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THE
GENERAL COUNCIL
OF THE BAR OF IRELAND

Director: Jerry Carroll

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Ms Breda Power
Assistant Secretary
Department of Jobs, Enterprise and Innovation
Earlsfort Centre
Lower Hatch Street
Dublin 2

31st July 2014

**Re: Bar Council Submission – Public Consultation on the operation and implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007**

Dear Ms Power,

I now attach the Bar Council's submission in relation to the Public Consultation on the operation and implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007.

The Bar Council is available if necessary to clarify or provide additional information in relation to this submission.

With kind regards.

PIAB Liaison Unit
05 AUG 2014

Yours sincerely

Jerry Carroll
Director


# PUBLIC CONSULTATION ON THE OPERATION AND IMPLEMENTATION OF THE PERSONAL INJURIES ASSESSMENT BOARD ACTS, 2003 AND 2007

## BAR COUNCIL SUBMISSION

**31ST JULY 2014**

**SUBMISSIONS IS RESPECT OF THE OPERATION OF THE PERSONAL INJURIES ASSESSMENT ACTS 2003-2007**

Introduction

1. The Personal Injuries Assessment Board, which is 10 years old this year, was born into some considerable controversy. A 2002 report[1] had advised that the legal profession was to blame for the increasing cost of insurance premiums. It found that the average cost of defending litigation amounted to 42% of the cost of a claim. Costs of litigation were presented as a crippling cost to Irish enterprise, which undermined competitiveness[2] . The legal profession, in some quarters, were presented as contributing to a culture of "ambulance chasing" and as facilitators of unmeritorious claims. In an attempt to address these perceived problems the government introduced a new personal injuries regime, which included the Personal Injuries Assessment Board Act (hereafter the "PIAB Act") and the Civil Liability and Courts Act 2004. The Civil Liability and Courts Act 2004 introduced a number of procedural changes, including reducing the period of time in which a claim could be made from 3 years to 2; required the early notification of defendants; specified the information to be included in a claim and introduced a mechanism to dismiss fraudulent claims.

2. The PIAB Act set up the Personal Injuries Assessment Board. Its function is to assess all motor, public liability and employer related

[1] Department of Enterprise, Trade and Innovation, The Final Report of the Motor Insurance Advisory Board (2002)
[2] Brennan, "Compensation Culture costs Irish Business £600m a year - SFA" The Irish Times, 31/1/2003

personal injures claims. No personal injuries claims may be initiated in this jurisdiction without a PIAB authorisation.

3. The Department of Jobs, Enterprise and Innovation has now called for submissions to examine how the legislation is operating in practice, and to identify whether there are areas in relation to the scope, powers or operation of the Act which might require change.

PIAB Mechanism

4. In order to make a claim in a personal injuries matter the claimant is obliged to file with PIAB an application, along with copies of all correspondence, a medical report and proof of any special damages claimed with PIAB. A fee of €45 must also be submitted. PIAB will notify the defendant of the claim, and seek consent to assessment. If the defendant has not replied within 3 months or consents to appraisal the Board will proceed to assess the value of the plaintiff's claim. The current cost of assessment to the defendant is €600. If the defendant refuses to consent PIAB will grant permission for litigation to issue through the courts.

5. PIAB determines the level of damages "*on the same basis and by reference to the same principles governing the measure of damages in the law of tort*"[3]. However, in any assessment the award is determined on the basis of full liability of the defendant. For example, no account is taken of any contributory negligence on the part of the plaintiff. The Board makes its determination on the basis of documentary evidence, as s. 21 of the Personal Injuries

[3] S. 10 Personal Injuries Assessment Board Act 2003

Assessment Act precludes PIAB from conducting a hearing. PIAB can, and often does, employ outside experts, particularly doctors to assist it in making an assessment. Any evaluation of the amount of compensation to be paid in respect of an injury is guided by the Book of Quantum.

6. Once an assessment is made PIAB will notify both claimant and defendant. The claimant has 28 days to accept the award, and if he/she fails to do so it is deemed a rejection. If a claimant rejects an award it is deemed to act as a tender[4] and holds very serious costs implications for the claimant[5]. The defendant has 21 days to accept the award and if he/she fails to reply is deemed to have rejected it. No costs implications follow from rejection of an award by a defendant. If either party rejects or are deemed to have rejected an award then an authorisation will issue to allow them to proceed to court. If both parties accept, or are deemed to have accepted an award then an order to pay will issue and this order has the same effect as a court judgment.

Case Profiles

7. Between 2009 - 2012 PIAB has received, on average, 27,386 cases per year. Looking at the same time frame, and also taking an average, 9,248 awards were made by PIAB per year. This indicates that only in approximately 33% of cases is any award made by PIAB; approximately 66% of cases are not assessed at all and consequently proceed straight to a litigation process.

[4] If the plaintiff upon the hearing of an action by a court fails to be awarded more than awarded by PIAB they will be responsible for the costs of the action. (see paras 29 - 32)
[5] Personal Injuries Assessment Board Act 2007, s3 (a)

8. It should also be noted that even fewer awards are accepted by both parties. In the time frame 2009 - 2012 an average of 5,606 awards per year were accepted. This represents 60% of awards, and only 20% of applications made to PIAB. Therefore it can be seen that, in fact, PIAB only successfully concludes 1/5 of personal injuries litigation.

| Year | Apps Rec'd | Awards Made | Awards Accepted |
|---|---|---|---|
| 2009 | 25919 | 8643 | 5387 |
| 2010 | 26964 | 8380 | 5038 |
| 2011 | 27599 | 9833 | 5875 |
| 2012 | 28962 | 10136 | 6124 |

9. In 2011 the Central Bank of Ireland[6] conducted a themed inspection into the processing of personal injuries claims. 18 insurers provided information to the Bank relating to its settlement of claims between 1/4/2010 - 30/6/2010 and an analysis revealed that: -

   a. A total of 6,672 claims were settled in the relevant period.
   b. Of these 39% were settled without reference to PIAB;
   c. 9% were settled prior to assessment by PIAB;
   d. 15% were assessed by PIAB and the assessments were accepted;
   e. 7% were settled after rejection of the award but prior to the instigation of litigation;
   f. 22% were settled after the instigation of litigation;

[6] Central Bank Themed Inspection Report 11th October 2011

g. 6% were settled on the steps of court;

h. 2% settled after the court award.

10. This Central Bank inspection illustrates that the role of the PIAB in the successful settlement of personal injuries claims is quite low. There is also the question of whether PIAB has actually removed claims that would otherwise have been litigated from the system. Indeed, Dr Jonathon Ilan notes in his 2009 paper "Four Years of Personal Injuries Board: Assessing Its Impact" that previous to the introduction of PIAB "*most claims would have been settled between claimant and respondent*".

*"There is clear indication that PIAB has "bureaucratised" the settlement process, In other words, a significant proportion of those cases which would have previously settled without full litigation, are now resolved through PIAB awards (and an even greater number settle prior to the issue of an award). Thus PIAB does not so much reduce the number of cases finally litigated, but creates an alternative mechanism for the resolution of those cases which would not have travelled the full distance to litigation."*

11. A further examination of the figures provided by the Personal Injuries Assessment Board reveals that a very high percentage of its awards are under €38,000[7]. The table below illustrates this.

[7] The jurisdiction of the Circuit Court prior to Jan 2014.

| Year | Awards Made | Awards<€38,000 | % |
|---|---|---|---|
| 2009 | 8643 | 7672 | 88.76% |
| 2010 | 8380 | 7619 | 90.91% |
| 2011 | 9833 | 8962 | 91.14% |
| 2012 | 10136 | 9232 | 91.08% |

12. In respect of awards made in this category they tend to be far simpler to assess, and generally speaking, do not include complex or ongoing injuries or ongoing loss e.g. future loss of earnings. As the assessment of these types of awards tends to be easier, for both PIAB employee and lawyer alike, it adds further credibility to Dr Ilan's views that these cases would have settled in any event, even without the participation of PIAB.

13. It should be noted that for the cases that are not resolved by the PIAB process the claims procedure adds to the delays that may be experienced by litigants. In 2012 the average time in the making of an assessment was 7.2 months. The maximum statutory period allowable under the Personal Injuries Assessment Board Act is 9 months.

Psychological Injury

14. Section 54 of the Personal Injuries Assessment Board Act 2003 insists that the PIAB's assessment of medical evidence is guided by the Book of Quantum. Furthermore, the courts are obliged to have

reference to the Book in the assessment of damages, however it is not bound by it and may have regard to other matters[8].

15. Anecdotal evidence suggests that PIAB have recently begun to assess cases in which psychological injury has been claimed. Heretofore, no such assessments were made. It is understood that the reason for this is because the Book of Quantum did not account for this type of injury. The basis for these assessments of psychological injury is not known.

16. It is respectfully submitted that the above-mentioned difficulties with the assessment of quantum generates two concerns. Firstly, there is a lack of transparency in respect in which awards are being made. This gives rise to concerns by all parties as to the basis upon which they are being assessed. Secondly, there is a lack of consistency in awards, particularly in regard to psychological injury.

Medical Negligence Cases

17. Medical negligence claims are exempt from submission to the Personal Injuries Assessment Board for assessment. Section 3(d) of the PIAB Act, 2003 specifically excludes claims *"arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person."*

[8] s. 22 PIAB Act

18. There are a number of compelling reasons for the continued exclusion of medical negligence actions from PIAB, which are discussed briefly.

19. PIAB is designed to address cases where liability is admitted and the only matter at issue between the parties is the quantum of damages. Such a straightforward analysis is very rarely the sole exercise required in resolving medical negligence litigation. Unlike the bulk of personal injuries proceedings, an injured person must establish two propositions: (i) the medical care received was below a reasonable standard and (ii) the treatment provided specifically caused the injury, as opposed to the underlying medical condition. In particular, proving the latter causative link often raises very complex medical and legal issues. Even where breach of duty is admitted, it is often the case that there are issues as to whether the injury complained of is attributable to the breach of duty as opposed to being attributable to the underlying medical condition being treated. Equally, a live issue in dispute may be whether the long-term outcome for the plaintiff was materially affected by any breach of duty. These difficult questions necessitate detailed expert evidence, frequently from a number of experts of different specialisations.

20. The existing mechanism whereby a plaintiff in a medical negligence action must secure supportive expert evidence before instituting and/or progressing a claim acts as an effective filtering mechanism. There are numerous examples of medical incidents that are not indicative of any negligence or breach of duty on the part of a clinician. It seems inevitable that many more instances of adverse

medical outcomes would be referred to PIAB than presently become the subject of legal proceedings if the onus is no longer on a claimant but rather on PIAB to conduct initial investigations.

21. At present, PIAB does not assess damages in cases where there are ongoing injuries. Very commonly, claimants in medical negligence actions have not fully recovered from their adverse medical outcomes. Further, claims of psychological *sequelae* arising from traumatic medical events are frequent. In circumstances where PIAB does not assess damages in such instances in personal injuries litigation, this supports the position that the remit of the 2003 Act should not be extended to include medical negligence actions.

22. Finally, even taking the very minimal number of medical negligence cases where liability and causation are admitted, the quantification of special damages is in itself a complicated task. By way of example, in a catastrophic birth injury claim the following experts are required to provide reports to accurately estimate past and future special damages: nursing care consultants, vocational experts, experts in assistive technology, rehabilitation experts, actuaries as well as individual specialist surgeons and physicians on condition and prognosis. The process of obtaining this evidence in order to quantify past and future damages for plaintiffs in medical negligence actions could not be truncated without creating a real risk that such claimants are under (or over) compensated for their injuries.

23. It appears inevitable that were medical negligence actions included in the scope of PIAB, the number of claims submitted for assessment would far exceed those that become the subject of litigation. This is because the cost, and it is a considerable cost, of obtaining the multiple types of expert evidence required would be shouldered by PIAB, thereby manifestly increasing the costs incurred by it. In order to improve the management of medical negligence actions in this jurisdiction, mechanisms other than the extension of the remit of PIAB should first be considered, such as a more formal system of case management, the introduction of periodic payment legislation or the implementation of pre-action protocols as in the United Kingdom.

Misidentification of Defendants

24. There is a substantial danger that a personal litigant going through the injuries board process may miss, or identify incorrectly, a defendant. PIAB can only do a certain amount in terms of their searches by or on behalf of personal litigants, and assisting personal litigants can present the board with issues in relation to a conflict of interest where they could trespass into advising personal litigants.

25. The personal litigant's ability, means and individual resources should not determine the nature and extent of the searches they can do on their own to ascertain the correct identity of all parties who should be involved. There is, of course, a complexity in identifying the correct defendant in a tort action, where a personal litigant may not be aware of a party who owed him or her a duty of care, either pursuant to statute or otherwise.

26. The PIAB claim form is supposed to be of such a nature, that personal litigants filling it out on their own behalf, without any legal experience or advice, are not at a disadvantage in so doing. In April 2014, during the Limerick Personal Injury Sessions, Mr. Justice Henry Abbott of the High Court, on the application of the Motor Insurers Bureau of Ireland (hereafter the MIBI), dismissed a case on the basis that the MIBI had not been listed as a defendant to the application before PIAB, but, rather, had been included under that part of the application that covers any other party that may have responsibility.

27. PIAB had deemed the MIBI a valid respondent to the application, and had duly issued an authorisation. The successful application made by the MIBI at the outset of the case was, that they had not been listed as a valid respondent, and, therefore, PIAB had not been entitled to make an assessment against the MIBI in the first instance and, consequently the authorisation was not valid. This highlights the injustice that can be caused and the draconian effect of a technical argument where a claimant fails to identify the correct respondents when the matter is before PIAB.

28. This difficulty is that the identification of the correct respondents is intrinsically linked to the issues that can arise by virtue of the Statute of Limitations Act 1957 (as amended). Personal litigants are, therefore, faced with the greatest prejudice of all if they fail to identify the correct defendant at the outset of their claim. In these circumstances a meritorious plaintiff may find that their claim is

barred as they have not instigated it within the required two year time period.

29. In order to remedy this injustice it is suggested that the role of solicitors in advising clients through the PIAB process be expanded. In this way claims can be promptly brought against proper defendants in a timely manner.

PIAB Tenders

30. The Personal Injuries Assessment Board (Amendment) Act 2007 inserted a new section 51(a) into the principal Act. which places a punitive sanction on costs against a claimant in the following circumstances.

31. Where a plaintiff has made a statement in writing that he or she does not accept an assessment of the relevant claim or is deemed not to have accepted that assessment, and a respondent does accept the assessment or is deemed to have accepted the assessment, if a plaintiff then brings proceedings to court and receives a lesser sum from the court then the plaintiff (1) does not receive an award of costs and (2) he or she may have to pay all or a portion of the defendant's costs.

32. There is a punitive effect on a plaintiff's failure to beat an assessment should the assessment be accepted by a defendant and the plaintiff is awarded less than the assessment by the courts. The language of the provision mandates the court to make no order as to costs in favour of the plaintiff and leaves the court with a limited

discretion of whether to award in whole or in part the defendant's costs against the plaintiff. This is a purposive piece of legislation. There is no reciprocal punitive effect on a defendant and this would appear to be manifestly unfair. The section also detrimentally affects an individual claimant's access to the courts. This provision runs contrary to what was promised by the legislature in advance of the enactment of the principal Act in 2003. The promise made not to impose sanctions on claimants in such circumstances was vital to all parties concerned in welcoming the Act in 2003, and in this respect the 2007 Amendment Act was enacted without sufficient public consultation.

33. This section affects all litigants, but, personal litigants are in a particularly vulnerable position, in that they have no independent advisor. Should they wish to access the courts at a later date, as is their constitutional right, but fail to beat an award made by a court, then they suffer the consequence, at best, of paying for their own costs out of the award or, at worse, are ordered to pay the defendant's costs, either in whole or in part. There is additional pressure on personal litigants, as they may not be sure if the assessment is adequate compensation for the injury sustained, and, they may miss the deadline to accept the award and be deemed to have refused same incurring all the consequential risk on costs should they want to litigate their claim. This runs entirely contrary to the "personal litigant friendly" ethos which was supposed to underpin PIAB upon it's inception.

34. PIAB's main purpose at the time of its enactment was to act as an assessor of the claim for personal injuries. There are procedures and

a plethora of options open to defendants to compromise the proceedings once the matter is before a court, or to force a plaintiff to consider any offer in relation to compensation such as a tender, a lodgment or the serving of a Section 17 letter (see below). While defendants have such an armory at their disposal, a plaintiff does not. In these circumstances, it again becomes imperative that a plaintiff has the benefit of legal advice and provision should be made for plaintiff's costs to be paid. As matters stand plaintiffs must pay for their own legal advice, effectively subsidising insurance costs.

S. 17 of the Civil Liability and Courts Act 2004

35. Section 17 requires both plaintiffs and defendants to serve a notice in writing of an offer of terms of settlement of a case within a prescribed period (being the period commencing on the date on which the Personal Injuries Summons was served and ending on the expiration of fourteen days after the Notice of Trial). Section 17(6) provides

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

36. Section 17 initially caused confusion amongst practitioners as it failed to specify which party should make an offer first. While the

decision of Kearns P. in *O'Donnell v. McEntee*[9] [2010] 3 I.R. 501 has brought some much needed clarity to this area, it is submitted that the section would benefit from review as it is perceived to be both unclear in its requirements and unnecessary given the existence of the lodgement/tender procedures and the provisions of the 2007 Act (see paras 29-31). Furthermore, given that a Section 17 Notice requires a plaintiff value his/her case in a vacuum (i.e. without knowing the strength of the defendants case/medical evidence), when a judge hearing the case will evaluate quantum based on the totality of the evidence adduced by both sides.

S. 26 of the Civil Liability and Courts Act 2004

37. Section 26 of the Civil Liability and Courts Act 2004 was introduced to deal with a perceived difficulty with fraudulent claims. It states: -

*"(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 -*

*(a) is false or misleading, in any material respect, and*

*(b) he or she knows to be false of misleading*

[9] Either party can make an offer at the moment of their choosing.

*the court shall dismiss the plaintiff's action unless, for reasons the court shall state in its decision, the dismissal would result in injustice being done.*

*(2) The court in a personal injuries action, shall, if satisfied that the person has sworn an affidavit under section 14[10] that-*

*(a) is false or misleading, in any material respect, and*

*(b) he or she knows to be false of misleading when swearing the affidavit*

*dismiss the plaintiff's action unless, for reasons the court shall state in its decision, the dismissal would result in injustice being done. "*

38. The necessity for this section is questionable, the courts already having jurisdiction to dismiss fraudulent or exaggerated actions[11]. It is notable for the fact that it applies to plaintiffs only. It fails to provide any sanction for defendants who raise false or misleading defences to actions, thereby jeopardising the rightful claim by an innocent, injured plaintiff.

39. Furthermore it fails to sanction defendants who unfairly or unsuccessfully invoke the section, thereby allowing these applications to be made with near-impunity. This is viewed as

[10] A verifying affidavit
[11] Shelly-Morris v Dublin Bus (2003) 1 IR 232

having a "chilling effect", particularly in the context of plaintiffs who are entirely honest, but are poor historians.

40. In *Smith v The Health Service Executive*[12], the plaintiff had been injured in the course of her employment with the defendant. Having obtained extensive[13] discovery of the plaintiff's medical records the defendant proceeded to cross-examine the plaintiff on "minor and transient" previous complaints, with no relevance to the injury then complained of (which said injury was not contested), alleging that negligible inaccuracies with the replies to particulars offered by the plaintiff were sufficient to ground an application under s. 26. O'Neill J described the application as a "*forensic assault on the plaintiff to set up an application under s. 26 of the Act of 2004, [and] can only be seen as wholly unjustified and an opportunist attempt to evade their liability to the plaintiff*". The Judge also stated: -

*" I would like to add that this section is there to deter and disallow fraudulent claims. It should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishap that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of an award of compensation to which they are rightly entitled."*

[12] O'Neill J 26th July 2013; [2013] IEHC 360
[13] *Ibid.* and possibly inappropriate - page 31

41. Prior to the introduction of s.26 applications, an allegation of fraud had to be specifically pleaded in a defence, thereby putting the plaintiff on notice that this extremely serious allegation was being made against them. Furthermore, it is a breach of the code of conduct of the Bar of Ireland for a barrister to plead fraud without express instructions[14]. In cases where fraud was pleaded but not made out the defendant could be penalised by an award of aggravated damages against them. The combined effect of these rules was to ensure that unfounded allegations of fraud could not be made. In short, the rules as previously existed ensured that there could be no "concoction" of fraud. The introduction of s. 26 has changed this. It is respectfully suggested that s. 26 be amended to deal with the issues of fraudulent defences and the failure of defendants to use the mechanism with *"prudent discernment"*[15]. In particular amendments should be made to ensure that if a s. 26 application is not made out that an award of aggravated damages shall be made against the defendant.

Conclusion

42. The Bar Council respectfully submits that this is an ideal opportunity to review a number of provisions in the current personal injuries regime. The suggestions made in respect of the tender provisions, s. 26 applications, medical negligence cases and section 17 offers would enhance the credibility of the personal injuries process, and allow for the development of a fairer and more equitable system, for plaintiff and defendant parties alike. It is

[14] Rule 5.16 Code of Conduct for the Bar of Ireland
[15] Page 30, supra

hoped that there will be an ongoing dialogue between the Bar Council and the Minister so there can be a meaningful exchange of views on this important area of the administration of justice.

The Bar Council

Dated this 31st July 2014