THE COMMERCIAL LITIGATION ASSOCIATION OF IRELAND

CONFERENCE: 21 JULY, 2016

The Rules of the Superior Courts (Conduct of Trials) 2016[1]

INTRODUCTION

The Rules of the Superior Courts (Conduct of Trials) 2016 Rules come into effect on 1 October, 2016.

Although the Rules are titled "Conduct of Trials", and are referred to in this paper as the Trial Rules, they make significant changes to other Rules of the Court quite unrelated to the conduct of trials so

(a) Where a plaintiff intends to offer expert evidence, the Statement of Claim should disclose that intention and *"state succinctly the field of expertise concerned and the matters on which expert evidence is intended or proposed to be offered"*.[2]

(b) A similar rule applies to the defendant, who must, in the Defence, disclose the same matters.[3]

(c) The parties to an action may apply to a non-party for disclosure of information whereby the non-party is required to *"prepare and file a document regarding the information"*.

[1] S.I. No. 254 of 2016.
[2] The rule does not apply to personal injury actions.
[3] Again the requirement does not apply to personal injury actions.

Broadly speaking, when read in conjunction with other new Rules which also come into force on the 1 October 2016 – Rules of the Superior Courts (Chancery and Non-Jury Actions and Other Designated Proceedings: Pre-Trial Procedures) 2016[4] - the Trial Rules apply to all actions in the chancery, non-jury and commercial lists.

This paper, however, is not concerned with the new requirements/procedures set out in the Pre Trial Rules or even the Trial Rules[5].

Rather, this paper is concerned with significant amendments made by the Trial Rules to Order 36 of the Rules of the Superior Courts, which is headed *"Trial"*; and Order 39, which is headed "*Evidence",* which amendments taken together have the potential to radically alter the way in which Trials are conducted in the future and to make the preparation for trial extremely difficult.

Before considering this proposition, it is appropriate to note some of the amendments to procedure brought about by the Pre Trial Rules. The extension to the non jury and chancery lists of the High Court of the rules which have been in place in the Commercial List for over a decade relating to Case Management Conferences and Pre Trial Conferences, bring these provisions into these lists – provisions which have the capacity in appropriate cases to reduce the amount of time taken up at trial and make more likely that when a matter is fixed for trial that it will "get on".

These provisions which involve the administration of the procedures surrounding litigation, and its speedy, and, it is supposed, cost effective, resolution, do not trench upon the (perhaps presumed) entitlement of the parties to the litigation to marshal and present their own cases. This latter entitlement stems from the fact that, at least currently, it is believed that ADVERSARIAL litigation, conducted in court, is the best way to come to a just result in a disputed legal matter[6].

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[4] Referred to in this paper, somewhat unoriginally, as the Pre- Trial Rules.

[5] For a comprehensive review see the excellent paper of Stephen Byrne B.L. to the Irish Rule of Law Conference.

[6] The resolution of disputes by adversarial litigation was not always the way in which disputes were resolved: Older methods of trial existed, such as, for example, trial by ordeal, which involved the party with the burden of proof wrapping his hand in leaves and then holding a hot iron for a set period of time. If he emerged unscathed, his cause was considered just and he had successfully proved his case. If he burned, he lost. Or trial by combat – although the protagonists didn't need to involve themselves: they could choose combatants to fight for them.

THE ADVERSARIAL TRIAL PROCESS?

"I will see you in Alternative Dispute Resolution" does not yet enjoy quite the same currency of "I'll see you in Court".

Before considering the new provisions, it is necessary to remind ourselves of what adversarial litigation entails, and the respective traditional roles of the various parties who are engaged in the adversarial trial process.

First and foremost are the parties themselves who are in dispute over some legal matter.

They may choose to go to court without legal advisers or they may engage legal advisers. In either event it is up to the party to put forward his/her case, as he/she sees it.

Of course the suggestion that a defendant chooses to go to court is not correct. If the plaintiff institutes proceedings the defendant must either settle/concede or meet the plaintiff in court.

In truth therefore the onus is on the plaintiff to present his/her case and the onus on the defendant is to meet that case. [7]

The Rules of Court exist to enable the plaintiff, represented or not, to present his/her case to the judge and the defendant to respond to it.

The role of the trial judge has been taken to be as described by Lord Denning MR in Jones v. National Coal Board [1957] 2 All E.R. 155.[8]

> *It was the role of the trial judge to hear and determine the issues raised by the parties not to conduct an investigation or examination on behalf of society at large.*

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[7] The importance of pleadings in this regard (albeit in the context of a claim in fraud) was emphasised by Clarke J. in Moorview v. First Active [2008] IEHC 211.

[8] Albeit not entirely endorsed by the Supreme Court in Donnelly v. Timber Factors Limited [1991] 1 I.R. 553, the Court of Criminal Appeal in People (DPP) v. McGuinness, seemed to approve the philosophy evident in Denning M.R.'s Judgment.

He went on to explain that that did not mean that the judge was a mere umpire saying

> *His object, after all, is to find out the truth, and to do justice according to the law; and in the daily pursuit of it the advocate plays an honourable and necessary role*
>
> *…truth is best discovered by powerful statements on both sides of the question*
>
> *…justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations*
>
> *…if a judge should himself conduct the examination of witnesses, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict.*

In Donnelly v. Timber Factors Limited [1991] 1 I.R. 553 McCarthy J. said:

> *"The role of the Judge of Trial in maintaining an even balance will require that on occasion he must intervene in the questioning of witnesses with questions of his own – the purpose being to clarify the unclear, to complete the incomplete, to elaborate the inadequate and to truncate the long winded. It is not to embellish, to emphasise or, save rarely, to criticise. That is the function of Counsel. The casual bystander, on seeing and hearing repeated judicial intervention, may well conclude that issues in the case or the case itself are being decided before the evidence and the submissions are complete: If the casual bystander may do so, how much more so the interested party, the litigant. This division of role between Judge and advocate was always important in civil trials by jury; it is more important now that claims for damages for personal injuries are no longer tried by juries."*

The role of the advocate, recognised by Lord Denning, and McCarthy J. and the decisions to be made by the advocate in the conduct of the litigation has continued to be recognised.

In Fyffes plc v. DCC plc [2009] 2 I.R. 417, Laffoy J., declining to draw an adverse inference from the decision of the defendant not to call a witness (Mr. McLaughlin) said

> *200. (1) …On the dealing issue the onus of proof was on the Plaintiff.*
>
> *(2) As a result of the pre-trial procedures, the plaintiff was aware that Mr. McLaughlin was in a position to give material evidence on that issue. It is quite clear that Mr. McLaughlin was a witness whose attendance could have been procured, if necessary, by the service of a subpoena.*
>
> *(3) The plaintiff decided not to call Mr. McLaughlin as a witness. I must assume that that decision was made on the basis that the Plaintiff could establish a prima facie case on the dealing issue without Mr. McLaughlin's evidence. That was a legitimate tactical decision for the plaintiff to make in the adversarial process which applies in the Irish legal system.*
>
> *(4) It is reasonable to assume that the defendants anticipated that they might have a case to answer on the dealing issue. Mr. McLaughlin was listed as one of the witnesses they would be calling. In relation to the dealing issue, the defendants adduced evidence from a number of witnesses, primarily …, whose evidence will be referred to later. In the course of the hearing it was indicated on behalf of the defendant s that Mr. McLaughlin would be called. In the event, the defendants did not call him. This was also a legitimate tactical decision for the defendants to make within the adversarial process.*

More recently, Cregan J. stated in Flynn v. NALM [2014] IEHC 408

> "197. *In the present case, although Mr. Marsh had tendered a witness statement and although it was perhaps surprising that he was not called as a witness for the defendants, I do not believe that it would be appropriate to draw an adverse inference from the defendant's refusal to call him as it appears to have been a legitimate tactical decision for the defendant to make."*

Apart from the legitimate tactical considerations which apply to the calling of a witness, practitioners and judges are, equally, aware of the rules relating to an application for a dismiss at the conclusion of the Plaintiff's evidence; and the different standards to be applied if the Defendant indicates that he/she will or will not be going into evidence, as exemplified in Hetherington v. Ultra Tyre Services Limited [1993] 2 I.R. 535; O'Toole v. Heavey [1993] 2 I.R. 544; as more recently applied in Moorview v. First Active [2010] IEHC 34[9], and Murphy v. Callanan [2013] IESC 30. Such decisions are often only made as the case proceeds.[10]

Thus in Moorview[11], Clarke J. observed

> *"It does not seem to me that the alteration in the Rules of Court applicable to the Commercial Court ... could be taken to have altered the substantive law. The law is that a Plaintiff is required to establish a prima facie case in respect of any issues arising on the pleadings on the basis of admissible evidence tendered on behalf of the Plaintiff. Furthermore, if the Plaintiff fails to establish a prima facie case on such evidence, then a Defendant is entitled to a non-suit and is not required itself to go into evidence. The fact that, as a procedural measure, it has been considered advantageous that parties obtain notice in advance of the evidence likely to be given by their opponent does not, in my view, alter that legal situation. A statement of evidence intended to be given by a witness is no more than what its description states it to be. It is a statement that the party concerned anticipates that, if necessary, the named witness will give evidence along the lines of the content of the witness statement concerned. In the absence of any agreement by the parties in advance that all of the witness statements filed should be taken as evidence in chief, or a form of similar agreement which would turn a statement of intended evidence into an admitted statement of actual evidence, I do not believe that a Plaintiff is entitled to place any reliance on Defendants' witness statements in circumstances such as arose in this case."*

[9] See McGrath on Evidence 2nd ed at 2-143 and following.
[10] Order 63, Rule 17 of the Pre-Trial Rules has potentially far reaching consequences here - the parties are required to exchange witness statements.
[11] [2009] IEHC 214 at para 3.18

The complexities and tactical decisions which arise are explored in some detail most recently in the Court of Appeal judgement in O'Leary (A minor) v. HSE, Ireland and Martin Healy [2016] IECA 25, which bears careful consideration[12]. There Ryan P. delivering the Judgment of the Court said, inter alia,

> *"55. ... Counsel for each of the Defendant parties put to the Plaintiffs two experts' certain statements that their witnesses were going to make or that were contained in reports from their expert witnesses whereby to contradict the (Plaintiff's) experts giving their evidence. This did not constitute going into evidence and neither is there some other rule that would prevent the parties applying for a direction. Indeed, it would have been remiss of Counsel not to put their case to the expert witnesses. But by doing so, they were not advancing down a path that stopped them making the case at the end of the Plaintiff's evidence that they did not have a case to meet. It would be a rule that was unjust and unfair and would also make no sense if such were the case. There is no such rule. The point is that Counsel is required to put the case for the defence to the witnesses for the Plaintiff so that the latter have the opportunity of commenting on the evidence. Otherwise, the Plaintiff witnesses have to return to give evidence in response to what has been said by the defence experts. There is often a battle in Court as to whether evidence has been put to the Plaintiff's witnesses in full or at all and it is a regular feature of forensic debate, but the basic point is that the appropriate and proper thing to do is for Counsel to put the case to the Plaintiff's witnesses.*
>
> *56. Such putting of the evidence is always done with the implied but unspoken understanding that this evidence would be given, if necessary, i.e. if it comes to that in the course of the case. There is always an implicit reservation of that kind. And even if there were no suggestion, or even understanding, implicit or otherwise to that effect, how could a Defendant, in justice and fairness, be shut out from*

[12] See also Schuit v. Mylotte [210] IESC 56

> *making an application that there was no case to meet in the event that there was some failure of the Plaintiff's proofs. The Trial Judge's role is to ensure that fairness prevails and so no unjust advantage is taken of the Plaintiff. On the other hand, the nature of litigation is that one party presents and the other party defends, and if the Claimant does not succeed in asking out a prima facie case, then the other parties entitled, as of right, to have the action dismissed. To do otherwise is to impose on a Defendant an obligation to prove a negative, that the Defendant is obliged, in the case of a claim made against him or her, to positively demonstrate by evidence that he or she was not to blame in the circumstances. There is no such obligation."*

The Court went on to consider the options open to a Plaintiff consisting of:

A. Seeking to agree the admission of discovery as proof of its contents.
B. Issuing subpoenae to the Defendant's witnesses.
C. Delivering Interrogatories.
D. Assembling the correct expert witnesses.

Quite apart from the emphasis that the foregoing place on the discharge by the Plaintiff of the burden of proof and the entitlement of the Defendant to challenge same at the conclusion of the evidence adduced by the Plaintiff, the trial process involves the constitutional right of the Defendant to fair procedures – an aspect of which is the right to cross examine, preferably without intervention by the trial judge.

The right to cross examine is regarded as central to the adversarial process. As McGrath Evidence (2nd Edition) at para. 3-86 recites:

> *"Cross-examination is considered to be of pivotal importance in the trial process. Wigmore has described cross-examination as 'the greatest legal engine ever invented for the discovery of truth. That view was echoed by Hardiman J. in Maguire v. Ardagh, who extolled the value of cross-examination as a truth eliciting process:*

> *'Where a person is accused on the basis of false statements of fact, or denied his civil or constitutional rights on the same basis, cross-examination of the perpetrators of these falsehoods is the great weapon available to him for his own vindication. Falsehoods may arise through deliberate calculated perjury (as in the case of Parnell), through misapprehension, through incomplete knowledge, through bias or prejudice, through failure of memory or delusion. In some cases a witness may not be aware that his evidence is false. A witness may be telling the literal truth but refrain, or be compelled to refrain from giving a context which puts it in a completely different light. And a witness called to prove a fact favourable to one side may have a great deal of information which he is not invited to give in evidence, favourable to the other party.'"*

McGrath also says at 3-88:

> *"Given the importance of cross-examination to the trial process, it is unsurprising that the right to cross-examine is considered to be a fundamental procedural right in this jurisdiction, constitutionally guaranteed in both civil and criminal cases."*

And at paragraph 3-89:

> *"... again in Donnelly v. Ireland Hamilton C.J. stated that*
>
> > *'The central concern of the requirements of due process and fair procedures is the same, that is to ensure the fairness of the Trial of an accused person. This undoubtedly involves the rigorous testing by cross-examination of the evidence against him or her.'"*

In the succeeding paragraphs of his text McGrath observes that there are limits to the right to cross-examine and that the Trial Judge can curtail cross-examination which is repetitive or excessive in length if the Judge is satisfied that the cross-examiner has been given an adequate opportunity to ask relevant questions of the witness, and states at 3-100:

"However, given the importance and constitutional basis of the right to cross-examine, the discretion of trial judges to disallow questions or otherwise curtail cross-examination is somewhat circumscribed and a trial judge should not rule out a line of questioning unless it is clearly irrelevant or otherwise objectionable."

Although the role of the judge has thus been to allow the parties to run the case, as practitioners and judges are also aware, the courts have sought to ensure that the time of the courts is not wasted (and that litigants are not put to unnecessary and excessive cost) by providing for nuanced costs orders where costs do not automatically follow in full for the successful party, as exemplified in Veolia Water U.K. plc v. Fingal County Council (No. 2) [2006] IEHC 240 and other cases.

It is against this background that the Trial Rules must be considered.

TRIAL

Order 36, Rule 9 currently provides:

"Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and in all cases may order that one or more issues of fact be tried before any other or others."

Practitioners, particularly those practising in the Commercial List of the High Court have become used to the idea of trials being conducted in modules and there are now a significant number of judgments dealing with that issue.

It is proposed to substitute the following for that rule:

"9.(1) Subject to the provisions of the preceding rules of this Order, the Court may in any cause or matter, at any time or from time to time order:

(a) that different questions of fact arising therein be tried by different modes of trial;

(b) that one or more questions of fact be tried before the others;

(c) that one or more issues of fact be tried before any other or others.

Obviously if that were the only change there would be no difficulty, as it simply restates the existing position.

The First Significant Change

However, it is not the only change. The new Rule goes on as follows

*(2) Subject to the provisions of the preceding rules of this Order**, the Judge** chairing any case management conference or pre-trial conference (each within the meaning of Order 63A, Order 63B or, as the case may be, Order 63C[13]) or the trial Judge **may** in any cause or matter:*

(a) which is listed for trial in the Commercial List or which is required to be heard in the Competition List, or

(b) in which an order may be made under Order 63C, rule 4,

***Make an order**:*

(i) directing that the trial be conducted in particular stages (in this rule, "modules") and determining the questions, issues or set of questions or issues of fact, or of fact and law, to be the subject of each or any module, and the sequence in which particular modules shall be tried;

(ii) specifying the nature of the evidence, or the witnesses, including expert witnesses, required to enable the Court to determine the questions or issue arising in each or any module;

[13] Inserted by the Rules of the Superior Courts (Chancery and Non Jury Actions and Other Designated Proceedings: Pre Trial Procedures) 2016 [S.I. 255 of 2016], which also come into force on 1 October 2016.

(iii) directing the exchange and filing in Court, either in advance of each or any module or following the conclusion of the module concerned, of written submission on the questions or issues of law arising in that module."

The text in bold highlights the potential significant new role of the judge in the conduct of the litigation and the potential impact upon the entitlement of the parties to call such evidence and witnesses as they think appropriate, in the order of their choosing, to discharge the onus upon them. Taking the other text out the provision provides

> **At the case management or pre trial conference stage or in the course of the trial**
>
> **The Judge may make an order specifying**
>
> - **the nature of the evidence, or**
> - **the witnesses, including expert witnesses,**
>
> **required to enable the Court to determine the questions or issue arising in each or any module.**

The idea of the Judge specifying the nature of the evidence or the witnesses to be led before him/her is novel and has potentially very far reaching consequences.

<u>The Second Significant Change</u>

Order 36, Rule 42[14], which currently provides as follows,

> *42. In every action tried by a Judge with a jury in which damages are claimed for injury to person and property caused by the negligent driving of a mechanically propelled vehicle the liability for which is required to be*

[14] Order 36, Rule 41 which currently provides as follows,

> *"41. Trials with assessors shall take place in such manner and upon such terms as the Court shall direct.*

is replaced by more detailed, and, it seems to me, uncontroversial, provisions in respect of the conduct of trials with assessors

covered by an approved policy of insurance under the Road Traffic Act, 1961, Section 56, the Judge shall direct the jury to apportion the damages (if any) awarded between the injury to the person and the injury to property."

is replaced with the following:

"42. (1) The Court or an officer of the Court may require any party to proceedings to provide a reasoned estimate of the time likely to be spent in the trial of the proceedings, including a list of the witnesses intended to be called by that party and an estimated time for the examination or cross-examination (as the case may be) of each witness intended to be called by that party or by any other party.[15]

(2) The trial of proceedings shall, as regards the time available for any step or element, be under the control and management of the trial Judge, and the trial Judge may, from time to time, make such orders and give such directions as are expedient for the efficient conduct of the trial consistently with the interests of justice.

(3) ***The trial Judge may****:*

(a) having regard to the period of time fixed for the trial, and

(b) having considered any materials (including any reports and summaries or statements of the evidence of any witnesses) delivered to him or her in advance of the trial in accordance with any provision of these Rules or any order or direction of the Court, and

(c) having heard the parties,

[15] It is important to note that unlike the other provisions of the Trial Rules, these rules apply to all types of litigation, including personal injuries. The Supreme Court in O'Brien v. Moriarty [2016] IESC 36 recently upheld the proposition that a party's right to cross examine may be subject to a time limit, albeit in the particular circumstances there the Court upheld the High Court to the effect that the cross-examination limited to 5(6) hours did not breach Mr. O'Brien's right to fair procedures.

Make *such* ***orders*** *and give such directions as are expedient for the efficient conduct of the trial consistently with the requirements of justice* ***which may****, without limitation,* ***include****:*

(I) orders fixing or limiting the amount of time allowed to each party for opening and closing the case (including, subject to paragraph (II)(d), the making of oral submissions on points or issues of law) and for examining and cross-examining each witness, which may include an order allowing each party an amount of time (out of the total time set aside for the trial of the proceedings) for its presentation of its case, which may be used in opening the case, in closing the case, in examining in chief or in re-examining any witness called by that party and in cross-examining any witnesses called by any other party, and

(II) directions:

(a) as to the issues on which the Court requires evidence;

(b) as to the nature of the evidence required to enable such issues to be determined;

(c) as to the manner in which such evidence is to be put before the Court;

(d) where written submissions on points or issues of law have been lodged in advance of the trial, as to whether the Judge shall require any oral submissions on points or issues of law in addition to those written submissions, or

(e) requiring the parties or any party at any stage of the trial to identify the issues which arise or remain for determination by the Court and the questions which the Court is required to decide in order to determine each such issue.

(4) For the purposes of considering the making of an Order under sub-rule (3) or otherwise, the trial Judge may require counsel for each party (or a party, if appearing in person) to indicate how much time is required by that party to be taken in the examination or cross-examination of each witness, or in any other step in the trial.

(5) ***The trial Judge may, having regard to any order or direction given in accordance with sub-rule (3),*** *allow the time proposed by any party, or may allow such other period of time as the Court considers is consistent with the efficient conduct of the trial and with the requirements of justice.*

(6) The re-examination of witnesses shall be limited to new matters that were raised for the first time on cross-examination and shall be concise.

(7) A party shall avoid duplicating the same evidence by different witnesses, save where such duplication is necessary for the just determination of the proceedings.

Again, the foregoing highlighted words have the potential to significantly change to the role of the trial judge. Taking out the other text the provision is as follows

> **The <u>trial Judge</u> may, having heard the parties, make orders or give directions**
>
> - **fixing or limiting the amount of time allowed to each party**
>
> - **for examining and cross-examining and re examining each witness**
>
> - **as to the issues on which the Court requires evidence;**
>
> - **as to the nature of the evidence required to enable such issues to be determined;**

- **as to the manner in which such evidence is to be put before the Court;**

- **requiring the parties or any party at any stage of the trial to identify**

    - **the issues which arise or remain for determination by the Court, and**
    - **the questions which the Court is required to decide in order to determine each such issue.**

Taken together with the provision of the Pre-Trial Rules which requires the parties to exchange witness statements 30 days prior to trial, these are dramatic changes to the trial landscape.

The Costs Regime

Order 36 Rule 42 goes on to provide for the sanctioning by Costs Orders of parties who prolong a trial. It provides

> *(8) Without prejudice to any other powers conferred on the Court by Order 99, in any case in which the Court is satisfied that the evidence of a witness called by a party was (in whole or in part):*
>
> *(a) unnecessary for the determination of any question or issue arising in the proceedings, or*
>
> *(b) merely duplicative of the evidence given by another witness called by that party,*
>
> *the Court may:*

(i) make an order disallowing (in whole or in part) recovery by a party of the expenses of the witness concerned or the costs occasioned by calling the evidence of the witness concerned, or

(ii) order the payment by that party (in whole or in part) of the costs occasioned to any other party by the calling of the witness concerned, provided that no such order shall be made where the Court is satisfied that any duplication of evidence was necessary for the just determination of the proceedings.

The inclusion of this Rule – which probably simply reflects existing practice – highlights that the Courts already enjoy powers of a deterrent nature in respect of parties who prolong a trial unnecessarily. The costs rules have effect, however, after the trial has concluded and leave the running of the trial to the parties.

Further the Pre Trial Rules provide that the Judge in charge of the Case Management Conference may impose costs on those he/she deems responsible for unnecessary costs incurred in the pre trial process – Order 63C, Rule 7(d) – prolix pleadings - and (e) – failure to comply with time limits; and Rules18,19,20 and 21.

The fact that the Court may "penalise" errant parties for wasting time by tailored costs orders might be thought to provide a sufficient deterrent to parties prolonging litigation and to minimise the necessity for the introduction if the other more novel rules.

EVIDENCE

Order 39 which is headed "Evidence" is amended by the insertion therein of a new Rule 55 in relation to the taking of evidence by video link which is not controversial.

However, the Order is also amended by the inclusion in the said Order as a new heading - XI Expert Evidence.[16]

[16] Insofar as experts are concerned Order 63C Rule 14(6), inserted by the Pre Trial Rules require the Plaintiff and the Defendant to notify each other of the intention to call expert evidence (it's not clear how this chimes with the requirement to plead expert evidence).

Many of the provisions of the new Rule probably simply restate existing practice. Some, however, are entirely new and, particularly when taken with the above new rules relating to Trials, have the potential to alter the landscape of adversarial litigation.

Before considering the new provisions, it is, again worth looking at the position which currently pertains[17].

In National Justice Compania Naviera S.A. v. Prudential Assurance Co. Limited [1993] 2 Lloyds Reports 68, Cresswell J., who was concerned that the experts before him had not fully appreciated their duties, assembled the duties and responsibilities applicable to expert witnesses that had been recognised over the years and stated that they include the following:

1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of the litigation.

2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to the matters within his expertise. An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

Apart from expert evidence, the Pre-trial Rules require that ordinarily witness statements for witnesses as to fact will be required.

[17] For a detailed consideration of the evolution of the role of expert witnesses, the best place to look, apart from text books and case law, is the Consultation Paper published by the Law Reform Commission in 2008 [LRC CP 52-2008].

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a Report could not assert that the Report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the Report.

6. If after exchange of Reports an expert witness changes his view on a material matter having read the other side's expert Report or for any other reason, such a change of view should be communicated (through legal representatives) to the other side without delay and, when appropriate, to the Court.

7. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of Reports.

The concern of the Irish Courts in respect of the role of expert witnesses has increasingly been expressed from the Bench and is perhaps best encapsulated in the following passage from the judgment of O'Donnell J. in Emerald Meats v. Minister for Agriculture [2012] IESC 48**,** where, speaking for the Supreme Court, he stated

> *"The details of the experts reports in this case are now only of historical significance in this Appeal because the Trial Judge rejected both hypothesis put forward by Emerald's expert to justify the figure of €20.2m ... By the same token, the Judge rejected the contention made on behalf of the Department that Emerald had suffered no damage beyond that compensated for already in the award of damages made by Costello J. ...*
>
> *The result is that the extensive expert's reports provided just after the commencement of the Trial were relevant to the hearing only in the sense that they were rejected and are almost completely irrelevant to the Appeal. Much of the 17 day hearing before the High Court was taken up with an analysis of the various hypotheses contained in these reports. In the end, however, the critical piece of evidence which underpinned the Judge's assessment of*

damages was the third of three very short "alternative views" provided by the Department's experts only on the eleventh day of the Trial.

... If Court time is to be used efficiently it means that only those disputes which really require judicial determination should reach the point of consuming both the time in Court for the hearing of evidence and the time out of Court for its assessment, analyses and adjudication by a Judge of Trial, and if necessary, on appeal. In theory, expert witnesses owe a duty to the Court to provide their own independent assessment. It is only because of their expertise and assumed independence that they are entitled to offer opinion evidence on matters central to the Court's determination. If this process functions properly, there should not be wide and unbridgeable gaps between the views of experts. Where there are differences, those should be capable of identification along with the relevant considerations so that the particular issue or issues which require judicial determination should be capable of ready exposition. Ideally, all of this should occur outside a Courtroom and well in advance of the Trial. It is not merely that the resolution of disputed issues in a Trial forum is an expensive and often frustrating process of determination; it is also that the early identification of the real areas in dispute may encourage parties to come to their own resolution which is likely to be more satisfactory to them, and certainly cheaper. It is important that experts, and particularly accountancy witnesses, do not simply accept their client's instructions as to certain matters and then construct calculations on the basis of those instructions. If that is all that is done, then the expert report is no more than the provision of a very expensive calculator. The Court is entitled to expect that such experts will apply their critical faculties and their expertise to the case being made by their clients. Furthermore, experts who are willing to provide such realistic advice to their clients are entitled to expect that the Courts will, where appropriate, identify, and be critical of, exaggeration and lack of realism when that is detected. ... It was partly because the figures proffered by both sides did not fit comfortably with what could be observed of the nature of the business and its prospects that the Court was driven to the limited and undoubtedly somewhat rudimentary analysis which is now the focus of this Appeal."

The new provision is as follows:

"X1. Expert Evidence

56. (1) Rules 59 to 61 inclusive apply to proceedings:

(a) which is listed for trial in the Commercial List or which is required to be heard in the Competition List, or

(b) on which an order may be made under Order 63C, rule 4[18]*.*

(2) In this rule and rules 57 to 61 inclusive:

reference to a "case management conference" or a "pre-trial conference" is a reference to such a conference fixed in accordance with the provisions of Order 63A, Order 63B or, as the case may be, Order 63C;

the "evidence" of an expert witness includes testimony as to fact and the expression of any opinion;

"expert" means an expert witness.

57. (1) It is the duty of an expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert.

(2) Every report of an expert delivered pursuant to these Rules or to any order or direction of the Court shall:

(a) contain a statement acknowledging the duty mentioned in sub-rule (1);

[18] Non Jury, Chancery and Other Designated proceedings. These provisions do <u>not</u> apply to other types of proceedings.

(b) disclose any financial or economic interest of the expert, or of any person connected with the expert, in any business or economic activity of the party retaining that expert, including any sponsorship of or contribution to any research of the expert or of any University, institution or other body with which the expert was, is or will be connected, other than any fee agreed for the preparation by the expert of the report provided or to be provided in the proceedings concerned and any fee and expenses due in connection with the participation of the expert in the proceedings concerned.

This appears to formalise the duty recognised by Cresswell J.

Order 39 goes on, again uncontroversially, to say

58. (1) Expert evidence shall be restricted to that which is reasonably required to enable the Court to determine the proceedings.

The Third Significant Change - Experts

The major change is effected in the following provisions, which again seem to me to involve the judge in the question of evidence to be adduced, and the manner in which it may be adduced.

(2) ***A Judge may –***

(a) of his own motion and after hearing the parties,[19] *or*

(b) on the application of a party by motion on notice to the other party or parties,

make any of the following orders or ***give any of the following directions as to expert evidence:***

[19] A Judge acting of his or her own motion runs the risk of the Judge compromising his/her role as an impartial arbitrator – Jensen v. Ross 373 DLR (4th) 656.

(i) requiring each party intending or proposing to offer expert evidence to identify-

(a) the field in which expert evidence is required; and

(b) where practicable, the name of the proposed expert;

(ii) ***determining the fields of expertise in which, or the proposed experts by whom, evidence may be given at trial****;*

(iii) fixing the time or times at which a report setting out the key elements of the evidence of each expert intended or proposed to be offered by each party shall be delivered to each other party concerned or exchanged and in default of such order being made, the provisions of sub-rules (1) to (5) inclusive of rule 46 shall apply to every such report;

(iv) where two or more parties (in this rule, the "relevant parties") wish to offer expert evidence on a particular issue, direct that the evidence on that issue is to be given by a single joint expert (in this rule, the "single joint expert");

(v) where the relevant parties cannot agree who should be the single joint expert –

(a) select the expert from a list prepared or identified by the relevant parties; or

(b) direct that the expert be selected in such other manner as the Court directs;

(vi) as to the terms on which and manner in which the single joint expert is to be instructed;

(vii) requiring any party:

(a) to pay to the single joint expert, or

(b) to deposit with the Accountant on account of fees to become payable to the single joint expert,

a specified sum in respect of or on account of a single joint expert's fees and, where the Court so orders, the single joint expert shall not be required to act until the said sum has been paid, or as the case may be, deposited.

(3) Save where the Court for special reason so permits, each party may offer evidence from one expert only in a particular field of expertise on a particular issue. Such permission shall not be granted unless the Court is satisfied that the evidence of an additional expert is unavoidable in order to do justice between the parties.

59. (1) A party may put a concise written question or questions concerning the content of an expert's report to-

(a) an expert instructed by another party; or

(b) a single joint expert appointed pursuant to agreement of the parties or pursuant to order made in accordance with rule 58(2)(iv).

(2) An expert shall not be obliged to answer any written questions put in accordance with sub-rule (1) which are disproportionate, unnecessary for the determination of any matter at issue in the proceedings or not within the expert's field of expertise. If necessary, a party or single joint expert may apply by motion on notice for a ruling on any issue arising from such written questions.

(3) Written questions under sub-rule (1)-

(a) may be put once only;

(b) shall be put within 28 days of service of the expert's report; and

(c) shall be for the purpose only of clarification of the report,

unless in any case-

(i) the Court permits otherwise, or

(ii) the other party who has instructed the expert concerned agrees.

(4) An expert's answers to questions put in accordance with sub-rule (1) shall be treated as part of the expert's report.

(5) Where-

(a) a party has put a written question to an expert instructed by another party; and

(b) the expert does not (in the absence of a ruling that he is not obliged to do so) answer that question,

the Court may make one or both of the following orders in relation to the party who instructed the expert-

(i) that the party may not rely on any, or a specified part, of the evidence of that expert; or

(ii) that the party may not recover any, or a specified part, of the fees and expenses of that expert from any other party.

60. Where two or more parties intend to call experts who, according to their reports as exchanged between the parties or filed in Court, may contradict each other as to evidence, then:

(i) following application by any party by motion on notice to the Judge chairing and regulating the pre-trial conference, or of that Judge's own motion, in any case in which such a conference is to be held, or

(ii) following application by any party by motion on notice to the trial Judge in any case, or

(iii) where so ordered by the trial Judge, having heard the parties, in the absence of any such motion,

the Judge concerned may order that the procedure set out in rule 61 be applied where that Judge considers it necessary in the interests of justice.

61. (1) Where an order has been made under rule 60, the expert shall be required to meet privately, without the presence of any party or any legal representative of any party, and to discuss with each other their proposed evidence.

(2) Following the meeting referred to in sub-rule (1) the experts shall be required to draw up a written statement (in this rule, the "joint report") identifying such evidence as is agreed between or among them and such evidence as is not agreed. The joint report shall be lodged in Court to be furnished to the trial Judge in advance of the trial and a copy shall be provided to each of the parties.

(3) ***Upon a consideration of the joint report, the trial Judge may, at any appropriate stage of the trial,***

(a) require any opposing experts to be examined and cross-examined (either on the whole or on a specified part of their evidence) one after another, in such order as the trial Judge shall direct, or

(b) apply the "debate among experts" procedure in accordance with sub-rule (4).

(4) Where the "debate among experts" procedure is applied, each of two or more contradicting experts shall be sworn in order to testify at the same time. When sworn, each expert, ***in such order as the trial Judge shall determine,*** *and without being examined by, or by counsel for, any party, shall give an outline of the evidence that is agreed between or among them. The experts shall then,* ***in such order as the trial Judge shall determine****, present the evidence on which they are not agreed the one with the other or others. Following such presentation the experts may, subject to the direction of the trial Judge in that regard, be required to debate the points which are not agreed between or among them, the one with the other or others.*

*(5) When the "debate among experts" in accordance with sub-rule (4) is complete, examination in chief by counsel****, if deemed necessary by the trial Judge, and cross-examination by counsel on such matters as the Judge directs, or if the Judge so directs, general cross-examination shall be allowed, as may re-examination."***

Again taking out some of the text the provision provides

A Judge may –

of his own motion and after hearing the parties, or

on the application of a party by motion on notice to the other party,

make orders or give directions as to expert evidence:

- **determining**

  - **the fields of expertise in which, or**
  - **the proposed experts by whom,**

  evidence may be given at trial;

- **directing that the evidence on an issue is to be given by a single joint expert**

THE JOINT EXPERT PROCEDURE

Where the relevant parties cannot agree who should be the single joint expert [a judge] may make orders –

- **selecting the expert from a list prepared or identified by the relevant parties; or**

- **directing that the expert be selected in such other manner as the Court directs;**

- **as to the terms on which, and the manner in which the single joint expert is to be instructed;**

THE PARTIES' OWN EXPERTS

Where two or more parties intend to call experts who, according to their reports as exchanged between the parties or filed in Court, may contradict each other as to evidence, then the judge can at any appropriate stage of the trial,[20]

- **require any opposing experts to be examined and cross-examined one after another,**

[20] This obviously envisages intervention by the trial judge only.

in such order as the trial Judge shall direct, or

- **apply the "debate among experts" procedure.**

DEBATE AMONG EXPERTS - PROCEDURE

Where the "debate among experts" procedure is applied, each of two or more contradicting experts shall be sworn in order to testify at the same time.

- **When sworn, each expert,**

  - **in such order as the trial Judge shall determine,**

  - **without being examined by, or by counsel for, any party,**

  shall give an outline of the evidence that is agreed between or among them.

- **The experts shall then,**

  in such order as the trial Judge shall determine,

  present the evidence on which they are not agreed

- **Following such presentation the experts may,**

  subject to the direction of the trial Judge

  be required to debate the points which are not agreed between them.

- **When the "debate among experts" is complete,**

examination in chief by counsel,

if deemed necessary by the trial Judge,

and cross-examination by counsel

on such matters as the Judge directs, or if the Judge so directs,

general cross-examination

shall be allowed,

as may re-examination."

The effect of the application of these rules on the outcome of litigation may be seen in the potential result in O'Leary: The defendants' perfectly legitimate strategy of not calling their own experts would appear likely to be out of their hands.

SUMMARY

The new rules provide the potential for the adversarial process with which practitioners are familiar to be substantially altered, at various stages of the process.

1. At the case management or pre trial conference stage or in the course of the trial

The Judge may make an order specifying

- **the nature of the evidence, or**
- **the witnesses, including expert witnesses,**

required to enable the Court to determine the questions or issue arising in each or any module.

2. The parties are to exchange witness statements – thus requiring the Defendant to answer evidence not yet given.

3. At the trial

The <u>trial Judge</u> may, having heard the parties, make orders or give directions

- **fixing or limiting the amount of time allowed to each party**
    - **for examining and cross-examining and re examining each witness**
- **as to the issues on which the Court requires evidence;**
- **as to the nature of the evidence required to enable such issues to be determined;**
- **as to the manner in which such evidence is to be put before the Court;**
- **requiring the parties or any party at any stage of the trial to identify**
    - **the issues which arise or remain for determination by the Court, and**
    - **the questions which the Court is required to decide in order to determine each such issue.**

4. Insofar as expert evidence is concerned

A Judge may –

of his own motion and after hearing the parties, or

on the application of a party by motion on notice to the other party,

(a) make orders or give directions as to expert evidence:

- **determining**

  - **the fields of expertise in which, or**
  - **the proposed experts by whom,**

  evidence may be given at trial;

(b) The judge can at any appropriate stage of the trial,

- **require any opposing experts to be examined and cross-examined one after another,**

  <u>in such order as the trial Judge shall direct</u>, or

(c) Where the "debate among experts" procedure is applied, each of two or more contradicting experts shall be sworn in order to testify at the same time.

When sworn, each expert,

- **<u>in such order as the trial Judge shall determine</u>,**

- **<u>without being examined by, or by counsel for, any party,</u>**

shall give an outline of the evidence that is agreed between or among them.

The experts shall then,

in such order as the trial Judge shall determine,

present the evidence on which they are not agreed

Following such presentation the experts may,

subject to the direction of the trial Judge

be required to debate the points which are not agreed between them.

When the "debate among experts" is complete,

examination in chief by counsel,

if deemed necessary by the trial Judge,

and cross-examination by counsel

on such matters as the Judge directs, or if the Judge so directs,

general cross-examination

shall be allowed,

as may re-examination."

(d) make orders directing that the evidence on an issue is to be given by a single joint expert

and where the relevant parties cannot agree who should be the single joint expert may make orders –

- **selecting the expert from a list prepared or identified by the relevant parties; or**

- **directing that the expert be selected in such other manner as the Court directs;**

- **as to the terms on which, and the manner in which the single joint expert is to be instructed;**

How these Rules will work out in practice in the years ahead should, at a minimum, be interesting. One might anticipate significant argument as to whether, in a given case, they afford (or afforded) fair procedures to the (disappointed) litigant.

PAUL GARDINER S.C.

22 July, 2016.