Subject: Public consultation on the operation and implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007

Dear Sirs

Public consultation on the operation and implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007

BLM is the UK and Ireland's leading risk and insurance law business, with over 170 partners and 700 lawyers and technical experts totally dedicated to risk and insurance matters. In Ireland, we act for a range of insurers and commercial organisations in dealing with personal injury claims. We therefore have a keen interest in the present consultation. Our response is confined to high-level points set out below.

We have significant experience of operating under pre-action rules and protocols in England and Wales. We believe there is a very good case for seeking to introduce similar approaches in Ireland. We would be very pleased to meet with interested officials to elaborate on any of the matters below and look forward to hearing from you.

Yours faithfully,

Rhona Mc Grath

BLM Response

Independent medical evidence is critical to fair assessment of general damages in respect of any personal injury claim. Section 11 of the Personal Injuries Assessment Board Act 2003 provides for assessment to be made by the Injuries Board (IB) in accordance with regulations made under section 46. These regulations provide that an application under section 11 of the Act shall be made in writing or by electronic mail, contain such information as may from time to time be specified by the IB, and be accompanied by, inter alia, a report prepared by a medical practitioner who treated the claimant in respect of the personal injuries the subject of the relevant claim. In addition, the IB can order a claimant to undergo a medical examination to facilitate its assessment of the claim.

It is self-evident that the quality of the available medical evidence directly affects the IB's ability to assess the claim accurately and, equally and to the same extent, affects the respondent's decision whether to accept or reject the Board's assessment. To facilitate the resolution of claims in a manner that is speedy and fair to all parties, we suggest that full disclosure of all medical evidence prior to assessment of the claim should be the norm. Early disclosure should promote the exchange of relevant information and should help to resolve points of difference between the parties. This in turn should prevent lengthy and expensive litigation in all but the most contentious cases.

Where cases are not resolved following assessment, we would favour the introduction of predictable and general

pre-action procedures aimed at promoting resolution before litigation. As with any such system, effective and balanced sanctions which discourage non-compliance will prove an essential addition to ensure effective implementation. We would add that predictable and consistent judicial enforcement of the sanctions is equally important.

Existing pre-action protocols of the type adopted in England & Wales may offer a set of principles that could be adapted and adopted in an Irish setting. We would point out that there is current activity in Scotland which will change presently voluntary pre-action procedures into compulsory ones.

In our view, the pre-trial disclosure process in operation in England & Wales - a relevant example being the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents1 - may provide a starting model which, with adaptation, could well improve how Irish personal injury claims are resolved. Under this Protocol, a version of which has been in force since April 2010, the claimant must disclose medical records which their expert considers relevant (see in particular section 7.4(2)). Crucially, subsequent medical reports must be justified, for example:

- where the expert recommends further time before providing a final prognosis
- where the claimant is receiving continuing treatment.
- where the claimant has not recovered as expected in the original prognosis2.

[Near-identical provisions for employers' liability claims and public liability claims are set out in a separate Pre-Action Protocol3.]

These types of protocols - which are incorporated into formal rules of court so as to have force and weight - put all stakeholders in a position where they should be confident in a clear understanding of the extent of the plaintiff's injuries and their impact. In our view, pre-action provisions along these lines could help to remove doubt on the part of those responding to IB assessments as to the extent of injuries in question.

From the defendant's perspective, difficulties have been seen to arise in circumstances where the plaintiff rejects an IB assessment but later seeks to rely on additional medical reports in support of his or her claim. This can lead to the valuation of the claims increasing significantly after assessment. We accept that this may well be justified where, for example, the plaintiff's injuries have deteriorated unexpectedly since the Board's medical examination. However, the routine use of subsequent medical reports as a tactic in litigation to seek to inflate damages beyond the level of the assessment has a number of deleterious effects. First, it adds to costs and delay. Second, it prevents the respondent from securing any meaningful costs protection under section 51A of the Act.

Related to the above point is that the Board's Book of Quantum contains fairly broad categories of injuries and associated guideline figures. We understand that the categories and figures have not been reviewed since it was published in June 2004. The net result is that respondents find it difficult either to have confidence that they will secure costs protection under section 51A of the Act (should they accept the assessment) or to pitch tenders accurately (should they not). We would therefore suggest that consideration should be given to reviewing and updating the Book of Quantum. For example, a greater number of injury categories and subcategories could provide far greater predictability to users.

In conclusion, we submit that the introduction in Ireland of appropriate and controlled pre-action procedures which mandate full disclosure of medical evidence at or before IB assessment should allow all parties understand cases fully

and in so doing should reduce costs through promoting early resolution and avoiding unnecessary litigation.

1. http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-claims-in-road-traffic-accidents-31-july-2013 The protocol applies to injury claims arising from road traffic accidents and valued at up to £25,000.

2. Medical evidence and records are dealt with at sections 7.1 – 7.8 of this protocol.

3. http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims

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