FOIL
FORUM OF INSURANCE LAWYERS
IRELAND

Informing Progress - Shaping the Future

FOIL Ireland learning event

Getting a contribution

Recent developments under the Civil Liability Act (CLA) 1961

This event was hosted by FOIL Ireland on 23rd November 2021 and was presented by **Brian Hallissey BL**. This is a summary of the presentation, but a full set of the speaker's notes and the slides used are available on the FOIL members' website using the following links:

Notes - https://www.foil.org.uk/update/getting-a-contribution-recent-developments-under-the-civil-liability-act-1961/

Slides - https://www.foil.org.uk/update/getting-a-contribution-slides-recent-developments-under-the-civil-liability-act-1961/

The issues

There were four issues to be addressed:

1. The rules and procedures for contribution;
2. Recent case law on time limits;
3. Recent developments in sections 34 and 35;
4. Defender v HSBC

Procedures for contribution

RSC Order 16**:** application for leave to issue the third-party notice (TPN);

or S.27(1)(a) Civil Liability Act 1961 (CLA): co-defendants claim contribution – serve notice seeking indemnity/contribution;

or S.27(1)(b): Third Party Notice procedure (concurrent wrongdoers);

or S.27(1)(b): issue separate plenary proceedings against that other party (concurrent wrongdoers).

Concurrent wrongdoers - when both or all are wrongdoers and are responsible to a third person (the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them – See S.11 CLA

S.31 CLA provides:

An action may be brought for contribution within the same period as the injured person is allowed by law for bringing an action against the contributor, or within the period of two years after the liability of the claimant is ascertained or the injured person's damages are paid, whichever is the greater.

This must be contrasted with the wording of S.27(1) which provides:

A concurrent wrongdoer who is sued for damages or for contribution and who wishes to make a claim for contribution under this Part—

(a) shall not, if the person from whom he proposes to claim contribution is already a party to the action, be entitled to claim contribution except by a claim made in the said action, whether before or after judgment in the action; and

(b) shall, if the said person is not already a party to the action, serve a third-party notice upon such person as soon as is reasonably possible and, having served such notice, he shall not be entitled to claim contribution except under the third-party procedure. If such third-party notice is not served as aforesaid, the court may in its discretion refuse to make an order for contribution against the person from whom contribution is claimed.

This is curious in that that the time limits comprise both a limitation period and a requirement that a TPN (where applicable) be served on the third party as soon as is reasonably possible. In most cases it is the 'as soon as is reasonably possible' issue which arises.

Third party or separate proceedings?

Order 16(1) is permissive: it confers a discretion on the court to grant liberty to issue and serve a TPN.

Order 16(1) Is not limited in its scope to claims for contribution or indemnity: it extends to claims for contractual indemnity or damages in contract and tort.

Once the TPN is served the defendant is entitled to a determination of the third party liability as of right and not subject to the possible discretionary refusal in separate contribution proceedings. This is not the case where there is a separate claim for contribution, where the court has discretion to refuse relief.

RSC Order 16(1)(3) allows 28 days for an application to be made from the time allowed for the delivery of a defence. This needs to be considered against the S.27(1)(b) time line which says that the TPN must be served 'as soon as reasonably possible'.

It must be borne in mind that S.27 governs third parties who are concurrent wrongdoers. Therefore, an assessment must be made as to whether the third party is a concurrent wrongdoer within the meaning of S.11 CLA. If so, RSC and S.27 applies. If not, only RSC applies and the S.27 case law is not applicable. The example given of a non-concurrent wrongdoer was where the plaintiff sued his employer for an injury sustained at work and the defendant then sued its insurer, which had refused indemnity. The insurer is not a concurrent wrongdoer and the Plaintiff does not have a cause of action against the insurer. Rather, the only liability that arises for the insurer is in relation to the potential indemnity under the policy to the Defendant. These would not be S.27 third party proceedings.

Third party time limits

The starting point is the 28-day time limit under O16. The Court in *Connolly v. Casey (1998)* said it would only be in "very exceptional circumstances" that a TPN would be set aside for failure to comply with the 28-day rule.

There are, however, other cases that appear to soften that approach. In *Greene v. Triangle Developments Ltd (2015),* the Court of Appeal noted that the time-limit under O16 is not one with which the parties will normally comply or even be expected to comply. This reflected the practice of the parties. In *O'Connor v. Coras Pipeline Services Ltd* (2021), Barrett J. described as "regrettable" the fact that the rules establish time constraints which are so rigorous that they are more often honoured in the breach than the observance, with the courts expected to tolerate what appears to be a general divergence in practice from the timescale that O16(1)(3) ordains.

A defendant needs to be seen as dealing with third party proceedings immediately, not just concentrating on the defence. One of the stricter approaches was seen in *Clúid Housing Association v. O'Brien & Ors (2015)* where Murphy J. had very serious regard for the 28-day limit. The respondent to the application to set aside, the third named defendant, argued that the substance of the plaintiff's claim was only capable of expert review when particulars were delivered. However, Murphy J. was not satisfied that this was so.

The statement of claim had been delivered in November 2012; the defence in January 2014; and the motion for the TP proceedings was issued in March 2014. The TP applied to set aside its joinder and in defending its position, the defendant argued that it needed to wait for expert opinion on its case. In terms of the defendant, the court noted:

a). its particular knowledge arising from its involvement in the building project and the problems that arose;

b). its expertise as consulting engineers;

c). the detailed particulars pleaded in the statement of claim.

It was held that ''*in the circumstances of this case the Court is not persuaded that the respondent needed anything more than the statement of claim to decide on the appropriateness of joining the third party. Indeed, the Court goes so far as to suggest that this may be one of the few cases in which a requirement to comply with the twenty-eight-day time limit set out in O. 16 r. 1(3) might be warranted".*

The TPN was set aside.

Defendant representatives should therefore look to see how detailed the particulars of claim are and how this should be measured against the expertise of the client.

Cluid Housing might be seen as an outlier in terms of the very strict approach taken – however, it shows that in certain cases, a Court will determine that the TP proceedings should have issued within a very short time period.

Notwithstanding the reluctant acceptance by the courts that RSC time limits are unlikely to be met, the 28-day limit serves as the starting point for the consideration of whether or not the defendant made the application "*as soon as reasonably possible*".

What is the end point of the timeline? It could be the date the motion issues, is granted by the court or is served on the TP. There is some uncertainty on this point.

In *Greene v. Triangle Developments Ltd (2008)*, the court approached the issue on the basis of the date upon which the TPN is served. Whereas in *McElwaine v. Hughes*[8] *and Morey v. Marymount University*

Hospital and Hospice Lt (1997), the court measured the timeline to the earlier date upon which the motion seeking to join the TP was issued.

Simons J. recently set out his view on the issue in *Susquehanna International Group Limited v Execuzen Limited & Ors (2021)*: ''*…time should be taken as running from the date upon which the third- party notice is actually served''*.

This appears to be more in keeping with the statutory language, i.e.," serve a third- party notice upon such person as soon as is reasonably possible".

The key point is that there should be no delay whatsoever in serving the TPN and the Defendant must be in a position to provide a reasonable explanation (on affidavit) for any such delay.

The respondent to an application to set aside the TPN will need to set out in detail the reasons for any delay. However, the courts have confirmed that the respondent is not required to account for the entirety of the period in question:

"*The whole circumstances of the case and its general progress must be considered and that the absence of an explanation for some of the delay was not a sufficient ground to set aside the third party notice*" (*Connolly v. Casey (2000)).*

The assessment by the court is both subjective and objective. It is incumbent on the court to look not only at the explanations which have been given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the third- party notice was served as soon as is reasonably possible*. (Greene v. Triangle Developments Ltd (2015)).*

- In *Majella Kenny v Noel Howard (2016)* the following chronology applied:

  Personal injury summons: 14th March 2013
- Defence delivered: 7th April 2014
- Papers sent to senior counsel to consider joining the HSE as a third party
- There was then a nine-month delay, apparently because the papers had been mislaid.
- Senior counsel advised that specialist expert input was required: 30th January 2015;
- Letter of engagement to expert: 20th April 2015 – expert the suffered a period of ill health
- Expert recommended another expert: 27th June 2015
- Motion issued: 26th August 2015
- TPN served: 19th November 2015

The TPN was set aside by the Court of Appeal which held that ''*…the section requires that the time taken should be related to the necessities of the case so that the notice that is served can properly be described as being served ''as soon as is reasonably possible''. This is the key to understanding the provision. It is not a matter of criticising the concurrent wrongdoer applicant; neither is it a matter of excusing error or default. It is a judgment about what is reasonably necessary in the circumstances of the case.*

It ''is impossible to accept that the delay of two years could, on any view of this case, be considered to be as soon as reasonably possible''.

In relation to third party time limits, the courts always emphasise that each case will turn on its own particular circumstances. In *Kenny* the court stated that ''*A delay in one case may be reasonable whereas the same time lapse in another may be fatal to a defendant's wish to join the alleged contributor*.''

Therefore, these are fact specific applications, the decisions in any one of which will depend on the particular circumstances that present in such application, though some degree of speed is invariably required.

In *Kenny* 24 principles were set out (which are detailed in the speaker's full notes) but the following were highlighted in the presentation.

> [8] While a court may take all the circumstances into account, there needs to be evidence as to the reasons for, and excuses for, a delay.
>
> [13] Proceedings cannot and should not be instituted or contributions sought against any party without assembling and examining the relevant evidence and obtaining appropriate advice thereon. It is in this context that the word "possible" must be understood.
>
> [14] The qualification of the word "*possible*" by the word "*reasonably*" in S.27(1)(b) gives a further measure of flexibility, indicating that circumstances may exist which justify some delay in the bringing of the proceedings.
>
> [16] It is incumbent on a trial judge, when faced with a set-aside application to look not only at the explanations given by a defendant for any purported delay, but also to make an objective assessment as to whether, in the whole circumstances of the case and its general progress, the TPN was served as soon as is reasonably possible.
>
> [20] Any lawyer representing a party in litigation must be taken to be fully aware of the need to act with reasonable expedition in progressing the proceedings. Such lawyers do not need to be reminded by their client of their obligations. If those lawyers are guilty of such delay as puts the proceedings at risk, then it may well be that the consequences of that delay should not be visited on the innocent other side, but rather may have to result in the proceedings, or an appropriate aspect of them, being struck out for delay, with the party aggrieved having its remedy against the lawyers whose delay has led to that unfortunate situation.
>
> [24] An element of caution is required before a TPN is served, especially where an allegation of professional negligence is involved.
>
> [25] Prejudice to a relevant party has to be a relevant factor in deciding whether or not a defendant has proceeded "as soon as is reasonably possible".

The issue of whether prejudice to the TP was relevant divided the Court in *Kenny*:

Ryan P. for the majority said: "*…it is difficult to see how prejudice … could arise in this case, that is not the issue; if it is clear that the third-party notice was not served as soon as reasonably possible, that is a failure of compliance with the specific mandatory requirement of s. 27 (1) (b). The section does not require proof of prejudice in order to rely on its terms*."

Barrett J. in the minority, held that it was of relevance and included it in his list of principles.

However, it seems that in practice prejudice will still be considered by the court anyway. For example, see *Haughton v. Quinns of Baltinglass Ltd (2019)* where Simons J. (in light of the decisions in *Kenny and Greene*

which had been cited to him) did not regard prejudice to the third party as a decisive factor, he, nonetheless, had regard to it in considering the whole circumstances of the case.

Another case of relevance is *Istvan ACS v KCT Freight Limited (2016)* where it was said that a motion to join could have been issued in the Summer Vacation. Instead, it issued in November. Some allowance has to be made for the slow-down in commerce that occurs as opposing practitioners take their respective summer holidays. But for the entire Summer Vacation to pass and for nothing to be done must be fatal to a claim that the defendant acted *as soon as is reasonably possible*" within the meaning of S.27(1).

Third party proceedings thus need to be progressed, even through the summer vacation.

When looking at the application of the principles, another statement of relevance comes from *Clúid Housing Association v. O'Brien & Ors* (see above):

> *''While the respondent has asserted that it required sight of the replies to particulars in order to brief independent experts to advise it in relation to the third party's liability, it has adduced no evidence to support that assertion. The Court has not been directed to any replies which were crucial or even material to the respondent's decision to issue third party proceedings. The experts retained by it have not been identified nor has the nature or scope of their examination been disclosed. In this regard the Court also notes that the particulars of negligence pleaded against the third party both in the third party notice and the third party statement of claim do not differ materially from those pleaded by the plaintiff in the underlying proceedings, all of which suggests that the respondent was never in fact dependent on the assessment of an independent expert to inform its decision to join the third party/applicant''.*

Third party procedure in the District Court

It is important to note that the TP procedure in the District Court is different.

Very tight time limits!

Order 42A r.3 DCR provides that in order to join a third party to the action, a respondent may, within 10 days of the service upon him or her of the claim notice or notice of application (exclusive of the date of such service), issue and serve a copy of the third party notice on the claimant or the claimant's solicitor.

No requirement for leave from the Court.

Unlike the Circuit Court (O7 r.2 CCR), there is no provision made in relation to the plaintiff joining a third party as a co-defendant.

O43 r.6 DCR allows the court, either on or without the application of any party, to add as a respondent (or claimant) any party who ought to have been joined as a party.

Time may be extended under DCR O39(3)(5).

As far as the TP is concerned, they must also act quickly to apply to have the TPN set aside.

The SC in *Boland v Dublin City Council (2002"* held that just as a defendant must act as soon as "reasonably possible" in applying to join a third party so must a third party act as soon as "reasonably possible" in seeking to set it aside.

Note also, that care must be taken to ensure that the TP is not estopped from applying to set aside the TP notice.

> "*Had the applicant filed a (TP) defence before bringing this application, different considerations would apply. In such circumstances a Court might well hold that having opted to defend the proceedings the third party could not then resile from that position by seeking to set them aside. Further the delay involved in taking such a step could also mean that the application had not been brought as soon as " reasonably possible "* (*Cluid Housing*)

Other Grounds to Set Aside (apart from delay)

A third party can apply to set aside a TPN on other grounds. Examples include *Hassett v South Eastern Health Board* (2006) where an application was made to set aside third party notices that had been issued and served out of the jurisdiction on the basis that the Irish courts did not have jurisdiction to hear the third party claims. The application was unsuccessful with Finnegan P holding that the Irish courts had jurisdiction under Article 6(2) of Council Regulation (EC) No. 44/2001.

Other examples are cited in the speaker's notes.

Separate proceedings for contribution

A party can issue separate proceedings under S.27(1)(b)

To elect for separate proceedings risks the claim for contribution being refused under the court's discretion. As most TP claims are brought by way of a TPN, there are fewer reported cases on this issue but the leading case on discretion is *ECI European Chemical Industries Ltd v. McBauchemie Muller GmbH (2006).*

In exercising its discretion to reject the independent action, in circumstances where the TPN was either not served, or served but subsequently set aside, the court must consider whether there was a good reason why the statutory requirement of serving the third party notice as soon as was reasonably possible was not complied with. If there was no good reason for the failure to comply, then, in most cases, irrespective of any question of prejudice, the independent action should be rejected. The onus of proof in this regard is on the claimant. There may be exceptional cases in which, as a matter of justice, the action should not be rejected on that count alone.

In considering whether a TPN was served as soon as was reasonably possible, the surrounding circumstances may be taken into account.

While the issue of reasonableness may, as here, be res judicata as it relates to the delay in serving the TPN, the court may, in assessing whether there was a good reason for failing to comply with the statute, address the issue of reasonableness in relation to other non-temporal issues.

The bar is therefore set very high.

There are very few reported decisions on discretion under S.27(1)(b) but most cases since *ECI* will still consider prejudice anyway:

> "Nonetheless I think it is appropriate to note that the defendants herein are prejudiced by the delay ipso facto in involving them in this dispute by reason of the ten years that has elapsed to date." - *Andrews Construction Limited v Lowry Piling Limited (2010).*

It is more difficult to avoid discretion where the TPN set aside for delay. In those cases where a third- party notice had actually issued, only to be set aside subsequently, any matter already decided on the application to set aside the TPN must be treated as res judicata. Where the TPN had been set aside because it had not been served as soon as reasonably possible, then this finding will inform the exercise of the court's discretion to allow a claim for contribution in separate proceedings. The Supreme Court suggested that in most such cases, irrespective of any question of prejudice, the separate proceedings claiming contribution should be rejected.

On this analysis, it is only in those cases where the TPN had been set aside for reasons other than delay that there is a likelihood of being allowed to pursue a claim for contribution thereafter in separate proceedings. (*Simons J.* in *Ashford Castle Limited & Ors v E.J. Deacy Contractors & Industrial MaintenanceLimited & Ors (2021)).*

More recently, in *Ballymore Residential Ltd v. Roadstone Ltd* (2021), Collins J. has queried whether the approach adopted by the Supreme Court in the *ECI* case might be thought to be an unduly narrow one. He suggested, obiter dicta, that if the defendant to the claim for contribution has not been materially prejudiced by a failure to utilise the third-party procedure, then it might appear difficult to understand why the court's discretion should be exercised against permitting a claim for contribution to be pursued.

However, as it currently stands, on the current state of the authorities, the setting aside of a TPN on the grounds of delay will almost certainly have the consequence that the defendant is precluded thereafter from seeking any contribution from that party as the discretion will be exercised against the Defendant in those proceedings.

Ballymore Residential Ltd v. Roadstone Ltd is an example of separate proceedings being justified.

Ballymore built 145 houses with stone supplied by Roadstone. Pyrite was contained in the stone. A number of homeowners' claims against Ballymore are pending. Shortly after service of plenary summons in the homeowner claims, Ballymore issued plenary proceedings against Roadstone seeking indemnity and damages. Ballymore subsequently joined Roadstone as TP in the homeowner claims. Roadstone applied to strike-out the indemnity proceedings as Ballymore were estopped having served the TP notices.

> Both the High Court and Court of Appeal refused the strike-out application:
>
> *''As regards the three actions in which third party notices have been served by Ballymore, those notices were served long after the Indemnity Proceedings were commenced and it is not clear to me whether and how S.27(1)(b) applies in such circumstances. More generally, it is not at all clear that S.27(1)(b) is to be construed as dictating that the service of a TPN is to be regarded as an irrevocable step which has the effect of imposing an absolute and unavoidable requirement on the party serving such notice to claim contribution by way of the third party procedure … Roadstone's argument requires the Court to construe section 27(1)(b) as operating as an absolute constraint on the jurisdiction of the High Court to manage proceedings before it. Absent clear language to that effect – and I see no such language in S.27(1)(b) – I am unwilling to adopt such a construction of S.27(1)(b) and I am certainly not prepared to do so in the context of a strike-out application*"

The question therefore remains open – although Collins J. expressed very strong reservations about the estoppel point

What if the TP is not a concurrent wrongdoer?

There is an important distinction to be made in cases to which S.27 CLA is applicable. Applications to set aside are determined by reference to the "as soon as reasonably possible" criteria.

In a case where the proposed third party is not a concurrent wrongdoer, the CLA does not apply and the application to join the third party is made under the RSC only. There are very few cases on this issue but see recent decision of *McDonald J. in Morrow v Fields of Trust Limited (2020)*.

In a case where the TP (an insurance broker) applied to set aside a TPN (brought under O16), the court applied the well-established Primor principles (relating to delay) and considered:

(a) whether there had been inordinate delay in taking a relevant step;

(b) whether that delay was excusable or inexcusable;

(c) if the delay was inexcusable, where did the balance of justice lie?

In *Morrow* the plaintiff was working overseas with the defendant charity and in the course of carrying out building works, suffered personal injuries. The PIS was served and verified by affidavit in March 2015. The defendant had 8 weeks to deliver a defence and 28 days thereafter to issue the TPN, which would have been 3rd June, 2015. The defence was delivered in May 2016. The TP motion was issued in 8th December, 2016 – 18 months after the RSC time limit expired.

The proposed TP was the insurance broker who was retained by the defendant to advise in relation to the insurance required for its overseas charity work.

Inordinate delay? Yes, O16 contemplates a TP application made within a short time frame. 24 months is inordinate.

Excusable? The first period of 12 months to make contact with expert for a liability report is inexcusable. Other periods are excused – final period of naming incorrect entity not excused – 1 year 8 months not excused

Balance of Justice? No prejudice identified, some of inexcusable delay was bona fide mistake.

Application to set aside refused.

"*In an appropriate case, delay on its own would be sufficient to persuade a court to set aside a third-party notice*".

This is the correct case to cite in non-S.27 applications.

Conclusions on TP against plenary

The TP limits are strict – The court will look at the entirety of the circumstances – delay by lawyers will not be tolerated.

Solicitors must ensure that file is reviewed immediately and application made with haste – active file management necessary.

Issuing separate proceedings for an indemnity runs the risk of a refusal under the court's discretion.

Collins J. in Ballymore suggests SC applied "unduly narrow" approach in ECI case.

In most personal injuries cases, it is likely that the TP is the more straightforward route and may be harder to justify bringing a separate indemnity claim o/s of the plaintiff's proceedings.

Conversely, there will be cases where an issue is better decided in separate plenary hearing – cases involving multiple claims (such as in Ballymore) – likely to save court time and costs to determine the issues separately'

Ballymore litigation will eventually answer the estoppel point'

Different test to set aside for "non-concurrent wrongdoer" TPs'

Sections 34 and 35 CLA

S12 – 1% Rule.

S.21(2) – Measure of Contribution between wrongdoers – "just and equitable having regard to the degree of that contributor's fault" – Comparative blameworthiness not causal potency – see *Patterson v Murphy (1978).*

S.34 Contributory Negligence – Assessment between P and D but defendants beware of raising improper pleadings and the risk of aggravated damages.

S.35 – Deemed or Statutory Contributory Negligence: Allows for "identification" to reduce D's liability to P. These are most often seen under S.35(1)(h) and (i), which are dealt with in detail in the speaker's notes.

This has seen a significant resurgence in the last five years since *Hickey v McGowan (2017)* in all types of litigation.

S35 General Points

S35 applies to all torts, not just negligence - *Hickey v McGowan.*

S.35 is a "deeming provision" – "shall" – *Hickey v McGowan* – once triggered, no discretion.

It is a procedural defence and must be pleaded – *Kehoe v RTE.*

It applies to all torts, including defamation – *Kehoe v RTE.*

There can be concurrent wrongdoers arising out of different causes of action (i.e., assault and negligence) – *McCarthy v Kavanagh.*

It is only necessary to issue the proceedings to avoid S.35(1)(i).

If the limitation period is still open at the trial of the action and no proceedings were issued, S.35(1)(i) cannot be relied upon - *McCarthy v Kavanagh.*

Regarding S.35(1)(i) O'Donnell J. in *Hickey v McGowan* said:

''I do not necessarily accept that it would be appropriate to permit a party such as the first named defendant in this case, to rely on the failure of the plaintiff to sue other members of a religious order when knowledge as to the identity of such members was something much more clearly within the power and control of the first named defendant rather than the plaintiff''.

This was taken a step further by a decision of Hyland J. which has shown that a Disclosure Order can be sought to identify parties who are concurrent wrongdoers. This is not a Norwich Pharmacal type Order as it is not an application solely for discovery: i.e., existing defendant is also a wrongdoer

Hyland J. specifically noted the comments of O'Donnell J. and the unresolved issue of whether S.35(1) could be relied upon where the defendant(s) had the knowledge of the other wrongdoers. She ordered the 2nd Defendant to disclose the names and address of all of the Brothers during 1979-1984 and current members (*See Kenneth Grace v Paul Hendrick and Edmund Garvey (2021))*.

Contingent pleading

This point arose in *UCC v ESB* – ESB raised a S.35(1)(i) defence at the appeal.

ESB alleged that the advisers engaged by UCC were negligent in designing the building, etc. The HC had found UCC guilty of contributory negligence (i.e., S.35(1)(a)) as the advisers were deemed to be its agent – CoA overturned – SC reinstated.

S.35(1)(a) "*a plaintiff shall be responsible for the acts of a person for whom he is, in the particular circumstances, vicariously liable*".

The claim against the professional advisers was not statute barred at the time of the trial in 2014 but the six-year limit subsequently expired.

> "*Without deciding the merits of the pleading question concerning the possibility of what might be described as a contingent pleading, it does seem to me that it is appropriate to have regard to the fact that the ESB did not put UCC on any form of notice that it might, in the future, rely on s.35(1)(i) should the situation arise that a potential claim against any of the relevant professional advisors became statute barred. While not necessarily decisive, it seems to me that the absence of any notice in that regard is a material factor to be taken into account in assessing the justice of allowing a new argument to be made."*

But … a contingent plea opens the door to that other wrongdoer being joined as a co-defendant and a potential claim for an indemnity – increased costs.

In PI proceedings, P may have benefit of the 1991 Act and date of knowledge provisions.

P will usually join that party – S.78 Courts of Justice Act 1936 generally protects the P in this situation.

A contingent plea should not be made alleging professional negligence in the absence of a liability report.

<u>Defender v HSBC – S.35(1)(h)</u>

The speaker was unable to deal with this case due to time restrictions but the points to be made are set out in his notes.

Practitioners (particularly Plaintiff advisers) must be alert to the potential consequences of settling a claim against one concurrent wrongdoer. This may lead to the other (non settling) concurrent wrongdoer raising a defence under S.17(2) and S.35(1)(h) of the CLA, "identifying" the Plaintiff with the liability of the settling concurrent wrongdoer. Therefore, an assessment should be made of the inter defendant liability to ensure that the S.17(2)/35(1)(h) defence is not a complete defence.

Q&A

The 28-day time limit runs from the date the defence should have been delivered, not the date (if later) that it was delivered.

It was agreed that as the judiciary changes, trends emerge as to how certain issues are being dealt with. The courts appear to be tightening up on the rules relating to the issue and delivery of TP notices. Defendants must be able to explain and justify delay. They must also be active in handling the file and avoid long gaps in activity.

Regarding the point of identifying the plaintiff with any wrongdoer who was not joined as a defendant, could the defendant just conveniently ignore the whole TP procedure and plead S.35 on the basis that it was for the plaintiff to join that other party?

That is an option, as the defendant cannot have it both ways. It cannot join a TP and then complain if the plaintiff does not join the TP as a defendant and is not be able to hit them with identification. (S.35(4)). Where a S.35 type defence is preferred, the Defendant must be satisfied that the intended third party is indeed a concurrent wrongdoer within the meaning of the CLA.