

## **Paper on Medical Negligence April 2010:**

### **Introduction:**

1. Good morning Ladies & Gentlemen... *Dunne v. National Maternity Hospital* [1989] 1 IR 91 is a decision which every practitioner will be familiar with; in particular, the six principles set out in that judgment. I do not however propose to refer to those but rather to a passage which appears immediately following them. In that, Finlay C.J. said:

*“The development of medical science and the supreme importance of that development to humanity makes it particularly undesirable and inconsistent with the common good that doctors should be obliged to carry out their professional duties under frequent threat of unsustainable legal claims. The complete dependence of patients on the skill and care of their medical attendance and the gravity from their point of view of a failure in such care, makes it undesirable and unjustifiable to accept as a matter of law a lax or permissive standard of care for the purpose of ascertaining what is and is not medical negligence. In developing the legal principles outlined and in applying them to the facts of each individual case, the courts must consistently seek to give equal regard to both of these considerations”.*

2. In furtherance of these considerations the substantive law has responded well with both a principled and practical balance having been achieved, although of course this is a continuous process which will further develop according to needs. Procedural law on the other hand has not fared nearly as well. It is in this area that I propose to address a number of topics this morning. Some of them arise out of the Civil Liability and Courts Act 2004, others simply emerge because litigation is now more complex, lengthy and costly and yet more can be directly related to the ongoing search for equality and fairness. Overall, I hope to cover the following subjects:

- i) Proceedings in medical negligence actions, including:
  - a. The initiation of proceedings;
  - b. Pleadings;
  - c. Offers;
  - d. The trial of the action.

- ii) Expert witnesses:
  - a. The duties of experts;
  - b. The production of expert reports under S.I. No. 391/98 and the requirements of discovery in medical negligence actions;
  - c. Meetings between the experts.
- iii) Alternative damages payment regimes:
  - a. Reviewable periodic payments;
  - b. *Interim* payments;
  - c. Provisional payments;
  - d. Structured settlements / periodic payments.

I shall outline the history and current situation with regards to each, and then I may hazard an opinion as to where the law might go in these areas. As was noted by my honourable colleague, Mr. Justice Quirke in his recent address to the Insurance Institute of Dublin, on the 16<sup>th</sup> November last year:

*“If you, or I, or the legal profession or the Government or any other participant in personal injuries litigation, believe that the system can be improved in one way or another, then I believe that we should express views and make proposals openly so that they can be considered and, if accepted, implemented.”*

**The Initiation of Medical Negligence proceedings:**

*The Letter of Complaint:-*

3. Under s. 8 of the Civil Liability and Courts Act 2004 (“the 2004 Act”) a plaintiff, in a personal injuries action is required to serve “*a notice in writing*” stating “*the nature of the wrong alleged*” within 2 months from “*the date of the cause of action*”; which is defined in sub-section (2) as:

*“(a) the date of accrual of the cause of action, or  
 (b) the date of knowledge, as respects the cause of action concerned, of the person against whom the wrong was committed or alleged to have been committed, whichever occurs later.”*

The term “*date of knowledge*” has the meaning attributed to it in the Statute of Limitations (Amendment) Act 1991 (s. 2). Thereafter a plaintiff will be considered to

have “*knowledge*” for these purposes, regardless of whether he appreciated that the actions would or would not legally constitute negligence. Thus in *Cunningham v. Neary* [2004] IESC 43, the Supreme Court found that the plaintiff was statute barred because although she did not explicitly know that the defendant had unnecessarily removed her ovary when she had complained to the Medical Council in 1998 she had knowledge of the fact that the defendant had removed her ovary in 1991, that she had twice asked him why he had done so, that she had received no explanation at all and that other women had made serious complaints about him. This knowledge was thus such that it was “*then ‘reasonable’ for her to seek medical or other expert advice*”. It should be noted that the Court accepted that the plaintiff had no knowledge of the potential wrong done to her between the operation, in 1991 and 1998. It was at that time that media reports began to surface which called into question the professional conduct of the defendant in case brought by other women, and prompted her ultimately to make her complaint to the Medical Council. However, in circumstances where she then waited until 2000 to instruct a solicitor, and until 2001, when she received a report on the matter, to issue proceedings, she was statute barred as she had had knowledge for this purpose since 1998. A person’s knowledge includes that which he might reasonably have been expected to acquire:

“(a) *from facts observable or ascertainable by him, or*  
(b) *from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek.*” (s. 2(2)).

Thus, a claimant would not be held to have knowledge if a fact is only ascertainable by an expert, and the claimant has made reasonable efforts to obtain that advice; or if knowledge of a fact was failed to be obtained by virtue of the injury suffered.

**4.** If a plaintiff fails to serve the required notice under s. 8, then the Court may:

“(a) *draw such inferences from the failure as appear proper, and*  
(b) *where the interests of justice so require—*  
(i) *make no order as to the payment of costs to the plaintiff, or*  
(ii) *deduct such amount from the costs that would, but for this section, be payable to the plaintiff as it considers appropriate.*”

One must, therefore, ask what is the purpose of the section, has it any value to the plaintiff, what value does it have for a defendant and how does it help the litigation overall?

5. It is immediately evident that the provision in question is unclear. It speaks of a “notice” and not simply a “letter”, as if to imply more formality or detail. It requires the “nature of the wrong alleged” to be specified. What level of detail is therefore required? Is it sufficient to inform a hospital that you have suffered certain complications due to negligence? Is it anticipated that lawyers should be engaged before formulating such a notice? Surely yes. If so, how can they avoid an “abuse of process” charge that the claim was issued “*without first ascertaining that there are reasonable ground for so doing*” (*Reddy v. National Maternity Hospital* [1997] IEHC 143). What about the person himself, who presumably is suffering some form of ailment and in many cases may be still hospitalised or under active medical care. It may take several months to recover from iatrogenic injuries and in any event a plaintiff may not simply be physically or mentally well enough to contemplate litigation or seek legal advice. Even if they are so ready, how any worthwhile detail could be furnished without at least considering the records, and getting some, even a provisional, analysis thereon?

6. There is no doubt but that the sooner a complaint is made the better overall; as justice will be better served. The same comment applies to all aspects of litigation, including an informative joinder of issues and a speedy, fair and efficient end to litigation. Let me disregard any implication within the section touching upon a plaintiff’s credibility (although some commentators have suggested that this is precisely what underlines it), and say that the rationale of its existence is aimed at permitting a defendant, at the first appointment, to obtain relevant material, to identify potential witnesses, as to fact or opinion, and to allow for an outline of his position. If purposely engaged upon this exercise, it may defuse litigation before it seriously gets going.

7. However, for such a notice/letter to have any utility in the manner suggested, it must be sufficiently detailed. In most cases that cannot occur before lawyers are

engaged, records obtained, witness statements taken and an expert's view acquired. In all but the simplest of cases this cannot be achieved within the specified time period. This must be virtually self-evident. And yet there exists a statutory sanction for non-compliance on a plaintiff. Whilst it is unlikely that a judge would apply the section in these posited circumstances, nevertheless there exists a risk that he may do so and consequently the plaintiff must remain conscious of that risk.

**8.** The section is also silent as to the actions to be taken by an alleged wrong doer. Should or must they reply? Should or must they substantively reply? It would certainly seem reasonable that they should, although such an obligation cannot be read into the section. However, to do so may put a defendant to significant costs in circumstances where litigation, without detail or evidential backing, is merely threatened. A defendant can therefore choose or be forced to wait until the summons is served before considering his position and communicating that to a plaintiff. This will inevitably be at a more advanced stage of the litigation where positions may have hardened, costs incurred, and an opportunity for early resolution lost.

**9.** It seems to me that the section, in all but the most straightforward medical negligence action, is in reality not workable and even if it was, it neither addresses nor achieves the type of balance inherent in the above quoted passage from *Dunne*. I believe that consideration should be given to the making of a provision under which a plaintiff would be obliged to set out in substantive detail his claim and thereafter to impose, by way of response, a similar obligation on a defendant. However, for this to have any real benefit, two important elements will first have to be addressed. The first is the time frame involved and the second is the extent of the response. In my view, a period of perhaps six months should be allowed. This could not be described as prejudicially long and should have no impact on the retention of documents given the existing hospital and medical protocols in that regard. Within say a further period of three months a defendant should be statutorily obliged to engage, in a purposeful and meaningful way, with the claim. The shorter time period is justified by the more liberal and comprehensive access which a defendant has to reports and experts than a plaintiff. If a regime like or similar to

that suggested existed, there is a reasonable prospect that litigation, which otherwise would proceed, may come to an end sooner and in more satisfactory form, for those concerned.

Pleadings:-

**10.** Currently in medical negligence cases the same pleading requirements apply, as to all other personal injuries actions. It is undoubtedly true that medical negligence involves injuries which are personal in nature, and so in that respect they are personal injuries. However, actions arising out injuries caused by the provision of health services, the carrying out of medical or surgical procedures, or the provision of medical advice or treatment are expressly excluded from the remit of the Personal Injuries Assessment Board (P.I.A.B.). The legislature has therefore recognised, at least for these purposes, that medical negligence claims are not traditional personal injury actions.

**11.** One may therefore wonder why the same pleading regime applies. This regime came about because, especially from the mid-1990s onwards, there was an increasingly vigorous campaign alleging a preponderance of over exaggerated, or even downright fraudulent, claims; although when challenged hard evidence was lacking in this regard. Concern also existed because the issues between the parties were often poorly defined, with the result that Courts were bogged down in long and highly contentious trials. The creation of a specific pleadings regime by the 2004 Act, the insertion of Order 1A in the Rules of the Superior Courts (by S.I. 248/2005), and the establishment of P.I.A.B. sought to tackle these problems. Specific provision is made for the contents of the Personal Injuries Summons (s. 10), and the Defence and Counterclaim (s. 12). Section 13 of the 2004 Act requires that all pleadings shall, in the case of the plaintiff contain full and detailed particulars of each allegation, assertion or plea comprising the claim, and in the case of a defendant or a third party, contain full and detailed particulars of each denial or traverse, and of each allegation, assertion or plea, comprising his or her defence. It is therefore clear that one of the key benefits of the system should be the clear identification of the issues, both for the parties themselves, and for the Court.

**12.** However in practice this has not necessarily been the case. The form of pleading as set out in Form 2, Appendix CC of the RSC, still allows for a type of defence that, although not denying a claim, will instead seek to put a plaintiff on proof of a matter or not admit a fact. This may be the case even if the fact is in reality uncontested. The 2004 Act intended to end such blanket denials, veto evasive responses and prohibit mere negative pleading, as such are entirely uninformative from the Court's point of view, as they are from a plaintiff's point of view. This strongly militates against early resolution, or even discussion, and defies the ethos underlying the changes. This should therefore be altered and a positive duty placed on a defendant to engage constructively with the issues. Active supervision may be required and, if it is, in my view it would be worth it.

**13.** An example on the causation side may illustrate what I am speaking of. Take the case of a man who sues after being exposed to high levels of asbestos and who now has lung cancer. He alleges that his condition is due to industrial negligence. The defendant denies this, putting the plaintiff on proof of certain facts and simply not admitting others. Neither the plaintiff nor the Court may ascertain from the defence why. However, it is in fact the case that the plaintiff is, and has been for the best part of his life, a heavy smoker. This fact is known to the defendant. Why should the defendant not admit that the plaintiff has lung cancer, but that its sole cause is the inhalation of cigarette smoke? I can see no prejudice to a defendant should he so do. Instead such an obvious admission serves to inform both the plaintiff and the Court, and help to reduce significantly Court time which otherwise will have to be spent in establishing altogether unnecessary facts. This simple step, with the resulting benefits, will of course cut costs. Such a step is far short of ceding the case: the plaintiff will still have to show that he inhaled asbestos, that the defendant was responsible for the asbestos *etc.*: a plethora of proofs. If a defendant makes such admissions there must inevitably be a substantial reduction in the number of witnesses and consequently the length of the trial. Such can only serve all parties in the long run.

**14.** One variation on this example is also worth mentioning. I have seen defences where assertions are not admitted, and allegations are required to be proved. This is common, and perhaps acceptable, if stopped there: but in addition I have also seen a

defendant state that he is not negligent and not liable for the injuries. One plea may be considered a general traverse, whilst the other may be viewed as a positive line of defence. Confusion is thus created and the giving of further particulars is refused as the standard form of defence permits such pleas. This type of approach should be actively discouraged and s. 13(1)(b) of the 2004 Act as well as O. 19, r. 17 RSC 1986 should apply and particulars ordered. As can therefore be seen, the pleading problems must be addressed and a truly engaging culture must be proclaimed and universally applied.

**15.** I have mentioned time limits in the context of a s. 8 notice, however when compared with other plenary actions, there are equally stringent requirements in relation to the summons and defence. Since 31<sup>st</sup> March 2005 there is a two year time limit for the originating summons; in the format at Form 1, Appendix CC of RSC. Such a document is intended to be highly detailed. In some cases problems can arise, for whatever reasons, mostly related to the individual. It can therefore take several months, if not much longer, for him to initiate action, for his solicitor to procure medical records and to obtain supporting medical opinion. Solicitors may frequently face a dilemma if a would-be plaintiff comes in very late in the day. It is difficult in medical negligence cases to issue, what might be termed, a protective summons, as might be usual in ordinary negligence cases, because of both the high level of detail required, and also the duty on counsel to have supporting material before issuing. Under the old regime it would have been possible to simply issue a plenary summons to stop the clock ticking; however the personal injuries summons is more akin to a statement of claim and therefore inevitably requires more time.

**16.** Defendants in medical negligence actions do not have it easy either. Order 1A, rule 8 of the RSC require that the defence be served within eight weeks of receipt of the summons. Although extension is possible with the consent of the other side, or where the Court considers it necessary or expedient to enable the action to be properly prosecuted or defended, or else is in the interests of justice, it is clear from s. 9 of the 2004 Act that the starting position is that time should not be extended. As with the plaintiff, defendants may have equal problems in assessing the strength of the plaintiffs claim within that time.

It may indeed be for this reason that many defences in medical negligence contain negative pleadings, although tactical motives and strategy may also play a part. In practice it is still more likely that extensions will generally be granted, but as Kearns P. noted in *O'Donnell v. McEntee* [2009] IEHC 563, a case to which I will refer to in more detail later, this fact should not be a relevant consideration; the fact is that the legislation sets short and strict time limits.

**17.** Nonetheless, as Kearns J., as he then was, stated in *Payne v. Sholvin* [2007] 1 IR 114 at 124:

*“The root of the problem, however, lies less in the complexity of the law or procedure than in the climate of mutual suspicion and defensiveness which is still all too prevalent in this area of litigation.”*

It should be incumbent on parties to plead positively and engage purposefully with the facts and issues. The same requirements should be placed on all parties without exception. This has no implications for the onus or standard of proof. In my opinion, the positive obligations with regards to personal injuries actions should be strengthened, if anything, in relation to medical negligence, but such a move must be balanced with a proper timeframe. It is only in this way that the parties and the Court may properly identify the issues and consequently gain the benefits of narrowing such issues; thereby ultimately saving time and money for all concerned.

**18.** One further thing should be mentioned in relation to pleadings. Section 14 of the 2004 Act requires that “*any pleading containing assertions or allegations*” served by either side must be accompanied by a verifying affidavit. The importance of the affidavit lies not in its contents, but more in the consequences which follow should any statement made in a pleading turn out to have been knowingly false or misleading. Under s. 26(2), the court in such circumstances shall dismiss the plaintiff’s claim unless, for such reasons as given in a decision, such dismissal would result in injustice being done. Further, providing false or misleading information in a verifying affidavit is an offence which is prosecutable either summarily or on indictment (s. 29 of the 2004 Act). The penalties for conviction on indictment are a fine up to €100,000 and/or imprisonment for up to 10

years. Even when prosecuted summarily a number of preconditions apply so that it shall not be so prosecuted unless the Court considers the matter to be minor and fit to be so tried, the accused does not object to being tried summarily, and the D.P.P. consent to such prosecution. The penalties for summary conviction are a fine up to €3,000 and/or imprisonment for 12 months. It is therefore clear that the Oireachtas considered these matters to be of the utmost seriousness. Indeed, as mentioned before, one of the primary purposes for the 2004 Act was the prevention of fraudulent claims, although once again it should be said that such claims, which undoubtedly must exist, are rare and exceptional rather than common and usual.

**19.** Whilst I completely agree that fraudulent claims should be punished to the utmost, care should be taken to make sure of one's designation. Of all areas of litigation, it must be noted that personal injuries are just that, namely injuries to the person, and so self-exaggeration need not be entirely intentional. The more disabling the impact, the more personal the effect. A plaintiff may naturally feel the need put his best foot (or two) forward; but he may not be alone in this regard. So too may a defendant or his witnesses overstate the safety of a procedure to try and disguise the obvious gaps in their case. Indeed as my colleague Quirke J. noted in his Institute address:

*“To some extent, I think that this endemic problem has its roots in our adversarial system of justice which permits each party to vigorously challenge the evidence of the other.”*

He unfortunately cannot see how this culture can be changed. The Court must, after all, depend upon the evidence before it, and not rely on its own speculation. Similarly it must be difficult for a defendant to prove that a person is lying about an ailment. A broken arm is obvious, headaches may not be. A person may appear physically fine, but still suffer ailments and aches which can only truly be measured in the sufferer's head. Hyperbole as to injury can therefore be almost impossible to challenge. Similarly, many medical issues may be contentious and therefore even if wrongly motivated it would be difficult to demonstrate that a defendant was deliberately misleading or lying to the Court. As with perjury, therefore only the most outrageous lies in the face of the Court or on affidavit could successfully be prosecuted. Thus, to much of an extent, despite its draconian

appearance, the offences for making false statement on affidavit may ultimately be toothless in the face of exaggeration and hyperbole. As was noted by Quirke J. in his aforementioned paper, it is ultimately difficult for the courts to deal with the problem of exaggerated claims.

**20.** In relation to outright fraudulent claims, the extent of these would seem to be overstated. As Quirke J. noted:

*“It is sometimes suggested that fraudulent claims figure prominently within personal injury litigation. I have found little evidence which would substantiate that proposition...”*

He could recall only three cases in which it had been alleged that the plaintiff’s claim was wholly fraudulent. In two of those cases it was established that the claims were not in fact fraudulent, a fact ultimately acknowledged by the defendants. In the third case he was satisfied that the claim was fraudulent and forwarded the papers to the D.P.P. for consideration. I am unaware of the status of these proceedings. Pragmatically speaking though, it must be very difficult to maintain a purely fraudulent personal injury claim. By their nature, very rarely could a person fraudulently claim to have been injured if they had not been; but for the lure of compensation some could do anything.

Mediation Conferences:

**21.** An interesting provision contained in the 2004 Act relates to mediation conferences. The Court, at any time before trial, has the power to insist upon the parties engaging in mediation, if it is of the view that such may assist in the settlement of the matter. The “compulsion” element in this provision would at first sight seem to have little utility: what is the purpose in forcing an unwilling party into mediation? Such a view point would defeat the section but more so it would negate the Court’s power in attempting to resolve matters. If the parties are obliged to mediate they should and must do so *bona fide*, and once again in a constructive and honest manner. The chairperson appointed to the mediation conference should report what has, or has not occurred, in a fully open manner, expressing freely his considered views on behaviour. If there is no settlement, the Court, at the end of a trial, may take into account this report in deciding if

there was proper engagement, and if not, the Court may order the defaulting party to pay the costs of the action, or such part as it sees fit, after the direction under s. 15(1).

**22.** To my knowledge, there has been very few mediation conferences held in relation to medical negligence actions. This must be considered unfortunate. Such conferences could be helpful, especially in very complex cases, *e.g.* in relation to birth injuries, where many facts and issues remain unclear or elusive, even after medical records, experts reports and discovery have been obtained. As noted it is probably unlikely that a Court would force mediation upon unwilling parties; such would almost inevitably cause resentment on the part of the resisting party, making the prospects of settlement even more unlikely. However, I would encourage practitioners to consider this option. Mediation must be preferable to a lengthy and inevitably costly trial.

*Settlement Offers:*

**23.** As noted before, some of the primary concerns driving the 2004 Act are; to reduce *inter partes* costs, to have cases dispatched of more efficiently, and in the process free up Court time, so that the existing load of personal injury actions can be challenged. In this regard, as with mediation conferences, the Act contains provisions which reward attempts to settle, and punish unreasonable refusal to do so, *e.g.* through refusing all or part of the costs at the conclusion of the hearing. Section 17 of the 2004 Act provides that:

*“(1) The plaintiff in a personal injuries action shall, after the prescribed date, serve a notice in writing of an offer of terms of settlement on the defendant.*

*(2) The defendant in a personal injuries action shall, after the prescribed date, serve a notice in writing on the plaintiff—*

*(a) of an offer of terms of settlement, or*

*(b) stating that he or she is not prepared to pay any sum of money to the plaintiff in settlement of the action.*

*(3) A copy of a formal offer shall, after the expiration of the prescribed period be lodged in court by, or on behalf of, the plaintiff or defendant, as the case may be.*

*(4) The terms of a formal offer shall not be communicated to the judge in the trial of a personal injuries action until after he or she has delivered judgment in the action.*

*(5) The court shall, when considering the making of an order as to the payment of the costs in a personal injuries action have regard to—*

*(a) the terms of a formal offer, and*

*(b) the reasonableness of the conduct of the parties in making their formal offers.*

*(6) This section is in addition to and not in substitution for any rule of court providing for the payment into court of a sum of money in satisfaction of a cause of action or the making of an offer of tender of payment to the other party or parties to an action.*

*(7) In this section—*

*“formal offer” means an offer under subsection (1) or (2)(a), or a statement under subsection (2)(b);*

*“prescribed date” means such date before the date of the commencement of the trial of the personal injuries action concerned as is prescribed by order of the Minister;*

*“prescribed period” means such period commencing on the prescribed date as is prescribed by order of the Minister.”*

The “prescribed date” is the date upon which the personal injuries summons is served. The “prescribed period” starts on the prescribed date and ends 14 days after the service of the Notice of Trial, save in respect of District Court proceedings, which ends 4 days after the delivery of defence: S.I. 169/05.

**24.** Some, but not all, of the problems concerning s. 17 were considered in the recent decision of Kearns P. in *O'Donnell v. McEntee & Ano'r* [2009] IEHC 563. Following service of the Notice of Trial on 26<sup>th</sup> September 2008, the defendants, in February 2009, called on the plaintiff “*to furnish your formal offer of terms of settlement, as prescribed by s. 17 of the Civil Liability and Courts Act, 2004 by return and without delay.*” Following a reminder, the plaintiff’s solicitors, on 21<sup>st</sup> April 2009, replied that counsel

was considering that, but in any event they “*would expect you to be in a position to have simultaneous exchange of formal offers in accordance with the legislation*”. Conflicting correspondence and opinions issued between the parties on the matter until eventually the defendants served a notice of motion on 9<sup>th</sup> November 2009, seeking the plaintiff’s compliance with s. 17 of the 2004 Act. Kearns P. summarised the problems with s. 17 thus:

*“The problems which arise under s. 17 of the Act include the following: who should go first where the making of an offer is concerned? Should there be simultaneous offers? Are there time limits within which offers must be made, as distinct from the requirement that a copy of a formal offer be lodged in court after the expiration of the 14 days following the making of an offer?”*

Whilst the section provided no penalty for non-compliance, Kearns P. was nonetheless satisfied that a party could apply to court to compel such compliance.

**25.** With regards to the time limits for submission of the offers, Kearns P. was in no doubt that:

*“[T]he Act and Regulation clearly require that an offer be made within the prescribed period. That period is specified in S.I. 169 to be the period commencing on the prescribed date (i.e. the date upon which the summons is served) and **ending** [emphasis in original] on the expiration of fourteen days after the service of the Notice of Trial in those proceedings. To my mind there is no ambiguity whatsoever about this provision, notwithstanding the fact that a copy of any offer does not require to be lodged in court within any specified timeframe. I completely reject the view that the statutory provisions themselves leave it open to the parties to make s. 17 offers at any time up to and including the trial itself.”*

**26.** With regards to the issue of simultaneous offers, Kearns P. noted that:

*“The problem of simultaneous offers is not a problem which arises in the instant case, but clearly is one which may arise in the future. There is a clear and obvious failure of the legislation to address this particular issue. Insofar as one may adopt a purposive interpretation of the statutory provisions, one can only*

*infer an intention that the statute does not require simultaneous offers, given that such a approach would produce an absurd outcome [namely that both parties might accept different offers simultaneously], a purpose which statutes are generally not presumed to intend.”*

He continued:

*“Much more intractable, however is the issue of which party should first make an offer. There is no easy solution to this problem.”*

Having considered the historical position in relation to personal injuries actions, namely that a plaintiff would go first in presenting an offer to a defendant, and contrasting it with the alternative view that the tortfeasor should be the one to make an offer first, which would mirror and reflect the provisions of O. 22 of the RSC, he concluded that:

*“I am unable to resolve the difficulty of who should go first without rewriting the legislation to specify which party goes first. The only thing that is clear is that both parties must make their offers within the time stipulated. This in turn can only mean that either party can make its offer at the moment of its choosing within the specified period. To the extent that this may produce the oddity of simultaneous offers being made (and accepted) that problem remains a difficulty created by the poor drafting of the legislation in question. However it is not a difficulty which arises in the instant case.”*

In those circumstances he granted the defendants an order directing the plaintiff to comply with s. 17(1) of the 2004 Act. I will come back to this decision in a moment but firstly some comment on the section itself.

**27.** The requirement that the offer “in a personal injuries action” be made “after the prescribed date”, in circumstances where the prescribed date is that of the service of the summons, would appear to add virtually nothing to the section. In order for a personal injuries action to exist a summons must have been issued. Prior to that date there is no such action in existence. Although technically there would be an action in existence between the date of issue and service, this is unlikely to be a significant amount of time. I therefore cannot see that “after the prescribed date” adds any more to the provision than what is already implied in the phrase - “in a personal injuries action”. In any event why

should offers made prior to the service of a summons not be taken into account by the Court? The purpose of the section is to encourage settlement. If following an offer from either side there was an unreasonable refusal to settle at that early stage why should that not be a material matter? Of course it might readily be explained by, *e.g.*, a lack of detail on the liability or damages side, and if so that would be fine. However, I can see no reason in principle why such offers should be outside the remit of s. 17.

**28.** Whilst the decision of Kearns P. is of course highly informative, it is however, undoubtedly a fact that there is no express end date contained in subss. (1) and (2) of the section; these being the most obvious place for a cut-off date if that was intended. The offer must merely be after the service of the summons. Whilst offers shall be lodged with the Court (subs. (3)), the time frame is only stated to be after 14 days following the service of the notice of trial. Again this would seem to be an open ended provision; it has a “not-before date”, but not an “end date”. These provisions are therefore rather peculiar in their wording. The key sections are subss. (1) and (2): they oblige the parties to consider settlement. The least important provision is that in subs. (3) because it has no purpose until judgment is delivered. Indeed lodging the offer(s) at that time would be perfectly fine. Therefore it seems a most strange way for the legislature to specify a cut-off date for the making of an offer. Moreover it could well be that neither party, despite an advanced level of preparation, is truly in a position to make final calculations when the actual trial date might be months off. A substantial lead-in period is usually required in such actions so as to accommodate the available experts; many of whom travel from abroad. Surely an offer a few weeks before trial is better than no offer? I therefore believe that s. 17 offers should be permitted to be made as late as possible during the currency of an action; noting as I do that the key driver of the section is settlement. But how late is late? I would suggest that s. 17 offers should be allowed at any time prior to trial provided that the recipient has a reasonable period to consider the offer, *i.e.* to consult with his advisors, reflect on what is before him and maturely consider the benefits and disbenefits. Of course offers can be made at any time up to judgment, but in my view after trial starts, any such offer should have no s. 17 implication. I realise of course that the section, in its present form and as interpreted, does not permit what I suggest.

**29.** In relation to the issue of who should go first, I note that Kearns P. took a purposive approach to the legislation, taking into account the motives for its enactment. In that regard he considered that the plaintiff should offer first, although he expressly made no ruling on that point. One might ask why should the plaintiff make the first offer? Under O. 22 of the RSC 1986 the plaintiff is under no obligation to make any offer. Why should it not be the defendant as the alleged wrongdoer? The section seems to explicitly favour the defendant, firstly by the inclusion of s. 17(2)(b); there is no equivalent open to a plaintiff, who may wish strongly to have his damages assessed by a Judge. He should be allowed to so say. Secondly, whilst a plaintiff who fails to accept a settlement offer may be penalised in the ultimate cost order, there is no sanction facing a defendant who unreasonably refuses an offer – he must already pay the plaintiff’s costs. This should be changed. A defendant’s unreasonable conduct should not be incentivised: a higher scale of costs or interest at a specified rate, from a certain date, should be considered.

**30.** In many cases a plaintiff is likely to have some items of damage capable of being agreed upon at an early stage, and whilst the decision of Kearns P. would seem to suggest that offers of part settlement may be covered by s. 17, nonetheless the section is silent as to whether this is the sort of offer which it contemplates. The section should of course explicitly have referred to “settlement or part settlement”. Even part settlement of a claim may ultimately save costs and Court time.

**31.** It should be noted that the “prescribed date” and “prescribed period” for the purposes of the section are set by regulation. It therefore may not be necessary to amend the primary legislation in order to remove the ambiguity which surrounds this section. One could readily conceive of having one “prescribed date” for the plaintiff and another for the defendant; thus determining once and for all who should go first. Moreover, the “prescribed period” can also be easily changed by statutory instrument. I therefore think that the Rules making Committee could look at this, as a matter of urgency.

**32.** There is still ambiguity however as to the status of the offer. There is no useful definition of what a formal offer constitutes. Nor is there provision for the withdrawal or superseding of an offer. Can, therefore, only one s. 17 offer be made? If multiple offers were to be allowed, how should the Court deal with those in relation to costs? Can an offer refer to matters other than money; say an apology? For such a simple section, it provision raise many questions.

**33.** Reverting to *O'Donnell*, whilst it can be said that technically the issue of who should go first was not at issue, surely it was immediately proximate. The plaintiff it seems clearly did not wish to prejudice her position by making an offer first, and neither did the defendant. Kearns P. merely concluded that both were obliged to make their offers within the prescribed time. Although he acceded to the defendants' motion, it would presumably have been open to the plaintiff to pursue a similar motion, and one must presume successfully, against the defendants compelling them also to comply with s. 17. In the absence of any finding that one party or another should go first, it is difficult to see how this section will operate effectively in practice. The President did note that the section could not have contemplated a contemporaneous exchange of offers, as this could lead to the absurd position where both parties could accept both offers. For example if the plaintiff offered to accept slightly less than the defendant offered, this would mean that the defendant had offered more than the plaintiff sought; in those circumstances both parties would wish to accept the other's offer. I respectfully agree that such a situation would be absurd and that it could not have been contemplated by the legislature. However in the absence of an obligation on either party to proceed first, and where the issuing of such an offer is likely to prejudice whoever makes it first (since that party will have effectively shown their hand), I cannot see how s. 17, in its present form, will assist in the early settlement of proceedings; the plaintiff will deliberately seek more than he wants, and the defendant will offer less than he is willing to give up, depending on who goes first. Indeed this would appear to be the current situation in any event, as Quirke J. noted in the above-mentioned paper in the context of exaggeration and the adversarial system:

*“This ... has resulted in a (perhaps peculiarly Irish) type of auction where each party feels that it should demand approximately 150% of what it hopes to achieve.”* (p. 10)

**34.** Even if it was accepted that a plaintiff should proceed first, how could a Court compel him to do so at any time before he is ready? Kearns P. would seem to suggest that section 17 offers need not be all encompassing. At p. 18 of the decision he stated:

*“[A]ny inability to be as precise as one might wish in any offer made should not result in an adverse award of costs if the inability to fully quantify the claim is reasonable at the time when the offer is formulated.”*

This seems perfectly sensible. A plaintiff may not be in a position to fully quantify their claim. They should, however, be in a position to quantify some of their special damages, and even if there could be agreement on this matter between the parties it would again shorten the issues to be determined by the Court; which can only be of benefit, as I have stated before, to all concerned.

**35.** Purposefully looking at the section or otherwise, as stated by Kearns P., it would be a stretch in statutory interpretation to read any obligation to proceed first into the section. However, in those circumstances it would appear to me that the section must inevitably create an absurdity; no party wanting to go first, but both obliged to proceed within a set time limit. As I have asked, what if both parties moved to compel the other to comply with s. 17 at the same time? Both are obliged to do so, but then the Court would in any event have to indicate who should go first in circumstances where the statute is silent on the matter. Clarification is therefore required. It may be that Rules of Court can give a workable meaning to this section by re-defining “prescribed date” and “prescribed period” either individually for both plaintiff and defendant, or collectively; otherwise it would have to be statutorily amended.

### **The Trial of the Action:**

**36.** There are a number of issues which should be touched upon in the processing of medical litigation, including the role of experts.

**37.** The first issue relates to pre-trial hearings under s. 18 of the 2004 Act. This section allows the Court of its own volition to direct such hearing on any issue in dispute between the parties. To my knowledge this provision has yet to be invoked; it could be usefully utilised where discreet or isolated issues exist. It would have to form part of greater case management, as otherwise it may have little knock-on effect and indeed if not carefully structured might only involve “hearings within a hearing”, which may in fact increase costs and add inconvenience to the overall litigation. I would certainly be an advocate of such pre-trial hearings, especially in medical negligence actions, where there are often a plethora of issues between the parties. As with many of the provisions in the 2004 Act, this section aims to reduce the costs of the main trial by narrowing the issues which need to be fully litigated.

**38.** At present there is no specific provision for case management in personal injuries actions, although a court would undoubtedly have an inherent power to so do on a case by case basis. There have been calls for making this procedure available, particularly for difficult catastrophic type cases, which can be both complex and costly. Proper case management, similar to that carried out by the Commercial and Competition Courts would greatly reduce the costs of such actions. However such Court intervention would not be required in all cases and even where necessary a modified or tailored regime may be sufficient.

**39.** Therefore the first and highly critical exercise would be to identify which cases could benefit from case management. The success of such a filter exercise is critical as otherwise, to take just one example; the already strained capacity of the courts would be further stretched. Some system short of formal rules, perhaps one based on a practice direction, may suffice. Paragraph 21 of Practice Direction 51 (relating to Family Court proceedings) provides that the Court may “*by reason of the complexity of the proceedings, subject matter, number of parties or otherwise*”, either of its own volition or on application, determine that the proceedings should be subject to a more detailed case management regime. In this regard the Court may direct the parties to prepare and

**40.** However, as I have said, case management may neither be suitable nor desirable in all cases. There can be over 500 medical negligence cases a year, and were case management requested in even a small percentage of these, the Courts would become case managers and not case deciders; hence my comments about the entry criteria. Cases involving complex issues, either of fact or law, cases of likely duration or those experiencing excessive delay would benefit. The Court could streamline the process, encourage settlement and, if a trial is unavoidable, arrange for its conduct in the most efficient way possible.

**41.** Another point is whether there should be a split trial on the issue of liability and damages. Apart from those cases where a substantial amount of “damage” evidence is necessary on the liability issue, or where the medical reports are admitted or where the disputed medical evidence is minute, I strongly support those who advocate a separation

of both issues. The immediate benefit is to significantly reduce the length of the trial: secondly, once liability is established, there is a clearer vision of damages, which frequently settle thereafter. Whether the splitting of the trial should be directed by the judge of his own volition or only on application by a party is debatable. I would have a preference for direction control rather than agreement control. Whichever, it should become increasingly the norm. Whilst I acknowledge that unlike other cases, medical negligence actions can be extremely contentious on damages and/or quantum, and thus a decision on liability may be less likely to influence outcome, nevertheless even a percentage success would be an improvement on a lengthy inclusive trial. Such a power to fix the separate trial of issues of “fact and law” is currently provided for in the Commercial Court under O. 63A, r. 6(1)(ii), and in the Competition Court under O. 63B, r. 6(1)(ii).

**42.** There is provision in England and Wales for the calling of all witnesses as to fact first. The power to do this is contained in CPR 32(1), which provides that the Court may control the evidence by, *inter alia*, the way in which it is placed before the Court. Like a split trial the aim of such a measure is to save Court time, and that of the parties; ultimately reducing costs. The rationale behind this provision stems from the current position where a party calls all of its witnesses, both as to fact and opinion, first, and then the other side does likewise. There may therefore be weeks or even months separating such factual witnesses. This can cause particular problems with regards to both the examination and cross-examination of expert witnesses. Such a witness bases his opinion on the facts as suggested, on assumptions later to be sustained, or worse still on a range of disputed facts. The evidence is therefore contingent or provisional: it is not final. The entire foundation for his opinion may shift or even evaporate. In fact, to be meaningful, that witness would have to offer a view on several hypothetical scenarios, all dependant on the judge’s ultimate finding. If not so done, and it is extremely difficult to so do, witnesses may have to be recalled at great inconvenience and cost to the parties, and indeed to the witnesses themselves. Trials can be greatly prolonged and parties held in suspense. Further, unless extreme care is taken, it may be difficult for the judge to isolate all facts in a complex case, months after the giving of such evidence. Consideration of all

witnesses as to fact sequentially would allow a specific set of facts as found by the judge to be put to the experts, hopefully eliminating the need to examine those witnesses on disputed or alternative factual bases, or recall them. This approach would establish a much clearer basis for expert views, thus saving significant time. This system is currently used in the UK which means that the factual evidence for both sides is called first, with the relevant cross-examination of factual witnesses then taking place; all occurring before any expert testimony is called.

**43.** However, as with many of the proposals mentioned today, there may be practical problems with this one. Take the following example. Would a defendant doctor, who attended on the patient, be a witness as to fact for these purposes? It seems likely to me that he should be treated primarily as a witness as to fact since, although he would undoubtedly have the skills of an expert, his evidence would primarily relate to what he did or observed or what he had heard. In addition, also being a party, it would be impossible for him to objectively comply with the requirement of impartiality. The Technology and Construction Court in England in *Multiplex Constructions (UK) Ltd. v. Cleveland Bridge UK Ltd.* [2008] EWHC 2220 (TCC) recently considered this question; whether a witness as to fact, who was also a highly qualified and experienced engineer, was confined to giving evidence of fact, without including his expert opinion on matters? The Court noted that as a matter of practice, technical and expert opinions were frequently expressed by factual witnesses in the course of their narrative on the evidence, however such opinion evidence “*does not have the same standing as the evidence of independent experts who are called pursuant to CPR rule 35*”. Nonetheless, the Court noted that such evidence was usually valuable; leading to considerable saving of costs. He concluded that a person with expertise, who is giving factual evidence, may also proffer:

“(a) *statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience.*”

**44.** Jackson J. in that case also referred to the case of *Lusty v. Finsbury Securities Ltd* (1991) 58 BLR 66 where the Court noted at para. 26 that:

*“Of course a defendant’s evidence on matters of this kind may lack the objectivity to be afforded to the evidence of an independent expert, but this consideration goes to the cogency of the evidence, not its admissibility.”*

On one reading of the situation, such would seem to be a reasonable course. Another would be that in a medical case the conclusion should be different. Many procedures are under the exclusive control of a doctor(s), with the injured party having no useable faculty to engage or even observe. The principle, if not the only, person who knows or understood what happened, may be the doctor who is also a defendant. He should therefore be confined to factual matters. If it should be otherwise the distinction between fact and opinion could become blurred; this distinction should never be lost sight of. In the same overall context, could I strongly suggest that as a matter of practice, there should always be a written proof of evidence from a factual witness.

**45.** To briefly summarise what I have just been discussing. I believe it would be of great use to both the Courts and parties to medical negligence actions, that specific provision should be made for:

- i) Greater case management and use of pre-trial procedures;
- ii) The splitting of the trial on issues of liability and damages / quantum.

I would also encourage greater use of the existing provisions, such as section 18 of the 2004 Act. All of these provisions, in keeping with the aims of the 2004 Act, would reduce the amount of trial time, and encourage settlement; such would, as repeatedly stated, reduce litigation costs. A matter which I have mentioned, and to which I will return, is whether it would be prudent to exclude medical negligence actions from the general category of personal injuries actions, instead forming a separate list and rules which could more properly take into account the very real differences in complexity and nature of such cases. When considering issues such as case management, such a regime would be extremely difficult to operate under the present system. Much of the Court’s time in the personal injuries list is already taken up by medical negligence cases. Case management of even a fraction of those cases could further delay many more facile personal injury cases, which do not require such case management, and which could be tried easily and quickly. There is thus a practical interdependence between some of the

suggestions which I make and the measures required to implement them. Certain reforms are thus necessary prerequisites to the implementation of others.

### **Experts:**

#### Experts' Duties:-

**46.** Expert witnesses are critical in personal injuries cases; not only on negligence, but also on causation and damages. Not perhaps in all cases but definitely so in a great number of such cases; with their evidence most frequently being decisive. As was noted by Charles J. Lewis in his book, "*Clinical Negligence – A Practical Guide (5<sup>th</sup> Ed.)*" (2001), p. 91:

*"An expert is the backbone of the medical negligence action..."*

**47.** A person can become an expert by reason of experience, training or knowledge (*A.G. (Ruddy) v. Kenny* (1960) 94 ILTR 185 at 190 *per* Kingsmill Moore J.); there is no requirement for formal qualifications, provided that the judge is satisfied that the person is an expert in their contended field (*e.g. McFadden v. Murdock* (1867) 1 ICLR 211). In medical cases, there is another point to look out for: if otherwise academically and professionally qualified, is a witness an "expert" in an adjoining area by knowledge and experience, as distinct from qualification (see *Galvin v. Murray* [2001] 2 ILRM 234 at 239).

**48.** Having qualified himself, what are the functions of an expert witness? In essence he provides scientific assistance in areas which are more than likely unfamiliar to the Court; so said Lord Cooper in *Davie v. Edinburgh Magistrates* (1953) SC 34 at 40. From what perspective should he do this? Thorpe L.J. in *Vernon v. Bosley* [1997] 1 All ER 557 put it rather well:

*"[T]he area of expertise in any case may be likened to a broad street with the Plaintiff walking on one pavement and the defendant on the opposite one.*

*Somehow, the expert must be ever mindful of the need to walk straight down the middle of the road and to resist the temptation to join the party from whom his instructions come.”*

**49.** So what are his duties in this regard? In England and Wales, following Wolff’s proposals in 1996, and cases such as the *Ikarian Reefer* case [1993] 2 Lloyd’s Rep. 68, an expert’s duties are now to be found in the Civil Procedure Rules 1998, No. 35. It is worth referring to those, which include, *inter alia*, the following:

- i) The expert has an overriding obligation to help the Court on matters within his expertise, which overrides any obligation to the person instructing or paying the expert.
- ii) Experts must deal with cases proportionately, expeditiously and fairly and be aware of the overriding objective that courts deal with the cases in a just fashion.
- iii) Experts should be independent in the expression of their opinions, regardless of litigation pressures and particularly should not promote a particular point of view or engage in the role of an advocate.
- iv) Experts should confine their opinion to matters which are material to the dispute between the parties and provide opinions only in relation to matters within their expertise – questions falling outside this expertise should be identified.
- v) The expert’s report must state the instructions given, whether written or oral, and the basis upon which such instructions were given.
- vi) Experts should take into account all material facts before them at the time they give their opinion, and their report should set out those facts and any other literature relied upon in coming to those conclusions – it should also be indicated if the opinion is provisional or if more information is required.

Unfortunately there are no analogous rules in this jurisdiction, but it is to my mind without doubt that they would apply similarly here. Kearns J. in the Supreme Court in

*Payne v. Shovlin* [2007] 1 IR 114 at 124, commenting on the introduction of the CPR in England and the reforms of Lord Wolff, noted:

*“Insofar as experts are concerned, the basic premise of these new English rules is that the expert’s function is to help the court, not to advance the case of the side by whom he or she is paid. Lord Woolf was particularly anxious that expert witnesses should not be ‘partisan advocates’ but rather ‘neutral fact finders or opinion givers’”*

**50.** The closest we have in this jurisdiction are the informal rules contained in “*An Expert Witness Directory of Ireland 2010*” which runs a website “*expertwitnessireland*”. This site contains a code of practice for experts engaged by solicitors. It is expressly stated at para. 13 of the code that:

*“It is the duty of an expert to maintain professional objectivity and impartiality when advising a party, preparing a report for proceedings and when giving oral evidence in court.”*

**51.** What is therefore clear, and which I would emphasise with particular vigour, is that an expert witness is not an advocate for the party by whom he is instructed. A number of commentators and judges have expressed concern with the level partialness of some expert witnesses. Barr J., in his paper “*Expert Evidence – A Few Personal Observations and the Implications of Recent Statutory Developments*” (1999) 4 (4) BR 185, noted that although experts are rarely dishonest:

*“they seem to lack a true understanding of their function, i.e. to assist the court in arriving at the truth by providing a skilled expert assessment, which is objective and fair, of matters requiring a specialised appreciation of the particular problem at issue.”*

Flood J., in *News Datacom Ltd v. Lyons* [1994], was quite dismissive “*of a partisan expert.*” Indeed I too have been critical of expert witnesses in certain judgments whose opinions, both written and orally, do not hold with common sense, but only with their client’s point of view. Ultimately, the expert’s duty is first and foremost to the Court. Their role must be to assist justice in its conclusions on any matter. This is entirely

compatible with having genuine differences of opinion, but what I object to is the infrequency of agreement on matters which permit one view only – a point I shall return to later in relation to meetings of experts.

**52.** In the UK in June 2005 a new protocol for solicitors instructing experts and a new code of practice for experts was published. It was signed off on by the appropriate bodies as well as by the Master of the Rolls and the chairman of the Civil Justice Committee. The protocol makes two very important points: the first of which is that whilst solicitors may instruct an expert as to the form of his reports, the content and opinions therein must be a matter for him alone; secondly, a useful test for real independence is whether the expert would express a similar opinion if given the same instructions by the opposing party.

**53.** Lord Wilberforce, in *Whitehouse v. Jordan* [1981] 1 WLR 246 , noted back in 1981 that:

*“It is necessary that expert evidence presented to the court should be, and be seen to be, the independent product of the expert uninfluenced as to form and content by the exigencies the litigation. To the extent that it is not, the evidence is likely to be not only incorrect by self-defeating.” (ibid. at 256 – 257)*

**54.** The importance attributed to impartiality, objectivity and independence by the judiciary cannot be underestimated; being transparently fair is the best way and should be the only way. Defensiveness, intractability and illogicality in argument are all negative indicators. Those experts who engage in such partiality ultimately do a disservice to their clients and most ostensibly to the interests of justice. It is also likely to negative other evidence which, if not tainted, may well be probative. Therefore risks should not be taken and reputation should not be endangered.

**55.** However, not all blame lies with the experts or their instructing lawyers. The Courts in the past have not sufficiently involved themselves in upholding this basic and paramount duty, in all but the most glaring cases; with the only indications of

dissatisfaction being a mild scolding or reprimand. Our neighbours in the UK are much more active: awarding costs against an expert personally where, in flagrant disregard for his duties, he had caused significant expense to be incurred (*Phillips v. Symes* [2005] 1 WLR 2043). Although I am not necessarily advocating this approach, it is interesting to see the more pro-active attitude of the English courts in upholding experts' duties. This is one way: there may be others: it matters not provided the end result is achieved. In this respect one may ask have the Irish Courts demonstrated excessive restraint, and if they have is it not time to change?

*Experts' Reports and the Role of the Court:-*

**56.** In 1997 there was significant reform of the rules relating to discovery and disclosure of, particularly, expert reports in personal injuries actions (S.I. 348/97). It is unnecessary to detail the 1997 regulations, suffice to say that they were replaced by S.I. 391/98 since, as was accepted by Kearns J. in *Payne v. Shovlin* [2007] 1 IR 114 at 125 that:

*“[T]he requirements and obligations created by those rules posed huge practical difficulties for practitioners because of the scope of what was required to be disclosed.”*

**57.** The regulations were introduced primarily to prevent what might be called “trial by ambush”; that is people producing evidence at trial, frequently in report form, without notice to the other side. S.I. 348/97, contained a much broader definition of “reports”, than that contained in its replacement, S.I. 391/98. The definition of “report” now is:

*“a report or reports or statement from accountants, actuaries, architects, dentists, doctors, engineers, occupational therapists, psychologists, psychiatrists, scientists, or any other expert whatsoever intended to be called to give evidence in relation to an issue in an action and containing the substance of the evidence to be adduced [emphasis added] and shall also include any maps, drawings, photographs, graphs, charts, calculations or other like matter referred to in any such report...”*

**58.** S.I. 391/98 amended O. 39 RSC, inserting rules 45 – 51 and required, *inter alia*, that in personal injuries actions:

*“The plaintiff in an action shall furnish to the other party or parties ... a schedule listing all reports from expert witnesses intended to be called within one month of the service of the notice of trial in respect of the action or within such further time as may be agreed by the parties or permitted by the Court.”* (O. 39, r. 46(1))

Once this is done, the defendants should furnish a similar schedule within seven days, and within seven days of that both parties should simultaneously exchange the actual reports. Any further reports obtained after this exchange should be delivered forthwith to the other party. There is also provision for the withdrawal of reports under r. 46(6).

**59.** It was widely perceived that given the definition of “a report” in S.I. 391/98, in particular the phrase *“intended to be called to give evidence in relation to an issue in an action and containing the substance of the evidence to be adduced”*, that the exchange required, covered what evidence an expert would adduce in examination in chief only and not otherwise. For example if an expert provided a discursive document for internal purposes only or wrote a communication outlining weaknesses in the case then this would not need to be disclosed. However, the Supreme Court in *Payne v. Shovlin & Ors.* [2007] 1 IR 114 did not agree with this interpretation.

**60.** Kearns J. in *Payne v. Shovlin*, having reviewed the English legislation and case law on the matter, stated that:

*“While it is correct to say that Disclosure Rules of 1998 introduced an exception to the general privilege attaching to communication made in contemplation or in furtherance of litigation, it should be remembered that litigation privilege is itself an exception to the general principle that all relevant information should be before the court. The consequent need to construe this latter exception strictly has been recognised frequently by the courts. [see *Smurfit Parabas Bank Ltd. v. A.A.B. Export Finance Ltd.* [1990] 1 IR 469, per Finlay C.J. at p. 477]... Thus the exception to the privilege rule introduced by the rules of 1998 may be seen in itself as an exception to an exception and one which has as its purpose the*

*furtherance of the principle that justice is best served where ‘all relevant documentary evidence is available’.*”

He ultimately found that:

*“The relevant test, it seems to me, is whether or not the ‘substance’ of the evidence to be given, or part of it, is contained in the first report even if views in that first report are later altered or modified or given subject to qualification in such first report.”*

Mentioning the case of *Galvin v. Murphy* [2001] 1 IR 331, he noted that:

*“The only importance of the case is the observation by Murphy J. at p. 336 to the following effect:*

*‘Clearly, the disclosure rules are designed to forewarn other parties of expert evidence with which they may be confronted. The rules have no role to play in investigating the strengths or weaknesses of an opponent’s case.’*

*No one could cavil or disagree with this proposition and it is common case between the parties before this court that the mischief of ambush and/or surprise is something to be avoided. However, the failure to produce an earlier report which contains a view different from that contained in the final report may produce exactly the kind of surprises about which Murphy and Geoghegan JJ. warned. I think counsel for the second defendants point is well made, namely that the failure to produce an earlier report, providing it contains the substance, or part of the substance, of the evidence which, at the time of its compilation it was intended to give, may lead to a situation where in the course of cross-examination, it may emerge that the author expressed a different view, for example, in relation to causation in a medical negligence action, at an earlier time and adverted to same in a first report. How can the interests of expedition and efficiency be served if such information only emerges in cross-examination? It might well require that the trial be adjourned while further lines of inquiry are pursued in the light of the particular revelation. Further, it would always be possible that such additional inquiries might lead to the claim being dropped altogether. All of these costly and undesirable consequences are avoided by*

*disclosure of all reports which contain any of the substance of the evidence intended to be led.”*

He thus stated finally that he:

*“would interpret the rule as requiring production of all reports of an expert intended to be called as a witness which contain in whole or in part the substance of the evidence to be given.”*

**61.** This currently is the law, but it has attracted some debate. Some commentators are doubtful if the distinction between discovery and disclosure has been maintained. “Ambush” occurs when, without warning, a significant piece of evidence is placed on the table. Fair procedures would decry this. It has been queried, that where the substance of an expert’s view is contained in a furnished report, why should it also necessary to furnish other reports from the same witness? How is the opposition “ambushed”? It knows precisely what the witness is going to say. Some suggest that it is an altogether different point to test the reliability or weight of that evidence. This is a “strength or weakness” argument, but hardly an “ambush” one. Therefore it has been said that if drafts or earlier reports are to be obtained this must be done *via* discovery and not S.I. 391/98.

**62.** Given the overriding obligation of experts to the Court, one might ask why earlier reports should not be provided. The mere fact that an expert has changed his mind on a matter between reports, is not in itself prejudicial to the party on whose behalf the report was filed, provided that the expert can reasonably explain the changes. On the other hand, should an expert not be able to explain his change in view this may be indicative of undue influence upon the report by the lawyers; which of course is unacceptable. Furthermore, as has been noted by many commentators and the judiciary alike, the interests of justice are best served where there is full and frank disclosure. In any event, only the reports of experts upon whose evidence a party seeks to rely on which are to be disclosed (see *Kincaid v. Aer Lingus* [2003] 2 IR 314).

**63.** The extent of disclosure of expert reports required under the English regime was considered in *Carlson v. Townsend* [2001] All ER 663. The defendant had sought

disclosure of a discarded report prepared by the plaintiff's medical expert under the pre-action protocol for personal injuries claims (there are a number of such protocols which supplement the CPR). However Brook L.J. stated that it was not the aim of the protocols *"to deprive the claimant of confidential pre-action advice about the viability of his claim which he would be at liberty to discard if he did not agree with it"*. Although the protocol "encouraged" the early exchange of expert reports, it did not require it.

**64.** It is therefore through this interpretation of which reports are covered by the CPR and the pre-action protocols, which has led to the general practice in England of the exchange of "first reports". Such a report will not need to be disclosed to the other side under CPR 35, being covered by litigation privilege. No particular format is required, but it should be marked as a 'first report' which is intended for advising counsel and solicitors in the preparation of a case and, importantly, does not contain the substance of the evidence to be given.

**65.** However, recent case law in England has shown a greater willingness to overcome litigation privilege, particularly to discourage "expert shopping". In *Beck v. Ministry for Defence* [2003] EWCA Civ 1043 the Court imposed as a condition of permitting a defendant to put in a new report, replacing an older one, that the former report be disclosed. Ward L.J. noted:

*"Expert shopping is to be discouraged and a check against possible abuse is to require disclosure of the abandoned report as a condition to try again."*

It should be remembered that in England and Wales under the CPR the Court has full powers to restrict and control expert evidence. This form of order was nonetheless an innovation of civil procedure.

**66.** It can therefore be seen that, potentially, there is a struggle between full and fair disclosure and an expert's duties to the Court, on the one hand, and the undoubted right of parties to legal professional privilege, on the other. How, therefore, can these principles be best balanced? I feel that parties should be able to avail of preliminary expert reports which may be used to assess their case, that is, where it is now and where it

could or ought to be. In considering experts' duties to the Court it is important to note a distinction between what might be called the "investigative stage" of proceedings, and the presentation of evidence. When does an expert owe a duty to the Court? The core duty relates to the evidence which he gives before the Court. There is no question that an expert must be honest, open and impartial in his evidence before the Court. Thus where a report contains the expert's evidence to be given at trial, it should be disclosed if that expert is called to give evidence at trial. However, if an expert provides a consultative or discursive report dealing with matters such as *e.g.* identifying further experts who might need to be instructed, identifying areas of strength or weakness, or pointing out matters upon which further proof is required, it should be considered to be covered by litigation privilege. It is vital that a plaintiff be entitled to properly assess his case – only through allowing full and frank discussion with experts can justice in this regard be fully served. Currently, due to the extensive range of documentation captured by the disclosure rules, I have been informed that there is a practice of consulting with experts only by telephone, with the solicitor preparing an attendance note which is covered by litigation privilege: this rather than getting the expert to put his opinions in writing. This drives *bona fide* investigation underground. It seems to me that this should not need to be the only way in which experts can express opinions which help in the conduct of litigation which their clients are involved in. Provided that the expert is not expressing opinions which he will give in evidence, he should be allowed to advise his client in writing without the need to disclose those advices. In my view, both the common good and public interest are served, by allowing parties to properly set up, investigate, and process to finality, claims for personal injuries negligently inflicted.

**67.** Leaving aside S.I. 391/98 for a moment, and the Court's power on a discovery application, it seems to me that there is much to be said for having a protocol on discovery in significant injury cases. As a matter of routine, a hospital or doctor should be obliged to give a legible copy of the clinical records of the Risk Management Incident Report Form, and of any protocol relative to the specific type of treatment involved. A similar obligation should be on a plaintiff to produce all past relevant records. This

should apply unless specifically waived by either party. This simple protocol would greatly speed up matters, and would avoid protracted discovery applications.

**68.** Before moving on it is worth mentioning the provisions of s. 20 of the 2004 Act. This allows the Court to appoint an approved person, where appropriate, to carry out investigations into and give expert evidence in relation to such matters as the court directs. The parties are obliged to co-operate with the person appointed and provide them with any report or document prepared by the parties, and any materials which were used in the preparation of those reports or documents. The section does not appear to differentiate between pre- and intra-trial situations; however the parties are entitled to cross-examine the witness on any matters investigated. The cost of the expert is to be provided by whichever party the Court so determines. This section has yet to be utilised in this jurisdiction, but questions such as: who approves; what are the entry criteria, and therefore the rejection criteria; is there a list of such persons; and, how would the suggested investigating powers sit with litigation privilege, are all matters left unaddressed. The Courts in England and Wales have implemented a similar provision in the hope of shortening and simplifying the matter.

**69.** However, experience to date is mixed; instead of reducing costs, many litigating parties appoint their own shadow experts to advise them in relation to the report of the single joint expert. From the outset, policy was clear but divergent. For fast-track cases single joint experts were to be the rule rather than the exception, whereas similar provisions in the commercial rules acknowledged that because of size and complexity, the use of a single joint expert in many cases is inappropriate.

**70.** An early area of confusion existed between the CPR and the Protocol with regard to one or both parties appointing a single joint expert. Some of the resulting problems were discussed at the Annual Conference of the Expert Witness Institute in 1999, by Lord Bingham: others felt that it fell to the Courts to decide on the delimitation of the role of the single joint expert. In *Daniels v. Walker* [2000] 1 WLR 1382 the defendant, who was dissatisfied with the report of the single expert, sought to instruct his own expert. If

denied, he claimed a breach of Article 6 of the European Convention on Human Rights; although the Court gave this argument short shrift, noting that the CPR made it clear that there was an overriding obligation to treat the parties justly. In relation to the more substantial matter as to whether the defendant could instruct and call their own expert, the Court stated:

*“The correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert’s report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert’s report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.”*

Lord Woolf M.R. did however note that part of this discretion involved proportionality as between costs and court time and the issues in question. He further notes that even if ultimately the parties do seek their own independent experts, the initial appointment of a single joint expert may nonetheless be beneficial since it may help to narrow the issues in the case. Thus any independent experts ultimately appointed will already have some of the issues narrowed down. Ultimately though, in the vast majority of cases, he notes, a single joint expert should be sufficient, and if there is disagreement with him it should ordinarily be sufficient to deal with this through questions put to the expert.

**71.** The issue of single joint experts was further considered, again by Lord Wolf, in *Peet v. Mid Kent Healthcare NHS Trust* [2002] 1 WLR 210. The case related to a question of whether the plaintiff’s parents were entitled to attend meetings with the joint experts, there were seven in that case, in the absence of the defendants. He was ultimately of the view that, in line with the “Code of Guidance for Experts and those Instructing them” (1<sup>st</sup> June 2001 revision) it would be inappropriate for one party to attend with the experts in the absence of the other party, unless the other party had consented to such in writing. He was also clear as to how he viewed the single joint expert system:

*“The starting point is: unless there is reason for not having a single joint expert, there should be only a single expert. If there is no reason that justifies more evidence than that from a single joint expert on any particular topic, then again in the normal way the report prepared by the single expert should be the evidence in the case on the issues covered by that expert's report. ... But the assumption is that the single joint expert's report is the evidence.”*

**72.** However, some commentators have noted particular problems with the single joint expert (see Thompson, *“The Problem with Single Joint Experts”* NLJ 154.7138(1134)). In relation to Court supervision of the expert, Thompson notes that case management effectively gives the Court total control over the use of expert evidence, and for the limiting of that evidence to what it determines is necessary to resolve the matter justly. However, how does Court test the objectivity and impartiality of the expert? He comments that:

*“In an adversarial system, where each party appoints its own expert, the expert evidence is tested by cross-examination; where there is just one expert, the evidence is seldom tested in that way. The parties may address questions to the expert for clarification, but that is not a complete answer. Indeed, an increasing number of cases do not now reach the courts, as the parties settle when the expert's report is produced. This would seem to cast the single joint expert in the role of arbitrator, if not judge.”*

The rules can also mean that the interaction with the single joint expert must, necessarily, be more formal than with an independent expert. It is not possible for the parties to merely ring them up and discuss their case with them.

**73.** Overall it is clear that the appointment of single joint experts must generally save both the Court and parties time and expense; only in exceptional cases may it lead to extra expense and time. It would seem that, in England at least, the provision of single joint experts has encouraged settlement and shortened proceedings. However, as noted by Thompson, there may be issues with regards to access to justice if parties are ultimately denied access to independent expert advice, or if they are not permitted to properly cross-

examine the expert on his report. I would agree, regardless of any ostensible benefit in having a single joint expert, parties must ultimately be allowed to have access to independent expert advice, should they so wish, even if only to advise them on the report of the single joint expert.

*Expert Meetings:-*

**74.** In the England and Wales, under CPR 35.12, a Court may direct, at any stage, that discussions take place between the parties' experts for the purpose of identifying the issues and, where possible, reaching agreement thereon. The Court may direct what issues should be discussed, and that a statement of the agreed issues and non-agreed issues, with the reasons therefor, be furnished to the Court. However, such discussions cannot be referred to at trial without the consent of the parties, nor can any agreement between the experts bind their principle without express agreement.

**75.** In this jurisdiction, under both the Commercial and Competition Court rules, there is a comparable rule whereby the Court may direct, either of its own motion or on application of a party by notice of motion:

*“[A]ny expert witnesses to consult with each other for the purposes of:*

*(a) identifying the issues in respect of which they intend to give evidence,*

*(b) where possible, reaching agreement on the evidence that they intend to give in respect of those issues, and*

*(c) considering any matter which the Judge may direct them to consider, and requiring that such witnesses record in a memorandum to be jointly submitted by them to the Registrar and delivered by them to the parties, particulars of the outcome of their consultations:*

*provided that any such outcome shall not be in any way binding on the parties...”*

(rule 6(1)(ix) under both Order 63A and Order 63B, RSC).

**76.** There is much to recommend the adoption of such a procedure in medical negligence actions; however there are still a number of questions as to how it would best operate in practice. In particular:

- i) What is the meeting's purpose?
- ii) When should the meeting take place?
- iii) Who prepares the agenda? The Court or the parties?
- iv) Who attends the meeting / consultation? Experts only or both experts and lawyers?
- v) If lawyers are present what is their role? Can they ask questions or direct the meeting or should they remain silent?
- vi) How should the Court interact with the experts in this regard? How heavily should it supervise the meeting and its focus? Should the experts report to the Court, and if so, what should be reported? How should the Court treat the reports provided to it in light of the meeting?
- vii) Can or should the experts amend their original reports or produce new report in light of the meeting?

**77.** A number of comments can immediately be made. If such a procedure is involved there must be *bona fide* discussions between experts. This requirement stems from a duty to co-operate, underlined by the inherent power of the Court to require it. Secondly, experts must act impartially, as otherwise any consultation will be entirely ineffective. This is a “*potential cultural change to the way litigation has been traditionally run.*” (Dowling, “*The Commercial Court*” (2007)). In *Baron v. Lovell* [1999] WL 478164, Brook L.J., dealing with the CPR, noted:

*“The whole thrust of the CPR regime is to require the parties to behave reasonably towards each other on the conduct of litigation. The old antagonistic point scoring, which used to drag out personal injuries cases and run up the costs, should now be at end.”*

**78.** Turning to the questions posed, the first is the meeting's purpose. It is to agree on all, or as many as possible, of the contentious issues. If the experts are honestly upholding their duties, it is likely that agreement can be reached on at least some of the points. Even that would be a useful exercise; concentrating the parties' minds on the most troublesome issues, and drawing others to the periphery.

**79.** The meeting should take place neither too early nor too late, with its timing being a matter for case management. It must obviously not take place unless all expert reports have been exchanged. It should occur at a time when, if the discussions are fruitful substantial costs will be saved, and if not, it will allow the parties to re-assess in light of such discussions. In truth timing must be flexible to achieve maximum gain.

**80.** Preparation for such meetings, including the drawing up of focussed agenda is very important. There are effectively two options in this regard. The first approach should be to allow the parties to jointly agree the agenda. Alternatively both parties could draft agenda and some agreed composite could be used. In the absence of agreement the Court would have to rule. In general, I would not be in favour of the Court being overly interventionist or interfering in this regard; after all it is the parties who are engaged in litigation, so if they or their lawyers feel a point should be raised with the experts, it probably should. However, some level of Court review and compulsion may be required to ensure that the meeting of the experts is not disrupted by such unnecessary disputes or disagreements. The Court itself might also have a role in suggesting or directing certain matters which, in its opinion, would provide guidance to the Court, or narrow the issues between the parties (as under O. 63A in the Commercial Court).

**81.** The next issue is who should be present. Should lawyers, either counsel or solicitors, be there? It has been noted that the exclusion of lawyers from the meetings may be prudent. Such may allow for more frank discussions between the experts. Others have suggested that lawyers could be present but have only a most limited role: they must not get involved in forming the expert's opinion. Their presence may be helpful to a client who otherwise may be fearful of such discussions. Therefore lawyers could have a role, but one must be careful that they should not get involved in the discussions. I would generally favour the availability, but not the presence, of lawyers, so this would allow full and frank discussion between the experts. Finally, I think it should go without saying that the litigants themselves should not be present; this would inevitably lead to friction.

**82.** As stated, I believe that it would be useful in medical negligence actions for the Court, where appropriate, to take a more pro-active role through proper case management of the matter. In this regard expert meetings should be no different. The Court should ensure that the time, place and agenda are set. Once the meeting has taken place the Court should be notified if it has resulted in the settlement of all or part of the case. It should also enquire as to whether further meetings between the experts would be of use; more than one meeting may be necessary, especially in complex litigation. Nonetheless, it must be imperative that the Court is kept abreast of developments between the parties. It would therefore be prudent that the experts should, following any meeting, prepare a report for the Court in relation thereto; stating the issues discussed thereat and whether there was any agreement.

**83.** In the Commercial Court, under O63A, r. 6(1)(ix), four tasks are identified which the experts should consider during consultation:

- i) Identify the issues which they intend to give evidence on;
- ii) Agree, where possible, the evidence which they intend to give on those issues;
- iii) Consider any matter the judge may direct;
- iv) Record in a joint memorandum the particulars of the outcomes of their considerations.

With regards to the joint memorandum there is no prescription as to what, precisely, the joint memorandum should contain, but it should, at a minimum, identify the issues which each expert intends to give evidence on, summarise the evidence which each expert intends to give, and identify the extent to which they agree. Interestingly, unlike the CPR in England there is no requirement that the experts identify those “*issues on which they disagree and a summary of their reasons for disagreeing.*” (CPR 35.12(3)(b)). A similar provision is adopted by the Northern Ireland Commercial Court in its practice direction on Expert witnesses. It would be worthwhile to include such a provision here.

**84.** None of this is to say that experts should not be able to change their minds; merely that they should be able to justify why they did so. What happens if, during the

course of the expert meeting, facts arise or discussions take place which cause one expert to change his mind on a matter which he has already reported? Should he be able to amend his report in light of those changes? This may of course be unnecessary; in that where there is conflict between the two it will be easily explicable. However, it would not be unwise, if such occurs, for an expert to issue a further report setting out where he has changed his opinion and why.

**85.** An interesting point arises in this context: although not binding, how would a Court, who has possession of the document, deal with evidence which is contrary to that noted in the document; for no reason one of the expert's has a change of mind. Would an explanation be required or would the memo simply be ignored. The joint memorandum / report following consultation is generally considered to be subject to "without prejudice". It does not bind the parties as to its content unless by their express consent. However, given that the Court will have seen the joint memorandum, how should the Court deal with any conflict between it and the evidence given in Court? That is not to say that the Court should use the contents of the memorandum to decide which expert is correct on a given matter; that is and must be a matter for the trial of the action and the substantive evidence. However, in circumstances where the expert has an overriding duty to the Court, and the Court is aware that an expert has changed his view on a matter, can the Court enquire as to a reason for this change? I cannot say how this would work in practice; in reality I merely flag this issue as a point to consider.

**86.** It should also be noted that with regards to the joint memorandum of the experts' meeting, as with their initial reports, solicitors and counsel should not be involved. The report must be an objective document listing, in fact, the matters of agreement and in my opinion, as in the UK, those of disagreement. Only in this way can the experts comply with their duties to the Court.

**87.** Ultimately, with regards to expert meetings, the usefulness of such meetings cannot be overemphasised; particularly if the duty of objectivity is kept foremost in mind. Such meetings can substantially reduce the areas of contention between the parties,

thereby reducing costs and Court time. Further, the mere possibility of such meetings may encourage the parties to settle. I would therefore favour the creation of specific rules, along the lines above-mentioned, dealing with such meetings in medical negligence actions. I feel that lawyers should not involve themselves in discussions. The meeting should not be an adversarial discussion of the case, or an attempt to undermine any of the experts' evidence or opinions. Instead it should be discursive, co-operative and collegial; aimed at narrowing, and if possible resolving, the issues, and thereby assisting the Court and the parties, and hopefully encouraging full or partial settlement. I would certainly be in favour of a joint memorandum by way of report to the Court on such discussions.

### **Alternative Damages Payment Regimes:**

#### *The Traditional Position:-*

**88.** There has been debate in this jurisdiction for many years on whether there should be provision for the award of damages in the form of periodic payments, rather than a one-off lump sum; there are arguments in support of both.

**89.** The overriding principle of compensation in torts is *restitutio in integrum*. The lump sum awarded takes into account both past and potential future losses and seeks to put the plaintiff at no financial disadvantage due to his injuries. In the vast majority of personal injuries and indeed medical negligence cases this will be sufficient. If I break my leg due to the negligence of another I will be entitled to recover, *inter alia*, the costs of my medical treatment, to date and the costs of future rehabilitative care, and my loss of earning both past and future. There is probably no real factor of uncertainty with the future calculation in this standard type of case. Thus if my broken leg will ultimately heal completely, or with predictable ongoing complications, a lump sum amount will take these matters into account and, hopefully, adequately compensate me for my losses. In such circumstances, of which the vast majority of personal injuries would fall or could be measured against, the lump sum is a perfectly adequate means of compensation. As well as putting the plaintiff back in his pre-accident position, so far as money can, it also serves the defendant since it brings finality to the proceedings. The rationale behind awards being final is obvious; the parties must be able to get on with their lives and/or

business in the full knowledge that their liability to a plaintiff is at an end, and they need not fear further losses arising from the same circumstances. Indeed, were it otherwise the Courts might become more engaged in the review of awards than the settling of new claims. There are thus clear advantages to a once off lump sum:

- i) the plaintiff receives a large capital sum and the freedom to dispose of it as he or she sees fit;
- ii) the defendant, or his insurer, in paying the lump sum, can close their books on the case, allowing them to plan for their future liabilities with more certainty.

**90.** However, there are certain types of litigation, and thus classes of litigants, for whom such a “one shot” approach may not be fundamentally fair. Exemplary of the defects with such a system are persons who suffer catastrophic injuries, such as serious brain damage at birth. In calculating the overall lump sum the Court will usually be required to calculate, *inter alia*, the cost of the plaintiff’s future care based upon evidence of life expectancy. The capital sum for such future care is calculated by establishing the annual net costs of that care, called “the multiplicand”, and then multiplying that amount by an appropriate figure actuarially calculated based on life expectancy, “the multiplier”. The latter part of this calculation involves a good amount of speculation and informed guesswork on the part of medical practitioners and actuaries. Further, given our adversarial system, the Court is often faced with conflicting evidence as to how long the plaintiff may live. How is the Court to properly resolve such uncertainty? Unfortunately there is no crystal ball. The Court must therefore decide how long, based on the evidence presented before it, the plaintiff is likely to survive.

**91.** However, once awarded there is no recourse for review. What then if the plaintiff exceeds his life expectancy? The amount originally awarded will not be sufficient in those circumstances, and the plaintiff may be left destitute trying to care for himself, or may not be able to do so at all; in fact some are in such a position right now. Others rely on relatives or State care. There is also the problem, particularly if the award is to a minor who has a long life expectancy, that future costs may rise significantly faster than

provided for in the award, or the rate of return may fall short, again leaving the plaintiff unable to fund his care. Improvements in medical treatment may also contribute to uncertainty as to the future prognosis of a plaintiff; some improvements might even cure what was once thought of as chronic and life-long *e.g.* spinal chord injuries or the loss of a body part or sense. Furthermore, what if the plaintiff dies many years earlier? Should the estate of the deceased benefit from what may be, in the circumstances, a significant overpayment by the defendants.

**92.** McLachlin J., in his judgment in the Canadian Supreme Court in *Watkins v. Olafson* [1989] 2 S.C.R. 750, noted:

*“The imperfections of a lump sum, once-and-for-all award, as a means of providing for a plaintiff’s cost of future care have often been noted. Where the injury is serious and the period of time for which care must be made lengthy, a large number of variables enter into the calculation. Should the plaintiff live longer than projected, or earn less on his capital than expected, he will run out of funds for his care. On the other hand, should chronic illness force him to live in an institution rather than his own home, or should he die earlier than forecast, the funds provided may turn out to be excessive, resulting in a windfall for him or his heirs at the defendant’s expense.”* (p. 9 of the judgment)

Indeed, in his opinion, periodic payments were more in keeping with the fundamental concepts of *restitutio in integrum* and full and fair compensation.

**93.** As I have said, the debate as to how best to deal with these situations has been raging for many years. As far back as 1972, the Interim Report on Motor Insurance, compiled by the committee of Inquiry into the Insurance Industry, recommended the introduction of a system of regular payments for the care of catastrophically injured persons, which would be *“tied to actual rather than expected duration of life”*. Later, in 1982, the MacLiam report noted that the introduction of periodic payments was *“socially desirable”*, although the focus of the report was on its potential affect on reducing costs of motor insurance; which it concluded would not be significant. Members of the judiciary and the Law Reform Commission have also called for the introduction of periodic

payments. In 1990, the late McCarthy J. in his foreword to White's "*Irish Law of Damages for Personal Injuries and Death*", commented:

*"[T]here seems nothing to recommend the payment of large sums of money which, in a number of instances must either be too much or not enough. The plaintiff, in short, lives for a much lesser period than anticipated or lives for a much longer period. Years of practice at the Bar certainly showed instances in which both circumstances applied."*

The Law Reform Commission in its *Report on Personal Injuries: Periodic Payments and Structured Settlements* (1996) LRC 54, noted many problems with the system of lump sum payments. In particular, *inter alia*:

- i) An award of damages can be very difficult to assess at the date of trial when there may be uncertainty surrounding future events, *e.g.* the prognosis of the plaintiff;
- ii) Plaintiffs, due to their inexperience in handling large sums of money, may see it dissipate quicker than intended (although it also noted that there was in fact little evidence that those awarded substantial sums for personal injuries were so profligate);
- iii) The fact that the award is both once-off and final militates against the accuracy of the award in its aim of fully compensating the victim.

As alternatives they considered a number of options including reviewable periodic payments, *interim* and provisional awards, and structured settlements. I shall now briefly comment on some of these proposals.

*Reviewable Periodic Payments:-*

**94.** The first option is reviewable periodic payments. This is by far the most elaborate system. It would allow the Court to review the amount of the periodic payment in light of changing circumstances. Some states in the U.S. have such a system. The definite advantage of such a system is its accuracy; only through periodic review can the inaccuracies of awards be wholly overcome. However, there are strong arguments against the use of such a system. The main objection is that it destroys finality in the award, without which it would be incredibly difficult for insurers to calculate their liabilities, and

therefore their premiums. It may also be a disincentive to rehabilitation, since if the plaintiff recovers the defendant may apply to have the periodic payment altered downwards. Further, the possibility of returning to Court in uncertain, and possibly contentious circumstances, would add significant cost to the administration of the scheme; an application to alter the payments could turn into a retrial on the issue of damages, ultimately costing more than any benefit gained from any alteration. It could also significantly burden the Court with numerous and lengthy applications for review. Indeed the English Law Commission rejected this proposal in 1973.

95. It was reconsidered more recently in light of the fact that structured payments are now provided for in England and Wales, and the English Law Commission concluded that in principle some form of review might be desirable if the plaintiff's condition deteriorated, leading to further financial dependence. However, it should not be reviewable if the plaintiff's condition improves, or because of inflation. The Court might therefore alter the periodic payment, or restructure the original agreement, although it felt that the latter was probably undesirable. Following consultation, however, the English Commission ultimately did not recommend reviewable periodic payments, instead feeling that the flexibility sought by those in favour of such awards could be achieved by *interim* or provisional awards. The Manitoba and Ontario Law Reform Commission also rejected this proposal noting similar concerns. McLoughlin J. noted that apart from the fact that review of the awards would involve further court hearings, and incumbent discovery *etc.* associated therewith:

*“Yet another factor meriting examination is the lack of finality of periodic payments and the effect this might have on the lives of plaintiff and defendant. Unlike persons who join voluntarily in marriage or contract, areas where the law recognises periodic payments – the tortfeasor and his or her victim are brought together by a momentary lapse of attention. A scheme of reviewable periodic payments would bind them in an uneasy and unterminated relationship for as long as the plaintiff lives.”*

*The result would be an increased burden on the parties and on the court system. Rules governing the review process would also be required, rules which might be better fashioned by non-judicial bodies.”*

I too would agree that reviewable periodic payments would not necessarily be the most appropriate solution to the problems of once-off lump sum damages; particularly considering the large administrative burden and costs which they would place on the Court and parties, and their lack of finality.

*Interim and Provisional Payments:-*

**96.** The next proposal considered was *interim* and provisional payments, which are now available in the UK. *Interim* awards would be suitable for certain damages, such as medical expenses, where liability is either uncontested or clear. The Law Reform Commission considered that provision for these could be introduced in the rules, giving the Court a discretion to impose them in suitable circumstances. The Commission noted that in the UK the mere existence of the procedure has meant that parties often agree some form of *interim* payment. However, experience has also shown that it is still not availed of in all cases where it would be appropriate. The Courts in the UK would appear to have introduced a requirement of “need” for the payment of such awards; although in practice it is operated fairly generously.

**97.** In Ireland *interim* payments are generally not made unless the Court, having awarded damages to a plaintiff, refuses to stay a portion of the award pending an appeal by the defendant on quantum. The Law Reform Commission ultimately concluded that the provision of *interim* payments should be put on a statutory or rule basis. In particular it was of the opinion that if such payments were allowed they should not be based on need, the defendants’ resources should not be relevant, it should apply equally to all defendants, and it should be conditional on an admission of liability; it should not be made where there is an appeal on liability, although the Court might have a discretion to grant such an award despite an appeal where liability appears clear.

**98.** It would seem to me to be sensible that, where liability is admitted, an *interim* award might be made in relation to non-contentious damages, such as medical costs to date, and/or loss of earnings. Even payment on account would be helpful. These would reduce the hearing on damages.

**99.** Provisional awards are awards which are made conditional on a future event or possibility. For example if a plaintiff will inevitably suffer certain consequences from an injury this can be provided for in the normal course of damages. However, there may be a chance that the plaintiff's condition may seriously deteriorate due to certain complications which only may arise. In the ordinary course it would be necessary for the Court to determine whether, on the balance of probabilities, this eventuality would occur, and thereby make some allowance for it in the award of damages. However, if a provisional award of damages is made, then there is no need for the Court to come to a final conclusion on the possible complications. Instead provision may be made for such an occurrence in the award, so that a plaintiff will be granted a set sum for possible consequences of the injury, and if such should materialise the plaintiff may apply to Court for the relevant damages. If complications never arise, the defendants will never have to pay any damages for them. Thereby both finality and accuracy may be achieved. Further, it may often be the case that much of the Court's time is taken up at trial with determining if the plaintiff will suffer from unlikely or at least remote consequences. If a provisional award could be made in relation to these, their debate at the trial of the action could be significantly reduced, if not eliminated entirely.

**100.** The use of provisional damages has been considered in a number of English cases (see for example *Wilson v. Minister for Defence* [1991] 1 All ER 838). Scott Baker J., having reviewed the case law in this area, concluded that:

*"The general rule in English law is that damages are assessed on a once-and-for-all basis. Section 32A of the 1981 Act creates a valuable statutory exception. In my judgment, the section envisages a clear and severable risk rather than a continuing deterioration... In my judgment, there should be some clear-cut event which, if it occurs, triggers an entitlement to further compensation."*

Scott Walker J. was seeking to deal with the distinction between events which are ‘par the course’ in certain degenerative conditions, in that case osteoporosis, as distinct from complications which may arise above and beyond the norm, but which nonetheless may occur. The mere fact that a plaintiff may deteriorate should not be enough for a provisional award to be made upon the basis of the level of that deterioration, since the deterioration itself is wholly foreseeable.

**101.** The Law Reform Commission here noted universal support for such a system of provisional awards. Not only do they alleviate many of the inaccuracies with lump sum awards, as well as encouraging settlement and reducing delay, but provided it was reasonably possible to calculate the probabilities of these contingent events, insurance companies would be able to take this into account when setting premiums.

**102.** I too would be in favour of an ability to grant provisional awards. That they could significantly save Court time is clear. Much contention may arise in relation to potential consequences, where it is not disputed that such exist, only how likely they are, and therefore whether a plaintiff should be compensated for them in the lump sum award. The removal of the need to prove that a certain consequence is likely to follow would remove a significant burden from the plaintiff, as well as saving costs and time for all concerned. Thus where there is a chance of serious deterioration in the plaintiff’s condition, this should be included as a provisional / conditional award, only to be activated should such occur.

*Periodic Payments / Structured Settlements:-*

**103.** Finally I come to periodic payments, or as they are sometimes referred to, ‘structured settlements’. As I mentioned there are problems with reviewable awards. However, if an award can be properly structured it may take into account future changes in conditions, for example through indexing, without the need for such review. A structured award may contain both lump sums and periodic payments. These are used increasingly frequently by Courts in both the UK and US. The Irish Law Reform Commission has noted that structured settlements do not significantly alter the way in

which damages or liability are determined, only the way in which they are paid to the successful plaintiff. Further they overcome many of the problems associated with lump sum payments. In particular structured settlements / periodic payments have the advantage that:

- i) The plaintiff is guaranteed an income for life, in circumstances where the life expectancy of the plaintiff and future events are uncertain.
- ii) The plaintiff is relieved of the burden of managing a large lump sum, and the associated costs thereto, and the temptation to dissipate it.
- iii) There is much less chance of over- or under-compensation of a plaintiff, it is therefore much more accurate than the lump sum.

**104.** There are some disadvantages when compared with some of the above options, for example, there is a lack of flexibility once the structure of the settlement is fixed. However, careful planning may alleviate this. A more serious problem with periodic payments can be security, in circumstances where, in order for them to be effective, an income must be guaranteed for the remainder of a plaintiff's life. It was suggested by earlier reports that a change from lump sums to periodic payment would not create any change in the costs, in particular, to insurers. However, in light of their use in the UK, some commentators would now seem to suggest that this may not be the whole story.

**105.** In the UK periodic payments are covered by the Damages Act 1996, as amended by the Courts Act 2003. In any case involving future pecuniary loss, the court must consider whether or not to make a periodic payment order. There are a number of prerequisites for the imposition of a periodic payment order. These include that:

- i) The power cannot be exercised in respect of damages for past pecuniary or non-pecuniary loss unless the parties agree – thus in the vast majority of cases periodic payments will be unnecessary, reflective of the fact that these two heads of damage will comprise the majority of any payment for minor injuries – it is therefore only worthwhile in serious cases where future loss forms the majority of the compensation.

- ii) Continuity of payments should be “reasonably secure” – meaning that either they are to be made by a government or health service body or are protected by a compensation scheme which guarantees payment in the event of an insurer’s insolvency.
- iii) The case must come to Court – thus a party not wishing to make periodic payments may avoid doing so by settling out of Court for a lump sum.

The Court will also take into account the needs of the plaintiff, although these can be difficult to precisely define. Further, the Court may have regard to the nature of any financial advice received by the plaintiff, and the scale of the annual payments taking into account any deduction for contributory negligence. Although theoretically the size of the award should not affect the ability of the Court to impose period payment orders, pragmatically where the damages are small, it may not be preferable, given the inevitable administrative costs associated with such an order. Thus, although not excluded, practical considerations may restrict the use of periodic payments to more serious cases.

**106.** Does the consideration of periodic payments change the way in which damages may be assessed? It has been suggested that in the UK by focussing on the needs of the plaintiff, there has been a significant change in the way the Court calculates damages. Richard Lewis, Professor of Law at Cardiff University, in his article *“Appearance and Reality in Reforming Periodical Payments of Tort Damages in the UK”*, a working paper delivered on the 23<sup>rd</sup> March 2006, noted that:

*“[I]nstead of a ‘top down’ it must adopt a ‘bottom up’ approach, thereby focussing more precisely upon the claimant’s needs.”*

The “top down” approach begins only after a lump sum amount is arrived at. The income stream which can be derived from that capital can then be used to assess whether it will meet the claimant’s annual needs. However, this approach fails to avoid one of the main criticisms of the lump sum award, namely that calculation and forecasts are required as to how long payments may need to be required, and the rate of return on investment of the lump sum. A plaintiff’s life expectancy is usually an element. It is only after this “top down” exercise has been carried out, that a structured settlement to transfer from the plaintiff to the insurer the risk of the plaintiff living beyond his expect life expectancy;

usually through the purchase of annuities from a life office with the lump sum to provide a stream of income for the plaintiff.

**107.** The “bottom up” approach, however is unconcerned with the calculation of the lump sum, or an estimate of the life expectancy of the plaintiff; instead, focusing on the needs of the plaintiff. The Court will assess the periodic payments the plaintiff will need for the future, and order that they be index-linked and paid for the duration of the loss, irrespective of the capital cost of providing such. Thus unlike the traditional approach, which places the risk of future security of income upon the plaintiff, with periodic payments that risk is transferred to the defendant. Although the order may make provision for changes in the payment regime over time, these are set out *ab initio* in the order. The Court thus need not engage in haruspical speculation as to how long support will be needed, how long the plaintiff will live, or what returns the plaintiff may get on future investments of the lump sum. It thus significantly reduces the number of presumptions upon which damages are calculated, thereby ultimately ensuring just and proper compensation, which neither over nor under estimates, to any great extent, the damage caused and to be suffered.

**108.** However, as stated, although it was anticipated that periodic payments would not materially affect the costs of insurance cover, Lewis and other commentators (*e.g.* Nick Leech, “*The Good, the Bad, and the Imposition!*” (September 2003)) suggest that this was based upon “*spurious assumptions*”. Lewis notes that liability insurers will almost inevitably fund periodic payments by purchasing annuities from a life insurer, or alternatively large composite insurers may self-fund the payments using the facilities of their own life offices (although in practice there would seem to be little enthusiasm for the latter option). *A contrario*, public bodies or health boards, may self-fund the future periodic payments from their own budgets. This means that private defendants will be forced to purchase annuities on the market. Lewis notes:

*“This could prove difficult and very expensive for them because there are only a small number of suitable financial products available at a high cost.”*

He gives two reasons for this:

- i) There is little competition in the market to provide annuities for tort claimants – in the UK there are only a couple of providers – life offices are also deterred because few such annuities are sought, and therefore the market is of little significance. It can be particularly difficult to underwrite annuities for the “impaired lives” of many of the injured plaintiffs – where there is only limited experience of the effect of injury on life expectancy, underwriting becomes “*more art than a science, and a miscalculated gamble can prove costly.*” Consequently, premiums have fluctuated widely and the cost of annuities is high.
- ii) By linking the annuities to the Retail Price Index, or another appropriate index, regulatory restrictions are effectively imposed upon the providers.

*“The life offices are required by the Financial Services Authority (FSA) to meet their solvency requirements by providing assets which closely match their liabilities. In practice this means that, to fund RPI annuities, they have been forced to purchase index-linked gilts issued by the Government. These are expensive to buy, the market for them being dominated by pension funds anxious to meet their own statutory obligations to obtain matching funds for their index-linked returns. In addition, Government has made all too few of these gilts available to the market. Because of the high demand and the limited provision the yields have been very low. In turn, this means that the RPI annuity rates offered by providers are poor value.”*

**109.** Thus where periodic payment of damages is provided for, defendants will be forced to make RPI linked periodic payments, which, unless they are self-funded, means purchasing such annuities in a limited market. It is thus the case that it will be much more expensive for liability insurers to purchase annuities to fund payments under a periodic payment order, than to merely hand over the traditional lump sum. Lewis notes that anecdotal evidence would suggest that the costs of these settlements has increased by as

much as a quarter or even a third, and thus insurance reserves have had to be revised accordingly.

**110.** Nonetheless, despite these obvious potential difficulties in funding a periodic payment order, it is not in dispute that there should be some provision made for them; after all they will only be required in a limited number of cases involving serious injury. In those cases, the justice done to the plaintiff by permitting periodic payments must inevitably outweigh any hardship to the defendant who must, ultimately, put the plaintiff back in a position, so far as possible, that he would have been in but for the defendants' actions; it would be inequitable to effectively penalise the plaintiff for the cost to the defendant of so doing.

**111.** The considerations by Lewis in relation to the increased costs of liability insurance certainly do, however, appear to me to be well founded. Further, his comments that it is likely that these costs will disproportionately affect private defendants, or their insurers, more than it will affect public bodies or health boards, would also seem well founded. In circumstances where, on Lewis' count, there are too few operators providing the necessary annuities within the UK, there could be major problems with finding provision for them here. In those circumstances I might suggest that if periodic payments were to be provided for, the State should maybe consider providing some form of purchasable annuity for these sorts of cases, to be provided in such a way as not to overburden the insurers with overly expensive annuities for the life of successful plaintiffs. This would seem to me to be equitable, considering that public bodies and health boards will not need these. Nonetheless, this is very much an off-the-cuff suggestion, and I do not pretend to know exactly how such a system would, or should, operate in practice.

**112.** Before finishing with regards to periodic payments, the issue of indexation should be mentioned. Under the UK legislation, ss. 2(8) and (9) of the Damages Act 1996 provide that:

*“(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail price index ... at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.*

*(9) But an order for periodical payments may include provision:*

*(a) disapplying subsection (8), or*

*(b) modifying the effect of subsection (8).”*

Thus periodic payments should be linked to the RPI unless otherwise directed by the Court.

**113.** The question of whether alternative indices could be used, and how this might operate in practice, was considered in the English High Court by Swift J. in *Thompstone v. Tameside & Glossop Acute Services* [2006] EWHC 2904 (QB). In that case the plaintiff sought to have their periodic payments linked to an alternative index, since it was felt that linking to the RPI would result in underpayment to the plaintiff, especially with regards to care. The Court considered that at most there was an evidential burden upon the plaintiff to show that the RPI was not an appropriate measure of indexation, and that there is at least one more alternative, or appropriate, measure that the Court might adopt instead. The plaintiff did not have to show on the balance of probabilities that it would be unsuitable. *“Once the Claimant has discharged that evidential burden, it is ... for the Court to decide on the evidence before it what is appropriate, fair and reasonable.”* In doing so, the Court must therefore consider and examine potential alternatives to the RPI as presented. The Court expressly rejected any contention that the cost of providing the relevant annuities, or affordability, was a relevant consideration for the Court; as stated I would respectfully agree.

**114.** In that case, several alternative indices were considered by the Court, with it ultimately deciding upon an index referred to as “ASHE 6115”, which in broad terms are a measure of the earnings of care assistants and home carers. The Court found that although the RPI is reliable and authoritative, simple to use, and precise in terms of what it measures, *“it is not designed as a tool for measuring growth in earnings ... [and]*

*[p]ast data shows that the RPI has not kept pace with growth in average carers' earnings."* There was therefore a "*strong probability ... that earnings levels ... will grow at a significantly faster rate than the RPI.*" In contrast, the ASHE 6115, "*would provide a reasonable and accurate indicator of the growth of the earnings of carers of the type to be employed by the claimant and it is therefore probable that it would fulfil the purpose of indexation...*" When considering indexation it was therefore important to consider the purpose for which it was to be used. In particular in this case the damages to be provided by way of periodic damage were to cover the future, and increasing, costs of providing care for the plaintiff. It was therefore important that the index chosen would properly reflect changes in this cost.

**115.** I have been informed that there is an equivalent index in this jurisdiction to the ASHE 6115, which indicates the changes in pay for carers. I would certainly be of the opinion that the use of such an index would be most appropriate in medical negligence cases where the provision of periodic payments is to provide for the cost of future care; such would only seem prudent. Swift J. in *Thompson v. Tameside* was quite clear that it is wholly open to a plaintiff to advance several alternative indices and request the Court to apply one. The defendants in that case had argued that the plaintiff should have to hang their hat on a particular index, rather than be allowed advance several alternatives. I too would be of the opinion that in circumstances where one or more indices could potentially be used, the Court may have the final say, and a plaintiff should not be unduly limited in advancing alternative indices.

### **Conclusion**

**116.** As can be seen therefore, there are a number of significant areas within the field of personal injuries and, in particular, medical negligence, which are in need of reform or reinforcement. To reiterate some of my points very briefly, I would note the following:

- i) The requirement to send a letter of initiation within two months of the injury would appear to me to be unduly harsh to a litigant who has

suffered iatrogenic injuries, and is therefore likely to still be in a state of recovery.

- ii) The form of pleadings required for personal injuries actions, in particular the personal injuries summons, which is more akin to a statement of claim than an ordinary plenary summons, places a significant burden on a plaintiff in medical negligence cases, given the frequently complex matters which need to be determined, and the obligation on a plaintiff to set out in full all of their complaint in order to stop the statute of limitations running. Similarly the period of time required for the defence to be filed, although in reality rarely complied with, is unrealistic given the complexity of such litigation.
- iii) Nonetheless, the ordinary form of pleadings would not be sufficient in medical negligence cases, and instead some new form of pleadings which retained the disclosure and positive pleading obligations of personal injuries, but which took into account the complexity of the litigation, and therefore the necessary delays in time, should be introduced. Any such amendment must end blanket denials, veto evasive responses and prohibit negative pleading.
- iv) Section 17 is surrounded with great uncertainty, as was pointed out in *O'Donnell v. McEntee & Ano'r* [2009] IEHC 563. It is in effect unworkable. Amendment by Rules may rectify this position, but a more substantive amendment is required so as to penalise an unreasonable defendant who refuses to embrace the settlement process.

- v) The duties of experts to the Court should be re-enforced with formal written rules setting out the obligations of expert witnesses. This must however be coupled with increased Court supervision of these duties, otherwise any such rules could become dead letters.
- vi) S.I. 391/98 was passed to deal with surprise evidence: that is to prevent one party from being ambushed by another. It was never intended to parallel or replace discovery, which is designed to strengthen one's own position or weaken that of the opposition. This distinction must not be lost. I believe that S.I. 391/98 should be modified to allow for a 'first report' which need not be disclosed. This would serve to assist a plaintiff in the preparation of his case, which may be entirely expert driven or dependant, and would remain consistent with concerns relating to trial by ambush.
- vii) A protocol on discovery in significant injury cases should be introduced and should automatically applied unless waived by either side. This should make provision for; *inter alia*, a transcript of the clinical notes, the relevant hospital protocols, and the Risk Management Incident Form, as well as the plaintiff's past and current records.
- viii) Provision should be made for judicial case management of medical negligence cases. This would assist the Court in ensuring that time was not wasted in preparation of the case. It could further be used to narrow the issues between the parties through the use of a jointly instructed expert, or through directing consultation between the parties' experts.

- ix) Trials should presumptively be split as between liability and damages, that is: (a) unless a significant amount of quantum evidence is required on the liability side, (b) unless the medical reports are admitted and are non-contentious, or (c) unless the medical evidence is miniscule. Such a practice must be classified as helpful.
- x) Where meetings take place between experts, there should be a requirement that they prepare a joint memorandum for the assistance of the Court indicating both areas of agreement and disagreement, and the reasons for same.
- xi) Provision should be made for *interim* and provisional damages orders, as well as for periodic payment orders. These would be preferable to a regime where only lump sums, and their inherent problems, are available to the Court.
- xii) With regards to periodic payments, these should be indexed to the most appropriate and sophisticated index or indices as the Court determines.

**117.** Ultimately, however, there is one reform which must, pragmatically, be a prerequisite for all of the above reforms. That is the creation of a medical negligence list with a specially assigned judge, or judges, with experience in medical negligence. At present a disproportionate amount of time in the personal injuries list is taken up, or potentially taken up, by medical negligence cases. This holds up less complex personal injuries cases which would take at most a few days. A separate list however without more is not sufficient. Resources must be applied.

**118.** There is one last thing which I might mention before I conclude. Many of the suggestions I have made above, especially with regards to reports, Court supervision of experts and case management, might be seen as advocating a more inquisitorial, rather than adversarial, approach to medical negligence litigation. One might well ask why this should be so. I feel that, like commercial and competition cases, medical negligence cases rely heavily on expert opinion, which will generally fall well outside of the Court's and in most cases the parties' expertise. Many of the matters discussed will be peculiarly within the knowledge of doctors or other medical professionals. In those circumstances the Court must in some respects defer to the opinions of those experts, meaning that it is imperative that such experts are impartial and independent. Many of these cases are also long, costly, personally trying on the parties, and require much court resources. If the aims of the 2004 Act are to be met, which include early settlement with savings of time and costs, a greater degree of hands-on control and direction by the Court is necessary. However, it must be noted that many different types of case also have a claim on Court resources, therefore the more open and engaging the parties are or have to be, the better. The use of a more inquisitorial approach by the Court, where the interests of justice demand, would in my opinion be wholly justified. I would therefore whole heartedly support any moves in this direction.