PIAB ONE YEAR ON — A HAPPY ANNIVERSARY?

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INTRODUCTION

The Personal Injuries Assessment Board Act 2003 and the Civil Liability and Courts Act 2004 are probably the most important legislative enactments to affect personal injuries litigation in modern Ireland. Serious questions still linger about PIAB's *raison d'être*, including whether the public interest is served in the procedural overhaul of this area of tort law. Why did the government take such an unbalanced approach towards claimants? And what portion of the alleged cost savings in insurance premiums have been passed on to consumers?

The dual objectives of the Personal Injuries Assessment Board ("PIAB") as stated in its lay person's guide are to reduce legal costs (including expert fees) involved in personal injuries claims and to reduce the amount of time it takes to finalise a compensation claim. Each of these objectives and various problem areas are now briefly examined.

COSTS ARGUMENT

The fact remains that the vast majority of the general public will continue to consult solicitors in relation their personal injuries claims (s.7 of the Personal Injuries Assessment Board Act implicitly recognises this). The Personal Injuries Assessment Board Act does not provide that legal costs will generally be recoverable before PIAB with limited exceptions. For example, s.45 provides that fees or expenses (although legal fees are not specifically mentioned) will be allowed for in the reasonable costs incurred by the next friend or committee in complying with a direction given under s.30(3) of the Act or separate interlocutory proceedings before the courts under s.12(4)(c). Legal firms, like other commercial entities, will inevitably have to increase solicitor/client costs to recoup the additional legal work related to PIAB.

PIAB has only been fully operational since July 2004 and essentially is in its infancy period. The PIAB process is, however, fraught with practical difficulties which cast doubt on the time reduction objective. It is also difficult at this early juncture to say conclusively what potential legal pitfalls are ahead for solicitors who will probably be making most of these applications under their client's authority. Practitioners will need some time to adapt to PIAB's policies and daily practices but the following observations can be offered at this stage.

STATUTE OF LIMITATIONS

The limitation period for personal injuries (including medical negligence claims) arising from negligence or breach of duty has been reduced from three years to two years from the date the cause of action accrued or the date of knowledge (whichever is later) under s.7 of the Civil Liability and Courts Act 2004. The operative date for s.7 was March 31, 2005. It is also essential to note that any interlocutory applications and, in particular, orders restraining the dissipation of assets, the preservation of evidence or other forms of injunctions brought under s.12(5) of the Personal Injuries Assessment Board Act shall not be regarded as the commencement of proceedings in respect of the relevant claim for the purposes of the statute of limitations. It is therefore self-evident that where time is of the essence practitioners should also forward expeditiously their client's application to PIAB. Section 50 of the Personal Injuries Assessment Board Act is also relevant here.

Solicitors already have to run tighter ships with respect to case management in light of the changeover from the previous "culture of delay". Stricter time limits now apply for example in the disclosure of reports and statements (S.I. 391/1998), the prompt delivery of a statement of claim under O.27 of the Rules of the Superior Court (RSC) (as amended under S.I. 63/2004), the establishment of commercial proceedings under O.63A, RSC and now s.9 of the Civil Liability and Courts Act. These matters clearly point to the need for solicitors to carry out a risk management assessment within their firms and to evaluate whether there are adequate resources in place to process the same caseload at this greater rate.

LETTER OF CLAIM — S. 8 OF THE CIVIL LIABILITY AND COURTS ACT

This section provides that where the plaintiff fails without reasonable cause to serve a notice in writing before the expiration of two months from the date of cause of the action, or as soon as practicable thereafter, on the wrongdoer stating the nature of the wrong alleged then the court may draw inferences or make no order or deduct the plaintiff's costs. This could be particularly onerous on the solicitor who receives initial instructions from a client as often occurs two months after the incident when the client finally decides to consult their solicitor after much deliberation. Essentially the solicitor, if he or she agrees to act, is undertaking work in good faith which will be subject to greater court scrutiny. Often the preliminary steps prior to issuing proceedings can prove problematic and become protracted, for example identifying the correct defendant(s), requisitioning company searches, obtaining medical reports, etc.

There is also the additional problem that the Personal Injuries Assessment Board Act and Rules do not provide definite guarantees to claimants in the event that the claimant wishes to join a further respondent party after the application for assessment has been lodged with PIAB. Rule 7(1) grants a discretion to the Board to issue to a claimant an authorisation to bring proceedings in respect of his or her relevant claim against the party or parties initially omitted. These procedures are technical enough for a legal practitioner and are clearly not user-friendly for the lay litigant. All sorts of problems can be envisaged where, for instance, a claimant initially makes a PIAB application on his or her own behalf and then subsequently seeks legal advice. Section 47 of the Personal Injuries Assessment Board Act is also relevant here.

TIME DELAYS

The cumulative effect of the Personal Injuries Assessment Board Act will lead to inefficient and excessively defensive forms of legal practice. For example, take a case where your client initially sustained a serious back injury which later resulted in secondary symptoms such as medically diagnosed depression. The Book of Quantum does not explicitly refer to psychological injuries stating that "[c]ompensation may be payable for injury types other than those that appear in this book". Notwithstanding this, the solicitor must still lodge an application for assessment before PIAB which has the discretion not to arrange for the making of an assessment under s.17 for injuries alleged to consist wholly or in part of psychological damage, the nature or extent of which it would be difficult to determine by the means of assessment to which the assessors are limited to employing under the act. The likely conclusion here is that the client still has to incur this additional expense and forsaken time before PIAB will rubber stamp the requisite authorisation (under s.17(6)) to allow the claimant initiate proceedings before the court.

MEDICAL REPORTS — PRACTICALITIES

The medical report to be submitted by doctors (in the form of a six page template) has not, in my experience, been well received by the medical profession. The cap of €150 to be paid by the respondent towards the fee is further evidence of the obstructive intention of the legislature knowing that this amount is substantially lower than the average fee charged. There is also the stark warning contained in the guidelines for claimant doctors which states, "Please note that under the Civil Liability and Courts Act 2004 it is proposed that all compensation may be lost if the claim is overstated and this legislation will be retrospective when introduced". It is debatable whether this warning is strictly on point with presumably the intention of the legislation (s.26 of the Civil Liability and Courts Act). Section 26 does provide under certain circumstances for the dismissal of a plaintiff's claim and is relevant here where an expert (acting on behalf of a plaintiff) has sworn an affidavit which is false or misleading in a material respect or the expert knows same to be false or misleading. The section, however, does not apply to the medical report and, therefore, the above warning ought to be amended accordingly.

The next difficulty after obtaining the report is that the initial medical report can contain an inconclusive or guarded prognosis statement (through no fault of any party). Most doctors will tell you that exact forecasts are difficult to give, particularly at an early stage of recovery, and a later examination or specialist's report may be required. Section 17i of the Personal Injuries Assessment Board Act does allow discretion to the Board not to arrange for the making of an assessment where a long term prognosis could not be reached within the time limits (generally a nine-month period and a further six-month time extension under s.49). The valuation of a client's claim, however, depends primarily upon one's ability to assess the client's potential damages and the issue of liability. One medical report may simply not be enough and PIAB will probably only allow partial costs for one report. Solicitors need to be careful not to potentially expose themselves by offering advice to clients to consider settlement based on an inconclusive prognosis, particularly in relation to serious and permanent injuries (even if liability is not at issue). The reality also is that solicitors will most likely lodge the application with PIAB promptly, especially in light of the new reduced periods of limitation. Section 24 of PIAB does allow for

further independent medical examination of claimants in certain circumstances which could help to alleviate this time problem to a certain extent, most probably for minor injuries. The time periods however under s.49 are unworkable for clients who have sustained more serious and permanent injuries, particularly where further adverse sequelæ have not yet been ruled out.

CIVIL LIABILITY AND COURTS ACT 2004 — BRIEF OVERVIEW

The preamble of the Civil Liability and Courts Act purports to provide for certain procedural and other changes in actions to recover damages for personal injuries. The writer believes that some Civil Liability and Courts Act sections are more of form than of substance, particularly s.11 (request for further information), s.13 (pleadings generally) and s.19 (evidence)(see also Gilhooly article, *The Parchment*, Dublin Solicitors' Bar Association, Autumn 2004).

There are positive sections within the Act including pre-trial hearings (under s.18) which could provide a useful forum to help effect more economic settlements. Section 18(1) deals with the purpose of determining what matters relating to the action are in dispute. This is a similar procedure as operated by the Chief Industrial Magistrates Court, New South Wales (CIMC) which directs the litigant parties to lodge an agreed statement of facts and legal issues in advance of the hearing and to confirm that they are ready to proceed in order to avoid late adjournment applications. The net effect is that the CIMC case lists have been freed up and the range of contentious matters have been narrowed, thereby reducing the hearing time in court.

The use of a verifying affidavit (under s.14) is already utilised in New South Wales. It has shielded the profession there against allegations of culpability made by clients who have been found themselves to be dishonest or misleading the court. Verifying affidavits are also somewhat similar in nature to the provisions of the Statutory Declarations Act 1938 and in particular s.6, which provides that it is an offence for a person to make a statutory declaration knowing it to be false or misleading in any material respect. Section 14 helps elevate to the statute books the crime of fraud wherein an individual's pleadings contains false representations or pretences.

A DIFFERENT APPROACH

The justification for PIAB is questionable particularly as the estimated cost of establishment of the board is €38 million (see *Law Society Gazette*, November 2002) and the writer's respectful submission that it will prove to be of limited utility. The stated objectives of PIAB could have been achieved by more moderate reform of civil procedure to streamline assessment only cases and by the careful reform of the substantive law of negligence and in particular the statutory based defences. The Civil Liability and Courts Act is sadly oblivious to this point. The Civil Liability Act 1961 provides limited exceptions, for example the apportionment of liability in cases of contributory negligence and *volenti non fit injuria* (voluntary assumption of the risk) under s. 34. The Occupiers Liability Act 1995 also contains relevant statutory defences.

The thrust of the New South Wales Civil Liability Act 2002 does however show this important shift in emphasis. This is based on the rationale that equality of arms between litigant parties helps to ensure a fair contest and control the level of compensation awards, taking into account the principle of *restitutio in integrum* of the plaintiff's position prior to the accident. Some examples of statutory-based defences include qualified protection for persons, including good Samaritans coming to the assistance of a person injured or at risk, volunteers doing community work and self-defence in relation to the trespass to the person.

CONCLUSION

Solicitors need to carefully study the Acts themselves and draw their own conclusions. The writer's opinion is that the establishment of PIAB does not represent an efficient or transparent outsourcing of the rôle of the courts in the administration of justice. It does seem, based on the above reasons, that the intention of the legislature was not solely to confuse personal injury claimants but also to obstruct the legal profession given that there were clearly more balanced alternatives available. Some of these issues have been ventilated in the recent *O'Brien v PIAB* judgment, which included a finding that PIAB had interfered in the solicitor-client relationship and had acted *ultra vires* by corresponding (contrary to the client's wishes) directly with the client. Trends are also beginning to emerge such as the establishment of the Private Residential Tenancies Board formed under the Residential Tenancies Act 2004. Again, this lengthy piece of legislation is not user friendly for the general public. The legislature would do well to remember Calabresi's proverb before further embarking upon this legislative route: "If a legal rule is clear, you don't need a lawyer: all you need is a ruler".

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