Gníomhaireacht Éileamh an Stáit
State Claims Agency

30th July, 2014.

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

Our Ref: CB/COC **Your Ref:**
Please quote our reference number on all correspondence

Dear Ms Power,

Re: Public Consultation on the Operation and Implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007

I acknowledge receipt of your letter dated 19th June last, with enclosure, requesting the Agency's comments, observations or submissions on the operation and implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007.

On behalf of the Agency, I wish to acknowledge the significant contribution that the Personal Injuries Assessment Board (InjuriesBoard.ie) has made in relation to the reduction of costs in personal injury cases.

The Agency's comments, observations and submissions in relation to the Acts are attached and I hope and trust that they prove helpful in relation to the overall review of the Acts.

Yours sincerely,

Ciarán Breen,
Director.

Att.

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State Claims Agency – Submissions Concerning the Public Consultation on the Operation and Implementation of the Personal Injuries Assessment Board Acts, 2003 and 2007

Book of Quantum

The State Claims Agency (SCA) suggests that the Book of Quantum should be re-examined and revised, as appropriate.

Scope of Claims

The SCA wishes to propose that InjuriesBoard.ie should include needle-stick injuries in the classes of claims that it assesses and also claims involving minor/moderate psychological sequelae. Currently, such applications are not assessed by InjuriesBoard.ie pursuant to Section 17 of the Personal Injuries Assessment Board Act, 2003.

Non-attendance of Claimants for Medical Examinations

1. While it is not mandatory for a claimant to attend medical examinations, InjuriesBoard.ie, in the event of non-attendance, will assess the claimant's claim, based on the information which it has. This information may, in certain cases, be out of date and frustrates the assessment process.

2. The SCA recommends that InjuriesBoard.ie should review its procedures in relation to recalcitrant claimants who refuse to attend independent medical appointments arranged on their behalf by the Board.

3. In certain cases, InjuriesBoard.ie refused to furnish copies of claimants' medical reports on the grounds that such reports contain information of a personal and sensitive nature not related to the accident. It would be useful if the Board would clarify its policy approach to this issue as many medical reports, obtained by SCA and insurers, contain information of this nature.

4. In the event of non-attendance by claimants, the SCA and other defendants are required to pay non-attendance fees. These fees, where they arise outside of the InjuriesBoard.ie process, are not paid by defendants and it appears to the SCA that it is anomalous to expect that the SCA should pay such non-attendance fees.

Incomplete Applications

The SCA believes that InjuriesBoard.ie should not treat as complete those applications which contain only partially complete information. It is the SCA's view that claimants should be required to produce documents such as a medical report, statement and/or certificate of loss of earnings etc. In many instances, these are not furnished by claimants.

Authorisations

The SCA believes that InjuriesBoard.ie should review its procedures in relation to the issuing of authorisations in order to avoid unnecessary and protracted delays.

Legal Costs

The SCA believes that InjuriesBoard.ie should set out unequivocally those circumstances in which it will make an award of legal costs to a claimant and provide definitive guidance in relation to the circumstances in which such costs are awarded.

Inspection Facilities

Section 12 of the PIAB Act, 2003 facilitates an application for a restraining order requiring evidence to be preserved. Orders, under the section, have been made in circumstances where there is no immediate threat of destruction of evidence. The SCA advocates that, in the absence of any immediate threat, such applications should be brought by way of Notice of Motion together with a Grounding Affidavit.

Clinical Negligence Claims

The Agency has no objection in principle to the assessment by Injuries Board of clinical negligence cases where liability/causation is not in dispute. However, it has always been the view of this Agency that there are special features associated with clinical negligence claims which indicates that they are best managed within the existing tort system.

Under the current arrangements, the tort system poses formidable obstacles to patients successfully pursuing clinical negligence claims. A plaintiff is required to establish that the hospital or doctor owed him a duty of care, that the duty of care was breached and that the breach of the duty of care caused the injury alleged in the action. This is a relatively high burden of proof for a plaintiff to establish. To succeed, she/he will need a legal team with experience of a complex area of law. She/he will also need to produce expert witnesses who will satisfy a court that, on the balance of probability, the treatment she/he received caused the alleged injury. The fact that, typically, over 40% of clinical claims are eventually abandoned illustrates the stringency of the tort system in filtering out cases where there is no evidence of negligence on the part of the defendants.

In the absence of the sifting function currently exercised by plaintiffs' solicitors as regards issues of liability and causation, there is a substantial risk that a greater proportion of adverse clinical incidents would find their way into InjuriesBoard.ie. Persons who suffered an adverse clinical incident, who might not otherwise make a claim, would be attracted to a fast track and low cost claims assessment system. Currently, only 0.5% of reported adverse clinical incidents are litigated annually. We would be concerned that a scheme such as that operated by the Injuries Board would almost certainly lead to many more patients receiving compensation than at present.

This might be achieved with lower transaction costs but the overall cost to the State, insurers and the medical defence organisations would be higher. We say this because the defendants would be obliged to investigate much higher numbers of claims, submitted to InjuriesBoard.ie, than heretofore. This will involve the allocation of additional resources by hospitals in relation to the securing, copying and transmission of medical records to the SCA and medical defence organisations. In addition to the risk of an increase in the number of claims, we have additional concerns which are outlined under a number of headings below.

Duplication

As things stand, the State Claims Agency (SCA) receives about 500 new clinical negligence claims annually. This represents a large proportion (estimated to be 85% - 90%) of the clinical negligence litigation that is initiated in Ireland each year. Much of the (relatively scarce) clinical claims expertise, to include the valuation of damages, necessary to deal with this specialist area of litigation already resides in the SCA. This specialist team, comprising seventeen lawyers, has been carefully recruited by the SCA over a number of years.

It should also be pointed out that the State is now the principal underwriter of clinical risks in Ireland and, therefore, the argument used to justify the establishment of the PIAB – namely, the need to reduce cost impositions on private market insurers and thereby reduce insurance premiums – does not apply in this case. In fact, based on its experience and in line with its statutory brief to minimise the litigation costs associated with State claims, the SCA has sought to drive a wide-ranging set of initiatives designed to reduce substantially the delivery costs associated with clinical negligence litigation.

The payment of damages in catastrophic injury cases such as Cerebral Palsy (CP) cases, has traditionally been paid on a lump sum basis. Most of these cases average settlements, in respect of general and special damages, in the order of €6 million. There are also considerable legal costs attaching to the settlement of these cases. In an effort to control these disproportionate legal costs and to make savings on the annual CIS claims budget, the SCA has advocated a radical shift to the use of Periodic Payment Orders (PPOs) as an alternative method of awarding compensation in catastrophic injury cases. Thus, the SCA has persuaded the courts, who have agreed in a line of recent CP cases, to award a contingency lump sum only, which averages €1.75 million, and to suspend for two years, pending the introduction of a statutory PPO scheme, the making of an annual PPO re the cost of future care for the plaintiff.

The Working Group on Medical Negligence and Periodic Payments, on which the SCA is represented, has produced its report on pre-action protocols. The sole purpose of these protocols is to ensure that cases are settled, in the main, prior to litigation, thereby avoiding the higher costs associated with the litigation process.

The underlying incidence of clinical negligence claims has seen a relatively modest increase in recent years; it is the case that, with the almost complete withdrawal of medical defence organisations from the market, an increasing proportion of new claims, in addition to legacy claims, are being handled by the State through the Clinical Indemnity Scheme (CIS). The fact that the CIS had to be established in the first place illustrates well the special circumstances associated with clinical negligence.

Book of Quantum

An additional difficulty relates to the Book of Quantum which would be used by the Injuries Board to assess the level of damages associated with various types of injury. The descriptions of injuries and the associated damages tariffs in the current Book relate principally to routine injuries (e.g. fractures, dislocations, soft tissue injuries, etc.) and are not, in the main, transferable to clinical negligence actions. Compilation of a Book of Quantum based on the more complicated injuries typically arising in clinical actions (and their corresponding damages tariffs) would be time-consuming and would draw on specialist

knowledge on these matters available, almost exclusively at this stage, in the SCA. Any updating of data would also have to be provided by the SCA. Such a process might strike an objective observer as circuitous and wasteful.

Nature and size of claim

The greater the amount of money at stake, the less likely that a defendant – in this case, the State - would be willing to concede liability solely on the basis of a claim's 'nuisance' value. The majority of clinical negligence cases in addition to general injuries' pleas, include pleas of psychological sequelae and we understand that InjuriesBoard.ie do not currently assess cases involving psychological overlay.

Liability and causation issues

Another key distinction relates to the difficult area of liability and causation in clinical negligence litigation. The Injuries Board currently deals only with cases in which liability is not at issue, a factor which simplifies the litigation process significantly. The question of liability in clinical negligence cases is inherently more problematic than in straightforward road traffic or employer liability cases. In a significant majority of clinical negligence cases, liability is either unclear at the early stages or remains in contention throughout. In the case of birth-damaged infants, for instance, it can be very difficult to establish whether the injury arose as a result of lapses in the care and treatment provided to the mother and/or the infant or whether the injury arose as a result of an event beyond the control of the hospital or medical staff involved i.e. an intrauterine event prior to birth.

Liability and causation issues in clinical negligence cases are very different from those pertaining in routine personal injury actions. In clinical negligence actions, the defendant health enterprise and, vicariously, the practitioner, may be liable but the plaintiff's case may fail on causation grounds. This arises, for example, in relation to issues of consent to treatment in clinical negligence cases. Thus, an admission of liability based on lack of consent or improper consent does not necessarily entail that the case against the defendant health enterprise/practitioner is one for assessment only.

We would argue that the complexities involved in establishing liability - and the associated delays – render clinical claims unsuitable for the fast-track assessment process applied by the Injuries Board to motor vehicle and similar claims. In the evaluation of the latter claims, it is often clear from an early stage that there is no dispute as to liability.

Procedural issues

We would also be concerned about delays arising from the submission of clinical negligence claims to the Injuries Board. A clinical negligence claim usually begins with the submission by a patient of an FOI request for his/her medical records. The patient's solicitor then commissions expert reports in relation to liability, causation and special damages. These, presumably, would be submitted directly to the Injuries Board if clinical negligence claims were to come within its remit. The Board would then issue a Formal Notice to the defendant – which, in the majority of cases, would be the SCA – seeking its consent to an assessment of the claim. The SCA would have a period of 90 days in which to decide whether or not to consent to an assessment by the Board. Such a period is adequate in the case of most low-value claims where liability issues and medical prognoses are often relatively straightforward.

These claims represent a minority, less than 5%, of the SCA's clinical negligence portfolio and are invariably settled at a very early stage, at least possible cost.

However, for a number of reasons, a deadline of ninety days would be insufficient for the vast majority of clinical negligence claims. The investigation of such claims can be very time-consuming, not least because of delays in obtaining medical records and witness statements. Even after all the relevant records and statements have become available, there can be further delays associated with obtaining expert reports.

Usually, in such cases, the expert opinion is specific to the nature of the treatment or diagnosis allegedly responsible for the injury and, as a consequence, there are only a limited number of specialists sufficiently qualified to provide it. Secondly, an expert opinion in a clinical negligence action must, of necessity, veer into the medico-legal domain – it must deal with the question of whether the defendant enterprise or practitioner is guilty of such failure as no enterprise/practitioner of equal status would have been guilty of, if acting with ordinary care. These various complications mean that it would be difficult for the SCA to be in a position to respond within the ninety day deadline for consent to an Injuries Board assessment. In the absence of a definitive determination of the liability and causation issues, the SCA would have no alternative but to refuse consent to assessment.

As matters stand, after a respondent consents to an Injuries Board assessment, there is a further delay of over seven months involved in producing that assessment. Because of the greater complexity of clinical cases, it is possible that the Injuries Board would struggle to meet its statutory obligation to produce its assessment within nine months. Even if the SCA, as respondent, accepted the assessment, it could still be rejected by the claimant. The net effect of the whole Injuries Board process could, therefore, delay ultimate resolution of the claim by up to a year or more. In the latter regard, it is worth noting that the SCA has reduced the average life-time of a clinical claim, from initiation to resolution, from 5/6 years pre CIS, to 3 years and 4 months post CIS.

As indicated earlier, less than 5% of clinical negligence cases involve a straightforward admission of liability. Thus, if all clinical negligence cases were to be first submitted to InjuriesBoard.ie, the delay caused by this process would be disproportionate when compared to the small number of cases which would be suitable for assessment by the Board.

Finally, Section 8 of the NTMA (Amendment) Act, 2000 stipulates that the SCA shall manage delegated claims (and counter claims) in such manner as to ensure that the liability of the State authorities in relation to such claims are contained at the lowest achievable level. This statutory mandate forms the guiding principle which underpins the Agency's approach to the management of claims. Necessarily, this involves, where appropriate, the resolution of claims at the earliest possible stage where liability is not in issue.

Hopefully, the foregoing is helpful in the context of the general discussion concerning the role of the Injuries Board.ie and the assessment of clinical negligence cases.