentious Business Committee of the Law Society is that we are probably looking at the 1<sup>st</sup> January 2012 for the jurisdictional increase as indicated by the Minister and an extension of the statutory scale.

#### **Slide 7            Revised Costs for the NI County Court**

- **Three additional costs bands proposed**
- **£15K - £20K**
- **£20K - £25K**
- **£25K - £30K**
- **No Taxation of County Court costs**
- **Discretionary power for exceptional cases**
- **A one third uplift on the scale**

These are under consideration by the County Court Rules Committee.

Annual increases will be considered by reference to inflation.

I repeat the common themes of both Jackson and Ford: costs, delay and certainty.

#### **Slide 8            Strengths of NI System**

- **Simple and straightforward County Court process**
- **Timescale from issue to Trial 4/6 months**
- **Fixed fees/certainty of risk**
- **More efficient processes for High Court**
- **Fees generally agreed reference scales**

When one reads the comments made by Lord Justice Jackson in his report on costs in England and Wales, particularly his references to an extension of the fast track scheme and fixed fees one might be forgiven for thinking he craves a County Court scheme similar to that which we have in this jurisdiction. Procedure is relatively straightforward, cases move quickly and those which do require to go to Trial can nevertheless be completed within four to six months of issue and service of the Civil Bill.

Fees are fixed by reference to a statutory scale. When a client presents you with instructions you are able to advise with reasonable accuracy their risk in terms of costs should the case be lost.

The Solicitor also knows from the start roughly what he will be paid if he or she achieves a successful outcome. Those with an eye to profit will realise that the quicker they can bring the case to conclusion the less overall time and administration will be required in dealing with the matter and consequently the more likely they are to produce a profit. Speed of process and efficiency in file handling is rewarded. Deliberation, prevarication and lack of direction risks frustrating the client but it will also cost the Solicitor.

Recent developments in High Court practice have been outlined to you by Mr Justice Gillen. I touch upon the Rules and procedures including the Pre-Action Protocol, Practice Direction, Questionnaire and Certificate of Readiness and the impact on Solicitors in their conduct of High Court litigation.

I am prepared to endorse the view that these changes have now created opportunity to move cases on more quickly than before. The procedures can be used as prompts or check lists for good practice. Cases can now be moved from start to finish within 6 to 9 months or within 2 to 3 years for more complex litigation.

With fees generally agreed by reference to scales the same comments apply to efficiency being rewarded.

I can perhaps best illustrate what I am saying by reference to examples of cases that I have looked at within my practice. I offer examples of good and efficient litigation contrasted with examples of delayed proceedings.

**Slide 9            High Court: Slow case**

- **Road Traffic Accident 1995**
- **Liability Admitted**
- **Settlement late 2005/2006**
- **Damages: £40K**
- **Taxation hearing July 2010**

In July last year I was involved in a challenge on Taxation of a Solicitors account in a case that settled in 2006. The Taxation hearing was fixed late July, disputed costs were settled on the morning. The case involved an accident in 1995. Liability was admitted so the case concerned quantum only. There was no special loss so it was a matter of assessing the injury. There were some queries on the medical evidence and level of recovery. The case eventually settled 2005/2006. Ten years after the Solicitor was instructed. The settlement was £40K, not insignificant but not high value by any comparison. Today that case should progress to Trial, medical complications and all, within 2/3 years.

**Slide 10            High Court: Efficient Litigation**

- Accident                    17.08.2008
- Writ                         23.03.2009
- Statement of Claim       24.04.2009
- Defence                    03.06.2009
- Setting Down              23.03.2010
- Third Party Notice       08.09.2010

- QB Review 15.09.2010
- Third Party joined as
- 2<sup>nd</sup> Defendant 05.10.2010
- Trial 19.01.2011
- Settled December 2010
- Settlement - £100,000.00 (40/60 between Defendants)

L (a minor) v M & N

Relevant case on point, Leanne Burke-v-SELB and NK Fencing [2004] NIQB 13.

A minor Plaintiff climbed a palisade fence to retrieve a football. He slipped and impaled himself on the spiked fence causing severe damage to one arm. Scarring to the arm presented as a severe and permanent cosmetic blemish with no likelihood of improvement. There was no functional impairment.

Liability was not straightforward responsibility for the fence was debatable; this was not a scintilla case; engineering evidence was secured by each party. A Defence was served on the 3<sup>rd</sup> June 2009 and the case was Set Down for Trial after exchange of Interrogatories, discovery and particulars on the 23<sup>rd</sup> March 2010.

We joined a Third Party on the 8<sup>th</sup> September 2010 after getting leave on the 16<sup>th</sup> August 2010. We had to that point argued that our client, the original Defendant was not responsible and that another party should have been sued.

The Solicitor referred the case for review on the 15<sup>th</sup> September 2010 even though they were likely to join the Third Party as a Second Defendant. The Judge at review fixed the case for Trial on the 19<sup>th</sup> January 2011. The Second Defendant was joined on the 5<sup>th</sup> October 2010.

A deal was struck between Defendants splitting liability 40/60 and the case then settled on the 21<sup>st</sup> December 2010 in the sum of £100K.

The most compelling aspect on reflection is the fact the case was pursued without the support of Legal Aid. This was about a Plaintiff Solicitor and Counsel using instinct and feel to move a case aggressively and yet proficiently.

#### **Slide 11 County Court: Slow progress**

- **EL personal injury**
- **Date of Accident: 15.1.04**
- **Writ issued October 2004**
- **Remittal February 2006**
- **Trial/Adjourned May 2006**
- **Hearing November 2010**

- Settlement                   **£5,000.00**
- Timeline: Accident to settlement: **6 years 10 months**

**Slide 12           County Court: Slow case**

- Pedestrian RTA Injury
- Date of Accident           **11.3.05**
- Civil Bill                   **27.2.08**
- Medical evidence delays
- Trial                         **2.2.10**
- Plaintiff awarded         **£5,000.00**
- Timeline:                 **Accident to hearing: 5 years**

**Slide 13           County Court: Efficient Litigation**

- RTA damage only
- Date of Accident           **1.4.10**
- Civil Bill issued           **28.4.10**
- Lodgement                 **30.6.10**
- Settlement                 **August 2010**
- Damages                   **£814.43**
- Timeline: Accident to settlement: **4 months**

**Slide 14           County Court: Efficient Litigation**

- EL injury case – multiple Defendants
- Date of Accident           **1.6.10**
- Civil Bill issued           **2.9.10**
- COR                         **21.10.10**
- Settled                     **2.12.10**
- Settlement                 **£2,500.00**
- Timeline: Accident to settlement: **6 months**

**Summary:**

It seems clear, whether we like it or not as lawyers, the world is now customer driven. We need to develop a sense of business in our practice. We certainly have to maintain our competence as practicing lawyers; in this regard our clients must see us as reliable. However we must also focus on cost of service and on efficiency.

On a simple business analyses if we know within a given range what we will be paid for a particular transaction it seems logical that the quicker the matter is processed through our practice there will be saving of resource and time and the transaction ought to be more profitable. Ask yourself the following questions:-

- How many current litigation files are you dealing with?
- How often do you expect to review each file?
- Monthly? Every fortnight?
- How long would you expect to spend on a review?
- From that you ought to be able to estimate the time spent on each transaction every six months or a year.
- Reduce then the timeline and you are bound to achieve a saving in the overall time spent. That immediately enhances your profit by reference to a fixed fee.

In these times of austerity I offer you another thought from a case we are all acquainted with but from an angle you have not considered before.....

#### **Slide 15      Lesson from history.**

#### **Donoghue v Stevenson [1932] AC 562 HL**

- Mary Donoghue, also referred to as McAlister, born on the 4<sup>th</sup> July 1898, lived at 49 Kent Street, in Glasgow. On the evening of Sunday the 26<sup>th</sup> August 1928 she visited a friend in Paisley and together at 8:50pm they entered The Wellmeadow Café. The friend ordered an ice cream and for May Donoghue a bottle of Stevenson ginger beer.
- After pouring some of the ginger beer from the brown opaque bottle into a tumbler May Donoghue took a drink. Her friend began to refill her glass when the partly decomposed remains of a snail floated out of the bottle.
- Had it been her anonymous friend, rather than May Donoghue, who was served with the snail-tainted ginger beer, the world would probably have heard nothing of it. For the friend would have sued Mr Minchella the owner of the Café because there was a contract of sale between them.
- May Donoghue said she was made ill by what she thought she had seen. She sought medical help 3 days later from her doctor and was referred to Glasgow Royal Infirmary.

- The rest as they say is history.....Lord Atkins “neighbour principle” and the foundation of the duty of care and a cornerstone for the development of the concept of negligence as we know it today.
- Mr Walter Leechman a Glasgow Solicitor advised May Donoghue on a cause of action against Stevenson and issued a Writ on her behalf in the Court of Session claiming £500:00 damages and costs.
- The Defence application for a dismiss in the Court of Session failed but on Appeal succeeded 3 against 1. The Court of Session Second Division followed its own authorities where a mouse was found in ginger beer. The Court troubled their minds on the difference between a rodent and a gastropod and concluded that for the consumer they were the same and a remedy was only available if the ultimate consumer had a contract of sale with the manufacturer.
- And so to the House of Lords.....the rest we know.....
- Did you read however that on the Petition to the House of Lords signed by May Donoghue she is described as “in forma pauperis”. She swears “I am very poor and I am not worth in all the world the sum of five pounds”. Attached was a certificate signed by the Minister and Elders of her Glasgow Church attesting that May Donoghue is a “very poor person”.
- Who in this room has been to the House of Lords? Who would today take a person with no means to the House of Lords in a personal injury action?

I now propose to look at High Court practice and current procedure.

## **Slide 16          Dispute Resolution**

- **Litigation - tool**
- **Solicitor – service provider**

I feel that I need to stress that despite references to business and profit I remain a lawyer and am proud to be part of a great profession. I still believe that a career as a Solicitor offers good opportunity, satisfaction and reward. However as a Solicitor practicing in litigation I am also conscious of my role as a service provider I am running a business acting for clients.

A client comes to you with a problem, a dispute that requires you to invoke legal principles to provide a solution. Certainly the client wants you to achieve a satisfactory resolution to the problem. But today they demand more and I feel they are entitled to more. They want the process to be cost effective and relatively quick.

They will today be less willing to accept a process that takes 5 years or 10 years to produce a result or one that costs more in legal fees than the damages at stake.

You are providing the client with a service. Lose sight of that and you will be in danger of losing the client.

**Slide 17          Preliminary**

**Order 1 Rule 1**

**“These rules may be cited as the Rules of the Court of Judicature (Northern Ireland) 1980”**

To see the relevance of this role to the changes which I will shortly discuss may I refer to the very start of the RSC for NI. Order 1 of the 124 Orders which govern High Court procedures in Northern Ireland.

**Slide 18          Order 1 Rule 1A**

- **The overriding objective**
- **Civil Justice Reform Group Report (Campbell Report - June 2000)**
- **Rule effective from September 2001**

**Slide 19                  Order 1 Rule 1A**

- **Enable the Court to deal with cases justly**
- **Ensure parties on equal footing**
- **Save expense**
- **Proportionality**
- **Ensure fairness**
- **Process expeditiously**
- **Best use of Court resources**

**Slide 20          Order 1 Rule 1A (2) (c)**

**Deal with cases in ways proportionate to:-**

- **Money involved**
- **Importance of case**

- **Complexity of issues**
- **Financial position of parties**
- Everything that follows has as its mandate that objective.
- Where does that place the Solicitor? What is the role of the Solicitor acting for a client in a litigation matter in 2010/2011?

**Slide 21      Solicitor Responsibility**

**“Solicitor must take greater responsibility for handling High Court Litigation”**

- Knowledge of the RSC
- Informed role in the presentation of the evidence
- The ability and confidence to make tactical decisions on the conduct of the dispute resolution.

When preparing for this lecture Peter Campbell reminded me of a lecture on High Court Practice we each attended as young Solicitors. Mr Justice Carswell as he was then, later to become Lord Chief Justice for Northern Ireland before his appointment to the House of Lords, suggested that anyone serious about High Court practice should have the red book of Rules at arm’s reach on their desk. I am not sure if I was impressed or amused I might have had trouble then finding a complete set of Rules. However his comment did stick with me and today carries as much if not more resonance as it did then.

What does this mean in practical terms for Solicitors.

My view:

- Cases will move much faster.
- It will be possible to bring to Trial from issue of proceedings within 6 or 9 months.
- More difficult cases 2/3 years
- Files will have to be reviewed more often.
- Post responded to more quickly.
- Solicitors will not be able to rely on Counsel for every tactical decision.
- Solicitors will have to reduce number of files they retain at any given time.
- But with quicker turnover/turnaround I anticipate greater opportunity to maximise costs and profit.
- Solicitors fees for most cases in Northern Ireland resolve by reference to scale fee. It is logical that faster turnaround should lead to better profit % age.

**Slide 22      The Detail**

- Relevant Rules of Supreme Court
- Pre Action Protocol
- Practice Direction 01/2008
- Certificate of Readiness

**Slide 23      Order 18**

**Amended 6<sup>th</sup> January 2010**

**Defendant must state:-**

- Allegations he denies
- Allegations he unable to admit or deny
- Allegations he admits

**Defendant denying liability must do so with “sufficient clarity”**

**Time for defence now 6 weeks.**

**Slide 24      Order 18**

**Obligations on the Plaintiff also revisited.**

**Gillen J**

**“A particular concern of mine is the failure to adhere to O18 in many statements of claim and defences which come to me in their current form. In particular bland pleading of breaches of statutory duty....”**

**Slide 25      Order 25**

**Medical Evidence**

- O25 R5 plaintiff shall serve medical evidence in support of statement of claim
- O25 R6 any other party discloses any medical following examination
- O25 R7 a party relying on medical at the trial shall disclose it 10 weeks from close of pleadings or with 21 days of receipt
- O18 R20 close of pleadings 21 days defence

**Slide 26            Order 34**

- **O34 R2(1) the Plaintiff shall set down within 6 weeks of close of pleadings or such other period fixed by the Court**
- **O34 R2(2) if the Plaintiff fails to set down the defendant may do so or apply to dismiss for want of prosecution**
- **O34 R3 and R4 method and documents for setting down**

**Slide 27            Order 38**

**O38 R1A (1) any report served under O25 may be relied on in evidence at the Trial, also maps, plans, photographs disclosed**

**O38 R1A(2) any other party giving sufficient notice may require to maker of the report give oral evidence or require formal proof**

**O38 R1B unless the Court otherwise orders any party limited to 2 medical witnesses and one other expert**

**Slide 28            Order 62 Rule 10 and 10A**

- **O62 R10 where it appears to the Court in any proceedings that there has been any conduct unreasonable or improper it may order costs against that party (waste costs orders)**
- **O62 R10A if witness evidence is called when this could otherwise have been presented or was not reasonably necessary the Court may order the costs of the witness be paid by the party who caused the witness to be called**

**Slide 29            Pre Action Protocol**

- **Drafted by Coghlin LJ and Master McCorry**
- **Coghlin LJ “To encourage cards on the table”**

Look at the drafting and explanation offered for its implementation and cross reference to the Practice Direction and the Certificate of Readiness, a common theme emerges and that is Order 1 Rule 1A.

I believe that the rationale presented when the Protocol and Practice Direction were introduced is the same as that applied by Mr Justice Gillen and Mr Justice McCloskey when drafting the Certificate of Readiness and in their conduct of case reviews. Understand what the Judges and Masters are looking for at each stage of the process and you will navigate stormy seas with ease.

## Slide 30      Pre Action Protocol

### Objectives

- **Equal footing**
- **Proportionate costs**
- **Efficiency of time**
- **Efficiency of resource**

When the Protocol was first produced in draft to the Civil Justice Reform Committee on the 9<sup>th</sup> January 2008 the then Lord Chief Justice in his introductory remarks referred to practical improvements in the litigation process.

## Slide 31      Pre Action Protocol

### Aims

- **More contact**
- **Exchange of information**
- **Better investigations**
- **Opportunities to settle**
- **Timetable progress**
- **Cards on table**

Lord Justice Coghlin explained:-

“The purpose of the pre-action protocol is to encourage the parties to “put their cards on the table” as soon as possible and the aim of the practice direction and questionnaire is to rationalise arrangements between the Master and the Queen’s Bench Division Judges”

## Slide 32      Pre Action Protocol

- **Promote early exchange of documents**
- **Encourage offers to settle**
- **Highlight ADR option**

After an explanation of what it was that he and Master McCorry had hoped to achieve Lord Justice Coghlin concluded in:-

“The aim of the Protocol and Practice Direction is to develop a culture of co-operation and efficiency in dealing with cases”,

**Slide 33          Practice Direction 01/2008**

- **Overriding objective O1 R1A**
- **Encourage exchange**
- **Discovery**
- **NFBP**
- **Facilitate inspections**

Practice Direction 01/2008

Starts by quoting the objectives of O1 R1A and immediately commits to assist the parties to litigation to comply with the “overriding objective”.

It then encourages the parties to exchange discovery and particulars. Inspections should be facilitated as the norm.

Its primary procedural development was to introduce an automatic review process 9 months after an Appearance is entered. Due to resource issues automatic “capture” no longer applies. Any party may request referral for review 9 months post Appearance.

**Slide 34          Practice Direction 01/2008**

- **Case capture**
- **9 months post Appearance - on applications**
- **Masters’ Review**
- **Questionnaire**
- **2<sup>nd</sup> Review**
- **Referral for SD**
- **Default to QB Review list**

At the first Master’s Review each party should provide the Master with a completed questionnaire. The name of the case appears at the top of the questionnaire followed by the identity of the firm and the party being represented. The name of the attending Solicitor should

be included. Having attended many Reviews over the last two to three years may I suggest the following when preparing for an attending a Master's Review:-

- Check the High Court List on-line the evening before or first thing in the morning to see when and where the case will be reviewed. The lists can change;
- The Solicitor with conduct of the file should where possible attend;
- If another Solicitor or Counsel is to attend they should be fully briefed and have a good knowledge of the file, the cause of action, the state of play and issues still to be addressed;
- The attending Solicitor should be able to outline the nature of the accident, the cause of action, the consequent injuries, an outline of financial loss and the history of the pleadings and exchange of evidence to date;
- The Review will then consider all outstanding interlocutory matters including exchange and amendment of Pleadings, Particulars, Replies, Interrogatories where applicable, exchange of discovery, inspection, and the possibility of other parties being involved;
- Expert evidence will be reviewed, this includes medical evidence, evidence as to financial loss and in more complex cases care evidence and accountancy evidence;
- Any party anticipating further expert evidence ought to raise the issue with the Master;
- A timetable for completion of investigations including discovery and expert evidence should be presented.

After submissions from the parties at first review the Master will set a date for a second review. Generally the Master will outline a series of directions on progress to be made before the 2<sup>nd</sup> Review. Suitable Orders will also be made for example on Discovery or NFBP. Other intended applications may require Notice of Motion and Affidavit.

These are recommended to the main summons list however the Master may give encouragement on how they should be conducted.

If at the second or subsequent Reviews Orders previously made by the Master have not been complied with the Solicitor risks "Unless Orders".

At the 2<sup>nd</sup> Review (in some circumstances the Master may permit a 3<sup>rd</sup> Review; for example high value or complex cases); the Master will either direct the Plaintiff to Set the Case Down for Trial forthwith or he will adjourn the case for Setting Down within 3 months. In default of this the case is referred to the QB Review List.

It is worth noting that at any time before, during or after the review process the parties can agree to proceed to Setting Down and after completing a Certificate of Readiness agree a mutually suitable date for hearing and simply notify the Lists Office through the High Court Central Office.

**Slide 35          Clinical Negligence Litigation**

- **Pre-Action Protocol dated 27.02.09 (Amended 2011)**
- **Clinical Negligence user group**
- **Precedent letter requesting disclosure of records**
- **Precedent letter of claim**
- **Recommended defence response**

Clinical Negligence litigation is currently regulated by reference to a Pre-Action Protocol dated 27<sup>th</sup> February 2009 which came into operation on the 20<sup>th</sup> April 2009.

On the 7<sup>th</sup> September 2009 significant changes to Order 38 and to Order 25 came into force compelling for the first time in this jurisdiction an exchange of liability evidence.

All clinical negligence cases are subject to a Queen's Bench Review before they are fixed for Trial.

A clinical negligence practitioners user group has been established with the assistance of the Law Society. It is recommended that any Solicitor involved in clinical negligence litigation should join the user group.

The steering committee of the group has been working with Mr Justice Gillen to further refine the Pre-Action Protocol and procedures for efficient management of clinical negligence litigation. Through consultation and meetings the group have taken the views of its members and changes to the Pre-Action Protocol have been recommended and are currently with the Law Society for approval. A precedent letter requesting access to medical records has been drafted together with a recommended precedent letter of claim containing the sort of detail that will be expected hereafter.

The Respondent is expected to produce medical notes and records within 40 days of receiving a request following the group template, or explaining any difficulty that is being encountered.

The letters tie in with proposed amendments to the Protocol. A Respondent is expected to acknowledge a letter of claim within 14 days and then provide a detailed Letter of Response to each of the allegations/headings contained in the letter of claim, within four months.

If there is an urgency, protective proceedings may be issued, or the proposed Respondent may be prepared to commit in writing to a “standstill agreement”. A draft standstill agreement is presently being considered by the Steering Committee.

It is expected that every clinical negligence case will be referred for Review by a High Court Master within **fifteen months** of an Appearance. Each case will then be “captured” for Queen’s Bench Review fifteen months after the first Review by a High Court Master, unless the case has already been listed for Trial. It is therefore anticipated that every clinical negligence case will be listed for Trial within 24 to 36 months of proceedings being issued.

**Slide 36          Clinical Negligence Litigation**

**Order 25          Liability Evidence**

- **Simultaneous disclosure of liability reports**
- **20 weeks from Close of Pleadings**
- **Further reports within 21 days of receipt**

**Quantum Evidence**

- **Plaintiff quantum reports disclosed within 10 weeks of Close of Pleadings**
- **Defence quantum reports disclosed within 20 weeks of Close of Pleadings**

**Slide 37          Clinical Negligence Litigation**

**Order 38          Quantum Reports**

- **O38 R3B(1) (a) defines clinical negligence**
- **O38 R3B(1) (b) defines medical evidence**
- **O38 R3B(2) (a) requires disclosure by a Plaintiff within 10 weeks of Close of Pleadings**
- **O38 R3B(2) (b) a Defendant shall disclose within 20 weeks of Close of Pleadings**

**Slide 38          Clinical Negligence Litigation**

**Managing Experts**

- **Selecting the expert**

- **Instructing an expert**
- **Meeting the expert(s)**
- **Managing exchange of reports**
- **Experts meetings**
- **Commercial List Practice Direction No6/2002**

Selecting an appropriate expert in a clinical negligence action may be critical to the outcome. The Solicitor needs to identify an expert suitably qualified to comment in the area of clinical practice at issue. A Solicitor must be satisfied as to the experts experience as a clinician, qualifications and experience as an expert witness. A review of the experts CV is recommended. Take soundings from colleagues or other firms who have used the expert before.

The clinical negligence user group are working on a framework for assisting members in the selection of appropriate expert witnesses.

Care should be taken when instructing an expert to ensure they are fully briefed on the facts and on the issues which you want them to address. Ensure the expert has all relevant papers and more particularly all relevant medical records.

A meeting or consultation with the expert I would firmly recommend before they complete a report for exchange. I have had personal experience just under two years ago of a meeting in London with two very well regarded experts who had reported on causation in a particularly complex case. I travelled with Senior Counsel to London to meet a Neonatologist and a Paediatric Neuro-Radiologist. I think it is fair to say that neither Senior Counsel nor I understood preliminary reports produced by each expert. We did however follow the reasoning sufficiently to realise that we could not have exchanged the evidence and advanced to Trial. It was only after a two hour intense meeting that we and our experts developed a proper understanding of what had happened to cause respiratory collapse and as a consequence profound brain injury. Further enquiries were highlighted before final reports were completed. In that case after exchange meetings were arranged between experts on both sides the defence experts accepted our evidence. Shortly before Trial it was agreed the case would proceed as a quantum only.

The conduct of expert meetings is best approached by reference to the Commercial List Practice Direction NO6/2002 which can be viewed at:-

<http://www.courtsni.gov.uk>

copies of the guideline documentation should be provided to the experts involved.

**Slide 39          Certificate of Readiness**

- **Responsibility of Plaintiff**
- **Parties 14 days to return**
- **Signed by each Solicitor/Party**
- **Lodged with Setting Down**

On the 12<sup>th</sup> April 2010 a Certificate of Readiness was introduced into High Court procedures. This applies to all High Court actions in which damages are claimed for personal injury. A case can no longer be fixed for Trial unless a Certificate is completed in accordance with the notes provided.

Responsibility for completion rests with the Plaintiff's Solicitor. They complete the document first and then send a copy to each other party and their Solicitor. Each party/Solicitor completes those parts relevant to their case and with 14 days return the Certificate to the Plaintiff's Solicitor.

The Certificate must be signed by each Solicitor. Hard copies or electronic copies may be used.

Once the Plaintiff's Solicitor has heard from all parties they shall prepare a final version and circulate this within 7 days; each party has 7 days to raise further representations.

The final Certificate will be lodged in Court usually with the Notice of Setting Down and a request for Trial on an agreed date.

The Certificate is a pre-requisite to fixing a case for Trial

Any failure or default in dealing with the Certificate of Readiness will result in referral of the action to the Senior Queen's Bench Judge. The Court, reliant on O62 R10/10A may impose costs against the offending party.

The hope is that the use of a Certificate of Readiness will reduce the need for case Reviews before the Senior Queen's Bench Judge.

**Slide 40          Certificate of Readiness**

**Medical Evidence**

- **Plaintiff lists medical evidence, relied on**
- **Indicates if complete**
- **If not give particulars**
- **Other parties do likewise**

The Plaintiff Solicitor lists medical evidence they intend to rely upon. Then states if this is complete. If not must explain what further evidence is required and when it will be available.

The other parties answer similar queries.

#### **Slide 41          Certificate of Readiness**

##### **Order 38 Requirements**

- **Agreement/objection to medicals  
(O38 R1A(2))**
- **O38 R1B applications - more than 2 medical witnesses/ more than one other expert**

The parties are asked to list the medical witnesses they intend to call at the Trial.

If more than 2 medical witnesses, have you permission from the Court? This is provided where appropriate by a Master's Order following an application by Summons and Affidavit explaining why the evidence of more than 2 medical experts is required for the Trial.

#### **Slide 42          Certificate of Readiness**

##### **Engineering Evidence**

- **Each party declares if relies on engineering evidence**
- **Have they share maps, plan photographs**

#### **Slide 43          Certificate of Readiness**

##### **Accountancy Evidence**

- **Asks if any party relies on a Forensic Accountant**
- **Asks if report/reports disclosed**
- **Requests details of disclosure**
- **Asks if about meeting between experts**
- **Requests minutes of any meeting**

The view of Mr Justice Gillen the current Senior QB Judge is that Accountants are being retained unnecessarily in many straightforward cases where financial loss is claimed.

He will refuse to allow the cost of an Accountant if he concludes their instruction was unnecessary. Where they are used he encourages efforts to agree their evidence or narrow the points in dispute. Early exchange of reports and meetings between experts encouraged.

Exchange of and agreement on Scott schedule required. Minutes of meetings retained and signed off.

#### **Slide 44          Certificate of Readiness**

##### **Trial**

- Estimated duration requested
- Trial Bundles to be considered
- Skeleton arguments to be considered
- Authorities legal and expert to be considered

Principal purpose of Certificate of Readiness is to focus on issues and preparation of a case for Trial.

It is hoped that this will result in fewer cases being referred for case management hearing before the Judge, and fewer adjournment applications in cases once listed.

#### **Slide 45          Listing for Trial**

##### **Post Setting Down**

- **COR lodged at (Central Office of High Court)**
- **With Setting Down**
- **Parties agreed Trial date.**
- **Case listed on agreed date.**
- **If problems arise return to Office within 14 days with consent and new date.**

Provisional list and Call over of provisional cases now abandoned.

#### **Slide 46          Queen's Bench Review List**

- **Not Set Down as directed by Master referred to QB Review list**

- **Failure to agree date case to QB list.**
- **Undue delay referral to QB list**
- **Specific request any party can result in referral to QB list**
- **Minors cases and clinical negligence generally subject to QB Reviews.**

**Slide 47      Queen's Bench Review Hearing**

- **Nature of case and evidence discussed by each party in detail**
- **Each addresses their readiness for Trial**
- **A date is generally suggested for Trial**
- **Parties have 14 days to check witnesses**
- **Court will present directions for Trial**
- **Further reviews stipulated**
- **Default may result in wasted costs**

The Queen's Bench Review hearings are usually listed at 9.30 am most mornings in the Nisi Prius Court. It is a good idea to check the High Court list on-line the evening before or early on the morning a Review is due to be heard. A Review hearing can often be changed to another Court or to a different time.

It is recommended that the Solicitor with conduct of the file be in attendance. They should have a detailed working knowledge of the file, the cause of action, the facts, the pleadings, progress to date, medical evidence, other expert evidence, outstanding matters, and further matters to be completed before Trial. Expect to be asked to explain why the case has required referral for Review and be in a position to timetable completion of all enquiries and proofs in preparation for Trial.

The COR lists most of the issues that you will be asked to address. However the following is a summary of matters which you will generally have to explain:-

- The background facts and cause of action;
- Progress of pleadings and of the evidence;

- The reasons for any delay;
- Completion of medical evidence and Order 25 obligations;
- Inspection and discovery issues;
- The manner in which the case is pleaded in the Statement of Claim and Defence and compliance with Order 18;
- Completion of all other interlocutory matters;
- Any other expert evidence and disclosure of expert evidence;
- COR and Setting Down in compliance with Order 34;
- Compliance with Order 38;
- Agreement of expert evidence and identification of experts required for Trial;
- The possibility of meetings between experts and the potential to narrow the issues for Trial;
- Trial Bundles;
- The need for skeleton argument on legal issues;
- The potential for negotiation and a meeting between the parties;
- The possibility of experts giving evidence through television link;
- Efforts made to agree a date for Trial.

Solicitors need to be aware that when preparing expert evidence for Trial they should carefully consider if expert evidence can be agreed without the need for formal proof. This is particularly so of medical evidence. The Trial Judge will inevitably now ask at the outset what efforts were made to agree medical evidence and if it is proposed to call a Doctor to give evidence they can expect to be asked to produce documentary proof showing that the medical report was objected to by another party.

Failure to address these matters may carry cost implications and in some cases may result in wasted costs Orders.

There is a general view that too often expert witnesses are being called to give formal evidence at Trial unnecessarily and that in many cases medical and other expert evidence could be agreed.

