State Claims Agency and Cantillons Solicitors

Submission to Mr Justice Charles Meenan in relation to the work of the Expert Group to review the law of torts and the current systems for the management of clinical negligence claims

4 September 2019

The second of the five Terms of Reference[1] of the Expert Group to review the law of torts and the current systems for the management of clinical negligence claims (the "Group") includes a requirement to consider "whether there may be an alternative mechanism to the court process for resolving clinical negligence claims".

One such alternative that has been suggested is to expand the civil actions to which the Personal Injuries Assessment Board Act, 2003 applies to include clinical negligence claims. For now, the Personal Injuries Assessment Board ("PIAB") is prohibited by section 3(d) of the PIAB Act from dealing with a civil action "arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person".

At the meeting of the Group on 11 July 2019, Mr Justice Charles Meenan invited Group members Ms Catherine Tarrant of the State Claims Agency and Mr Ernest Cantillon of Cantillons Solicitors to provide written observations on this alternative. These observations are set out below.

For this purpose, we will not consider the precise method for delivery of this alternative, i.e., whether the role and function of PIAB would be expanded or a new "Medical Injuries Assessment Board" or MIAB (as some have labelled it) would be created. Please note that any reference to MIAB is intended merely as shorthand for application of the PIAB mechanisms to clinical negligence claims.

Before considering its relevance to clinical negligence claims, it may be useful to describe the reasons why PIAB was established and to elaborate these PIAB mechanisms and how they are applied.

Establishment of PIAB

The Long Title to the PIAB Act explains that it was made:

> "to enable, in certain situations, the making of assessments, without the need for legal proceedings to be brought in that behalf, of compensation for personal injuries (or both such injuries and property damage), in those situations to prohibit, in the interests of the common good, the bringing of legal proceedings unless any of the parties concerned decides not to accept the particular assessment or certain other circumstances apply, to provide for the enforcement of such an assessment, for those purposes to establish a body to be known as the personal injuries assessment board and to define its functions and to provide for related matters".

The Foreword by the Chairperson of PIAB published in the first annual report[2] outlines the context in which PIAB was established. When conceived, it was hoped PIAB would:

a) reduce and/or limit increases to the cost of insurance premiums for consumers, with motor and liability insurance in Ireland among the most expensive in the world;

[1] < https://health.gov.ie/wp-content/uploads/2018/06/TOR-Expert-Group-on-tort-reform-and-management-of-clinical-negligence-claims-26-June-2018.pdf> (accessed 2 August 2018)
[2] < https://www.piab.ie/eng/news-publications/Corporate-publications/piab-annual-report-2004.html > (accessed 3 September 2019)

b) reduce and/or avoid the cost of litigation for parties, with litigation overheads estimated at 46% on top of every euro paid in compensation in 2003;

c) deliver a speedy alternative for cases where adjudication on legal issues was not required, with plaintiffs waiting six times longer for negotiations even to commence in claims;

d) discourage unmeritorious claims and the perceived "compensation culture"; and,

e) relieve pressure from the courts, where scarce resources were being consumed by personal injury claims;

f) deliver an independent, fair and accurate assessment of quantum.

The mission statement then was: "to fairly, promptly and transparently compensate the victims of accidents involving personal injuries in a cost effective manner". That mission has evolved a little so that now it is: "to facilitate the delivery of compensation in a fair, prompt and transparent manner for the benefit of society overall".

The core objectives then were: to assess the amount of compensation in personal injury cases; to reduce the litigation costs associated with delivering personal injury compensation; and, to reduce the amount of time it takes to finalise a personal injury compensation claim. Those objectives too have evolved so now they are:

- to assess fairly and accurately the amount of compensation entitlement in personal injury claims within the remit of the Personal Injuries Assessment Board in a timely manner;

- to promote the lowest possible administration costs associated with the resolution of personal injury claims;

- to promote a culture of innovation and excellence, fostering an efficient, flexible organisation with motivated and skilled staff and maximising the positive impact of technology;

- to promote and advance a superior customer service, focussed on making information about our services accessible to all, supported by a transparent and accessible claims assessment process and a cost-effective organisation; and,

- to continue to contribute positively to the changing personal injury claims resolution environment in Ireland through greater use of the Board's non-adversarial model.

Existing role of PIAB

In their own words, PIAB "provides independent assessment of personal injury compensation for victims of workplace, motor and public liability accidents, without the need for many associated litigation costs".[3]

In plain terms, those "victims" (i.e., possible plaintiffs) are prohibited from commencing an ordinary civil action. They must instead make an application to PIAB. PIAB then informs the defendant(s) about the claim. If the defendant does not veto, PIAB will make an assessment of the compensation to be paid. If the defendant does veto, PIAB will issue an authorisation that leaves the plaintiff(s) free to progress their claim in the ordinary way in court. After PIAB makes its assessment, both parties are free to accept or reject. Where both parties accept the assessment, PIAB will issue an enforceable order to pay. If either plaintiff or defendant rejects the assessment, PIAB will issue an authorisation that leaves the plaintiff free to progress its claim in the ordinary way in court.

In each of the last three years for which there is published data, the number of claims made to PIAB has been greater than 33,000 (2016: 34,056,[4] 2017: 33,114;[5] 2018: 33,371).[6] The number of assessments made by PIAB has been just over 12,000 per annum (2016: 12,966; 2017: 12,663; 2018: 12,112). The number of assessments accepted has been fewer still, at about half the number of assessments made (2016: 7,071; 2017: 6,788; 2018: 6,206).

For the year 2018, more than 86% of assessments made in 2018 were valued under €38,000 (10,523 of 12,112). PIAB has been reporting this volume from inception, before the limit for claims in the Circuit Court was increased to €60,000 in 2013.

As between the three categories of claim, 70% of assessments made were for motor liability claims, with 18% for public liability and 12% for employer's liability. The average value of assessments made for motor liability claims was €22,682, for pubic liability was €28,372 and for employer's liability was €30,839.

From this data, we make the following general observations:

a) Less than one-fifth of claims made to PIAB end with an enforceable order to pay made by PIAB.

b) Almost two-thirds of claims made to PIAB do not proceed to assessment. For the most part, it can be expected that the bulk of these are claims where assessment by PIAB has been vetoed by defendants.[7]

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[3] < https://www.piab.ie/eng/about-piab/Background-and-history/ > (accessed 3 September 2019)
[4] < https://www.piab.ie/eng/news-publications/Corporate-publications/Annual%20Report%202016.html > (accessed 3 September 2019)
[5] < https://www.piab.ie/eng/news-publications/Corporate-publications/Annual%20Report%20and%20Accounts.html > (accessed 3 September 2019)
[6] < https://www.piab.ie/eng/news-publications/Corporate-publications/2018%20Annual%20Report.html > (accessed 3 September 2019)
[7] The other reasons for this include that the parties resolve the matter between themselves soon as the defendant learns of the claim, something most likely in the employment context where there is an existing relationship between the parties.

c) For the one-third that is assessed by PIAB, roughly half are accepted. While not all of the other half that is rejected by the parties will progress to a civil action in court, it can be expected that the bulk do.

d) The vast majority (86%) of the assessment work done by PIAB is on claims with a value below €38,000.

e) The vast majority of the assessment work done by PIAB is on motor liability claims (70%), where issues of liability and causation are materially different from clinical negligence claims.

Relevance to clinical negligence claims

Without remarking about whether it has succeeded in its founding objectives, it might be helpful to recall the expected value of PIAB for motor, public liability and workplace claims and to consider the prospect for the same value to be achieved for clinical negligence claims.

"reduce and/or limit increases to the cost of insurance premiums for consumers"

Strictly, this is not relevant for clinical negligence claims.

For the most part, the relevant consumers here, medical professionals, are protected from insurance premiums.

That is because those State authorities whose claims are delegated for management by the State Claims Agency ("Agency") do not have conventional insurance cover. Instead, these authorities operate under State indemnity, a self-insurance model whereby the State bears the financial risk associated with the costs of claims on what is referred to as a "pay as you go" basis. The Clinical Indemnity Scheme ("CIS") was established in 2002. Under the CIS, the State assumes full responsibility for the indemnification and management of all clinical negligence claims.[8]

"reduce and/or avoid the cost of litigation for parties"

This would be near impossible for clinical negligence claims.

It is common for clinical negligence claims to require assessment of difficult and complex issues regarding breach of duty and causation.

In a significant majority of clinical negligence claims, liability is unclear at the early stages and often remains in contention throughout. For example, in the case of brain damaged infants, it can be difficult to establish whether the injury arose as a result of lapses in the care provided to the mother/infant or whether the injury arose as a result of an event beyond the control of the hospital/doctor, i.e., an intrauterine event prior to birth. In the cases where

[8] Further detail about the Agency and the CIS is contained in the submission by the Agency dated 7 August 2018.

breach and causation are clear from the outset (less than 5% of the clinical negligence cases dealt with in the Agency) the Agency already moves to immediate compromise of those cases and therefore there is no real advantage to MIAB dealing with these.

Causation is a major issue in a significant proportion of such cases. Even where breach of duty is established or acknowledged, it is frequently the case that there are issues as to whether the injury complained of is attributable to the breach of duty as opposed, for example, to being attributable to the condition being treated This is perhaps the most important difference from motor, public liability and workplace claims: for the vast majority of clinical claims, the plaintiff was unwell on arrival and unwell on departure.

Also, as explained further below, the assessment of quantum is rarely open to measurement by reference to benchmark averages (of the kind compiled in something like a book of quantum). For these reasons, it is unreasonable to expect claimants to forego legal support.

At the heart of clinical claims is an assertion that a professionally trained and qualified person has acted without due skill, care or diligence. Those kinds of assertion are not easily or lightly made. Again, for these reasons, it is unreasonable to expect claimants to forego legal support.

Indeed, for the same reasons, these are the kinds of claim that are more commonly vetoed or rejected at PIAB.

The introduction of MIAB would not likely reduce the administrative and other overheads for the Agency and the hospitals. In the MIAB context, the Agency (or someone) would still have to carry out the work that any defendant should, to investigate the claim and form a view whether assessment is appropriate and/or acceptable.

Worse still, an increase in overhead can be forecast, as MIAB can be expected to waste valuable resources assessing claims where their assessment will almost always be rejected. With a greater amount of money at stake, the defendant will be less willing to concede liability solely on the basis of a claim's "nuisance value".

Also, the introduction of MIAB would almost certainly increase the number of claims.

There is a substantial risk that a greater proportion of adverse clinical incidents would progress to PIAB claims. Persons who suffered an adverse clinical incident, who might not otherwise make a claim, might be attracted to a fast-track and low cost claims assessment system. Now, a very low proportion of reported adverse clinical incidents are litigated annually. The introduction of MIAB would almost certainly lead to many more patients claiming compensation than at present. While this might be achieved with lower transaction costs, the overall cost to the State, insurers and the medical defence organisations would be higher. The defendants would be obliged to investigate much higher numbers of claims, submitted to PIAB than heretofore. Indeed, this will involve the allocation of additional resources by hospitals in relation to the securing, copying and transmission of medical records to the Agency and medical defence organisations.

Also, as explained further below, the current system is effective at limiting unmeritorious claims. Any change to MIAB would remove key filters and perversely increase the risk of unmeritorious claims.

Finally, the introduction of MIAB would result in a duplication of effort by agents of the State. As explained further below, the Agency already resolves claims that are comparable to those processed by PIAB within a short period of time.

"deliver a speedy alternative for cases where adjudication on legal issues was not required"

It is certainly true that PIAB delivers a speedy process, with an average claim processing time of 7.2 months.

While many clinical negligence claims are not resolved within 7.2 months, very few are comparable to the nature and value of the claims currently dealt with by PIAB (70% of which relate to motor liability and 86% of which are valued at below €38,000). The Agency estimates the proportion of claims annually that are comparable to those processed by PIAB at 5%. For that 5%, the Agency estimates the average claim processing time is less than one year. That compares very favourably to the 7 months for PIAB, particularly when you consider the PIAB process ends with the assessment, so the time for payment is not included. The estimate for this small cohort of claims managed by the Agency ends with payment.

More generally, there has been a separate regulatory response to timelines in clinical negligence claims.

Part 15 of the Legal Services Regulation Act, 2015 (the "2015 Act") addresses clinical negligence litigation. When commenced, it will insert a new Part 2A to the Civil Liability and Courts Act, 2004, which would empower the Minister for Justice and Equality to make regulations specifying the terms of the pre-action protocol for clinical negligence litigation. The desirability of encouraging early resolution of enquiries or allegations relating to possible clinical negligence and encouraging early settlement are chief among the criterion according to which those regulations can be made.

We expect timelines to shorten, likely dramatically, in cases where adjudication on legal issues is not required.

"discourage unmeritorious claims"

We fear the introduction of MIAB would do the reverse.

Under the current system, a plaintiff is required to establish that the hospital or doctor owed him a duty of care, that the duty of case was breached and that the breach caused the injury alleged. To succeed, the plaintiff will need a legal team with experience of a complex area of the law. They will need to produce expert witnesses who will satisfy a court that, on the balance of probability, the treatment received caused the alleged injury. The fact that, typically, over 40% of clinical claims are eventually abandoned illustrates how effective the current system does filter out unmeritorious cases where there is no evidence of negligence on the part of the defendants. In additional, anecdotal evidence suggests that up to 70% of enquires made of reputable practitioners are rejected, without any need for the State or the courts to consider those.

The introduction of MIAB would remove these filters.

"relieve pressure from the courts"

Given our observations that clinical negligence claims have characteristics that make them poor candidates for MIAB assessment (or an assessment with good prospects for acceptance) and that it would remove filters against unmeritorious claims, we have to expect that MIAB would not relieve any pressure.

"deliver an independent, fair and accurate assessment of quantum"

It is rare for the current system to lead to disputes on quantum only. It is altogether more common for sensibly advised parties to reach broad agreement on measurement, but to differ on the limitation period, breach of duty and, in particular, causation.

More fundamentally, it is difficult to see how the many adverse sequelae arising from clinical negligence could be readily translated to a book of quantum that necessarily underpins this fair and accurate assessment process.

That prospect is complicated further by the frequency of claims for nervous shock and/or post-traumatic stress. Indeed, it is rare for PIAB to trespass the measurement of quantum for such injuries, given section 17(1)(b)(ii)(II) of the PIAB Act, which provides that PIAB may discontinue an assessment "because the injury or injuries alleged to be sustained 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 by this Act".

Response to the Eversheds submission

By submissions dated 5 June 2019, Eversheds Sutherland ("Eversheds") made a submission to the Group advocating in favour of MIAB. Although the most important issues are addressed above, we thought it would be helpful to respond to other parts of the submission.

It is far from clear what is meant by MIAB allowing "true learning from clinical incidents", when the risk management functions of the Agency performs this function across the entire cohort of reported adverse incidents; not just those leading to compensation claims.

Eversheds too have identified the substantial and important reforms already ongoing. They suggest without explanation that these reforms would complement and strengthen MIAB. We cannot understand this suggestion.

It is true that some claims are made by plaintiffs against medical professionals in whose care the plaintiff patient will continue. We have not seen any evidence that the existence of a claim would compromise that continued care. More fundamentally, we cannot understand how swift access to compensation for earlier events can be expected to improve the continuing patient-doctor relationship.

Eversheds are correct that the right of access to the courts is important for many plaintiffs. No-one has suggested that should prevent the establishment of MIAB. How could it when the system is designed to allow easy access to the courts for unwilling defendants and any party unhappy with the outcome?

The suggestion that a 10% reduction in clinical negligence claims would be considerable is fair, but based on conjecture. The evidence and our experience suggests an increase in claims is more likely. The suggestion this might lead to a reduction in awards is not understood. MIAB would not reduce awards; it would merely reflect the ordinary price for an award. Worst still, it creates an inflation risk for "ordinary" claims.

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