# CIVIL LIABILITY & COURTS ACT 2004: SOME THOUGHTS ON PRACTICALITIES

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## INTRODUCTION

It strikes me that this is an Act in which there is an identifiable objective but which creates no system to achieve that objective. The objectives are to deal with fraudulent and exaggerated claims and to reduce costs. However the means consists of a series of relatively discrete procedural measures – some with little connection to others. It reads like the product of a brainstorming session seeking "good ideas". Accordingly it is difficult to analyse the Act or its likely effect in a systematic way. One is left to consider its individual parts rather than the whole. The result for this paper is, I am afraid, a somewhat disjointed narrative and a fairly arbitrary choice of topics for discussion.

I will consider four topics; court appointed experts; dismissal of fraudulent claims; mediation and, briefly, the exclusion of witnesses from the courtroom. For ease of reference, at the opening of each topic I set out an edited version of the relevant section.

## SECTION 20: EXPERT EVIDENCE

> 20.—(1) In a personal injuries action, the court may appoint such approved persons as it considers appropriate to carry out investigations into, and give expert evidence in relation to, such matters as the court directs.
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> (2) A party in a personal injuries action shall cooperate with a person appointed under this section and shall, in particular, provide the person with—

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> *(a)* (i) any report or other document prepared by the party, or
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> (ii) any report or other document prepared on behalf of the party concerned, for the purposes of or in contemplation of the personal injuries action,
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> and
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> *(b)* any document or information used or referred to for the purpose of preparing the report.
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> (3) The costs incurred in the appointment of, and carrying out of an investigation by, a person appointed under this section shall be paid by such party to the personal injuries action concerned as the court hearing the action shall direct.
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> (4) A party in a personal injuries action shall be entitled to cross-examine a person appointed under this section in relation to any matter that he or she was appointed to investigate and give expert evidence on.
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> (5) The President of the High Court in consultation with the President of the Circuit Court and the President of the District Court shall approve such persons as he or she considers appropriate for the purposes of this section, and a person so approved is in this section referred to as an "approved person".

I should point out that the appointment of court experts is not novel and precedent does not suggest that much use will be made of them. Indeed in the United Kingdom, as early as 1904 Lord McNaughton thought the court inherently had such powers.[1]

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[1] *Colls v. Home And Colonial Stores, Limited* (H.L.(E.)) 1904 AC 179 at 192:

The English R.S.C., Ord. 40,[2] expressly provided for such appointments from 1934; "But by 1937 notes to The Annual Practice were already recording that 'Applications under this rule have been but few in number', an observation which has continued to be made for the ensuing 60 years."[3] The White Book 1997 – the last pre-CPR[4] – recorded[5] that applications under the order "have been very few in number". It must be conceded however that the appointment of experts under the rule required application by a party – whereas Section 20 would seem to permit appointment of the judge's own motion.

Of course in theory, the availability of evidence from an entirely unbiased expert is attractive. However it seems to me that there are significant practical difficulties attendant upon the operation of Section 20. Even on a theoretical and philosophical basis, William Binchy raises serious questions about Section 20.[6]

For example he points out that one implication of the Section is that the integrity and impartiality of experts retained by the parties are not to be trusted and that this undermines one principle underlying the acceptance of expert evidence – namely

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> But I have often wondered why the Court does not more frequently avail itself of the power of calling in a competent adviser to report to the Court upon the question. There are plenty of experienced surveyors accustomed to deal with large properties in London who might be trusted to make a perfectly fair and impartial report, subject, of course, to examination in Court if required. I am not in the least surprised that the plaintiffs in the present case objected to a report from a disinterested surveyor, but in my opinion the Court ought to have obtained such a report for its own guidance.

[2] R.S.C., Ord. 40, r. 1 provided that in a matter "in which any question for an expert witness arises the court may at any time, on the application of any party, appoint an independent expert … to inquire and report upon any question of fact or opinion not involving questions of law or of construction."

[3] *Abbey National Mortgages Plc. v. Key Surveyors Ltd.* (C.A.) 1996 1 W.L.R. 1534 (Bingham M.R).

[4] Civil Procedure Rules 1998, which came into force in England and Wales on 26 April 1999, largely replacing the previous Rules.

[5] §40/1-6/6

[6] Binchy & Craven, *Civil Liability & Courts Act 2004: Implications for Personal Injury Litigation*. (FirstLaw, 2005).

that the expert is to give an unbiased opinion for the assistance of the court rather than a view informed by partisan loyalties.[7]

Barr J. has stated:

> …I have no doubt that the holy grail to which professional witnesses should aspire may be summarised in two words: objectivity and fairness. (…) 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…[8]

The duties and responsibilities of experts were set out by Creswell J. in *National Justice Cia Naviera SA v. Prudential Assurance Co Ltd, The Ikarian Reefer*[9] – I refer to two:

> The duties and responsibilities of expert witnesses in civil cases include the following:
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> 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 litigation …
> 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his

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[7] In the view of His Honour Adrian Head:

> The expert witness should never be a party's advocate but a person who, having understood the parties' relevant allegations, can see whether they correctly define the issues to which the expert's expertise is to be directed, and – pinpointing any discrepancies – can put that expertise impartially at the disposition of the judge to assist in performing the task of rightly deciding an issue before the court.

See "A Judge's Analysis" (1996) 146 *New Law Journal* 6770, p. 1723.

[8] "Expert Evidence – A Few Personal Observations and the Implications of Recent Statutory Development" (1999) 4 (4) *The Bar Review* 185.

[9] [1993] 2 Lloyd's Rep 68.

> expertise … An expert witness in the High Court should never assume the role of advocate.[10]

With respect, Professor Binchy's criticism seems a little unrealistic. Most experts give their evidence objectively. Those who do so are the most valuable to their clients as they allow lawyers to advise realistically and the Court places confidence in their views. However a significant minority are not so objective:

> For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend, if called as witnesses at all, to espouse the cause of those instructing them to a greater or lesser extent, on occasion becoming more partisan than the parties.[11]

I think any personal injuries practitioner will acknowledge that there are doctors whose sympathy for their patients can seem habitually excessive - and there are doctors who seem to do little but examine for insurance companies and who seem fortunate never to see an injured person at all. However sensible practitioners also recognise that the expert who "pushes out the

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[10] [1993] 2 Lloyd's Rep 69. The learned judge also set out the following duties and responsibilities:

> 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.
> 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…
> 6. If, after exchange of reports, an expert witness changes his view on a material matter … such change of view should be communicated … to the other side without delay and when appropriate to the Court.

[11] *Abbey National Mortgages Plc. v. Key Surveyors Ltd.* (C.A.) 1996 1 W.L.R. 1534 (Bingham M.R.).

boat" is often of little use to his client and undermines his own credibility generally.

Indeed some time ago I settled a case with a very experienced solicitor who paid me significantly more than the case was worth. I couldn't figure out why until I remembered the name of the doctor who had examined the plaintiff. While I had not seen his report, I safely inferred that it said there was nothing whatsoever wrong with the plaintiff. All his reports in every case said that. I realised that the solicitor had been misled by his experience into believing that this was just another dismissive report from the insurers' hack and that he should prudently assume that there was in fact something wrong with the plaintiff!

Most experienced judges are well-placed to distil the truth from contradictory evidence – whether or not from experts. That is their job and their expertise. Surely the interposition of a supposedly neutral expert carries with it the risk that his evidence will be given excessive weight and that the judicial function of determining the truth will be usurped to a greater or lesser degree? However I have other difficulties with Section 20.

### *A. Additional costs imposed by Section 20*

Firstly and as I have often noted to my chagrin, in an individual case the medico-legal fees can easily exceed the barrister's fees. We are now faced with the addition of an additional set of medico-legal costs in an action. In large cases these will be easily borne. However in smaller cases the costs of the court-appointed expert and his "investigations" could add significantly to the costs of the action. Why these additional costs have been imposed by the section in circumstances in which the necessity or benefit of a neutral expert has not been established by any research or hard evidence of which I am aware is quite unclear to me.

### *B. Difficulties regarding appointment of experts*

There is a yet more important concern. The experts will be appointed from a panel of "approved persons". If they are to be widely used, given the large number of disciplines (even within medicine) required and given the geographical spread of the Circuit Court, it seems inevitable that large panels of experts will

have to be appointed around the country. Membership of such a panel will be remunerative and perhaps even prestigious. Accordingly what is involved, in essence, is the awarding of potentially lucrative government contracts.

Also, approval will require consideration by the appointing authority of the expertise and integrity of the approved person. While Section 20 gives no guidance as to how these panels of experts should be set up, one must assume that the process will be open and transparent.

The Section makes the President of the High Court the appointing authority and gives him no guidance whatsoever as to the criteria he should apply. One must wonder whether it is appropriate to impose upon the President the task of awarding lucrative government contracts. I have no doubt that any President of the High Court will approach the task with complete integrity but it seems to me to be invidious that the President should be placed in that position.

The matter becomes more difficult when one considers the geographical spread of the Circuit Court. The President of the High Court is to consult with the President of the Circuit Court. In order to set up panels around the country local knowledge will be required – in particular, knowledge as to the skills, abilities and integrity of potential appointees in the particular context of litigation. It therefore seems likely that for practical reasons the President of the Circuit Court will in turn consult local judges. The result, it seems to me, will be a cadre of professional witnesses seen as having the imprimatur of the local judge or judges – or at very least the imprimatur of the Presidents of the High and Circuit Courts.

Take doctors for example. Will members of that cadre remain entitled to examine plaintiffs on behalf of insurers in cases in which they are not the appointed court expert? If not, many of those interested in medico-legal work are unlikely to go on the panel. If they are entitled to examine for insurers, and given that a premise of the section as identified by Professor Binchy, is that experts' integrity cannot be trusted, is not the integrity of the panel members seen to be compromised?

On the other hand, what is to happen in the event that a doctor who is a member of the panel is called on to testify on

behalf of a plaintiff who happens to be his patient? If that doctor's membership of the panel has been procured in part on the advice of the judge before whom the case is to be tried, is the plaintiff not seen as having an unfair advantage over the insurance company whose doctor is not a member of the panel?

### *C. Remuneration of court appointed experts*

There is, perhaps, an even more pressing practical difficulty with the proposal of court appointed experts. That is the question who is to pay their fee? Many experts will not be interested in acting as a court appointed expert unless their fees are guaranteed. My experience of doctors is that very many are unwilling to take commercial risk as to medico-legal costs. I am not suggesting that they should – I am merely stating what I perceive to be a fact.

The section provides that the expert's costs should be paid by such party to the action as the court hearing the action shall direct. One would imagine that these costs will ordinarily follow the event. I frankly have considerable doubts that many doctors will be willing to take the commercial risk of expecting fees from dismissed and impecunious plaintiffs against whom their costs have been awarded.

It is probably too paranoid to imagine that court appointed experts, with this prospect in mind, might subliminally favour the plaintiff in the knowledge that only the defendant is likely to actually pay his fee!

One way out of the difficulty would be to have the expert's fees guaranteed by the insurer – or to have the judge award the costs against the defendant with an order over against the plaintiff. However, it seems to me that such a proposition – effectively the fees being guaranteed by the insurer – undermines the integrity of the court appointed expert such that he becomes, in the end, just another insurer's doctor.

Then there is the question – how will the judgment for costs in favour of the expert be enforced? The Act says nothing on the issue. Let us assume that the successful insurer seeks to enforce its own costs. Firstly does it have any right to include the court appointed expert's costs in the bill? Secondly and in so far as the insurer makes only partial recovery, is it not reasonable to expect that the court appointed expert may be last in the insurer's list of

priorities when it comes to dividing inadequate spoils? Alternatively, the court system itself could enforce the judgment but, again, no mechanism is provided and, frankly, one must doubt the vigour with which such enforcement might be pursued.

The obvious answer is that the Courts Service should pay the court expert – presumably with the Courts Service having recourse to the unsuccessful party. But the Act does not so provide.

### *D. Investigation by the expert*

Finally there is the matter of the "investigation" by the expert. The parties are bound to give him "any report *or other document* prepared by the party, or prepared on (his) behalf … for the purposes of or in contemplation of the personal injuries action". There seems to be no recognition of legal professional or litigation privilege in this investigation. For example, what is the position in respect of information in expert reports disclosable under O.39 Ch VI RSC where they are withdrawn from disclosure?[12] Even more alarmingly, the section would seem to require disclosure to the court expert of privileged documents such as attendances on non-expert witnesses which would never come within the disclosure rules O.39 Ch VI RSC.

Further, there is no guidance as to what use a court expert might make of such privileged documents or withdrawn reports. Can he testify as to their content – and, if not, can he really be expected to ignore that content when giving his opinion?

All in all and for reasons including those adverted to by William Binchy, it seems to me that Section 20 is ill thought-out and has left many very practical questions unanswered.

## SECTION 26: FRAUDULENT ACTIONS.

> 26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—

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[12] See Order 39 Rule 46(6) and e.g. *Kincaid v. Aer Lingus Teoranta*, unreported, Supreme Court, 9 May 2003.

> *(a)* is false or misleading, in any material respect, and
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> *(b)* he or she knows to be false or misleading,
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> the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

Section 26 (2) provides likewise in respect of a false or misleading verifying affidavit sworn under section 14.

My experience in personal injuries actions suggests that the real problem here is not so much the outright fraudulent claim as the fundamentally valid but exaggerated claim. It is the gilders of lilies who are most common. The problem historically was that there was little or no disincentive to exaggerate. If the plaintiff was found out he would nonetheless be awarded the true value of his case.

The first thing to be said about section 26 is that its premise is that where the court finds that a plaintiff gave deliberately false or misleading evidence the court shall dismiss the action. That is the default position. It is only where the court expresses reasons why such dismissal would cause injustice that the action is not dismissed. The Section provides no other or lesser penalty.

It seems to me that this is a particularly blunt instrument. The question of exaggerated claims was dealt with in a relatively recent line of cases – *Vesey v. Bus Éireann*[13], *Shelly-Morris v. Bus Átha Cliath*[14] and *O'Connor v. Bus Átha Cliath*.[15] In those cases it was held that the objectively exaggerating but subjectively truthful plaintiff should not be penalised. In other words, if the plaintiff exaggerated but not deliberately, no sanction would be imposed. However the exaggerating claimant whose exaggeration undermines his credibility in respect of his evidence generally may be dismissed. The judge is not obliged to try to separate the wheat from the chaff of his evidence. However the court also acknowledges that such a plaintiff's credibility may be independently established to some greater or lesser degree by

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[13] [2001] 4 IR 192 (S.C.).
[14] [2003] 1 IR 232 (S.C.).
[15] [2003] 4 IR 459 (S.C.).

other evidence. For example the exaggerating limper may have had an objectively discernable fracture of his leg. Under this line of authority that plaintiff still gets damages – though presumably less than he hoped for!

I hope – and indeed anticipate – that the courts will be reluctant to dismiss outright even a deliberately exaggerated claim which is, nonetheless, fundamentally valid. Yet Section 20 provides no lesser penalty than dismissal. I suggest that the result will be that the section will be relatively rarely applied and over time it will have a diminishing effect on plaintiffs' attitudes to their cases.

It seems to me that the solution is a fairly simple one. I am unclear why it wasn't included in the Act – perhaps it was politically more flamboyant to announce that exaggerating plaintiffs would be dismissed entirely. It seems to me that a perfectly acceptable solution would be to allow judges to apply a penalty in damages in cases of exaggeration.

This is a proposition summarily rejected by Hardiman, J. in *Vesey*.[16] The precise argument by analogy made for it by the defendant was rejected for a flaw in the analogy. However it is unclear that the basis of rejection was any wider. It may be simply that the proposition lacked the authority of precedent. It doesn't seem to have been rejected on the basis that it lacked intrinsic merit. It does not seem to me that there is any impediment to statutory introduction of such a power.

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[16] [2001] 4 IR 192 at 201 (S.C.):

> "I have considered counsel for the defendant's submission to the effect that the damages to which the court considers the plaintiff is entitled should be reduced or extinguished as a mark of the court's disapproval of the sustained dishonesty which characterised the plaintiff's prosecution of his claim. I am not satisfied that there is a direct analogy with an award of exemplary damages to mark the court's disapproval of the conduct of a defendant. Such exemplary damages are a graft upon the plaintiff's entitlement to compensatory damages and an award of damages of the latter sort is a condition of the award of exemplary damages. Even if, contrary to the view I have expressed, there is an inherent power to reduce damages in circumstances such as the present, it would not be appropriate to exercise it without warning in the circumstances of the present case."

It could operate something like this. Assume the court expressly finds that the plaintiff has asserted a claim which, if true, would be worth €100,000. The court then "strips out" the deliberate exaggeration to find the true value of the case as worth say €75,000. However the court could go on to apply a penalty of, say, €25,000 to express its disapproval of the exaggeration. The result is an award of €50,000. Thus the plaintiff is substantially penalised but not denied an award which is justly due. Such a power avoids the "nuclear option" of dismissing a deserving plaintiff entirely where he has, even deliberately, gilded the lily. It has the advantage of flexibility and proportionality[17] and, thus, I believe, would be far more likely to be applied by judges in practice.

Of course it might take some time for a "tariff" for exaggeration to become established. It might be suggested that comparing exaggeration to a sum of money is logically repellent in that it compares "apples and oranges". However the courts are well used to such decisions. Valuing injuries in monetary terms is itself an exercise in the comparison of apples and oranges. Also the courts regularly apply to liability issues percentage distributions of blame. This is more often an exercise in subjective views of blameworthiness than it is an application of discernable logic.

However I appreciate that this argument is more a suggestion of law reform than it is an attempt to address the terms of the Act as it stands. From that latter perspective I simply suggest that the bluntness of the instrument provided by Section 26 – that of dismissal of the action entirely – is such that it will be relatively rarely applied in practice. Courts will be more likely to find subjective than deliberate exaggeration by a plaintiff and apply a *de facto* reduction in damages by awarding him the bottom of the applicable scale of damages.

## SECTIONS 15 & 16: MEDIATION CONFERENCES

[17] It is beyond the scope of this paper to consider whether outright dismissal of an exaggerating plaintiff might be impugned at Constitutional or Human Rights law as disproportionate.

15.—(1) Upon the *request of any party* to a personal injuries action, the court may—

*(a)* at any time before the trial of such action, and

*(b)* if it considers that the holding of a meeting pursuant to a direction under this subsection would assist in reaching a settlement in the action,

*direct* that the parties to the action *meet to discuss* and *attempt to settle* the action, and a meeting held pursuant to a direction under this subsection is in this Act referred to as a "mediation conference".[18]

(4) There shall be a chairperson of a mediation conference who shall—

*(a)* be a person appointed by agreement of all the parties to the personal injuries action concerned,

*(b)* where no such agreement is reached—

(i) be a person appointed by the court, and

(ii) (I) be a practising barrister or practising solicitor of not less than 5 years standing, or

(II) a person nominated by a body prescribed,[19] for the purpose of this section, by order of the Minister.

(6) The costs incurred in the holding and conducting of a mediation conference shall be paid by such party to the personal injuries action concerned as the court hearing the action shall direct.

16.—(1) [A chairperson] of a mediation conference

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[18] Emphasis added.

[19] S.I. No. 168 of 2005 - Civil Liability and Courts Act 2004 (Bodies Prescribed under Section 15) Order 2005

SCHEDULE

Friary Law

Mediation Forum - Ireland

Mediators Institute Ireland

The Bar Council

The Chartered Institute of Arbitrators Irish Branch

The Law Society of Ireland

> shall … submit to the court … a report, which shall set out—
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> *(a)* where the mediation conference did not take place, a statement of the reasons as to why it did not take place, or
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> *(b)* where the mediation conference did take place—
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> (i) a statement as to whether or not a settlement has been reached in the personal injuries action concerned, and
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> (ii) where a settlement has been entered into, a statement of the terms of the settlement signed by the parties thereto.
>
> (2) A copy of a report prepared under *subsection (1)* shall be given to each party to the personal injuries action at the same time as it is submitted to the court under that subsection.
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> (3) At the conclusion of a personal injuries action, the court may—
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> *(a)* after hearing submissions by or on behalf of the parties to the action, and
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> *(b)* if satisfied that a party to the action *failed to comply with a direction* under *section 15(1)*,
>
> make an order directing that party to pay the costs of the action, or such part of the costs of the action as the court directs, incurred after the giving of the direction under section 15(1)."[20]

In effect the section provides for a form of compulsory mediation – this is something close to an oxymoron. Further, as the order is made only on application, one side can seek to force the other to mediation. Val Corbett - in an extensive treatment of the issue - has suggested this will cause "grave difficulties for the

[20] Emphasis added.

mediation process".[21] Indeed one wonders whether judges will think it worthwhile to make orders on resisted applications and whether orders are needed at all if both parties consent to mediation.

The scope of the obligation imposed by an order to mediate is unclear. It is to "meet to discuss and attempt to settle". Is the obligation satisfied merely by meeting or must one go further and "attempt to settle"? If so, what degree of effort is required? As the mediator's report merely states whether the meeting occurred and whether the case settled but, it seems, will not say whether either side "put his back into it", it seems that the Court can determine that "a party to the action failed to comply with a direction" only if that party fails to show up for the meeting. If so, a party may with impunity waste everyone's time by turning up but making no effort to settle.

In the end mediation will only work if both parties are willing to engage realistically. While mediation may well have advantages, one might suggest that if a judicial direction is required mediation may often be pointless.

Meanwhile, further costs will be added to the proceedings – at very least those of the mediator. We have yet to see whether solicitor and counsel will tax – but there seems no reason why they shouldn't. As with the court expert, the Act provides no satisfactory mechanism for assuring the mediator of his fees.

## SECTION 54: EXCLUSION OF CERTAIN WITNESSES, ETC.

> 54.—(1) The court in a personal injuries action may, upon the application of a party to the action, direct that a person (other than another party to the action or an expert witness) who it is intended will be called to give evidence at the trial of the action shall not attend that trial until he or she is called to give evidence.
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> (2) Where a court gives a direction under *subsection (1)*, it may give all such other directions as it considers

[21] "Mediation in Actions for Personal Injury: Is it Good to Talk?", in Binchy & Craven, *Civil Liability & Courts Act 2004: Implications for Personal Injury Litigation* (FirstLaw, 2005) p. 103 *et seq.*

> necessary or expedient to secure that a witness to whom the first-mentioned direction applies does not—
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> *(a)* communicate with other witnesses who it is intended will be called to give evidence at the trial of the action concerned, or
>
> *(b)* receive information such as might influence him or her when giving evidence."

This section is directed at preventing a witness from listening to his predecessors and tailoring his evidence accordingly – and at catching such rascals out. It is the kind of provision which appeals to those who watch Kavanagh QC. The Irish Courts always had the power to exclude witnesses from the court until called – see *O'Ceallaigh v. An Bord Altranais*.[22] I recollect making an application of this kind on one occasion myself with the desired result of demonstrating considerable inconsistencies between the plaintiff and his supporting witness. This section seems to me to be less an innovation than a mere reminder and statutory enactment of an existing power. I am unconvinced that it will be very relevant in practice. There seems no reason to imagine it will be used any more merely because it now takes statutory form.

## CONCLUSION

While the foregoing addresses only a few of many practical issues raised by the Act it suggests that the Act has not been sufficiently thought through in practical terms and, in particular, provides a remedy to deal with exaggerating plaintiffs which will in many

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[22] Supreme Court, unreported, 11 December 1998:

> "Further, I would leave open the entitlement of the inquiry to have witnesses excluded in certain circumstances - just as courts do … in England the practise relating to the exclusion of witnesses from a court applies to an extent which is not current in this jurisdiction but this power to exclude persons from a court in certain given circumstances is undoubtedly a jurisdiction that courts possess."

See also Deale, *Circuit Court Practice & Procedure in the Republic of Ireland* (2nd ed. Fitzbaggot Publications, 1989) §10.51.

cases be blunt to the point of injustice and for that reason may be little used in practice.