

Response to Civil Justice Review – Personal Injuries Assessment Board

The Personal Injuries Assessment Board (PIAB) welcomes the opportunity to provide a response to the Civil Justice Review which is currently being undertaken. We welcome any opportunity to engage with the Review Group as appropriate in the future. Below is our submission.

Why was PIAB set up? - To reduce litigation costs in uncontested cases

The Personal Injuries Assessment Board (PIAB) was established as an independent statutory body in 2004 as a key element of the then Government's Insurance Reform Programme. In the years preceding the establishment of PIAB insurance premiums had escalated to a point that businesses and consumers were being very seriously impacted by the rates being charged. One of the contributing factors to the high premiums was the high cost of personal injury claims particularly the administration/processing costs involved which added nearly 50% to the cost of the compensation amounts.

PIAB was set up to remove the need to go into a litigation system in uncontested cases and thereby remove many of the litigation costs associated with such claims. At the time between 30,000 and 35,000 cases entered litigation annually and the majority of the cases involved legal costs (both solicitors and barristers costs), as well as the costs of multiple medical reports, yet less than 10% actually ended up in court. PIAB offers a low cost and speedy administrative system which effectively operates as an alternate dispute resolution system.

What has PIAB achieved so far?

To date PIAB has made over 120,000 awards of compensation with a value exceeding €2.5 billion. Our delivery costs are under 7% and on average cases are assessed 7 months after the consent of the respondent/insurer is received. Approximately 60% of claimants and 90% of respondents accept our awards. Awards are made in line with the Book of Quantum which is a set of guidelines produced by PIAB based on historical award values, and which the courts are also required to have regard to under the terms of the Civil Liability & Courts Act 2004. Accordingly, in respect of the cases we have assessed and which have been accepted by both parties PIAB has provided a speedy, fair, transparent and low cost alternative for personal injury claimants.

Personal Injury Outcomes

To have a real sense of the overall personal injury claims environment one needs to look at the various settlement channels for resolving claims. When an individual has an accident they usually contact the person they hold responsible for it in the first instance (motorist, insurer, employer, business etc.). Due to a lack of published data an unknown number of claims are

settled directly between the parties at the outset without the claimant applying to PIAB. A person cannot initiate legal proceedings without first obtaining an authorisation from PIAB. PIAB receives over 30,000 claims per annum but only assesses about 12,000 cases. The rest are either not pursued or released by PIAB (an authorisation is issued to the claimant which permits them to commence proceedings if they so wish). An authorisation typically issues in 3 instances:

1. The respondent/insurer does not consent to PIAB assessing the claim – possibly because they have, or intend to settle the claim directly, or alternatively they wish to challenge the case
2. PIAB release the case as it is of a particular category which is not currently appropriate to PIAB's paper based administrative process e.g. wholly psychological cases or cases involving the interaction of injuries associated with a number of separate accidents
3. Cases where a PIAB award is rejected by either party

In instances where PIAB releases a case it has no further role in the matter. The case may not be pursued further, it may end up settling between the parties, it may result in proceedings being issued and the case either being subsequently settled, it may be resolved on the steps of the court, or resolved by way of a court hearing. While there is a lack of published data available in relation to the cases that PIAB does not directly resolve one assumes that where proceedings are involved the administration costs involved are much higher than through the PIAB process.

Emerging problems

It is desirable that in line with the long title of the PIAB Act 2003 that as many non-contentious cases as possible are resolved through PIAB rather than through litigation. A number of factors are however hampering the success of the PIAB model:

In recent years the **acceptance rate of PIAB** awards has lowered resulting in more cases going to litigation. While the factors are not known with certainty a number of possibilities are put forward:

1. The ability to “game” the system by prolonging a case or not co-operating with the PIAB system

There have been instances where some claimants have not co-operated with the PIAB process i.e. not attended medical examinations or provided details of losses (Special Damages). This results in PIAB assessing the claim without full information. As a consequence the award is likely to be rejected. Subsequently the claimant initiates proceedings and effectively presents a case in court with information that could have been presented to PIAB and receives a higher award, along with costs. While legislation is in the pipeline to deal with non-cooperation with

the process these legislative measures need to be supported by all parties involved in settling claims, and by the courts in particular. The core issue here is that the PIAB process is deemed to be administrative and what is ascertained in the PIAB process does not automatically carry over to the court notwithstanding that the same information (medical reports, vouching documentation for expenses) is used in both instances.

2. Inconsistency in award levels in the courts

While the Courts and PIAB are both required to have regard to the Book of Quantum, there appears to be little consistency in its use in the Courts. Since the most recent update in October 2016, its usage seems to have increased however it is still referred to as being of “little value” in some cases. Inconsistency in the application of award levels in the Courts leads to speculative rejection of PIAB awards in the hope of securing higher damages. The system is further undermined by the settlement strategy of insurers who will take a commercial decision to settle cases commercially on an individual basis to avoid a case going to court with its attendant costs.

3. The impact of the changes in the Court Jurisdictional limits

We await the outcome of the Cost of Insurance Working Group review of the impact of the changes to the jurisdiction limits of the Courts which were brought in during 2014. These changes appear to have caused or given the impression of causing claims inflation at the lower end of the severity scale of injuries. The impact of this has been a reduction in the acceptance rate of PIAB awards particularly for cases under €20,000.

The overall impact of the above factors is the slow but steady erosion of the positive impact of PIAB with a potential for further future reduction in acceptance rates. The core of the issue appears to be the interaction of the PIAB system with the Courts system and possibly how costs operate within the respective systems. A number of potential solutions have been proffered but all appear to have their limitations.

Potential Solutions

1. PIAB Amendment Bill

This Bill contains measures to deal with non-cooperation with the PIAB process. While these measures will help, other measures that have been examined are constrained because of the way that the legal system in Ireland is constructed and the interface between the PIAB model and the Courts. See below regarding the potential use of the PIAB file in litigation.

2. Faster resolution through fast tracking/Removing incentives to delay the progression of claims

Fast tracking of rejected awards to court is likely to close a loophole of unnecessarily delaying a case with unnecessary additional costs being incurred – issues relating to the Statute of Limitations as well as resource implications for the Courts Service would need to be addressed in this context.

3. Use of PIAB file in litigation rather than starting afresh (de novo)

There appears to be constitutional issues here in that the PIAB process is an administrative rather than judicial process. After a PIAB assessment is rejected the claimant is authorised to commence legal proceedings and has to reconstruct their claim from the start. As similar information is used in both instances further consideration of this issue is merited.

4. Disconnect between the Judiciary setting the levels of General Damages and the State (PIAB) being required to issue guidelines

The optimal solution is that the judiciary draw up the guidelines as in England & Wales and Northern Ireland. However Ireland does not currently have an appropriate body to draw up these guidelines but the Judicial Council may be able to fulfil that role in the future. Progress in this regard was achieved through constructive interaction between the judiciary and PIAB when the last Book of Quantum was issued and PIAB would be very keen to continue these efforts even in advance of the establishment of the Judicial Council. The Court of Appeal has outlined a number of principles in recent judgments as referenced by Barr J in *Jedruch v. Tesco Ireland Ltd* [2018] IEHC 205. Para 74 states: “In reaching an assessment of the appropriate level of general damages in this case, the court has been assisted by the guidelines set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56 and *Shannon v. O’Sullivan* [2016] IECA 93 and in particular to the criteria set down by Irvine J. at paras. 43 and 44 thereof. The court has also had regard to the dicta of the Court of Appeal in *Fogarty v. Cox* [2017] IECA 309. In the light of these judgments, this Court has had to somewhat recalibrate its approach to the assessment of general damages in personal injury cases. “

As a consequence it is unclear how PIAB can produce future versions of the Book of Quantum

Conclusions

In this submission we note that two of the aims of the Civil Justice Review are to:

- Reduce the cost of litigation
- Encourage alternative methods of dispute resolution

Optimising the use of the PIAB model will make significant strides towards achieving these aims and reduce the burden of the courts. PIAB also has a role to act fairly and independently

and not impinge upon the constitutional rights of individuals. PIAB believes that its role is being slowly eroded and there is the potential for further erosion. While PIAB is actively involved with policymakers in terms of measures that the executive can take to improve the situation it requires the support of the courts and judicial system. A full review of how both systems operate and their interconnection will bring greater improvements. Specifically PIAB requests the Review Group to consider the connection between the PIAB system and the Courts system with a view to establishing a smooth, efficient transfer of cases between the systems where such arises e.g. where a PIAB award is rejected and proceedings are commenced. We believe that it is of the utmost importance that there is consistency in the information that is provided to PIAB and to the Courts and that there is a consistent approach taken to the assessment of damages. The Court system should not be used to undermine the workings of the PIAB as intended by the legislature and the incidence of unnecessary costs should be minimised wherever possible.

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