



Law Society of Ireland

GUIDELINES FOR SOLICITORS DEALING WITH INJURIES BOARD CLAIMS

INTRODUCTION

When the Personal Injuries Assessment Board (now known as the “Injuries Board”) first came into being in 2004 following the passing of the Personal Injuries Assessment Board Act 2003 (“the 2003 Act”), it appeared to many that solicitors would no longer play a major role in personal injuries claims. This was certainly the basis on which the driving forces behind PIAB operated. Thanks to the efforts of the Law Society and others in the solicitors’ profession, claimants who would otherwise have been left to fend for themselves, have been provided with representation, guidance and expert advice in processing their claims.

Approximately 97% of all claimants use the PIAB, and the Supreme Court decision in *O’Brien-v-Personal Injuries Assessment Board* [2008] IESC 71 (delivered on 19 December 2008), confirms that solicitors may represent their clients in all claims directed to the Injuries Board.

The purpose of this booklet is to provide guidance to solicitors involved in the Injuries Board claims process, particularly those who may not have much experience in the area.

The process is taken step by step from receipt of instructions to award and what to do following the receipt of an award.

WHICH CLAIMS MUST GO TO THE INJURIES BOARD

All personal injury claims, bar a small number of niche areas, must first go to the Injuries Board before proceedings are issued. These niche areas are - cases involving the provision of a medical service, an action under Section 3 of the European Convention on Human Rights, breach of constitutional rights and Garda Compensation claims. Any proceedings issued without an Injuries Board authorisation that do not fall into those four categories are likely to be invalid.

There are other categories of claim that the Injuries Board releases without assessing for Statute of Limitations reasons e.g. claims against the estate of deceased persons, cases involving ships or aircraft and cases involving the Warsaw Convention. However, an application must first be made to the Injuries Board and an authorisation obtained. We will see later that the period within which an applicant must bring a claim, as defined by the Statute of Limitations, is extended by the 2003 Act. It is important to note here that the Statute of Limitations clock does not stop running in any of the above specific cases and proceedings must be issued within a two-year period.

Equally, the Injuries Board also frequently releases wholly psychological claims and assault claims without assessment. Again, however, the claim must first be registered with the Injuries Board which will then decide whether or not to make an assessment. Once more, an authorisation must be issued in those cases before proceedings can be issued.

Finally, for some years there was some doubt as to whether Motor Insurers Bureau of Ireland (MIBI) claims had first to go to the Injuries Board. This matter was clarified by the Supreme Court, which confirmed that they are to be treated in the same manner as all other personal injury claims, bar the aforementioned niche areas, and must be the subject of an application to the Injuries Board. The 2009 MIBI agreement reflects this in its conditions precedent to liability.

TAKING INSTRUCTIONS FROM CLIENTS

It is important when meeting the client on the first occasion to obtain all the following information:-

- (a)** The Claimant's address and date of birth, together with their PPS Number;
- (b)** The correct date and time of the accident. If there is difficulty obtaining the date from the Claimant, then contact either the family G.P., the hospital or wherever they attended, in order to double-check its accuracy;
- (c)** If it is a road traffic accident, the Claimant's own insurance details, the registration number of the vehicle and the name of the investigating Garda, if applicable;
- (d)** It is important to obtain the names of any relevant witnesses and their contact numbers;
- (e)** Try to ascertain exactly the type of medical treatment the Claimant received when they first attended, in particular, details of any x-rays or scans, medication, etc;
- (f)** Try to allocate a considerable amount of time in detailing the Claimant's injuries. Often, Claimants may not be forthcoming, but all injuries should be recorded and included in Form A for the Injuries Board. Considerable difficulty can arise later if the injuries are not documented in the form at the outset. This form can also be used in court at a later date;
- (g)** Details of all previous accidents and injuries (even if not arising out of a compensation claim) should also be taken from the client at this stage. It saves time if an authority can be obtained from the client at the initial instruction stage to communicate with the hospital and/or family G.P. for their records for the five-year period prior to the accident. Frequently a Claimant will not recall every single attendance on the G.P. or hospital in

relation to previous complaints and it may be a genuine memory failure. However, when the claim is passed to the insurance company, earlier accidents show up on their database. It is also important to obtain details of any pre-existing medical conditions at this stage.

- (h) Precise details as to how the accident happened. A straight-forward road traffic accident will not involve much investigation but an industrial accident may create a difficulty for the client to explain how it occurred. Some engineers may be willing to interview the client with a view to carrying out a preliminary report.
- (i) The Respondent's correct name and address must be obtained together with his vehicle registration number and insurance policy number (if this applies).
- (j) If the Respondent is a company, ensure to carry out a Companies Office search in order to establish the correct name and address of the company and its registered office. This can be undertaken very easily on the internet without charge at www.cro.ie.
- (k) If the correct name of the Respondent is not obtained at the outset, it involves returning the original authorisation to the Injuries Board, requesting them to amend it. This may also involve the Injuries Board insisting on re-serving the new Respondent resulting in further time being lost. The case could still become statute barred for failure to carry out the proper research at the outset and amending the title of the proceedings could still be hugely problematic if one goes to court.

MEDICAL REPORTS

The Injuries Board will often accept hospital records in lieu of a medical report but only where the Claimant can show that they cannot afford it or the time for registration of the claim is running out. Whilst many doctors prepare the standard format of medical report, it is advisable to send them the Injuries Board medical report template (Form B) as it renders it easy for the doctor to prepare it and it is also useful in that there is a particular section in it that refers to pre-accident medical history. There is, however, no obligation to use the medical report template and the Injuries Board will accept medical reports in various formats.

The medical report should contain the following:-

- (i) The Claimant's date of birth and occupation;
- (ii) Brief history of the accident including the date;
- (iii) The Claimant's complaints when he attended the G.P.;
- (iv) The G.P.'s clinical findings with regard thereto;
- (v) Opinion on the Claimant's condition and prognosis;

(vi) The G.P.'s recommendations for further referrals or treatment.

While it is desirable to have a report from a treating doctor, making the application to the Injuries Board in good time is of more importance.

Some doctors delay far too long in delivering a report despite many reminders from the solicitor. If that is the case, it may be necessary to obtain a medical report from another source and to inform the doctor that you are obliged to do so to avoid delay. Anything beyond two months may be considered to be unreasonable and in those circumstances the solicitor may wish to consider applying somewhere else if the medical report is not forthcoming. The Medical Council's Guide to Professional Conduct and Ethics for Registered Medical Practitioners, 7th Edition, 2009 at paragraph 57.6 states that doctors *"...must provide reports without unreasonable delay to ensure that no disadvantage accrues to patients."*

As soon as the medical report arrives, it is important to request the client to attend in order to go through the content of it. Compare the details of the Medical Report with the initial instructions and the current symptoms. If there is any conflict between the two, the issue should be clarified at this stage.

Check the date of the accident and if that is correct, go through the description of the injuries and the description of how the accident happened.

If any of the above are incorrect, then it is important to return the report to the doctor, pointing out that the date of the accident is wrong or that the injuries have not been properly described (as per your own instructions) or, alternatively, that the circumstances as to how the accident happened, are incorrect.

Some doctors will advise that they cannot furnish the report at an early stage as they need to ascertain the Claimant's progress. You may inform them that the Injuries Board will carry out their own medical examination and a preliminary medical report is all that is necessary at the commencement of the claim.

REGISTERING THE CLAIM

To register a claim with the Injuries Board, the following documentation must be filed:-

- (i)** The Injuries Board's Form A, correctly completed, signed and dated;
- (ii)** Cheque in favour of the Injuries Board in the sum of €50.00;
- (iii)** Copy medical report;
- (iv)** Authorisation on behalf of the Claimant authorising the Injuries Board to deal with the solicitor directly;

The application must be filed with the Injuries Board by registered post.

If the Statute of Limitations is about to expire in the very near future, the Injuries Board will generally immediately accept a claim submitted by fax, provided Form A is completed and the solicitor provides an undertaking to furnish them with a Medico-legal Report immediately the solicitor receives it. Therefore, it is not fatal if a medical report is not available at the eleventh hour when the claim is about to become statute barred.

Once the claim is deemed to have been received and be complete in accordance with Section 50 of the 2003 Act, then time stops immediately, under the Statute of Limitations. For this reason, it is important not to have any undue delay in obtaining a Medical Report as this prevents the claim being processed.

Following registration, the Injuries Board will notify the Respondent, and the Respondent then has ninety days to consent to the Injuries Board assessing the claim.

If the Respondent fails to cooperate with the Injuries Board and/or does not discharge its fee, it has discretion to assess the claim by default, under Section 14 (b). In most cases, however, the Injuries Board will not assess the claim if the Respondent does not discharge the fee.

It should be remembered, particularly if it is not clear whether liability will be an issue or not in the case, that Section 12 (3) of the PIAB Act, 2003, affords the Claimant's solicitor the right to apply to the County Registrar of the Circuit Court or to the High Court for access facilities for an engineer and to preserve the locus.

This particular section is very useful, as it is of significant assistance to have the engineer's report to hand as the liability issue could be reinstated if the assessment is rejected. It also brings the question of liability to a head, as an insurance

company may then be prepared to indicate in an open letter that “liability is not an issue” either before or after such a motion issuing.

THE STATUTE OF LIMITATIONS

This is unquestionably the most important element of the claim process. It is essential that the claim be properly registered for the purposes of ensuring that the limitation period under the Statute of Limitations stops running.

Section 50 of the 2003 Act states that, in reckoning any period of time for the purposes of any limitation period in relation to any relevant claim specified by the Statute of Limitations Act, 1957 or the Statute of Limitations (Amendment) Act, 1991, ‘the period beginning on the making of an application under section 11 in relation to the claim and ending six months from the date of issue of an authorisation.....shall be disregarded”.

Rule 3(3) of the PIAB Rules 2004 states that the date of

- (a) the receipt by the Injuries Board of an application under section 11 of the 2003 Act for the purposes of section 13 of that Act and
- (b) the making of an application under section 11 of the 2003 Act for the purposes of Section 50 of that Act

shall be the date upon which the application in the form specified in sub-rule (1)(a) containing the information specified in sub-rule (1)(b) is acknowledged in writing as having been received by the Injuries Board.

In other words, the Statute of Limitations will stop running as soon as the Injuries Board acknowledges in writing that the application is received and complete for the purposes of Section 50 of the 2003 Act. This letter should also state the date upon which it is deemed received and complete as this is the date upon which the limitation period stops running and from which it may be necessary to calculate how much time is remaining if the claim is subsequently released. If the letter does not contain this information, then the claim is not properly registered. It is not possible to overstate the importance of receiving this letter. Unless and until it has been received, the claim has not been registered and the limitation period has not stopped running.

It is not sufficient to merely submit the documentation by registered post and then relax, as it is conceivable that an error may have been made or something essential left out. In those circumstances, if it is any way close to the expiration

of the limitation period, be mindful that the error may be discovered after time has run out. This would obviously have dire consequences. Furthermore, it is necessary to ensure that the Injuries Board letter of acknowledgement states clearly the correct name of the Claimant and of all Respondents against whom the claim is made.

Therefore, do not wait until the Statute has expired before insisting upon receiving the letter confirming the claim is received and complete for the purposes of Section 50 of the 2003 Act.

Having been satisfied that the limitation period has stopped running, note that it will remain stopped until six months have elapsed from the date of the authorisation. An authorisation will be issued in the event that the claim is being released and court proceedings can then be issued.

By way of example, if an accident occurs on 1 June 2007, and the Injuries Board confirms that it has received the application and it is complete for the purposes of Section 50 of the 2003 Act on 1 September 2007, then one year and nine months will remain of the limitation period. If it were subsequently released by way of authorisation on 1 September 2008, then the limitation period would start running again on 1 March 2009 and would expire on 30 November 2010.

It is important to note that there appears to be a lacuna in this Section of the Act. It would seem that all personal injury accidents that occur on airlines and are covered by the Warsaw Convention, maritime accidents (in other words, injuries suffered on shipping vessels) and all actions brought against the estate of a deceased person, are not governed by the Statute of Limitations. The latter two categories are covered by the Civil Liability Acts. As the limitation period in respect of such injuries, which is also two years, is governed by separate legislation, it would appear that section 50 of the PIAB Act 2003 does not apply. Therefore, it should be pointed out to the Injuries Board when any such claims are being made, that they are to be released immediately, as otherwise they may become statute barred while in the Injuries Board process.

AUTHORISATIONS UNDER SECTION 17

The Injuries Board, upon receiving an application, has discretion to release cases under Section 17 of the 2003 Act where it is felt that it is not appropriate to assess them. In those circumstances, an authorisation is issued immediately, to allow proceedings to be issued.

While these discretions are fully set out in Section 17 of the 2003 Act, experience to date has seen this discretion applied frequently in certain areas. The most common areas are as follows:

- (a) Where the Respondent does not discharge the assessment fee to the Injuries Board;
- (b) Where the injuries are wholly psychological. For some inexplicable reason, this does not appear to apply where any physical injury is suffered alongside the psychological injury;
- (c) Where there are overlapping injuries between the injury sustained in the accident the subject matter of the claim and some previous or subsequent related injury;
- (d) Where the injuries are likely to require more time to deliver a prognosis from the date of consent than would allow the Injuries Board to make an accurate assessment. This frequently occurs following examination by the Injuries Board's doctor, but before assessment;
- (e) Where the amount of special damages, usually loss of earnings, cannot be ascertained prior to the projected assessment date. Again, this usually tends to occur well into the assessment process.

INDEPENDENT MEDICAL EXAMINATION

Under Section 24 of the 2003 Act, the Injuries Board has the authority to order an examination of the Claimant by one of its panel of medical attendants. The legislation suggests that such examination should be primarily used where a dispute arises between Claimant and Respondent as to the extent of the injuries sustained. It became clear from an early stage that such examinations would be arranged in nearly all claims where consent was received.

While it is not mandatory for the Claimant to attend, in the event of non-attendance, the Injuries Board will assess the Claimant's claim based on the information that it has. This may be scant or out of date and the Injuries Board may then not be able to make a fair award.

It is therefore advised that solicitors strongly encourage the Claimant to attend any such medical appointments. Clearly, a solicitor cannot be responsible for a Claimant's non-attendance and, particularly in view of the fact that Claimants are informed directly by the Injuries Board of such appointments, the ultimate responsibility for attendance rests with the Claimant.

Finally, although all expenses for attendance at medical examinations can be claimed in court proceedings, they cannot be claimed in the Injuries Board process prior to the award. However, any expenses sustained by the Claimant for attending an Injuries Board examination prior to award may be included as a head of claim under Section 44 of the 2003 Act, as an expense reasonably and necessarily incurred. It will then be a matter for the assessors to decide whether to award such an expense.

SPECIAL DAMAGES

A note of whatever expenses have been incurred by the Claimant may be submitted with the Form A. Additional items of expense may be submitted and it is important to note that there will be an opportunity later to update the Particulars of Special Damages. Do not delay in submitting Form A simply because it is not possible to quantify the special damages; submit the form as soon as it is possible to do so, and deal with the special damages at a later date.

Essentially, all expenses incurred by the Claimant, save for legal expenses, can be included under the heading of Special Damages. Such expenses may include:-

- (a)** Treatment fees
- (b)** Medical Consultations
- (c)** Damage e.g. loss of car
- (d)** Car Hire
- (e)** Medication
- (f)** Loss of Earnings
- (g)** Physiotherapy
- (h)** Vehicle towing
- (i)** Vehicle storage
- (j)** Travel
- (k)** Damage to clothing or property

This list is not definitive. Essentially, any expense incurred by the Claimant as a result of the injury or loss sustained can be included under this heading.

It is quite likely that when submitting Form A, the solicitor may not have vouchers for all expenses, or indeed, may not even be able to quantify them. However, it should be possible to vouch all losses/expenses prior to a determination by the Injuries Board. With regard to loss of earnings, it will be necessary to have the employer furnish a certificate as to the loss of earnings, which can include overtime, bonuses and any other benefits that the Claimant lost. If self

employed, an Accountant's Certificate as to the loss of earnings and/or benefits, will need to be submitted.

If difficulties arise regarding an employer certifying any loss, or if difficulties arise in obtaining any vouchers in respect of special damages, then the Injuries Board can, under Section 26 of the Act, seek this information from the relevant party, which will include any documentation necessary to verify the alleged loss by the Claimant. There is a statutory duty upon that party to comply with any such request from the Injuries Board, and failure to comply can result in prosecution.

If special damages are continuing into the future, then the Injuries Board may decide to reject the claim and may issue a Certificate under Section 17 of the 2003 Act, rejecting the claim, as the Injuries Board is unable to quantify losses into the future.

The Society recommends that solicitors do not give undertakings to third parties on behalf of clients. This is particularly relevant whilst the claim is within the Injuries Board process. It is important to remember that the Respondent may reject the claim and liability may become an issue in the case, such that the solicitor may not be in a position to comply with the undertaking. It may also happen that the Respondent's insurance company may send the settlement cheque directly to the Claimant, rendering discharge of the undertaking beyond the solicitor's control.

If a solicitor has already given an undertaking in respect of fees/costs, either to a hospital or a private medical insurance company, then these fees/costs must be included in the claim. Solicitors should also qualify such undertakings to state that the undertaking is absolutely conditional upon the solicitor receiving the settlement cheque and it being capable of being negotiated by the solicitor and also to the solicitor receiving from the client the appropriate authority to deduct such expenses from the settlement cheque.

AWARDS

The Injuries Board, under Section 49 of the 2003 Act, has nine months from the date the consent is received to make an award. This period may be extended by a further six months, but the time for making a determination cannot go beyond fifteen months. Before extending the time, however, the Injuries Board must inform the parties, in writing, before the nine month period has expired.

Awards comprise (a) general damages, which are damages, based on medical

evidence, for pain and suffering, past, present and into the future; (b) special damages, which are all of the expenses incurred by the Claimant that have been detailed and vouched and (c) fees reasonably and necessarily incurred, which effectively amount to fees for expert reports and any award of legal costs in respect of vulnerable Claimants, in addition to the return of the €50 application fee.

It is important to advise the Claimant that not all of the expenses may be recoverable in their full amount. Costs of medical reports vary from doctor to doctor, so a Claimant should be made aware that any shortfall in what the Injuries Board awards in report fees or any other expenses legitimately claimed, may be deductible from the award. All report fees should be included in the claim, but in some instances, the full cost of the report may not be recovered.

Under Section 30 of the 2003 Act, the Claimant has twenty-eight days to accept the award and the Respondent has twenty-one days. The period runs from the date of the service of the Notice by the Injuries Board, detailing the award. If both parties accept the award, then the case will be concluded, and a payment should follow. If either party rejects the award, an Authorisation will issue under Section 32 of the 2003 Act, enabling the Claimant to issue proceedings in court and the case with the Injuries Board will be closed. The proceedings should then be issued as quickly as possible.

It is a matter for each individual practitioner as to whether to seek Counsel's advice in relation to any award, depending on the severity of the injuries, the possibility of liability being an issue and the experience of the practitioner in the area. It may be advisable to do so.

The Injuries Board will not pay for any advices from, or consultations with, either Senior or Junior Counsel regarding the acceptance of the award. The Claimant will have to pay for these from the award. It is important therefore, to get written authority from the Claimant to procure such advices and to agree that same can be deducted from the settlement cheque, if the award is accepted.

ACCEPTANCE AND REJECTION OF THE AWARD

If both parties agree to the acceptance of the award, an Order to pay will issue under Section 38 of the 2003 Act. The Order to pay has the same effect as a judgement, and this is provided for under Section 40 of the 2003 Act. Under Section 41, once the amount is paid as directed, then this is in full and final settlement of the claim.

In the case of minors and/or persons of unsound mind, the approval of the court to accept the award is required. Section 35 of the 2003 Act deals with awards to such claimants. Applications should be brought before the court as quickly as possible in order to obtain court approval. The costs of the application, as well as the costs of advice given in relation to the award, can be recoverable against the Respondent and this includes Counsel's fees. If the court rejects the award, then the appropriate authorisation will issue to bring proceedings in the normal manner.

COSTS

Up to October 2007, no costs were awarded by the Injuries Board when making an award, with the limited exception of the costs of rulings required under s.35 (and enforceable under s.45) of the 2003 Act. However, the Injuries Board has now changed its policy in this regard and costs will be awarded in cases in which the Board deems the Claimant to be "vulnerable". As the concept of a vulnerable Claimant is not defined either in the legislation or at common law, an application for costs should be made to the Injuries Board in every case. Although it is likely to be refused in many cases, the exact policy of the Injuries Board in this regard remains unclear at present and therefore the sensible approach is to apply in all cases.

Although the Injuries Board has recently issued guidelines as to the circumstances in which costs are awarded to vulnerable Claimants, the guidelines fail to provide definitive guidance. At the time of going to print, a number of High Court judicial review cases are ongoing in this regard, the results of which may provide further clarification.

What is clear from the guidelines is that certain categories of claim will attract a modest award of costs that apparently averages €390, including VAT. These categories include cases involving minors, fatal injuries, MIBI claims and cases where the identity of the Respondent is an issue. Examples of cases where costs have not been allowed, generally relate to what the Injuries Board considers situations where the Injuries Board itself could have provided advice to the Claimant directly.

Nonetheless, solicitors should explain to Claimants at the outset that the solicitor's charges and any unrecovered outlay will more than likely have to be discharged from any award made to the Claimant.

The Injuries Board has also recently changed its policy with regard to the cost

of medical reports. Until July 2007, the Injuries Board would award only €150 towards the cost of a medical report. This was almost always insufficient to cover the cost of the report. The Injuries Board will now award medical report costs generally in accordance with the actual cost of the report, although some inconsistency remains in relation to the more expensive reports.

In addition, any other costs incurred which are directly associated with bringing the claim, should be sought. For instance, engineer's report fees have occasionally been allowed, though they are more frequently disallowed.

The recent changes in policy in respect of solicitors' fees and medical reports arises from the provisions of Section 44 of the 2003 Act which allows for costs and expenses necessarily incurred to be made part of the assessment award.

Finally, the provisions of Section 51B of the PIAB (Amendment) Act 2007 are of importance. This states that in any proceedings issued following an application to the Injuries Board, whether or not an assessment has been made or accepted, no amount in respect of fees or expenses will be allowed on taxation in connection with the application to the Injuries Board, other than those fees already referred to in Sections 35, 44 or 45.

Section 51B has the effect of ensuring that costs in relation to all applications to the Injuries Board will not be recoverable on a party and party basis if court proceedings are subsequently issued. However, such costs may be claimed as an item of special damage. It is then a matter for the court to decide whether to award this heading of special damage.

Precedent letters for use in Injuries Board cases are available on the 'Precedents for Practice' section of the Members Area of the Society's website www.lawsociety.ie.

The information herein is intended as a guide only. No responsibility is accepted for errors or omissions, howsoever arising.

March 2010

**Published by the Litigation Committee of the
Law Society of Ireland
Blackhall Place, Dublin 7**

Tel: 01 672 4800

Fax: 01 672 4801

E-mail: general@lawsociety.ie

Website: www.lawsociety.ie