COST OF INSURANCE WORKING GROUP

Report on the Cost of Employer and Public Liability Insurance

January 2018

Rialtas na hÉireann
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FOREWORD BY MINISTER OF STATE

The volatility in insurance prices in the last few years has significantly affected both consumers and businesses, particularly in the motor and liability areas. These difficulties triggered the establishment of the Cost of Insurance Working Group in mid-2016. The first phase of its work focused on the cost of motor insurance resulting in the completion of the *Report on the Cost of Motor Insurance* in January 2017. While a number of the recommendations of the Motor Report are also relevant to employer liability and public liability cover – in particular, the recommendations on the Book of Quantum, the Personal Injuries Assessment Board (PIAB) and the establishment of the Personal Injuries Commission (PIC) – it became clear during this stage of its work that there was also a pressing need to examine the drivers for the rising cost of business insurance. Consequently, it was decided that the second phase should review the employer liability and public liability insurance areas, as these represent specific business lines which had been identified by a range of business sectors as having increased disproportionately in cost in recent years.

Following my appointment as Minister of State for Financial Services and Insurance, I became Chair of the Working Group and in this role I have met and heard from a wide range of business stakeholders. I have been struck by the personal experiences and challenges these stakeholders have faced with regard to insurance and insurance claims. For some, the impact of increased insurance costs has brought the short-term survival of their businesses into question. For others, it has meant that they have been unable to plan for the future through further investment in their business, because the money instead has had to be used to meet large premium increases. Other concerns which have been raised with me include the difficulty in getting or renewing cover in certain business sectors; the size of awards in this country compared with the UK; frustration with the inconsistency of personal injury award levels, including the view that insurance companies can settle questionable claims too quickly; the legal and other costs in challenging claims through the court process; a perception that fraud and exaggerated claims have been increasing in recent years; that there is no consequence or risk to taking such a claim; and the need for the role of PIAB to be developed further.

The absence of good quality data and the need to reduce costs in the claims process are themes which emerged in both the Motor Report and this second Report. However, the significant difference during this phase of the work was the emphasis placed by stakeholders on what needed to be done to make the overall claims process more efficient and effective. As a result, this Report focuses on improving the personal injuries litigation framework, and in this context particular attention has been paid to the *Civil Liability and Courts Act 2004*. The Working Group's general view is that the 2004 Act is broadly speaking fit for purpose, but that it is not being used sufficiently. In relation to section 26 of the 2004 Act, the Group

believes that in order for this provision to be more effective in combatting fraud and exaggeration, there is a major onus on insurers to challenge false and misleading evidence, where appropriate by taking it to court, rather than settling on the court steps for fear of an unsatisfactory outcome. When a claim is dismissed for fraud, insurers should also be more prepared to refer the case to authorities for investigation and criminal prosecution under section 25 of the 2004 Act, and to follow up on those referrals. In this regard, there is a recommendation that an existing protocol between An Garda Síochána and the insurance industry, which has been in place since 2004, should be revamped in order to assist in the more effective investigation and prosecution of cases involving insurance fraud.

In preparing this Report and the Motor Report, what has become clear to the Working Group is that a key element in containing the cost of claims is to try and ensure consistency of award levels through the regular use of the Book of Quantum by all parties. This should mean that no matter what way a claim is settled, whether directly by an insurer, through PIAB or as a result of a court decision, the outcome should be broadly the same. Involving the judiciary in its compilation and adoption and introducing greater granularity into the Book through the work of the Personal Injuries Commission, as recommended in the Motor Report, will hopefully be a very significant step forward in this regard. I consider, therefore, that over time the clearest signal that there is a greater consistency of awards will be an increase in the number of PIAB cases being accepted by claimants.

I believe that the implementation of the recommendations in this Report, along with those in the Motor Report, will lead to greater stability in the pricing of employer liability and public liability insurance and will help prevent the volatility which we are currently seeing in the market.

I also welcome the recent publication of the First Report of the PIC which focuses on the diagnosis and assessment of soft tissue injuries. Its next module will focus on benchmarking of Irish awards with those in other jurisdictions.

In conclusion, I think the recommendations in this Report are credible and therefore achievable. However, it will require a level of open-mindedness and co-operation from all sides involved in the personal injury claims area. I am hopeful that the recommendations will be taken in the spirit that they are made. There is no intention to undermine the current awards system and, in particular, the rights of the plaintiff. Nonetheless, I believe that there is a need for serious reflection on how the personal injuries litigation system as a whole is operating and the impact it is having on the cost of insurance, and what this means for society in general.

Michael D'Arcy T.D.
Minister of State for Financial Services and Insurance

EXECUTIVE SUMMARY

Introduction

Primarily as a result of a substantial degree of volatility in pricing in the non-life insurance sector over the preceding decade or so, the Cost of Insurance Working Group was established in July 2016. The focus of the first phase of its work was on the rising costs of motor insurance, which culminated in the publication of the *Report on the Cost of Motor Insurance* ("the Motor Report") in January 2017.

As part of the consultations during the motor insurance phase, the Working Group received a number of submissions from business on the increasing cost of employer liability and public liability insurance, as well as the growing difficulty in getting cover in certain business sectors. These submissions, along with the large number of representations on the matter received by the Department of Finance, made it very clear that there was a pressing need to examine the reasons behind these trends. Although the Central Statistics Office does not produce statistics on the price variance of these specific types of insurance, its statistics on the cost of insurance overall showed an increase of 57% from January 2011 to July 2016, reinforcing the rationale for the Working Group's review of this area. The Working Group believes that, based on what it heard during its consultation process, this increase was likely to have corresponded with a similar rise in business insurance costs over the same period.

In addition, statistics from the Personal Injuries Assessment Board (PIAB) indicate that the employer liability and public liability insurance sectors account for approximately 15% and 27%, respectively, of the applications which it receives. Taken together, these account for the entirety of all non-motor insurance applications received by PIAB.

Therefore, the Working Group, in parallel with pursuing the timely implementation of the Motor Report recommendations, has since the beginning of 2017 been undertaking an examination of the employer liability and public liability insurance sectors. It has met regularly and, as referred to above, engaged with relevant stakeholders to understand the factors contributing to the rising cost of these types of insurance and to develop a range of measures to address the situation.[1]

The objective in the second phase was to build upon relevant work undertaken in the context of the motor insurance review, while examining the particular drivers of the cost of employer liability and public liability insurance, in order to recommend short, medium and longer term measures to address the issue of increasing insurance costs. In doing this, however, the Working Group always remained conscious of the need to ensure that a financially stable and solvent insurance sector is maintained.

[1] For more on the membership and engagements of the Working Group, see Chapter 1 and Appendices 1-3.

Role of Employer Liability and Public Liability Insurance

Insurance is a critical financial service providing policyholders with protection against financial losses from adverse events. Insurance provides a risk transfer facility for which insurers receive remuneration in the form of premium payments. In supplying insurance, the insurer is accepting a risk which can be unlimited for a price which is fixed (premium payment).

While, unlike motor insurance, there is no statutory requirement to have a minimum level of employer liability and public liability insurance cover, in practical terms, businesses by and large would be unable to continue functioning on a day-to-day basis without the "safety net" afforded by having such cover in place. Moreover, a number of more-regulated sectors which require the issuing of some form of licence in order to legally operate make the purchase of such insurance, in effect, obligatory.

The alternative of not obtaining cover from a designated insurance provider is for businesses to self-insure. However, accepting full liability to an unlimited extent for all relevant risks is not a viable option for the vast majority of enterprises or public bodies.

Therefore, a combination of the very significant increase in business insurance costs and the withdrawal of cover from certain sectors has meant that the issue of insurance has become a major survival and competitiveness issue for many businesses in Ireland. This in turn leads to significant knock-on effects upon levels of economic activity and prosperity in the country as a whole. These insurance difficulties being encountered by the business sector provide both the context for this Report and the rationale for the recommendations set out below.

Key recommendations

In order to help provide greater clarity, certainty and transparency in relation to business insurance costs, a series of recommendations have been made in this report. The key recommendations are summarised below, grouped according to broad themes, with the rationale behind each set out in detail in Part 2 of the Report. A detailed Action Plan identifying the responsible bodies and the timelines for delivery is set out after the executive summary.

Under EU law, insurance companies must price premiums according to risk and the Government cannot mandate a premium price.[2] However, it is possible in the Working Group's view for the State to play a role in helping to stabilise what is a volatile market and this therefore is the context in which the recommendations are made. In essence, a key aim of the Working Group is to address, as far as possible, the factors which have been identified as contributing to existing premium levels, in order to help achieve a sustainable reduction in such prices over time.

Even if insurance premiums had not witnessed a spike, the insurance industry in Ireland would still be in need of a series of reforms. Aspects of the operation of the market in Ireland are in need of modernisation and consequently a number of the recommendations both within this

[2] Article 181 of the Insurance and Reinsurance Directive (Directive 2009/138/EC) (the Solvency II Directive).

Report and arising from the Working Group's first phase are not directly relevant to the setting of premiums.

Improving Transparency Levels

Stark deficiencies in the availability of useable data across the whole insurance sector has become a major, and increasingly frustrating, obstacle impeding the Cost of Insurance Working Group in its attempts to initiate strong proposals to positively impact upon insurance costs.

There are four specific recommendations in this Report which aim to assist in the development of both collection processes for, and the appropriate sharing thereafter of, sets of reliable data. The quantity and quality of information which will become available upon the full implementation of these recommendations should greatly enhance the general understanding of the liability insurance sector and, in turn, the effectiveness of insurance policy overall.

Two of the four recommendations seek to directly link with data initiatives arising from the *Report on the Cost of Motor Insurance*. Firstly, it is proposed that the Central Bank of Ireland considers the merits and feasibility of extending the scope of the National Claims Information Database to incorporate a liability insurance element. It is proposed that the timing of this consideration should be balanced by the need to ensure the prioritisation of getting the motor insurance element of the database fully operational first, as there may be a number of learning points from this exercise which can be applied to any potential future extensions of the database. As a first step to gaining a greater understanding of this area it is proposed that a suitable template will be developed and utilised in order to produce the employer liability and public liability insurance equivalent of the *First Motor Insurance Key Information Report*, published in July 2017[3].

The remaining two "data" recommendations call upon the Central Statistics Office (CSO) and the Courts Service to look at the most effective method to provide better quality information in respect of the cost of insurance for business and more granular data on personal injury awards, respectively.

Reviewing the Level of Damages Awarded in Personal Injury Cases

Notwithstanding the ongoing work being undertaken in the area by the Personal Injuries Commission ("PIC"), the Working Group concluded that there would be substantial merit in a comprehensive examination being carried out of the feasibility of legislating for a cap in relation to the level of damages a court may award in respect of personal injury actions. Therefore an application requesting the commencement of such an exercise will be submitted to the Law Reform Commission, which is currently engaged in a consultation exercise in advance of preparing its next programme of law reform.

[3] http://www.finance.gov.ie/wp-content/uploads/2017/07/1st-Motor-Insurance-Key-Information-Report.pdf

Improving the Personal Injury Litigation Framework

The majority of the recommendations emanating from this Report relate to the personal injury claims environment and seek to introduce measures to enhance processes and procedures within the litigation framework. Ultimately, the basic aim is to ensure claimants receive a reasonable and just level of compensation in respect of their injuries as speedily as possible, while at the same time providing defendants with a fair opportunity to properly challenge a claim in appropriate instances.

A number of different stakeholders, particularly in a public liability context, informed the Working Group that they regularly, as potential defendants, are not being promptly informed that an incident, where it is alleged that they have been negligent, has taken place. The Working Group believes that the most effective way of improving the notification process is through both strengthening the relevant provisions of section 8 of the *Civil Liability and Courts Act 2004* and increasing the level of its utilisation. Accordingly, there is a proposal to amend the wording of the section itself in order to try to ensure that defendants are informed within one month of an incident occurring and that a failure to do so without reasonable cause will lead to some inference being made in court. Two other related recommendations seek to codify the section 8 notification requirements within Court Rules and to ensure a greater general awareness of the notification obligations, respectively.

A further recommendation is linked to Recommendation 8 of the Motor Report and looks to place an obligation upon insurers to provide adequate consultation opportunities to policyholders in relation to the processing of a claim which has been submitted against them. In this regard, reference is made to a set of guidelines agreed between IBEC and the insurance industry in 2003 which committed insurance providers to undertake detailed and meaningful ongoing communication with policyholders. These guidelines are seemingly not widely applied in practice but in the view of the Working Group can provide an extremely useful model for a new protocol between businesses and insurers.

Consideration was also given to the continuing relevance of the six-month period allowed under section 50 of the *Personal Injuries Assessment Act 2003*. Section 50 suspends the statute of limitations on the making of an application to PIAB and for a period of six months after an authorisation is issued by PIAB. The authorisation permits the claimant to proceed to litigation. The Working Group understands that the reasoning behind this six-month period was to provide claimants, particularly unrepresented ones, with the necessary time to prepare their case after leaving the PIAB process, and to issue proceedings. However, on the basis that many plaintiffs engage the services of a solicitor during the PIAB process, and cases can progress significantly during this time, there is an argument that the six-month standstill period is no longer needed in all cases and that it may unnecessarily elongate the litigation process. It was agreed by the Working Group that to give proper consideration to this matter, there is a need to first collect relevant data to indicate the time period between the date of a PIAB authorisation, the date of initiation of proceedings and the date of the settlement of the case. The Department of Business, Enterprise and Innovation will then be required to undertake a review of the operation of the section and determine whether changes should be made.

Tackling the problem of fraudulent or exaggerated claims is an exceptionally arduous task as it requires dealing with a view that it is essentially a victimless crime and that there is no harm in it. In preference to seeking to formulate brand new anti-fraud legislative measures, the Working Group deems that some limited amending, but more pointedly greater utilisation, of related provisions already in place represents the most desirable course of action.

In particular, a number of provisions contained in the *Civil Liability and Courts Act 2004*, relating to fraudulent and exaggerated claims, are either not being used at all or not to the extent intended when the Act was commenced. For instance, section 14 requires defendants to submit a sworn affidavit within a particular timeframe, and creates an offence when knowingly false or misleading material is contained therein. However, in practice it appears that section 14 is not being used. Another problem is that there is no ability for a court to make an inference when the timelines in section 14 are not complied with. Consequently, there is a recommendation in the Report to address that issue.

In relation to the engagement between the Gardaí and the insurance industry on suspected fraudulent claims, the Working Group established that a protocol was drawn up on this matter in 2004 titled "*Criteria and guidelines for the reporting of suspected fraudulent insurance claims to An Garda Síochána*". However, it appears not to have been used for quite a while. The Working Group is of the view, however, that it can be used as a template for a renewed agreement to ensure that fraudulent claims are appropriately addressed. Specifically, personal injury actions which have been dismissed due to a finding of fraud, whether explicitly through section 26 of the 2004 Act, or otherwise, should be referred for criminal investigation under section 25 of the 2004 Act.

The remaining two fraud-related recommendations seek to address the wide-ranging data challenges around how much of this activity is being investigated by the Gardaí through to the number of prosecutions and convictions. In summary, An Garda Síochána and the Courts Service are being requested to commence producing statistics which between them can provide instructive data along the various 'stages' of the personal injury fraud 'continuum', from the numbers of initial complaints and investigations to the resultant cases of prosecutions and convictions.

The assessment and setting of an award of damages in a personal injury case is a unique and complex part of the wider responsibilities of a judge. The intention of the final recommendation in the Action Plan is that suitable training and information supports be made available to assist the judiciary in ensuring that this specific task is discharged in a consistent and fair manner.

Telematics

It should be noted that an Addendum to the Motor Report setting out the role that telematics can play in combatting motor insurance fraud is being published in conjunction with the release of this report. This piece contains an additional recommendation requiring Insurance Ireland and the insurance industry to prepare a report on what can be done to increase the use of telematics in the Irish market with a view to combatting fraud.

Next steps

This report includes an Action Plan, which identifies the responsible bodies and the timelines for delivery. This Action Plan complements the Action Plan which is currently being implemented with regard to motor insurance ("Motor Report Action Plan"). The next phase of the process will be the continuation of the implementation of the Motor Report Action Plan, in parallel with the implementation of this Report's Action Plan. The responsible bodies and groups will immediately begin implementing the actions assigned to them.

The Working Group will continue to prepare quarterly reports with regard to the implementation of the recommendations of the Motor Report, but will now also include progress on the implementation of the recommendations in regard to employer and public liability insurance.

A number of the recommendations and action points have strong inter-linkages with the competitiveness agenda set out in the Action Plan for Jobs. The Working Group's quarterly updates will likely also feed into future progress reports of the Action Plan for Jobs.

Finally, the Working Group believes that the implementation of the recommendations will lead to greater stability in the pricing of employer liability and public liability insurance and will help prevent the volatility which is being seen in the market presently. In conclusion, the Working Group believes that one of the key indicators of the success of the recommendations in this Report will be a greater level of consistency in award levels. This should in turn result in an increase in the number of PIAB cases being accepted by claimants, as the need to litigate diminishes.

ACTION PLAN

OBJECTIVE 1: INCREASING TRANSPARENCY						
Rec No.	**Recommendation**	**Action Point**	**Action Point**	**Deadline**	**Relevant Bodies**	**Lead/Owner**
1	**CSO TO CONSIDER THE FEASIBILITY OF COLLECTING PRICE INFORMATION ON THE COST OF INSURANCE TO BUSINESSES**	**1**	CSO to commence feasibility study on data related to the cost of insurance to businesses	Q2 2018	Central Statistics Office	Department of Finance
		2	CSO to report to Department of Finance with proposals with the outcome of review, and if it considers such an index feasible, make appropriate proposals	Q4 2018		
2	**CENTRAL BANK OF IRELAND TO EXAMINE THE MERITS AND FEASIBILITY OF COLLECTING DATA FOR EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE CLAIMS IN THE NATIONAL CLAIMS INFORMATION DATABASE**	**3**	Central Bank of Ireland to produce a report on the merits and feasibility of collecting employer liability and public liability insurance data for inclusion in the National Claims Information Database	Q4 2019	Central Bank of Ireland	Central Bank of Ireland
3	**THE COURTS SERVICE SHOULD PUBLISH THE RESULTS OF PERSONAL INJURY CASES IN A MORE GRANULAR WAY IN ITS ANNUAL REPORTS**	**4**	Department of Justice and Equality to request the Court Service to provide options for a new template for more granular data on personal injury awards that it can produce going forward	Q1 2018	Courts Service, Department of Justice and Equality	Department of Justice and Equality

		5	Court Service be requested to include this more granular data in future annual reports commencing with the 2019 annual report	Q1 2019		
4	**THE DEPARTMENT OF FINANCE TO PUBLISH A KEY INFORMATION REPORT ON EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE CLAIMS**	**6**	Key aggregated metrics template to issue to Insurance Ireland for completion and submission	Q2 2018	Department of Finance, Central Bank of Ireland, State Claims Agency, Insurance Ireland, Society of Actuaries, PIAB	Department of Finance
		7	Collation and analysis of submission received and publication of Key Information Report on employer liability and public liability insurance	Q4 2018		

OBJECTIVE 2: REVIEWING THE LEVEL OF DAMAGES IN PERSONAL INJURY CASES						
5	**THE LAW REFORM COMMISSION TO BE REQUESTED TO UNDERTAKE A DETAILED ANALYSIS OF THE POSSIBILITY OF DEVELOPING CONSTITUTIONALLY SOUND LEGISLATION TO DELIMIT OR CAP THE AMOUNTS OF DAMAGES WHICH A COURT MAY AWARD IN RESPECT OF SOME OR ALL CATEGORIES OF PERSONAL INJURIES**	**8**	Department of Justice and Equality to provide a submission to the Law Reform Commission to request this issue be added to their Fifth Programme of Law Reform	Q1 2018	Department of Business, Enterprise and Innovation, Department of Finance, Department of Justice and Equality, Law Reform Commission	Department of Justice and Equality
		9	If the Law Reform Commission commit to exploring this issue, Department of Justice and Equality to consult with the Law Reform Commission as to the status of the project	Q4 2018		

OBJECTIVE 3: IMPROVING THE PERSONAL INJURIES LITIGATION FRAMEWORK						
6	**AMEND THE WORDING OF SECTION 8 OF THE *CIVIL LIABILITY AND COURTS ACT 2004* TO ENSURE THAT DEFENDANTS ARE NOTIFIED OF A CLAIM HAVING BEEN LODGED AGAINST THEM**	**10**	Department of Justice and Equality to draft the necessary amendments to section 8 of the 2004 Act	Q2 2018	Department of Justice and Equality	Department of Justice and Equality
		11	Department of Justice and Equality to bring forward legislation proposing amendment to section 8 of the 2004 Act	Q3 2018		
7	**THE RELEVANT COURT RULES COMMITTEE(S) TO CONSIDER AMENDMENT OF THE RULES OF COURT IN RESPECT OF SECTION 8 OF THE *CIVIL LIABILITY AND COURTS ACT 2004* IN ORDER TO ENSURE THAT DEFENDANTS ARE NOTIFIED OF A CLAIM HAVING BEEN LODGED AGAINST THEM**	**12**	Department of Justice and Equality to write to relevant Court Rules Committee requesting consideration of appropriate amendment of the Rules of Court relating to personal injuries summonses to take account of the section 8 requirement	Q1 2018	Department of Justice and Equality	Department of Justice and Equality
		13	Department of Justice and Equality to follow up with the Courts Service and produce a report to the Working Group on the implementation of Action Point 12	Q3 2018		

8	**ENSURE GREATER GENERAL AWARENESS OF NOTIFICATION OBLIGATIONS UNDER SECTION 8 OF THE *CIVIL LIABILITY AND COURTS ACT 2004***	**14**	Relevant Department to engage with relevant bodies, to include the legal professional bodies, the insurance industry, PIAB, citizens' advice bodies, local and state authorities as appropriate, to draw their attention to Recommendation 8 and to seek proposals as to actions they intend to take to promote a general awareness to the public of the notification obligation in section 8	Q2 2018	Department of Business, Enterprise and Innovation, Department of Finance, Department of Justice and Equality, PIAB, State Claims Agency	Department of Finance
		15	Relevant Departments to follow up with relevant bodies to seek an indication of what procedures they have put in place to promote a general awareness of the notification obligation to the public on an ongoing basis	Q4 2018		
9	**REVIEW OF THE OPERATION OF THE SIX-MONTH STANDSTILL PERIOD PROVIDED FOR UNDER SECTION 50 OF THE *PERSONAL INJURIES ASSESSMENT BOARD ACT 2003***	**16**	PIAB to report to the Department of Business, Enterprise and Innovation on its findings on the basis of data received from relevant stakeholders in relation to the time period from the issuing of PIAB authorisations (section 32 rejected cases) to the initiation of proceedings, to the settling of the case	Q4 2018	PIAB, Insurance Industry, Courts Service	PIAB

		17	On receipt of the report from PIAB, the Department of Business, Enterprise and Innovation to review the operation of the six-month standstill period under section 50 of the *Personal Injuries Assessment Board Act 2003*	Q2 2019	Department of Business, Enterprise and Innovation	Department of Business, Enterprise and Innovation
10	**INSURANCE IRELAND AND BUSINESS ORGANISATIONS TO AGREE A SET OF GUIDELINES FOR THE INSURANCE INDUSTRY IN RESPECT OF NOTIFYING AND ENGAGING WITH POLICYHOLDERS REGARDING CLAIMS SUBMITTED AGAINST THEIR POLICY**	**18**	Meeting to be convened by the Department of Finance to begin discussion on the development of guidelines in respect of notifying and engaging with liability insurance policyholders regarding personal injury claims submitted against them	Q1 2018	Insurance Ireland, Department of Finance, relevant business organisations	Department of Finance
		19	Agreement of new set of guidelines in respect of notifying and engaging with liability insurance policyholders regarding personal injury claims submitted against them	Q4 2018		
11	**AN GARDA SÍOCHÁNA TO COMMENCE PRODUCING STATISTICS ON COMPLAINTS AND INVESTIGATIONS RELATING TO FRAUD WITHIN THE PERSONAL INJURIES AREA**	**20**	Department of Justice and Equality to consult with An Garda Síochána in respect of the request to produce relevant statistics on complaints and investigations relating to fraud within the personal injuries area	Q1 2018	Department of Justice and Equality, An Garda Síochána, Courts Service	Department of Justice and Equality
		21	Department of Justice and Equality to report to the Working Group about the status of the request and the timeline for delivery	Q2 2018		

12	**THE COURTS SERVICE TO COMMENCE PRODUCING STATISTICS ON PROSECUTIONS AND CONVICTIONS RELATING TO FRAUD WITHIN THE PERSONAL INJURIES AREA**	**22**	Department of Justice and Equality to consult with the Courts Service in respect of the request to produce relevant statistics on prosecutions and convictions relating to fraud within the personal injuries area	Q1 2018	Department of Justice and Equality, Courts Service	Department of Justice and Equality
		23	Department of Justice and Equality to report to the Working Group about the status of the request and the timeline for delivery	Q2 2018		
13	**INSURANCE IRELAND, AN GARDA SÍOCHÁNA AND THE DPP TO AGREE A SET OF GUIDELINES FOR THE INSURANCE INDUSTRY IN RESPECT OF THE REPORTING OF SUSPECTED FRAUDULENT INSURANCE CLAIMS**	**24**	Meeting with appropriate stakeholders to begin discussion on the development of guidelines in respect of the reporting of suspected fraudulent insurance claims to An Garda Síochána by the insurance industry using the previous protocol as a starting point for this consideration	Q1 2018	Department of Justice and Equality, Insurance Ireland, An Garda Síochána, Office of the DPP	An Garda Síochána
		25	Agreement of new set of guidelines in respect of the reporting of suspected fraudulent insurance claims to An Garda Síochána by the insurance industry.	Q3 2018		
14	**AMENDMENT OF SECTION 14 OF THE *CIVIL LIABILITY AND COURTS ACT 2004* TO IMPROVE THE USE AND EFFECTIVENESS OF THE PROVISION**	**26**	Department of Justice and Equality to propose amendment to section 14 of the 2004 Act to allow for the court to draw inferences from non-compliance with the requirement to lodge the verifying affidavit within 21 days after the lodgement of the service of the pleading concerned	Q3 2018	Department of Justice and Equality	Department of Justice and Equality
		27	Department of Justice and Equality to report to the Working Group about the status of the legislation and its timeline for delivery	Q4 2018		

15	**DEPARTMENT OF JUSTICE AND EQUALITY TO CONSIDER PROPOSING AN AMENDMENT TO THE JUDICIAL COUNCIL BILL TO FACILITATE TRAINING AND INFORMATION SUPPORTS FOR THE JUDICIARY IN RELATION TO THE ASSESSMENT OF DAMAGES IN PERSONAL INJURY CASES**	**28**	Department of Justice and Equality to consider proposing an amendment to the Judicial Council Bill 2017 for the purposes of including an explicit reference to the assessment of general damages in personal injury cases	Q1 2018	Department of Justice and Equality	Department of Justice and Equality
		29	The Department of Justice and Equality to bring to the attention of the judiciary in an appropriate manner the recommendation that consideration be given to training pending the enactment of the Judicial Council Bill	Q2 2018		

CHAPTER 1 – INTRODUCTION

1.1 Introduction and Background

The Cost of Insurance Working Group began the second phase of its work in January 2017 to examine issues around the cost of insurance for businesses, specifically employer liability and public liability insurance. While it is acknowledged that there are significant differences between these forms of insurance and motor insurance, the Working Group is strongly of the view that many of the recommendations in the *Report on the Cost of Motor Insurance* (hereafter to be known as "the Motor Report") around areas such as improving the personal injuries environment and reducing insurance fraud are as relevant to employer liability and public liability insurance. Therefore, the aim of the Working Group was to try to develop an understanding of the difficulties faced by businesses, as well as why these problems are arising and from there to come up with a set of recommendations tailored to the need of the business sector, but which build upon the relevant recommendations in the Motor Report. In doing this, the Group has remained conscious of two key points: (i) the need to ensure that an economically vibrant and financially stable insurance sector is maintained, and (ii) that there is no diminution of the rights of plaintiffs. As with the first phase, the aim is for all relevant bodies and stakeholders to work together in order to help deliver fairer premiums for businesses without unnecessary delay.

The Working Group was initially chaired by the Minister of State at the Department of Finance, Mr Eoghan Murphy T.D. However, following his appointment as Minister for Housing, Planning and Local Government, he was replaced as Chair by Minister of State for Financial Services and Insurance, Mr Michael D'Arcy T.D. The Group is comprised of representatives from the Department of Finance, the Department of Business, Enterprise and Innovation, the Department of Justice and Equality, the Central Bank of Ireland, the State Claims Agency, and the Personal Injuries Assessment Board.

1.2 Terms of Reference of the Cost of Insurance Working Group

The terms of reference for the employer liability and public liability insurance examination by the Working Group were agreed as follows:

- Provide an overview of the employer liability and public liability insurance sectors
- Consider the impact of the cost of insurance on the competitiveness of particular business sectors
- Consider the impact of health and safety issues on the cost of insurance, and
- Examine other relevant market issues

In addition, it was agreed that the Working Group would build on previous work done as it relates to employer liability and public liability claims in examining:

- Personal Injury data and information
- Effects of legal costs and litigation processes on insurance costs
- Current claims compensation arrangements and cost of claims
- Impact of unlawful activity on insurance sector

1.3 The Approach taken by the Cost of Insurance Working Group

It should be noted that while the Working Group has broadly adhered to the terms of reference, different issues have emerged as a result of the consultation process, and consequently a greater level of emphasis has been placed on some issues over others; for instance, there has been a much greater prominence given to reviewing the *Civil Liability and Courts Act 2004* than was envisaged at the outset.

Moreover, while it was originally thought that the final results of the second phase would take the form of an addendum to the existing Motor Report and that it would be finalised in September 2017, it became clear reasonably early on that many of the issues raised were of a more complex nature than those raised in the Motor Report and that meeting this deadline would not be possible. Consequently, a decision was made in September to finalise the report by the end of the year.

The Working Group met fifteen times during 2017 and undertook an extensive consultation process involving a range of business stakeholders. These included the Hotels Federation of Ireland, IBEC, ISME, the Vintners' Federation of Ireland (VFI), the Licensed Vintners Association (LVA), the Retail Grocery Dairy & Allied Trades Association (RGDATA), Chambers Ireland, the Law Society of Ireland, and the Health and Safety Authority. It also met Insurance Ireland, a number of CEOs from insurers operating in the employer liability and public liability insurance market and representatives from Lloyd's of London. A full list of those consulted can be seen at Appendix 2.

The Working Group operated by way of two sub-groups, broadly looking at market related issues and legal issues. Chairs were appointed to these sub-groups and work commenced in July 2017. The sub-groups met on a weekly basis thereafter. The output of the sub-groups fed into the meetings of the Working Group, with the Working Group acting as a Steering Group to the sub-groups. Details of the work and membership of each sub-group is contained in Appendices 3 and 4.

CHAPTER 2 – INSURANCE FOR BUSINESSES

2.1 Introduction

Insurance is a critical financial service providing policyholders with protection against financial losses from adverse events. Insurance markets provide a mechanism for businesses and individuals to transfer risk to firms that specialise in absorbing risk. In doing so, businesses and individuals are better able to undertake certain activities and, in particular, certain economic activities, that they would otherwise be unable to do. In this way, insurance markets facilitate higher levels of economic activity.

Employer liability and public liability insurance, unlike motor insurance, are not compulsory for businesses. In reality, however, they are an essential pre-requisite for the operation of any business as the consequences of not having insurance are such that one single claim against a firm could bankrupt it. In addition, in order to conduct business in the first place many bodies, including the courts, will seek confirmation from a company that it is appropriately insured before they will issue a licence (e.g., a pub licence) or before they will agree to do business with them. This is because companies have a duty of care to their own staff, to people who enter their premises or with whom they do business. This duty of care has to be underpinned by an ability to pay compensation should an accident occur. In simple terms, the absence or unaffordability of employer liability and public liability insurance means that businesses are not in a position to operate in the economy.

2.2 The Effect Insurance Costs can have on the Competitiveness of Businesses

The National Competitiveness Council has considered the issue of the cost of business insurance on a number of occasions in recent years. In 2015, it published a Special Article on commercial insurance for enterprises in Ireland as part of its annual *Cost of Doing Business in Ireland* report.[4] Many of the issues highlighted in that article are the same issues which have been raised by stakeholders (i.e. a need for more data, a more effective PIAB and reform of legal services) and its recommendations are ones that are largely being addressed in the context of the Motor Report, and are also further developed in this Report.

In January 2016 the National Competitiveness Council bulletin stated that:

> an adequately-reserved, cost-competitive insurance sector is a vital component of economic activity and financial stability. Insurance costs are relevant to businesses of all sizes and in all sectors of the economy. The issue of greatest concern to businesses is the cost they pay for the cover they receive.[5]

The same bulletin states that given the recent escalation in commercial insurance costs, there is a need to ensure that the responsibility for improving the cost competitiveness is clearly assigned and

[4] NCC (2015), Special Article: Commercial Insurance for Enterprises in Ireland, *Costs of Doing Business in Ireland 2015*, p 45-61. Available at: http://www.competitiveness.ie/Publications/2015/24022045-Costs_of_Doing_Business_in_Ireland-Publication.pdf

[5] NCC (2016), Insurance Costs, Competitiveness Bulletin 16-2, January, p. 1. Available at: http://www.competitiveness.ie/Bulletins/Insurance-bulletin.pdf

accorded sufficient priority by policymakers. In addition, it argues that a reform of legal services is urgently required to reduce insurance costs.

Most recently, the National Competitiveness Council's *Costs of Doing Business in Ireland 2017* report highlighted how general insurance costs to consumers were having an impact on the competitiveness of doing business in Ireland – particularly in relation to health and motor insurance costs. It stated that "*Irish insurance price inflation as measured by the HICP (the Harmonised Index of Consumer Prices) has been volatile and significantly above the UK rate and Euro area average from early 2014*".[6]

2.3 Views of Stakeholders

The Working Group engaged in an extensive consultation process with the business sectors most directly affected by the increasing cost of employer liability and public liability insurance. A full list of those consultees is set out in Appendix 2. This consultative process allowed the Working Group to hear directly from different business types in Ireland about the impact the cost of insurance has on the viability and competitiveness of their sectors. It was clear from the consultations and submissions received that the cost of insurance and the process of navigating the insurance claims environment have become very challenging issues for all businesses in the State. The impact of the cost of insurance on a number of sectors of the economy is set out in Appendix 5.

The overarching theme which emerged from the process is one of frustration and anger with the impact that the cost of liability insurance is having on the viability of businesses in Ireland, in particular small businesses. While recognising and accepting a plaintiff's right to seek compensation for a genuine accident, businesses consider that the size of the awards in Ireland, when combined with the fact that there is perceived to be little risk to a plaintiff for taking a fraudulent or exaggerated case, has created a situation whereby insurance premiums have become prohibitively expensive. This, they believe, needs to be addressed.

The consultation process undertaken by the Working Group and its sub-groups has made it clear that businesses are affected in different ways depending on the nature of their operations. For instance, public liability claims are a major concern for the hospitality and retail industry whereas employer liability claims are more of an issue for the construction and meat industries.

One of the main concerns raised by stakeholders was volatility and uncertainty around insurance premium levels, which makes it very difficult from a planning perspective to factor this into how they manage their business. For instance, stakeholders reported that this uncertainty makes it difficult to commit to longer term investment decisions that might assist growth in their business. The lack of ability to control the cost of insurance premiums and the claims culture in the country were also mentioned.

Reinforcing the views of the National Competitiveness Council above, business stakeholders have indicated that in their view the cost of insurance is a major competitiveness issue for Ireland and that, unlike other market difficulties such as, for instance, fluctuating exchange rates, it is something within the control of the State to address. In some particular sectors, such as those operating on an

[6] NCC, (2017), *Costs of Doing Business in Ireland 2017*, p.26. : http://www.competitiveness.ie/Publications/2017/NCC-Costs-of-Doing-Business-2017-Report.pdf

international level, including the hospitality sector, the issue of competitiveness was especially relevant.

In order to give some indication of the depth of feeling on this issue a selection of stakeholder comments provided through the submission process are set out in Appendix 6. In addition to highlighting the impact that the cost of liability insurance is having on the viability of businesses in Ireland as mentioned above, the stakeholder comments make the following points:

(i) The level of awards for personal injury cases as set out in the Irish Book of Quantum are higher than in other comparable jurisdictions, including the UK, particularly for less serious injuries,
(ii) The legal costs associated with the claims process are too high and
(iii) Insurance companies are often too quick to settle 'dubious' claims rather than contest them.

Another major concern which has been raised by the business sector and also by the insurance industry is the issue of inconsistency of awards by courts. It has been argued by the insurance industry that certainty and predictability in award levels are key factors in enabling them to reserve appropriately for current and future claims and thus price accordingly. They argue therefore that the inconsistent application of the Book of Quantum is a factor which has led to volatility in pricing because an increase in an award for a particular injury will lead to all such current and future equivalent injuries claims having to be reserved upwards, which they say is then reflected in future price increases.

It is important to note that in considering the views of those stakeholders impacted by the increased cost of employer liability and public liability insurance, the Working Group has always remained conscious of the need to ensure that any actions or recommendations which emerge from its work do not undermine the rights of plaintiffs to seek an appropriate level of compensation for injuries they have suffered as a result of the negligence of another.

2.4 Chambers Ireland Survey

Chambers Ireland carried out a "Cost of Insurance" survey in August/September 2017. It asked a number of questions of its members to determine the scale of increase in their employer and public liability premiums and the drivers for those increases. There were 62 responses to the survey. Although this is not in itself a large sample size, the responses came from a broad range of different business types and sectors, and so the results are useful in providing an overview of the issues experienced by different types of businesses. The broker-led nature of the business insurance market was confirmed by the fact that 88% of those surveyed purchased their employer/public liability cover through such an intermediary. The majority of the insurers who met with the Working Group also noted that they sell most of their business in this sector through brokers.

Surveyed members were asked to provide the percentage increase of their insurance premium of the previous year, whether employer liability, public liability or a packaged premium. Forty-three percent of respondents indicated that their premiums had increased by between 5% and 20%, with a small number of respondents reporting very significant increases of 50% to 100% or higher than a 100% increase.

The summary responses to the survey are presented in the following tables:

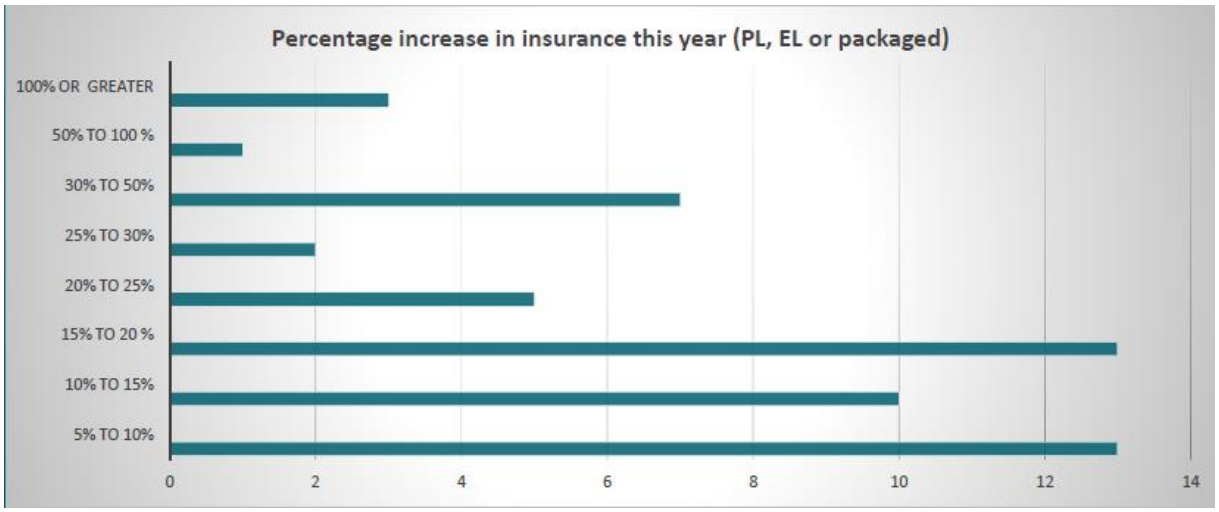


Table 2.1: Derived from Chambers Ireland Survey Results

Surveyed members were asked to provide details on the reasons provided by the insurer, or broker where relevant, for the percentage increase; the table below provides an overview of these reasons.

As can be seen, at 64%, "market conditions" represents by far the largest justification by insurers or brokers for such increases, and that where market conditions was given as a reason, insurers or brokers generally attributed these conditions to an increase in claims, which it was argued related to a claims culture. This is linked to the other 17% of respondents who were told directly that their insurance was increasing due to the overall number of claims and cost of claims. In some cases, respondents also noted that due to the nature of their business, for example the hospitality sector, insurers have less appetite to underwrite such risks.

In summary, when the various reasons as set out in Table 2.2 are examined, it appears that insurers and brokers have stated that increases in either the number and/or cost of individual claims is the main reason for the rising cost of business insurance for those surveyed.

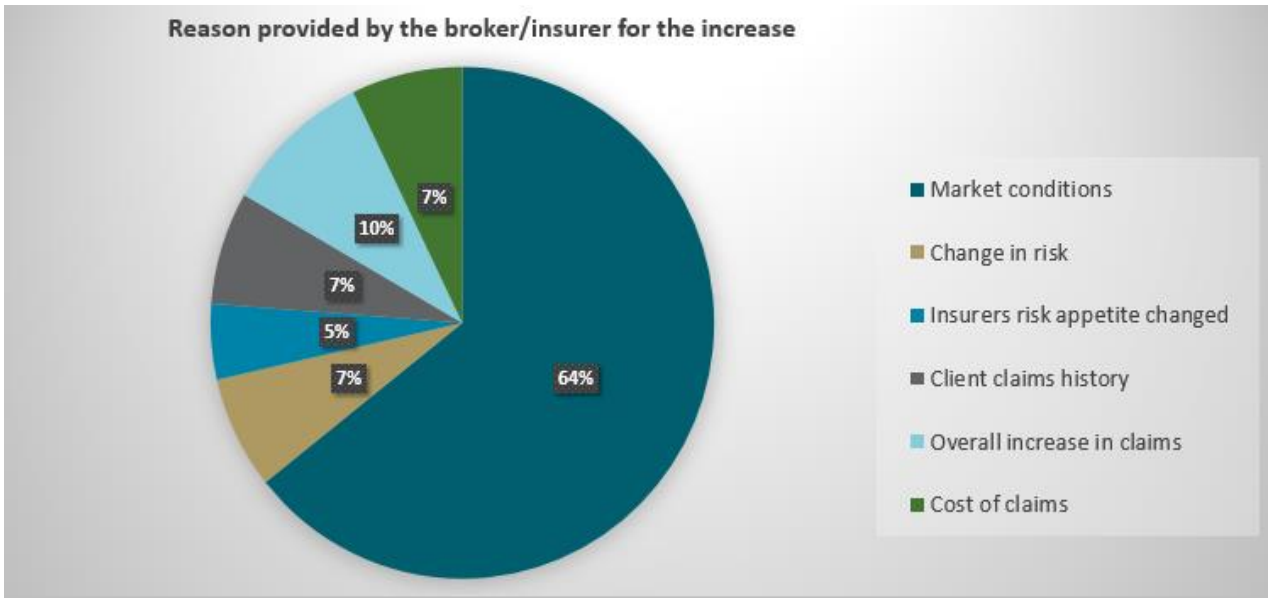


Table 2.2: Derived from Chambers Ireland Survey Results

CHAPTER 3 – UNDERSTANDING LIABILITY INSURANCE, IN PARTICULAR EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE

3.1 Introduction

Liability insurance is a part of the general insurance system of risk transfer, designed to offer specific protection against third party claims.[7] Liability can cover a wide range of potential claims ranging from injury to employees, injury to customers or visitors and damage to third party property.

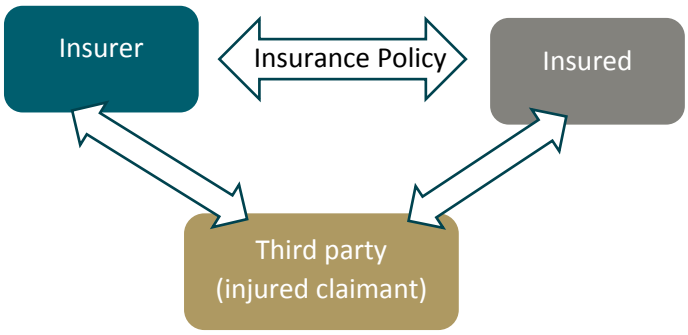
The principle of indemnity is the obligation to compensate another person harmed or injured by a negligent or wrongful act or omission as defined by law. When an insured causes a loss, the insurer assumes the insured's legal liability up to the policy limit. Therefore, the principle of indemnity in a liability insurance context applies to a person other than the insurer or the policyholder.

3.2 Common Principles of Liability

The insured is liable when, due to the insured's negligence:

- There is a reduction in assets, usually physical injury or damage to property
- There is a loss of (future) profit – financial loss usually resulting from injury or physical damage – pure financial loss is not covered

Liability insurance triangle



General liability insurance covers a broad range of insurances that a business may have in place to control the risks that they face in conducting their day-to-day business. The nature, scale and type of individual businesses is obviously very diverse, therefore the type and level of insurance which a business will require will depend on the sector it operates in, its size (based on, e.g., turnover, number of employees), and other factors. A doctor's surgery or a retailer will require different insurance cover to that of a farm or a large construction company.

Insurance relevant for businesses, no matter what the scale or nature of the business, may fall into the following categories:

[7] Third party claims are liability claims brought by persons allegedly injured or harmed by the insured. The insured is the first party, the insurer is the second party, and the claimant is the third party. This relationship is set out in the liability insurance triangle table.

- **Protection against risk of compensation claims and legal action**
  A business has legal responsibilities towards customers and the general public. If members of the public are injured, the business could be liable to pay compensation where it is proved that the business was at fault, i.e., it did not have sufficient protections in place or was negligent. Liability insurance covers the cost of compensation to the insured and the claimant, in addition to legal fees. As an optional add-on, legal expense insurance cover can pay for the legal costs involved in pursuing or defending other claims.

- **Protection for employees**
  The *Safety, Health and Welfare at Work Act 2005* sets out the main provisions for securing and improving the safety, health and welfare of people at work. The law applies to all places of work regardless of how many workers are employed and includes the self-employed. The employer is legally responsible for their own safety, the safety of their employees and any other person who may be affected by their work activities. Employer liability insurance covers the legal liability of an employer which relates to the bodily injury or disease sustained by an employee and which arises out of, and in the course of, employment.

- **Protection for damage to property**
  This provides cover for when property is damaged due to burglary, fire or flooding, and is therefore similar in nature to the cover which would be provided for by home insurance. Business interruption insurance can provide cover for periods when the business cannot operate due to damage to property.

- **Protection against financial risks**
  This provides cover for financial risks, such as customers with bad debts or money insurance cover which replaces stolen money belonging to the business.

3.3 Differentiation between Employer Liability and Public Liability Insurance

Employer Liability Insurance

Employer liability insurance covers the legal liability of an employer against the bodily injury or disease sustained by an employee which arises during the course of their employment within the organisation. Unlike the UK, where there is a legal requirement to have employer liability insurance, this type of insurance is not a legal requirement in Ireland. However, in practice, employers will obtain this cover as otherwise they are liable for compensation in the event that an employee has an accident or develops an illness for which they (the employer) is deemed responsible.

Policy wordings vary among insurers. However, an employer liability policy provides an indemnity to the insured against liability at law for damages and claimant's costs and expenses in respect of

bodily injury or disease sustained by any employee caused during the period of insurance and arising out of and in the course of employment within the business.

Bodily injury refers to death, illness and disease. Certain policy wordings may also include nervous shock and mental anguish.

The definition of an employee is broad and includes:

- Persons under a contract of service or apprenticeship
- Self-employed persons
- Persons on a work experience scheme
- Subcontractors working with the insured in connection with the insured's business

Public Liability Insurance

Public liability insurance is not a compulsory class of insurance in Ireland. However, for businesses which interact with the public as part of their normal operations, public liability insurance is an essential element of their overall insurance cover, as failure to have it could be financially ruinous in the event of an accident resulting in a large claim. Most policies will have a maximum indemnity limit.

A public liability policy protects an insured person in respect of their legal liability to third parties for bodily injury and for any loss or damage to material property which happens in connection with the business of the insured covered by the policy and which occurs during the policy period.

In summary, therefore, despite the fact that employer liability and public liability insurance are not compulsory classes of insurance in Ireland, they are an essential part of doing business and the cost of adequate insurance cover must be taken into account by a business as part of its overall operating costs.

3.4 How Employer Liability and Public Liability Insurance Cover is Sold

The Working Group consultations highlighted that the provision of business/commercial insurance (in essence employer liability and public liability insurance) is a much more complex area than the sale of insurance products to retail customers. There are a number of reasons for this including, for example, the diverse range of businesses from micro SMEs to large commercial organisations seeking cover, the different types of liability cover required and the range of excesses available. This is reflected in how such insurance products are sold, with a greater use of specialist brokers than on the retail consumer side. More detail is provided on distribution channels below.

Distribution Channels

A distribution channel is the means through which an insurer sells its products to an insurance buyer. The channels can be divided into two main types: direct insurance, where the insurance is purchased directly from the insurer, and indirect, where the insurance is purchased via an intermediary (more commonly referred to as an insurance broker).

In order for insurance brokers to be able to operate they must be authorised/registered if they wish to carry out the activity of insurance mediation or provide advice to consumers in relation to:

- General insurance products
- Life assurance products
- Health and medical insurance products

They must also be authorised/registered if they intend to act as an insurance broker on behalf of an insurance company with which they have an agreement or carry out certain specified activities, e.g., loss assessing and assisting consumers in dealing with claims under insurance contracts. It is an offence to engage in any activity outlined above without being registered with the Central Bank of Ireland[8]. The Central Bank maintains and publishes a register of insurance brokers/intermediaries.[9]

Packaged General Liability Products

Business insurance is usually sold as a package, combining a number of different risks under one policy. The types of cover a business will need, and the cost of the premium, will be based on a number of factors including:

- the nature of the business
- its annual turnover
- the number of people employed by the business
- the nature and value of property owned by the business
- the insurance claims history

Employer liability and public liability insurance can be purchased directly from the insurer. In some cases insurers will have direct sales branches or, more typically, given the nature of the risk, companies may use an intermediary (a broker) to purchase their insurance. The majority of insurers who met with the Working Group rely on insurance brokers for most of their business and it was noted that the market is quite heavily intermediated.

Insurers will typically offer packaged insurance solutions to businesses, so that the business purchases a package of insurance which provides the cover it requires depending on the nature of the business.

There may be several covers included in the one overall product. For example, an SME insurance product may provide buildings, contents and stock and business interruption cover, as well as employer, public and product liability cover. Other types of risk covered can include:

- Small-to-medium risks including SME risks, Fire, Lightning, Burglary, Money, Glass, and Fidelity Guarantee

[8] Offences are primarily outlined in Part 5 of *European Communities (Insurance Mediation) Regulations 2005 (S.I. No 13 of 2005*).
[9] The Central Bank of Ireland Registers are available at:
http://registers.centralbank.ie/DownloadsPage.aspx?AspxAutoDetectCookieSupport=1

- For large risks such as large industrial manufacturing type risks, including factories, separate products would be sold for employer liability and public liability insurance
- Various agricultural covers would also be included with farm products, for example, injury caused by animals straying

For the six main domestic non-life underwriters, packaged products account for approximately 60% of liability premiums.

Remuneration and Commission Models

The majority of intermediaries are remunerated for their services through commission on the sale of financial products. For commercial insurance, intermediaries are typically subject to a standard commission model based on the amount of premium paid. Therefore, in general, the higher the premium charged by the insurer, the greater the commission will be for the intermediary.

Based on data from Brokers Ireland, typical commission rates (as a percentage of the premium) are 6% for employer liability insurance, 10% for public liability insurance and, for combined or packaged products, 12.5% - 15%.

Fees for small-to-medium risks will depend on:

- The type of risk involved,
- The amount of technical difficulty involved in preparing risk information detail,
- Finding a market for the risk, and
- The costs involved in producing documentation where delegated authority has been granted to the broker

The fees for small-to-medium risks range from €50 - €100 per hour. For large risks, the fees would be a minimum of €200 per hour and will depend on the technical difficulty involved and the status of the staff member (account handler, underwriter, surveyor or Director) handling the placement. Brokers Ireland also stated that there has been no change in the standard commission structure for many years.

CHAPTER 4 – UNDERSTANDING THE LIABILITY INSURANCE MARKET IN IRELAND

4.1 Overview of Non-Life Insurance Market

The domestic non-life insurance market is concentrated across eight firms, six of which are regulated by the Central Bank of Ireland and two of which operate on a Freedom of Establishment basis.[10] The market (excluding Accident & Health) had a total Gross Written Premium (GWP) of €2.9bn in 2015, of which the six main domestic companies accounted for €2.3bn. This therefore indicates quite a concentrated market.

Motor insurance (both private and commercial) is the largest non-life segment, accounting for 47% of Irish risk premium, whilst property and liability business account for 29% and 20% of GWP respectively. As the scope of the Working Group's second phase is employer liability and public liability insurance, the Working Group's primary focus is therefore is on the General Liability class of non-life insurance which covers these areas.

Compared with the motor insurance sector, the General Liability class is a little more fragmented. This is reflected in the fact that ten companies account for 66% of 2015 liability premiums, six of which are Irish-authorised firms, with the other four branch operations (see section 4.4 for more information).

The general outlook for the domestic non-life insurance sector is improving. The basis for this assertion is that the domestically-focused firms had lower underwriting losses in 2016 compared to 2015 on their overall business with some individual firms reporting underwriting profits. Nevertheless, challenges remain for the sector, as insurers continue to contend with an uncertain claims environment, particularly with respect to their motor and liability books. Claims uncertainty has resulted in an increase in technical provisions[11] which means that based on prevailing market conditions, they believe they may have to settle claims for a higher amount than had been envisaged at the time a policy was sold. As personal injury claims in particular can take a number of years to resolve, it will be some time before it can be determined whether these provisions reflect accurately the actual final cost of settlement. A reported slowdown in settlement rates may also lead to higher outlays as costs are affected by inflation. Although the property book of business performed well in 2016, this was due to a particularly benign claims experience and underlying risks may remain.

The prolonged low interest rate environment has led to a persistent decline in firms' investment income since 2012. This fall-off in investment income is arising as maturing investments are re-invested at lower yields. As investment income is a key component of non-life insurers' profitability, a continuation of the low interest rate environment will provide an ongoing challenge to the strengthening of profitability. As one of the insurers which met with the Working Group noted, the reduction in investment returns requires underwriting to be profitable, which is not helpful in curbing price inflation.

[10] Freedom of Establishment: an insurance undertaking can operate within the Irish market by establishing a branch.
[11] Technical provisions are provisions made by insurers for claims that will be paid in the future. Although the average duration on technical provisions is short, approximately 3 years, certain claims, such as bodily injury claims, can take up to 10 years to settle.

4.2 Regulatory Framework for Non-Life Insurance

The regulatory framework for the provision of life, non-life and reinsurance in the European Economic Area (EEA), and the supervision of that activity, is prescribed by EU Directives (principally Solvency II).[12] As set out within Solvency II and the Irish transposing Regulations,[13] there are 18 classes of non-life insurance which includes motor vehicle liability and General Liability. Employer liability and public liability insurance fall within the category of 'General Liability' which covers all liability other than liability covered in class 10 (motor vehicle liability), class 11 (aircraft liability), and class 12 (liability for ships).

There are three ways an insurance undertaking can operate within the Irish market:

(i) Establish a head office in Ireland (authorised by and subject to prudential supervision by the Central Bank of Ireland)
(ii) Establish a branch in Ireland through Freedom of Establishment
(iii) Operate on a Freedom of Services basis

The provision of insurance through a branch on a freedom of establishment basis, or on a freedom of services basis is one of the key mechanisms of the Single Market as it allows an insurer authorised in one Member State to write insurance business in other Member States, subject to certain notification requirements. It does this by facilitating mutual recognition of the authorisation of insurance undertakings by Member States throughout the EEA.

4.3 Relevance of Cross-Border Cover in Ireland

A number of stakeholders noted that for certain risks and sectors where Irish authorised undertakings no longer have the appetite to underwrite such risks, they are instead being placed with Lloyd's and other London market insurers.

An insurer noted that on average 8 out of 10 of their policyholders who had moved cover moved to insurers authorised in other Member States. This trend includes the casualty and commercial insurance areas, in particular leisure and retail sector risks. This appears to be an increasing general trend but is more prevalent within the business insurance sphere.

What this suggests is that there is significant capacity, at a price which reflects the risk, particularly from non-Irish insurers such as in the London market and Irish branches of UK-authorised insurers. This is a point noted by a number of underwriters targeting the larger risks.

Feedback from stakeholders has also indicated that the London market, as well as underwriting larger or specialised risks, is also underwriting smaller commercial risks, such as retailers and operators in the leisure sector.

[12] Further information on the regulatory framework for insurance in Ireland is set out in Chapter 4 of the Cost of Insurance Working Group's *Report on the Cost of Motor Insurance*, January 2017: http://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf
[13] *European Union (Insurance and Reinsurance) Regulations 2015, S.I. No. 485 of 2015*.

London Market Overview – When referring to the London market, this typically means Lloyd's. Lloyd's is a specialised insurance and reinsurance market. The majority of business written at Lloyd's is placed through brokers who facilitate the risk-transfer process between clients (policyholders) and underwriters. Lloyd's underwriters carry on insurance business in Ireland through insurance brokers/intermediaries which have been given authority by a Lloyd's managing agent to enter into a contract of insurance on behalf of the members of a syndicate managed in accordance with the terms of a binding authority agreement. Such an insurance broker/intermediary is referred to as a "cover holder". A cover holder acts on behalf of a managing agent. The payment of commission by a managing agent to a cover holder facilitates the access to such Lloyd's agents into the Irish market. Business that is placed in the Lloyd's market must be placed through the insurance broker/ intermediary which has been approved by Lloyd's to do so. Such brokers/intermediaries are referred to as "Lloyd's brokers". One of the roles of a Lloyd's broker is to fulfil the administration and processing activities that would usually be carried out by a conventional insurance undertaking.

4.4 General Liability Insurance – State of Play of Irish Market

The majority of the main non-life insurers operating in Ireland write General Liability business. Table 4.1 below shows the level of GWP written by insurance undertakings authorised by the Central Bank, operating on a branch basis in Ireland or writing business on a freedom of services basis. While there has been limited changes in sector participants since 2010, in terms of market share there is evidence that business is shifting to freedom of services providers in particular – see Table 4.2 for more details.

Given the specific nature of underwriting commercial liability insurance, some insurers have tended to focus on niche segments, for example local authorities or farms. Others have adopted a broader market approach or focused on larger commercial risks.

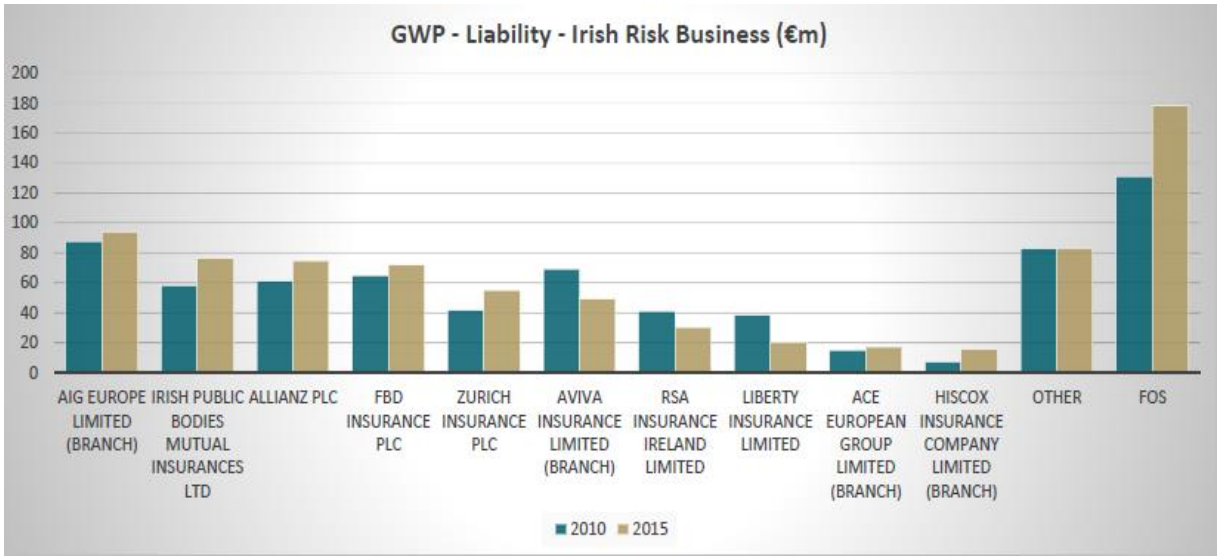


Table 4.1[14]

[14] Based on annual Insurance Statistical Data published by the Central Bank of Ireland up to 2015. Available at: https://www.centralbank.ie/statistics/statistical-publications/insurance-statistics (Note that other is comprised approx. 40% Irish authorised and 60% FOE branches)

Table 4.2[15]

The relevant authorising and supervisory authorities of the insurance undertakings in Tables 4.1 and 4.2 are set out below:

Company	**Prudential Supervisor**
Hiscox Insurance Company Limited (Branch)	Prudential Regulatory Authority (PRA) UK
ACE European Group Limited (Branch)	Prudential Regulatory Authority (PRA) UK
Liberty Insurance Limited	Central Bank of Ireland
RSA Insurance Ireland DAC	Central Bank of Ireland
Aviva Insurance Limited (Branch)	Prudential Regulatory Authority (PRA) UK
Zurich Insurance plc	Central Bank of Ireland
FBD Insurance plc	Central Bank of Ireland
Allianz plc	Central Bank of Ireland
Irish Public Bodies Mutual Insurances Ltd	Central Bank of Ireland
AIG Europe Limited (Branch)	Prudential Regulatory Authority (PRA) UK

[15] Based on annual Insurance Statistical Data published by the Central Bank of Ireland up to 2015. Available at: https://www.centralbank.ie/statistics/statistical-publications/insurance-statistics

4.5 Performance of the General Liability Insurance Sector

According to Central Bank data, General Liability business has generated ongoing losses from 2012 onwards, with the most significant losses evident in 2012. The combined operating ratio is a measure of profitability used by an insurance company to indicate how well it is performing in its daily operations. This ratio is calculated by taking the sum of incurred losses and expenses and then dividing them by earned premium.

The ratio is typically expressed as a percentage, and is calculated as follows:

$\frac{\text{Sum of incurred losses and expenses}}{\text{Earned premium}}$	x 100	= Combined Operating Ratio as a %

A ratio below 100% indicates that the company is making an underwriting profit, while a ratio above 100% mean that it is paying out more in claims than it is receiving in premiums resulting in an underwriting loss. Even if the combined ratio is above 100%, a company can potentially still make a profit, because the ratio does not include the income received from investments.

The following table illustrates the net combined ratio and net underwriting profit/loss for liability risk from 2008 to 2015:

Table 4.3[16]

[16] Based on annual Insurance Statistical Data published by the Central Bank of Ireland up to 2015. Available at: https://www.centralbank.ie/statistics/statistical-publications/insurance-statistics

In considering the profitability of the sector, it is also important to analyse investment returns over the period. The persistent low interest rate environment is materially affecting the levels of interest or investment income insurers can earn and consequently reduces their ability to use this income to compensate in part for underwriting losses, as has happened in the past.

4.6 Key Data from Insurance Ireland

General Overview of Data Supplied

As part of its review, the Working Group submitted a request to Insurance Ireland for certain key data for the period 2011 to 2016 linked to income and expenditure of insurance companies as well as the number of claims per year during this period. In order to get as accurate a picture as possible on the income and expenditure side, the data was sought on an accident year basis.[17]

Insurance Ireland informed the Working Group that it would not be possible to provide data in such a form (i.e. accident year) within the timeframe of the Working Group's schedule. Consequently, the non-availability of such data limits the ability of the Working Group to make firm conclusions on the current state of the employer liability and public liability insurance markets. However, Insurance Ireland did provide data that it publishes in the context of its annual Factfiles. This data reflects the key figures for each year on the basis of financial returns reported by companies for the period 2011 to 2016.

It is important to note here that financial year data only is of limited value in assessing the business sold in that year. This is because the underwriting profit for a given financial year can be affected by changes in reserves for previous years. For example, claims from previous years' business may have settled for less than expected, resulting in excess reserves being released. This increases the underwriting profit in the financial year, even though the claims in question relate to older years. Conversely, open claims from previous years' business may have shown adverse development, leading to reserves being increased. This reduces the underwriting profit in the financial year, even though the claims in question again relate to older years. Claims data split by accident year is required to give a fuller view of claims development.

It is therefore intended to ask Insurance Ireland to provide a more detailed overview of employer liability and public liability insurance claims, including data on claims paid and incurred claims, to be augmented with data on settlement rates, policy counts, and disaggregated by an accident year basis. A recommendation is set out in Chapter 5 in this regard.

The Tables containing the data from Insurance Ireland including relevant calculations are included in Appendix 8.

[17] Appendix 7 sets out in more detail the difference between accident year and financial year data.

Reported Claims for Employer Liability and Public Liability Insurance

Table 4.4 captures claims reported to insurers in each of the calendar years from 2011 to 2016.

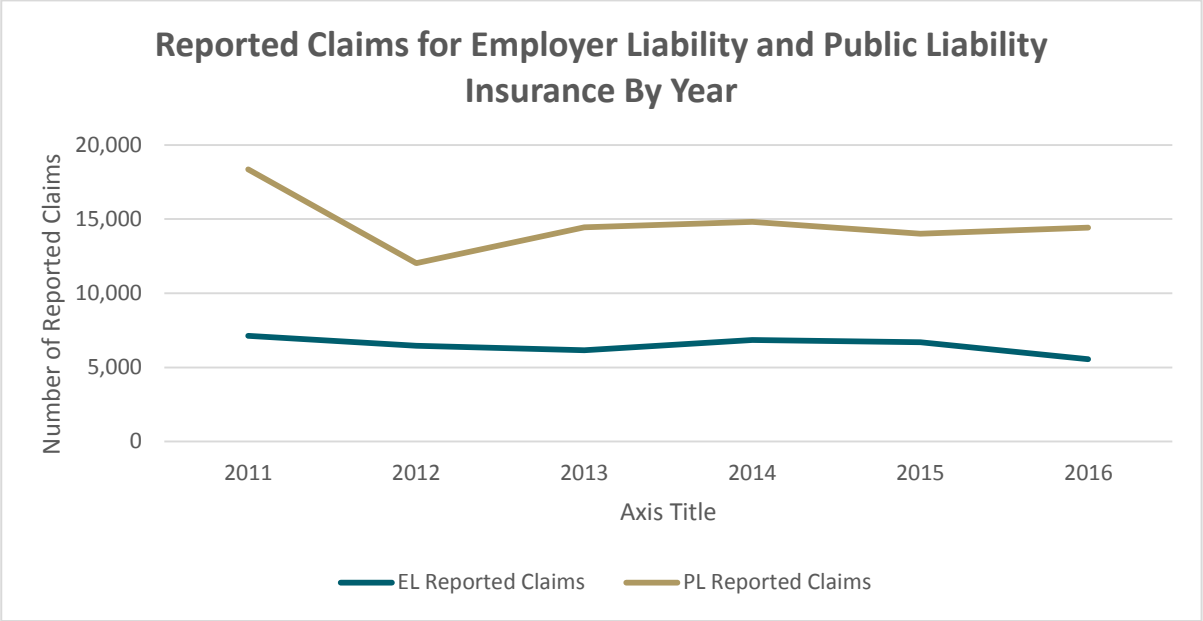


Table 4.4: Source –Insurance Ireland[18]

It demonstrates that the number of claims reported in each calendar year has remained relatively stable over the period covered, with a slight decrease in employer liability claims, and a sharp decline in public liability claims between 2011 and 2012, with a small level of increase since then. The Working Group notes that these figures are not fully aligned with the feedback / perspective provided by a number of stakeholders during its consultations (see other chapters).

[18] In Table 4.4, the data for public liability reported claims include personal injury and property damage claims. The data for employer liability reported claims includes personal injury claims only. This is because employer liability covers an employer liability for injury to employees whereas public liability provides cover against claims made by members of the public who have suffered injury or damage to property in connection with the business.

4.7 Key Data for Employer Liability Insurance

Overview

Table 4.5 sets out the key financial data for Employer Liability insurance as provided by Insurance Ireland.

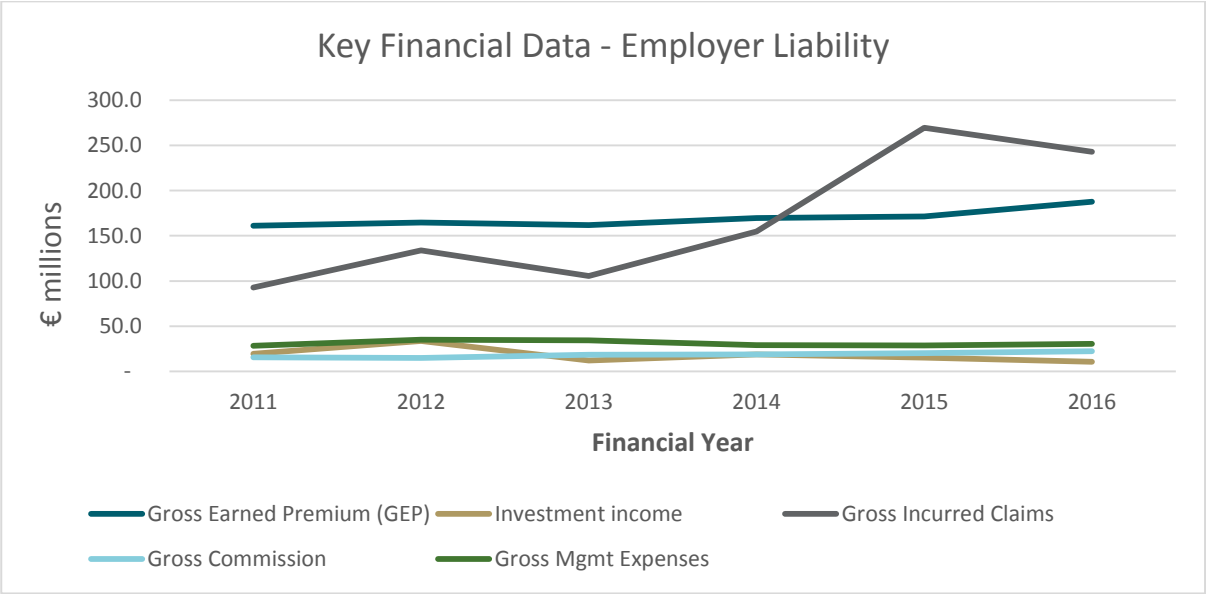


Table 4.5: Source –Insurance Ireland

Key financial data indicators show a period of relative stability in the employer liability insurance market over the period 2011 to 2016 for all key figures except for gross incurred claims[19] costs. Gross incurred claims costs show particular volatility in 2015 and 2016, which has resulted in likely losses in this line of business for insurers. The Working Group however notes that these figures appear to conflict with figures in Table 4.4 above, which shows relative stability, if not an overall decrease, in the number of reported employer liability claims for each of the years. Reconciling these figures however is difficult as they are on a different basis (reported year vs financial year) and comparisons are likely to be invalid.

[19] Gross incurred claims is an estimate of the amount of outstanding liabilities for a policy over a given valuation period, in this case the financial year. It includes all paid claims during the period plus a reasonable estimate of unpaid liabilities. It is calculated by adding paid claims and unpaid claims minus the estimate of unpaid claims at the end of the prior valuation period. Definition taken from: http://www.investorwords.com/19097/incurred_claims.html#ixzz4vrarnRJf

Income – Gross Earned Premium and Investment Returns

Table 4.6 provides an overview of trends in the main income streams, Gross Earned Premium and Investment Returns, as provided by Insurance Ireland.

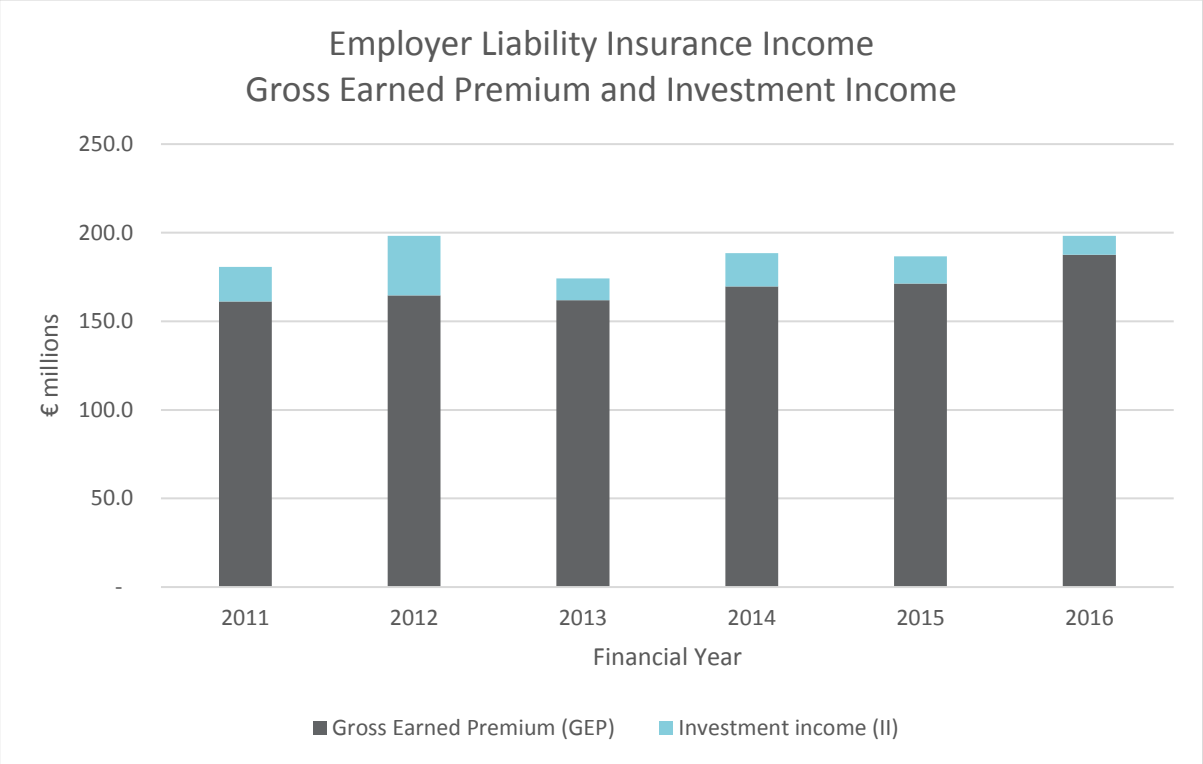


Table 4.6: Source –Insurance Ireland

Gross Earned Premium (GEP)[20] for Insurance Ireland members was €161.2 million in 2011. This has steadily increased up to €187.6 million in 2016 representing an increase of 16% over 6 years.

Investment income is used by insurers to supplement premium income and is generally a significant generator of income for insurers when underwriting profits are low (or negative). As in motor insurance lines of business, investment income has been relatively flat over the period, which can be attributed to the low rate of return on investments, in light of the low interest rate environment that insurance companies are operating within.[21]

Figures for 2012 and 2014 showed some increases over the previous years, while decreases occurred from 2012 to 2013 and again from 2014 to 2016. The 2016 figure is almost half of the same figure for 2011.

[20] In insurance, written premiums refer to the amount of premiums customers are required to pay for insurance policies written during the accounting period. Earned premium is the portion of an insurance written premium which is considered "earned" by the insurer, based on the part of the policy period that the insurance has been in effect, and during which the insurer has been exposed to loss. For example, if a 12-month policy is written on July 1st 2015, half of this written premium will be earned in 2015 and 50% will be earned in 2016 as the insurer is exposed to that policy evenly over both calendar years.

[21] Motor insurance investment income fell from €64.7m in 2011 to €25.2m in 2016 representing a reduction of 61% for the companies surveyed (First Motor Insurance Key Information Report, July 2017).

Expenditure – Gross Incurred Claims, Gross Commission and Gross Management Expenses

Table 4.7 sets out the main expenditure areas for Insurance Ireland members, and how they have changed over the period.

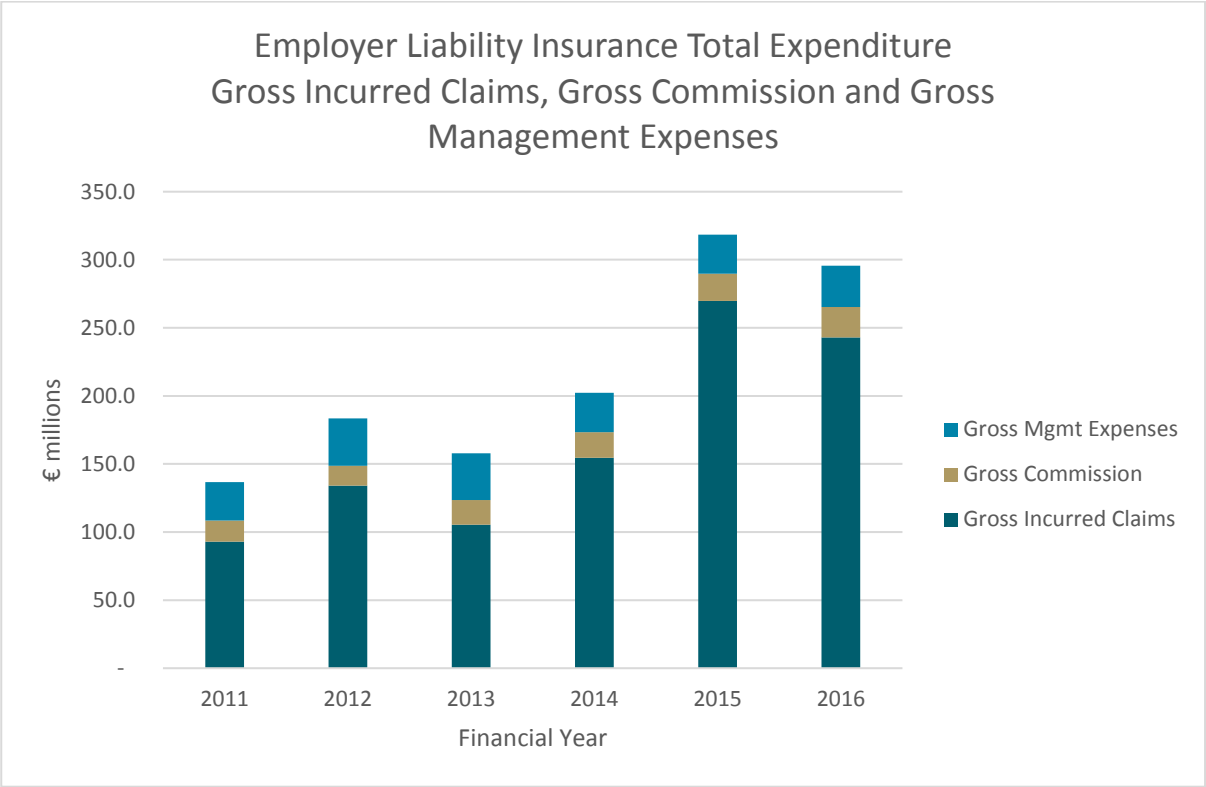


Table 4.7: Source –Insurance Ireland

According to the data from Insurance Ireland, insurers' total expenditure[22] remained relatively stable over the period between 2011 and 2014, albeit the overall trajectory is upwards, however the data for 2015 and 2016 shows major increases in total expenditure, reflecting large spikes in gross incurred claims.

Gross Commission Expenses has increased by around 45% over the period, from €15.5 million in 2011 to €22.4 million in 2016. Gross Management Expenses have increased by 7% over the same period, with some cost cutting taking place during the period covered.

Gross Incurred Claims Costs are comprised of the total payments paid by an insurer on a claim plus the estimated amount outstanding on a claim i.e. the total amount a claim is expected to cost the insurer. Gross Incurred Claims Costs increased by 161% from €92.9m in 2011 to €243m in 2016. Additionally, as noted previously, the incurred claims data does not appear to be consistent with the number of reported claims for employer liability insurance which have remained reasonably steady during this period.

[22] The Working Group has assumed that, according to the information provided by Insurance Ireland, total expenditure consist of the following: gross incurred claims; gross commission; and gross management expenses. For the purposes of the report, expenses is referred to as total expenditure.

Underwriting Profit/Loss of Employer Liability Insurance

Table 4.8 is derived from Insurance Ireland data and sets out the relationship between Gross Earned Premium and Total Expenditure.

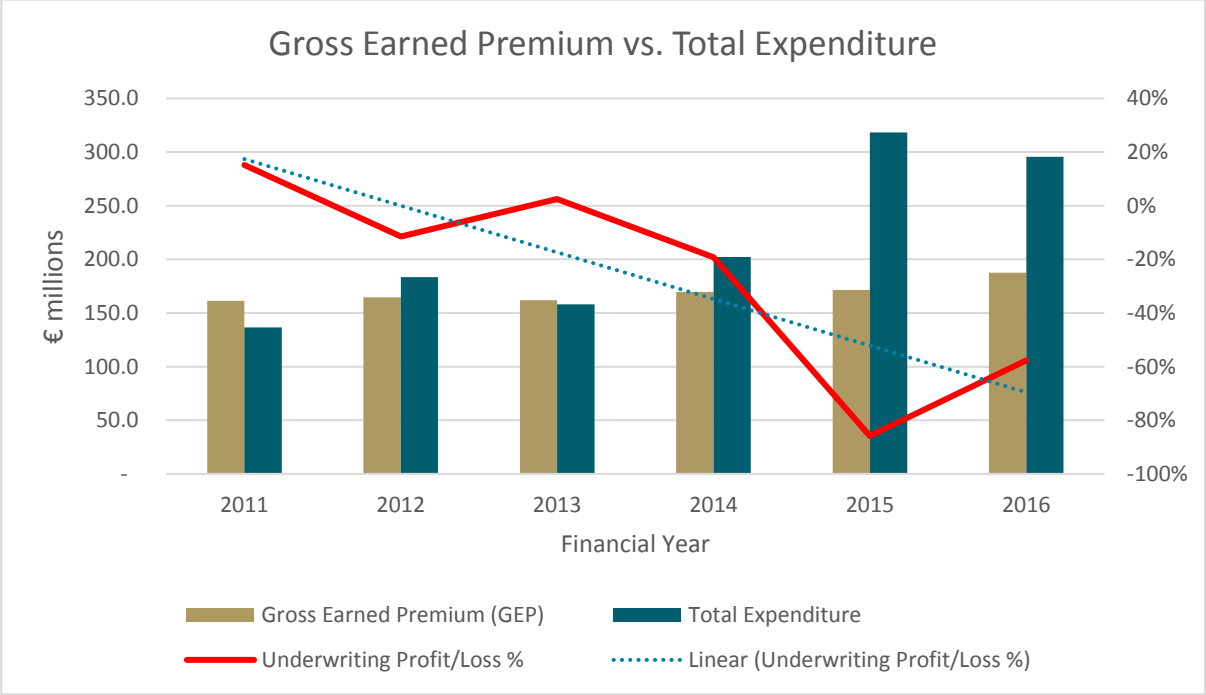


Table 4.8: Source –Insurance Ireland

Table 4.8 suggests that employer liability insurance became loss-making following a number of years of relative stable financial performance. As can be seen from Table 4.7, Total Expenditure is comprised predominantly of Gross Incurred Claims Costs. However, as the figures are on a financial year basis, it is difficult to ascertain whether there has been a recent significant change in the claims environment, whether losses in accident years 2011-2013 have been hidden by reserve releases from earlier years or whether the increase in 2015 and 2016 reflects increased provision for losses incurred during earlier years.

4.8 Key Data for Public Liability Insurance

Overview

Table 4.9 sets out the key financial data for Public Liability insurance as provided by Insurance Ireland.

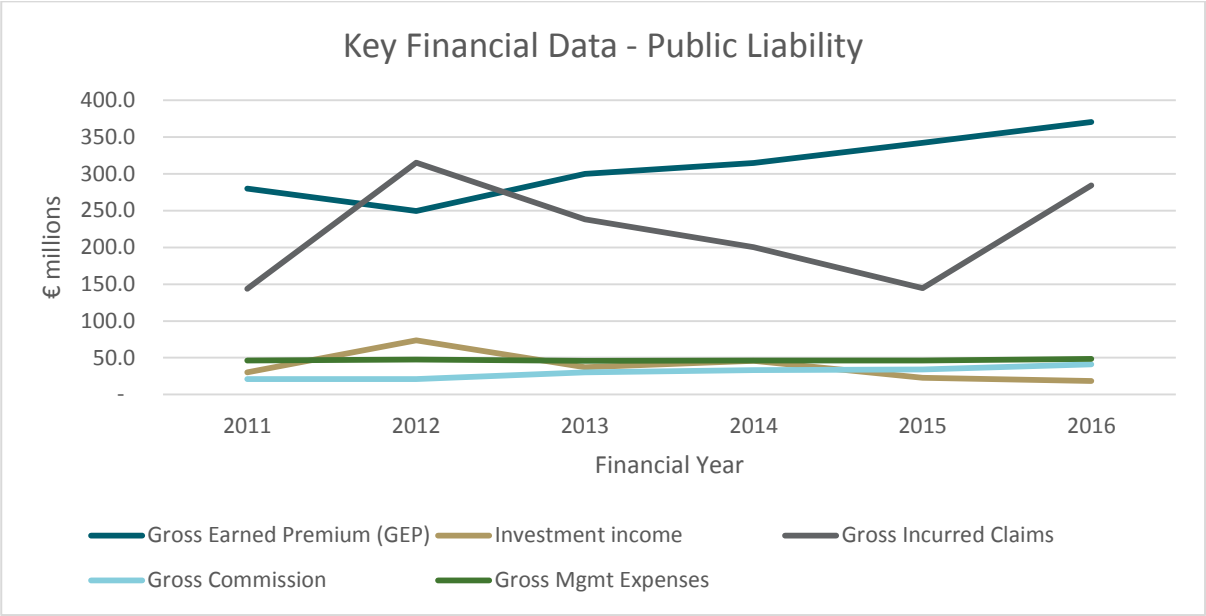


Table 4.9: Source – Insurance Ireland

Key financial data indicators show a period of steady increases in the level of Gross Earned Premium over the period covered, particularly since 2012, coupled with two periods of increased Gross Incurred Claims costs particularly between 2011 and 2012 and 2015 to 2016, with a period of sustained decrease in between. Figures for all other key financial indicators have remained stable over the whole period, with some noticeable decreases in investment income similar to other lines of business. This limited data suggests that the public liability insurance market appears to be profitable for insurers over most of the period but with potential tightening margins more recently.

Income – Gross Earned Premium and Investment Returns

Table 4.10 provides an overview of trends in the main income streams, Gross Earned Premium and Investment Returns, as provided by Insurance Ireland.

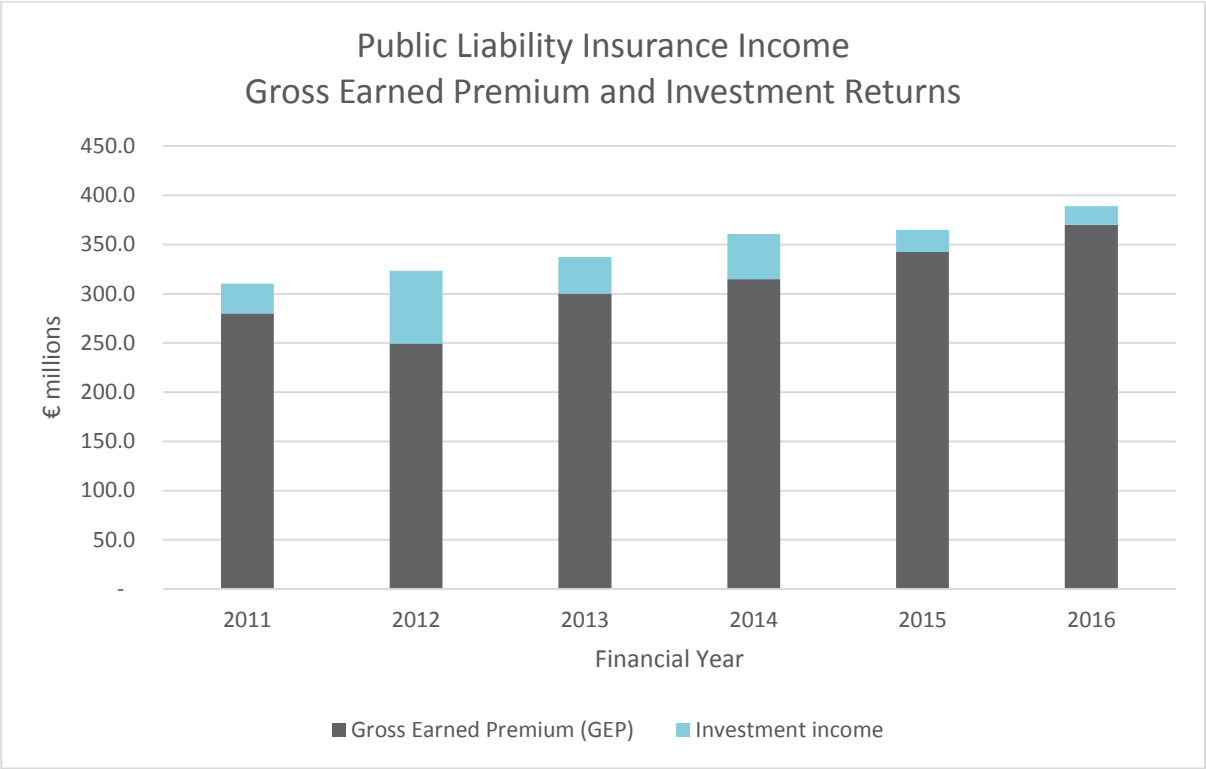


Table 4.10: Source – Insurance Ireland

Gross Earned Premium for Insurance Ireland members was €280.2 million in 2011. This increased steadily in each of the years up to 2016 to €370.3 million, representing an increase of 32% over the 6 years. As in other insurance lines of business, investment income has been relatively flat over the period, which can be attributed to the low rate of return on investments, in light of the low interest rate environment that insurance companies are operating within. Notwithstanding this, the data shows more marked increases in particular years, particularly in 2012 and again in 2014, however there is an overall decrease of around 40% between 2011 and 2016 returns.

Expenditure – Gross Incurred Claims, Gross Commission and Gross Management Expenses

Table 4.11 sets out the main expenditure areas for Insurance Ireland members, and how they have changed over the period.

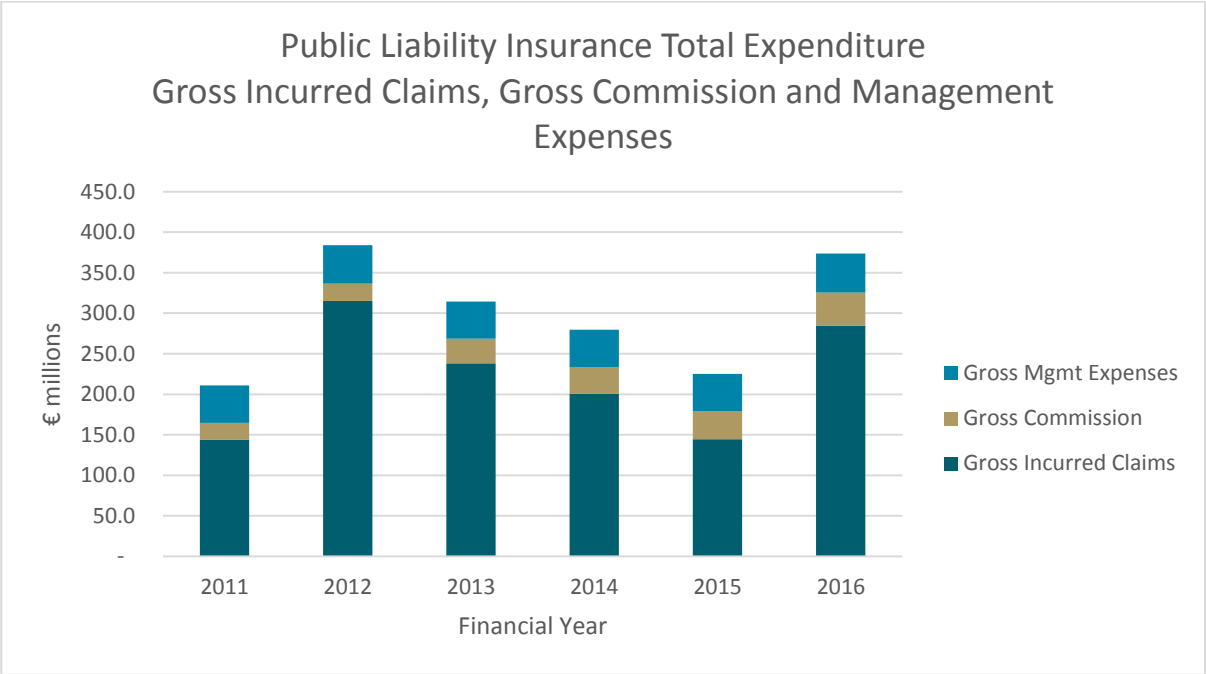


Table 4.11: Source – Insurance Ireland

According to the data from Insurance Ireland, insurers' total expenditure shows two sharp increases for the periods 2011 to 2012 and again in 2015 to 2016. Total expenditure was €210.9m in 2011 before rising to €384.1 million in 2012. Likewise, total expenditure was €225.1 million in 2015 and rose to €373.9 million in 2016. Total expenditure decreased over the period between 2012 and 2014. These increases reflect large spikes in returns related to gross incurred claims for those periods.

Gross Commission Expenses has increased by around 95% over the period, from €21.1 million in 2011 to €41.3 million in 2016. Gross Management Expenses have increased by just under 5% over the same period, with some cost cutting taking place since 2011 to 2016.

Gross Incurred Claims Costs fluctuated between 2011 and 2016. A spike from €143.65m in 2011 to €315.39m in 2012 was followed by three consecutive annual decreases before another very significant rise in 2016 which has nearly doubled the 2015 figure.

Underwriting Profit / Loss of Public Liability Insurance

Table 4.12 is derived from Insurance Ireland data and sets out the relationship between Gross Earned Premium and Total Expenditure for Insurance Ireland members.

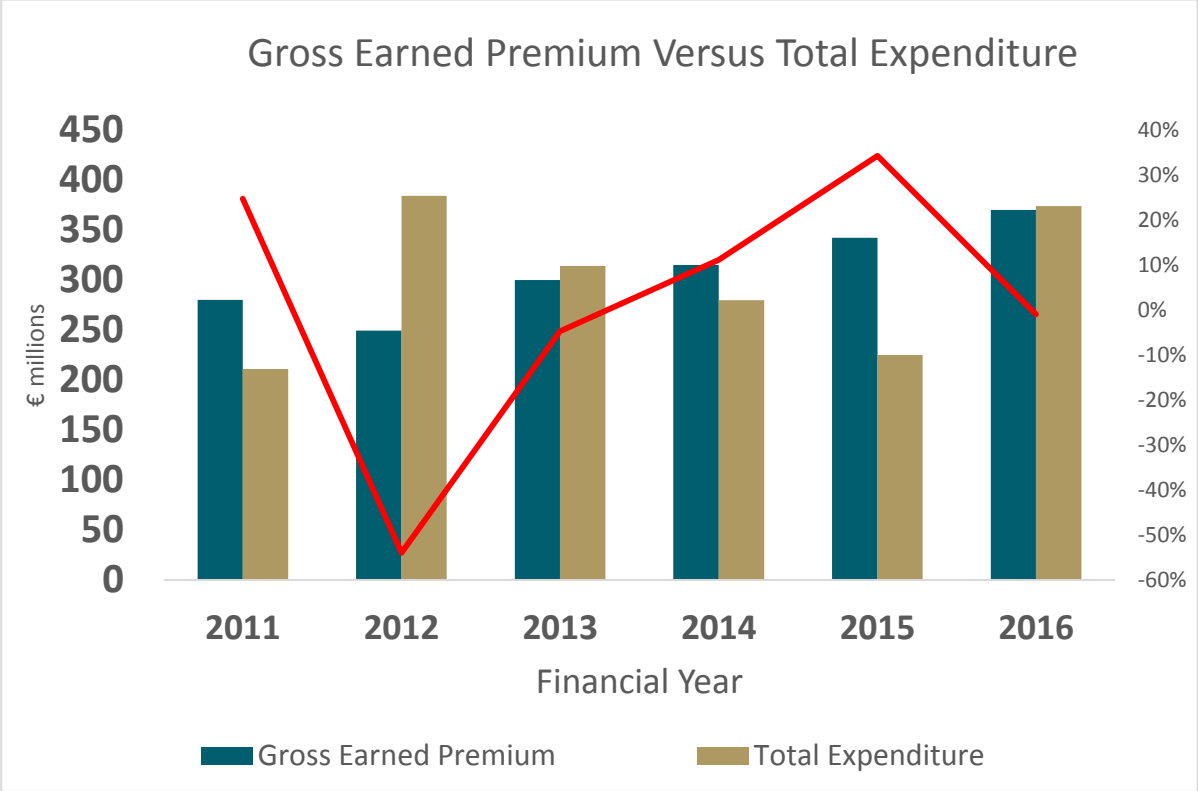


Table 4.12: Source – derived from Insurance Ireland data

As a percentage of Gross Earned Premium, total expenditure averaged 98% between 2011 and 2016, with a peak of 154% in 2012 and returning to 101% in 2016. From the data, gross incurred claims represents the largest portion of this figure. The make-up of each figure is discussed in more detail above.

Table 4.12 would suggest that public liability insurance, in terms of the ratio of gross expenditure claims to gross earned premium, has been profit-making for much of this period, and it was only in 2012 that there were any significant losses. However, as the figures are on a financial year basis it is difficult to ascertain whether there has been a recent significant change in the claims environment, or whether there are potential underlying losses over the period when measured using accident years which have been hidden by reserve releases.

4.9 The Impact of Brexit on the Insurance Sector in Ireland

The decision of the UK to exit the European Union will pose challenges for the Irish insurance market in particular. The domestic insurance sector often operates as a microcosm of the economy and will be exposed to both the challenges and opportunities arising from Brexit. This is likely to have knock-on effects upon the Irish financial services system.

There are also direct impacts on the existing financial services firms operating in Ireland today, including those who have direct exposure to the UK. Firms operating to or from the UK are the most immediately impacted. The Working Group considers that there may be potential implications for

the way that firms operating in Ireland are structured. As mentioned above, the freedom of establishment and freedom of service options as to how an insurer can conduct its business in the EU are critically important features of the Single Market and create the potential for material business changes including new authorisations for firms relocating business from the UK to Ireland.

Furthermore, it is possible that there could be a disorderly Brexit or 'hard' Brexit, with no transition period. The insurance sector needs to prepare for such scenarios. The Central Bank of Ireland issued letters to Irish-authorised insurance undertakings requesting that they submit plans to the Bank by the end of October 2017, setting out the impact of Brexit on their business. The Central Bank has reviewed the contingency plans submitted by relevant insurance undertakings and will continue to engage with undertakings to assess their preparedness for Brexit.

4.10 Conclusions of the Working Group

The key issue emerging from this chapter is the lack of publically available good quality data in relation to employer liability and public liability insurance. The absence of this data, in particular accident year data, makes it very hard to draw any firm conclusions about what the underlying trends in the market are and what are their causes. Consequently, the next chapter makes a number of recommendations to address this data deficit.

PART 2
ISSUES IDENTIFIED BY THE WORKING GROUP

CHAPTER 5 – DATA AVAILABILITY FOR EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE

5.1 Introduction

As has been noted in Chapter 4, one of the main constraints within the Working Group's consideration of insurance costs to businesses has been a lack of data, including official statistical data, with which to make conclusions about the necessary policy responses to issues identified.

This shortcoming has also been highlighted in the Motor Report and the various National Competitiveness Council *Costs of Doing Business in Ireland* reports. In simple terms, the absence of price data specifically makes it very difficult to assess market conditions, price competitiveness and the rationale for price increases across various categories of commercial non-life insurance.

The above view was reinforced by the business stakeholders consulted with by the Working Group who made similar points to those raised by many in the Motor Report, namely that an improvement in transparency, facilitated by additional collection and publication of data, was needed. This is particularly important as the main evidence the Working Group has that problems exist in the market is the general CSO statistic that insurance prices in their broadest sense increased by 57% overall between January 2011 and July 2016. This is supported in the main by anecdotal evidence from stakeholders on the particular levels of increase they have experienced. However, the Working Group is conscious that relying on anecdotal evidence alone may potentially give a distorted view of the overall employer liability and public liability insurance market.

In summary, the main information gaps that the Working Group identified with regard to this phase of its work related to:

1. The cost of insurance to businesses (a measure of inflation that reflects the cost of general liability insurance, or employer liability and public liability insurance);
2. Data which would enable the Working Group to examine claims trends and the costs of claims linked to public or employer liability claims;
3. Available data with regard to courts awards paid and availability of data on legal costs and other costs of delivery associated with cases.

In light of the fact that the Motor Report discussed the issue of data in detail, discussions in this phase have focused on whether it is possible to collect such information given the less homogenous nature of employer liability and public liability products compared to motor insurance, the specific circumstances on the way it is sold, and the range in the size of businesses which buy insurance, from micro-enterprises to multi-national companies. The factors considered in the previous report, such as value for money and precedents in other jurisdictions, are also considered in this phase.

The Working Group believes that there is potential to deal with a number of these issues through existing recommendations in the Motor Report. However, there needs to be further consideration by the relevant data collecting agencies of the feasibility of the collection of such information and this is explored in section 5(4) below.

5.2 What Data is available for General Liability, Employer Liability, and Public Liability Insurance in Ireland?

The Motor Report includes an appendix of the main sources of available insurance data in Ireland, much of which also covers employer liability and public liability insurance cover. These include the Central Bank of Ireland, the Central Statistics Office, the State Claims Agency, the Personal Injuries Assessment Board, the Courts Service, Insurance Ireland and the Society of Actuaries in Ireland.

In broad terms, as has already been noted, none of these sources is providing the appropriate publically available information which the Working Group believes is necessary in order to determine what the causes of the underlying trends in the employer and public liability markets are.

The main source of quantitative and qualitative data is the Central Bank, which collects a range of information from insurance undertakings in the exercise of its supervisory functions under Solvency II. On the quantitative side, insurance undertakings are required to submit data in quantitative reporting templates (QRTs) to the Central Bank. This data includes aggregate data on risk exposures which includes information on premiums and incurred claims, technical provisions and claims development triangles by line of business.[23]

On the qualitative side, insurance undertakings must produce and publish Solvency and Financial Condition Reports (SFCRs). These reports provide company information on business and performance, system of governance, risk profile, valuation for solvency purposes, and capital management, including information on the SCR (Solvency Capital Requirement) and MCR (Minimum Capital Requirement). The SFCRs for 2016 are available online for the insurers noted in this Report.

In addition, the Central Bank has developed a repository which houses (relevant) SFCRs to allow ease of access to stakeholders/policyholders.[24]

5.3 What Data is available for General Liability, Employer Liability and Public Liability Insurance in Other Jurisdictions?

A short description is provided below of how a number of other jurisdictions deal with the issue of providing transparency and/or improving data availability in the insurance sector.

United Kingdom

The Association of British Insurers (ABI), a trade association of insurers, collects extensive data from insurers and long-term savings providers, covering everything from motor and property insurance to life assurance and pensions.[25] Their extensive data offers the most comprehensive coverage of the UK insurance market. ABI produces regular detailed statistics including statistical data in relation to premiums and claims, commission and expenses, change in provisions, equalisation reserves, underwriting results, and operating ratios for a range of insurance categories.

[23] See Appendix 7 for more information.
[24] This repository is available at: https://www.centralbank.ie/regulation/industry-market-sectors/insurance-reinsurance/solvency-ii/communications/solvency-and-financial-condition-report-repository
[25] Association of British Insurers, *Statistics,* available at: https://www.abi.org.uk/Insurance-and-savings/Industry-data

The section on general (non-life) insurance is split into seven categories, six of which cover all of the individual product line data which the ABI collects, while one relates to total market and product distribution data, which encompasses the entire non-life market. Data is available for general liability insurance, however, it does not further break this down by type of liability cover. This data consists of the gross and net written premium by year.

Finland

The Federation of Finnish Insurance Companies, the trade association for insurance companies in Finland, publishes information on the gross premiums written, financial ratios, profit and loss accounts and balance sheets of non-life insurance companies operating in Finland.

Again, data collected in Finland is collected at the level of general liability, and the Federation of Finnish Insurance Companies does not further break this down by type of liability cover.

Denmark

The Danish Insurance Association, a trade association of Danish insurance undertakings, publishes an annual statistical analysis of the life, non-life and pensions business. In relation to non-life business, the Danish Insurance Association publication includes some aggregated information on premium income and claims by class and sub-class of insurance. With regard to commercial insurance, it provides this data on industrial injuries insurance, buildings insurance, commercial liability insurance, and others, but not on public liability insurance.

5.4 How can Data Gaps be addressed?

Price Index of Employer and Public Liability Insurance Costs to Business

The Central Statistics Office (CSO) does not currently collect or compile price indices in relation to the cost of insurance to businesses.[26] The CSO's view was that if it were to produce an index covering this area, it would be included in the publication called Services Producer Price Index (SPPI)[27] and would not fall under Consumer Price Index, where other types of insurance to consumers are currently collected and compiled. The CSO does, however, collect certain information on the operating costs of business broken down by categories, one of which is insurance. Additionally, Profit & Loss and Balance Sheet information from non-life and life insurance companies operating in Ireland is collected for the purpose of the Balance of Payments. Neither of these exercises are published. The Working Group notes that each of these data collection exercises relate to a specific purpose and that they are not price index-related. More information on the SPPI and the other exercises are detailed in Appendix 9.

The CSO highlighted that the production of such an index may have limited benefits given the range and varying sizes of businesses, and that such an index may not provide an accurate picture of what actual price inflation might be. For example, the costs between one sector and another may vary greatly reflecting the level or types of risk that may exist. In addition, larger firms may self-insure

[26] NACE code K66.11 relates to non-life insurance.
[27] See http://www.cso.ie/en/releasesandpublications/er/sppi/servicesproducerpriceindexquarter12017/

or be covered by a parent company's group insurance. This issue does not arise to the same extent for motor insurance when measured under the Consumer Price Index (CPI) where insurance tends to be sold to an individual in respect of their use of a motor vehicle, i.e., the type of customer and the scope of the policy are relatively standard.

In terms of the collection of this type of data, the CSO would need to consider the optimal approach. This may be the collection of information directly from businesses or its collection from the providers of the service, i.e., insurance companies in this case. The service providers approach is the one used for collecting information on motor insurance for consumers and is the more likely approach to be adopted, if a decision was made to proceed with this type of index.

The CSO has indicated that producing a price index for business insurance inflation would be a difficult challenge involving significant resources to develop initially. The maintenance of such an index they believe would be less resource intensive. In considering whether to produce this index, it would be necessary to establish that there was a willingness from insurance companies to provide the relevant information to setup the survey, and a commitment to provide the data on an ongoing basis. Compilation methods would need to be developed in line with the methods for surveys such as the Services Producer Price Index and the Consumer Price Index. In addition, the CSO would also need to consider the usefulness of the index for key stakeholders because the variety of types of business insurance products and the range of different businesses using such products means it will be very difficult to come up with an index which captures the differing movements in prices in an effective and meaningful way.

In summary, the Working Group is of the view that producing a price index for business insurance costs is a much more complex exercise than producing such an index for motor insurance because of the much greater uniformity in the products available to the general public for the latter.

The preliminary analysis above demonstrates the need to give further consideration to the feasibility of collecting such information. Given that there is a potential for significant resourcing requirements, the Working Group recommends that the Central Statistics Office consider the feasibility of collecting relevant data related to the cost of general liability insurance for businesses in the State, taking into account the issues highlighted above, and make a report to the Minister for Finance on this by mid-2018, with a view to commencing collection of this data if it is deemed feasible.

Claims Costs and Trends

The Working Group considered this issue in the first phase of its review and made a recommendation on the establishment of a National Claims Information Database.[28] In this respect, there is a potential to expand the scope of the National Claims Information Database to include claims information arising from employer liability and public liability insurance. As with the pricing data, the merit of any such extension to the Database would have to be extensively considered, taking into account the further complexities which employer liability and public liability insurance

[28] See Recommendation 11 of the *Report on the Cost of Motor Insurance*, January 2017, at pp. 17 and 87, available at: http://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf

present in terms of data collection and publication when compared to motor insurance. For example, the wide range of business types which are covered broadens the scope of the potential risk factors and, as a result, claim types. The claims experience of a small grocers would not be comparable to a large factory and averages are less useful in a less homogenous market. The Working Group notes that the legislation to establish the National Claims Information Database has been designed to allow for the potential future collection of data relating to any type of non-life insurance including public and employer liability insurance, in addition to motor insurance. This information, if it is subsequently decided to collect will be done so at a level of aggregation higher than individual claim level, i.e. not on a claim-by-claim basis, and aligned with the collection of information relating to motor insurance.

Personal Injury Court Awards and Legal Costs

The Department of Finance's *Motor Insurance Key Information Report* found that there was a large overhead in terms of legal and other costs[29] to insurers for private motor insurance claims that are settled post-PIAB including court awards. It was found that such costs averaged around 40% of the amount of compensation. In the absence of any data from the insurance industry on legal and other costs in the employer liability and public liability areas, the Working Group considers that there is a reasonable argument for as a starting point using the figures from *Motor Insurance Key Information Report* as a benchmark, in advance of getting better data from the industry.

The lack of clear cut information regarding court awards, as well as legal and other costs, was identified by businesses and insurers as a barrier to transparency. In addition, the issue of the inconsistency of court awards for personal injury cases was raised by a number of stakeholders, both in the last phase of work and in this phase of work with the view expressed by one stakeholder that a register of the awards of individual judges' be established.

With regard to personal injury awards, the Working Group notes that the Courts Services currently publishes limited data through its annual reports. They also report on the number of personal injury suits filed on a year by year basis. With regard to awards, the published data includes information on the number of awards broken down within financial ranges, in the District Court, Circuit Court and High Court. These ranges reflect the jurisdiction of each of the courts, however it is difficult to ascertain average amounts and very often the data contains information on medical negligence cases as well as motor and liability cases.

With regard to legal and other costs, there is no published data nor is there a relevant body that collects such information. In response to queries from the Working Group, the Law Society confirmed that it does not capture any information on the amount or the range of legal fees which solicitors charge in relation to personal injury cases, stating that "*if it were to do so, it would be likely to be contrary to competition law*", and did not offer an opinion as to whether it would see a benefit generally in such information being captured.

The Working Group also recalls that it looked at personal injury awards and legal and other costs in the first phase of its work as part of Chapter 8 (reducing the costs in the claims process).

[29] 'Other Costs' primarily relate to non-legal costs incurred by insurers as part of claims defence (engineer, medical, actuarial reports etc.)

It concentrated its efforts on

- reviewing section 30 of the *Civil Liability and Courts Act 2004*
- the Department of Justice and Equality examining the impact of legal and other fees on personal injury awards

In terms of the section 30 review, the Courts Service has been requested to examine the requirements, including system development and resource issues, needed to enable the commencement of section 30. The Courts Service is actively reviewing what is required to set up a register of personal injuries actions across court jurisdictions and the timeframe involved, with a view to establishing the register as quickly as possible. The sufficiency of the data required under section 30 will also be examined. With regard to the impact of legal and other fees on personal injury awards, Recommendation 22 requires the Department of Justice and Equality to examine the impact of these on personal injury awards. The review has been commenced, however it has proven to be more difficult than anticipated to establish a reliable set of data. The Working Group understands that certain data on legal fees (where there are requests for the new Office to adjudicate on those costs) will become available when the new Office of the Legal Costs Adjudicators is established in 2018.

The Working Group believes that these recommendations when fully implemented will lead to an increase in published data regarding court awards and legal fees. Additionally, the Working Group notes that the National Claims Information Database will contain some information on legal and other costs borne by insurance undertakings. This will provide some further clarity on this general issue.

Notwithstanding the above, the Working Group believes that the Courts Service could publish the results of personal injury cases in a more granular way in its annual reports, possibly by categorising the types of cases. This could involve the differentiation between certain types of cases that might typically involve higher award levels, namely medical negligence cases. Such granularity would provide a further level of clarity around the average awards provided, and if there are particular trends in the awards provided. Finally, with regard to a register to identify awards made by particular judges, the Working Group felt that such information was already generally available through media reporting.

5.5 Relevant Recommendations from the Motor Report

Recommendation 11 of the Motor Report:

> Establish a national claims information database

Recommendation 12 of the Motor Report:

> Quarterly publication of key aggregated metrics, on claims costs and trends within the market

5.6 New Recommendations

Recommendation 1

CSO TO CONSIDER THE FEASIBILITY OF COLLECTING PRICE INFORMATION ON THE COST OF INSURANCE TO BUSINESSES

The Working Group is of the view that producing a price index for business insurance costs is a much more complex exercise than producing such an index for motor insurance because of the much greater uniformity in the products available to the general public for the latter.

The preliminary analysis in the report demonstrates the need to give further consideration to the feasibility of collecting such information as well as the benefits of such an exercise considering the disparate range of liability products which would need to be included in such a price index. Given that there is a potential for significant resourcing requirements, the Working Group therefore recommends that the Central Statistics Office first carry out a review of the feasibility and benefit of collecting relevant data related to the cost of general liability insurance for businesses in the State, taking into account the issues highlighted in the report, and make a report to the Minister for Finance on this by mid-2018.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
1	CSO to commence feasibility study on data related to the cost of insurance to businesses	Q2 2018	Central Statistics Office	Department of Finance
2	CSO to report to Department of Finance with the outcome of review, and if it considers such an index feasible, make appropriate proposals	Q4 2018		

Recommendation 2

CENTRAL BANK OF IRELAND TO EXAMINE THE MERITS AND FEASIBILITY OF COLLECTING DATA FOR EMPLOYER LIABILITY AND PUBLIC LIABILITY CLAIMS IN THE NATIONAL CLAIMS INFORMATION DATABASE

The legislation to establish the National Claims Information Database has been designed to allow for the potential future collection of data relating to any type of non-life insurance including public and employer liability insurance, in addition to motor insurance. This information, if collected, would be collected and stored at a level of aggregation higher than individual claim level, i.e. not on a claim-by-claim information, and would be aligned with the collection of information relating to motor insurance.

Prior to a decision being made about the scope of the database being expanded, the recommendation asks that the Central Bank should consider the merits and feasibility of collecting data related to general liability insurance (or public and employer liability insurance) from all relevant insurance undertakings operating in the State for the purpose of an annual analysis of movements in claims costs/claims trends. If after carrying out this exercise it is deemed feasible and appropriate to proceed with this project, it would only be done once the motor element of the National Claims Information Database is established and functioning properly. The Working Group is of the view that the Central Bank would have to be satisfied with the effectiveness of the motor element of the database before it could move onto another phase. In addition, an arrangement for financing for the expansion of the database would need to be in place to prevent monetary financing by the Central Bank of Ireland as per the ECB's Decision on on the prohibition of monetary financing and the remuneration of government deposits by national central banks.[30]

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
3	Central Bank of Ireland to produce a report on the merits and feasibility of collecting employer liability and public liability insurance data for inclusion in the National Claims Information Database	Q4 2019	Central Bank of Ireland	Central Bank of Ireland

[30] https://www.ecb.europa.eu/ecb/legal/pdf/oj_jol_2014_159_r_0009_en_txt.pdf

Recommendation 3

THE COURTS SERVICE SHOULD PUBLISH THE RESULTS OF PERSONAL INJURY CASES IN A MORE GRANULAR WAY IN ITS ANNUAL REPORTS

The Working Group believes that the Courts Service could publish the results of personal injury cases in a more granular way in its annual reports, possibly by categorising the types of cases. This could involve the differentiation between certain types of cases that might typically involve higher award levels, such as medical negligence cases. Such granularity would provide a further level of clarity around the average award levels, and would help provide greater insight into particular trends in this area.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
4	Department of Justice and Equality to request the Courts Service to provide options for a new template for more granular data on personal injury awards that it can produce going forward	Q1 2018	Courts Service, Department of Justice and Equality	Department of Justice and Equality
5	Courts Service be requested to include this more granular data in future annual reports commencing with the 2019 annual report	Q1 2019	Courts Service, Department of Justice and Equality	Department of Justice and Equality

Recommendation 4

THE DEPARTMENT OF FINANCE TO PUBLISH A KEY INFORMATION REPORT ON EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE CLAIMS

In light of the usefulness of the *Motor Insurance Key Information Report* published by the Department of Finance and the limits identified in Chapter 4 of the publically available data, the Working Group considers that a similar exercise would be useful in relation to employer liability and public liability insurance. In this respect, it will task the Department of Finance, through the data sub-group, to make a request to Insurance Ireland for similar key metrics to enable it to produce a report.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
6	Key aggregated metrics template to issue to Insurance Ireland for completion and submission	Q2 2018	Department of Finance, Central Bank of Ireland, State Claims Agency, Insurance Ireland, Society of Actuaries, PIAB	Department of Finance
7	Collation and analysis of submission received and publication of Key Information Report on employer liability and public liability insurance	Q4 2018		

CHAPTER 6 – THE ROLE OF HEALTH AND SAFETY IN EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE

6.1 Introduction

Many claims which arise against a policy of Employer Liability or Public Liability insurance relate to injuries or illnesses. Consequently, the Working Group acknowledges the important role which health and safety can play to prevent the occurrence of such incidents which give rise to claims.

6.2 Health and Safety in the Workplace

As part of its consultation phase, the Working Group met with the Health and Safety Authority (HSA). The HSA was established in 1989 under the *Safety, Health and Welfare at Work Act 1989* and reports to the Minister for Business, Enterprise and Innovation. It is the competent authority in Ireland for the regulation and promotion of work-related safety, health and welfare and the safe use of chemicals. The core message which it sought to convey to the Working Group was that its experience has been that a policy of doing everything possible to prevent work place accidents from arising in the first place is the most effective strategy to reducing the number of injuries in a workplace. While it noted that its remit is work-related, it stated that the same kinds of general approaches adopted in the workplace to prevent injuries were also relevant to preventing members of the public from being injured in places such as retail outlets, hotels and pubs.

The Requirements

The HSA indicated that health and safety of workers is regulated by the *Safety, Health and Welfare at Work Act 2005* and its associated regulations. The Act requires employers to:

- Identify hazards in the workplace
- Assess the risks associated with those hazards
- Put in place a Safety Statement specifying how safety, health and welfare of their employees is to be managed
- Provide a safe place of work and safe systems of work
- Provide information, instruction, training and supervision
- Follow the Principles of Prevention

Data on Injuries and Illnesses

The Working Group was informed that the HSA, the Central Statistics Office (CSO) and the Department of Social Protection each collect information on workplace injuries and illnesses each year.

The HSA collects data from employers on fatal accidents at work and accidents at work resulting in more than three days of absence from work. This data collection exercise is done in line with a European-wide methodology and accident reports are submitted to Eurostat (Statistical Agency of

the European Commission) on an annual basis for the preparation of European comparator statistics.

According to the Authority's most recent annual statistics summary, there were 45 work-related fatalities reported to it in 2016, compared to 56 in 2015, 55 fatalities in 2014 and 47 in 2013. [31] Of the fatalities in 2016, 43 involved workers, with the remaining two involving members of the public, giving a worker fatality rate of 2.1 workers per 100,000.

Number of fatalities								Total
2009	2010	2011	2012	2013	2014	2015	2016	2009 -2016
43	48	54	48	47	55	56	45	396

Table 6.1: Number of reported fatalities (worker and non-worker) by economic sector, 2009–2016 (HSA)[32]

There were 8,381 non-fatal injuries reported to the HSA in 2016. Of these injuries, 7,957 (95%) involved workers, while the remaining 424 involved members of the public, including family members. There was a small increase in the number of injuries reported to the HSA in 2016 compared to 2015. The number of people in employment also increased in 2016; taking this into account, the rate of reported injuries as a proportion of those in employment increased marginally, from 3.8 per 1,000 in 2015 to 3.9 per 1,000 in 2016.

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Non-fatal accidents	7,976	8,303	8,069	7,002	7,583	7,094	6,804	6,598	7,431	7,775	8,381

Source: HSA database
The figures reported in Figure 2.1 differ somewhat from those reported in the previously published HSA annual statistics reports. There are two reasons for this discrepancy. Previously published figures for the years 2004 to 2009 included 'dangerous occurrence' figures, and these have now been removed. Secondly, the figures for more recent years have been adjusted to include incidents that occurred within the relevant calendar year but were reported late to the HSA.

Table 6.2: Injuries reported to the HAS, 2005-2016[33]

In the first quarter of each year there is a special module in the CSO's Quarterly National Household Survey (QNHS) that collects information on work related accidents and illnesses. As non-fatal incidents in work only have to be reported to the Health and Safety Authority if they result in more

[31] Health and Safety Authority, Summary of Workplace Injury, Illness and Fatality Statistics 2015-2016, at p. 7.
[32] *Ibid,* at p. 36.
[33] *Ibid,* at p. 15.

than three days absence from work, this module aims to supplement the data already collected by the HSA, aiming to fill in any possible data gaps.

The CSO doesn't publish any data collected in this module but it is used and published by the Health & Safety Authority and other bodies such as the Economic and Social Research Institute (ESRI).

The HSA acknowledges that this data indicates that there is significant under-reporting of accidents to the HSA, as is the case in other national employer reporting systems. In 2015, 7,443 worker injuries were reported to the HSA (HSA, 2016) while the CSO figures for the same period suggest that there were 16,905 work-related accidents that resulted in four or more days' absence from work. These results suggest that approximately 44% of accidents/injuries are captured by the HSA, representing an increase on the 38% of reported cases in 2014. The incentives and disincentives to report non-fatal incidents can vary significantly across different groups. Comparison with figures from the CSO suggests that under-reporting of accidents to the HSA is particularly evident among the self-employed and smaller employers.

Types of Injuries

Musculoskeletal injuries are the largest single category of injuries which are reported to the HSA each year. These are usually suffered by workers who are lifting, pushing or pulling loads or carrying out repetitive tasks. Injuries arising from slips, trips and falls are the second most common type of injury trigger reported to the Authority within this category. Some sectors (e.g. construction and agriculture) can see employees exposed more to the risk of falling from a height.

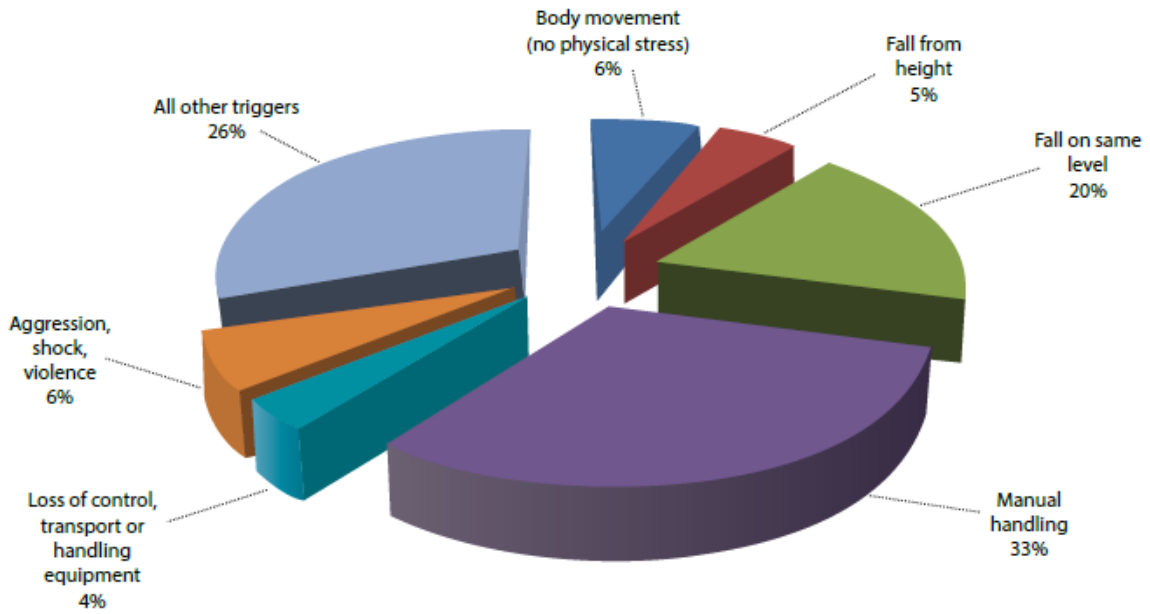


Table 6.3: Proportion of reported non-fatal injuries by trigger, 2016 (HSA)[34]

[34] Health and Safety Authority, Summary of Workplace Injury, Illness and Fatality Statistics 2015-2016, at p. 27.

The Authority stated that in their experience in the great majority of cases the injury could have been avoided if the employer had carried out a risk assessment and taken action to deal with the hazards identified. These preventative actions could include, for example, using lifting aids, organising shelving systems differently, the use of proper cleaning systems, good housekeeping and the use and maintenance of slip resistant surfaces.

6.3 Health and Safety and Public Liability

While the *Safety, Health and Welfare at Work Act 2005* is the primary body of law surrounding the health and safety obligations of a business to its employees, it does not create obligations in respect of customers or members of the public more generally. The duty of care owed to these individuals will vary depending on the circumstances of the individual case, while the applicability of the public liability policy will depend on the scope of that particular policy.

The indemnity provided by a general public liability policy relates to legal liability arising from accidental personal injury, or physical damage to material property. As there is no compulsory requirement in respect of public liability risks, businesses are free to decide whether to insure against public liability and the precise type of cover to obtain. Therefore, these general public liability policies can, depending on the needs of a business, extend to encompass, for example, the risks of nuisance, trespass, obstruction, wrongful arrest and defamation. Separate policies would, however, have to be obtained in respect of the risks of infringement of copyright, patent, trademarks, indirect economic loss and professional liability for example.[35]

Occupiers' Liability

Occupiers' liability is a key type of liability which gives rise to health and safety requirements and is typically covered by a public liability insurance policy.

The *Occupiers' Liability Act 1995*[36] (the 1995 Act) governs recovery for injury or damage suffered by an entrant as a result of the dangerous state of an occupier's premises. The 1995 Act draws a distinction between three categories of entrants, namely visitors, recreational users and trespassers. Visitors are entrants present by invitation of the occupier, for social reasons or by virtue of a contract. Visitors are owed the greatest duty of care. The occupier is obliged, pursuant to section 3(2) of the 1995 Act:

> to take such care as is reasonable in all the circumstances (having regard to the care which a visitor may reasonably be expected to take for his or her own safety and, if the visitor is on the premises in the company of another person, the extent of the supervision and control the latter person may reasonably be expected to exercise over the visitor's activities) to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon.

[35] Buckley. A, *Insurance Law,* 3rd ed., (Dublin: Round Hall), 2012, p. 496.
[36] Full text of the Act is available at: http://www.irishstatutebook.ie/eli/1995/act/10/enacted/en/html

The Act allows for occupiers to extend or restrict the duty of care owed, subject to certain conditions provided that it is reasonable and the occupier has taken reasonable steps to bring the notice to the attention of visitors.

Visitors are the most relevant category of entrants to this Report as those present in a business tend to be customers of the occupier or other persons present at the occupier's invitation or by virtue of a contract. The other categories of entrants are set out below primarily for completeness.

Recreational users are defined as entrants who are present with or without permission or implied invitation free of charge (not counting a reasonable charge for the cost of providing vehicle parking facilities) for the purpose of engaging in a recreational activity. A recreational activity includes any such activity conducted in the open air including any sporting activity, scientific research and nature study and the exploration of sites and buildings of importance.

While a trespasser is defined as an entrant other than a visitor or recreational user, recreational users and trespassers are owed the same duty of care. That is,

> in respect of a danger existing on premises, an occupier owes towards a recreational user of the premises or a trespasser thereon ("the person") a duty—
>
> (a) not to injure the person or damage the property of the person intentionally, and
>
> (b) not to act with reckless disregard for the person or the property of the person,
>
> except in so far as the occupier extends the duty in accordance with section 5.[37]

A number of criteria are set out to determine whether the occupier has acted with reckless disregard, while the duty of care owed to an entrant is extinguished in respect of criminal entrants, unless a court determines otherwise in the interests of justice.[38]

6.4 Stakeholder feedback – Employer Liability and Public Liability

The Business Sector

The theme of health and safety regularly arose during the course of the Working Group's consultations. Representative organisations of different businesses discussed their views on

- the standards and cost of compliance with health and safety requirements
- the role of health and safety in preventing incidents and responding to claims
- the relevance of health and safety to the cost of insurance and whether investment in health and safety is taken into account in premium calculations
- their engagement with insurers on the matter
- developments which they feel would have a positive impact on health and safety and the reduction of incidents which give rise to claims

[37] Section 4 of the Act available at http://www.irishstatutebook.ie/eli/1995/act/10/enacted/en/html

[38] S.4 (3) of the 1995 Act provides:
"(a) Where a person enters onto premises for the purpose of committing an offence or, while present thereon, commits an offence, the occupier shall not be liable for a breach of the duty imposed by subsection (1) (b) unless a court determines otherwise in the interests of justice.
(b) In paragraph (a) "offence" includes an attempted offence.

A view which spanned a range of businesses was that, in insurance pricing, there needs to be a greater recognition of good practice in risk management and health and safety. As Brokers Ireland opined, this would help their clients to see health and safety as an investment rather than a cost. The Construction Industry Federation, for example, stated that there has been material investment in health and safety from their members in recent times for which a return has not been seen in insurance pricing. The Health and Safety Authority also identified the establishment of a connection between good workplace safety, health and well-being and the cost of insurance as an area where there is scope for the insurance industry to do more to support businesses to improve safety.

Other health and safety issues identified by the organisations consulted included the use of the care-not-cash model of compensation to ensure that compensation does not equate to reward and the need to strike an appropriate balance of responsibility for safety between the individual and the business. In relation to the latter, RGDATA asserted that at present the occupiers of commercial premises are "*being held to an effective strict liability for accidents that occur on their premises*". They stated that the onus of proof has "*effectively shifted considerably from the plaintiff or claimant to the defendant occupier*". It is their view that this needs to be rebalanced with the onus on the claimant to prove actual negligence beyond a reasonable doubt (the criminal standard) rather than on the balance of probabilities (the civil standard) as is currently required.

The Vintners' Federation of Ireland (VFI) also recommended that individual business owners actively engage with their insurer on health and safety, recommending that they insist on a surveyor visiting their premises on behalf of their insurers at the outset of a policy to prevent, in the event of a claim, the policy being voided for a technical issue relating to the premises.

The Health and Safety Authority

The HSA highlighted a number of positive engagements which it has had with the insurance industry including:

- Co-operation with the Farm Safety Partnership Advisory Committee of the Authority (FSPAC) which holds events each year to promote farm safety
- The sponsorship of academic posts in relation to safety modules on third level courses (FBD)
- The sponsorship of the Young Farmer of the Year competition (FBD) and the Safe Farm of the Year (Zurich via its work with the Farming Independent)
- The employment of nurses to engage with employees of clients who may require rehabilitation before returning to work (AIG)

It also suggested several other areas where the insurance sector could do more to improve safety, health and well-being at work, including:

- Establishing a connection between good workplace safety, health and well-being and the cost of insurance
- Sharing data on work-related claims to allow for meaningful analysis of the causes of accidents and illnesses, the cost of claims or the prevalence of different work-related illnesses and the harmonisation of data collection methods

- Collaborating with voluntary and professional bodies like the Institution of Occupational Safety and Health (IOSH) and increasing the funding to the National Irish Safety Organisation (NISO)
- Promoting safety in the curricula of professions operating in high risk sectors
- Providing an advisory service to assist employers in complying and improving workplace safety, health and well-being
- Promoting the use of BeSmart (a free online tool to help SMEs to identify their workplace hazards, assess risks and develop a Safety Statement in accordance with legal requirements)

The Insurance Industry

As has been noted at other points in this Report, the Working Group met with both Insurance Ireland and a number of insurers active in the Employer Liability and Public Liability insurance markets in Ireland. The Group took the opportunity to question the industry about how it recognises the insured's health and safety measures, and to raise some of the points which had been brought up by the business sector during the consultation phase.

Insurance Ireland noted that a number of rating factors are taken into account when pricing risk and stated that notwithstanding investment in health and safety by a business, the insurer will look at their claims experience with that policyholder and with the sector in which they operate. The insurers' own risk appetite will also have an impact on the premium offered, particularly in a hardening market.

The insurance companies which met with the Working Group were keen to point out their commitment to promoting health and safety and improving standards. A number stated that they have dedicated resources in place committed to supporting and advising their clients on health and safety and that they meet with clients or attend their premises to survey risks. One stated that it has used risk management bursaries, where the insured can use what would otherwise have been a rate increase to improve health and safety. Sponsorship of safety related projects was also highlighted as one of the key areas where insurers see a role for themselves in promoting health and safety.

While insurers made little reference to a direct correlation between individual businesses' health and safety standards and the cost and availability of insurance, one noted that exceptional standards of health and safety could be helpful to a prospective insured whose business type would otherwise be borderline within its risk appetite. Another insurer noted that it reflects health and safety being taken seriously by insured's in its premiums, mentioning a particular unnamed client which includes health and safety as a standing item at its regular high level meetings.

One of the insurers also echoed the views of some of those in the business sector that the Occu*piers' Liability Act 1995* and the *Health, Safety and Welfare at Work Act 2005* were too onerous on occupiers and employers respectively, stating that little contributory negligence was being recognised.

6.5 Conclusions of the Working Group

The report of the HSA shows that each year there are thousands of injuries to employees in workplaces around the country, primarily relating to manual handling and slips, trips and falls and its experience has been that a large number of these could be avoided if the appropriate risk management strategies were employed. While the HSA noted that its remit is work-related, it stated that the same kinds of approaches that prevent workers sustaining injuries can also prevent members of the public from being injured in places such as retail outlets, hotels and pubs etc. It is clear therefore from this that there are improvements which can be made to the procedures currently employed by businesses in accident prevention.

The Working Group heard from the business community that given the relevance of health and safety to the prevention of accidents and the amount of money that many were spending in this area, that they were not always being rewarded sufficiently for their efforts from a premium perspective. The insurance industry responded to these assertions by stating that when pricing risk the insurer will look at the business's claims experience as well as the claims experience of the sector in which they operate, while the insurers' own risk appetite will also have an impact on the premium offered, particularly in a hardening market.

Notwithstanding the general approach of industry to pricing, the benefits to those seeking insurance of engaging proactively with insurers was noted by both insurers and business representative bodies. For instance, insurers stated that exceptional health and safety standards could bring an activity which might otherwise be outside their risk appetite within the scope of what they would consider insuring; and the Vintners' Federation of Ireland noted that having an insurer inspect the premises from a health and safety perspective at the outset of a policy can avoid disagreements down the line about technical issues.

In summary, while the Working Group does not believe it can make a specific recommendation in this area, as it cannot compel insurers to take on particular risks, it does believe that the insurance industry needs to give greater recognition to improvements in health and safety practice through lower premiums where warranted, particularly for smaller businesses.

Finally, as noted above, during the course of the Working Group's consultations, some consultees queried the interpretation of the level of the duty of care owed to visitors in the Occupiers' Liability Act 1995, arguing that it is too onerous on the occupier and in some cases borders, in their view, on strict liability.

The Working Group in considering this view, reviewed relevant case law and found that there are many examples of cases which are dismissed on liability grounds as no evidence of negligence is put forward to substantiate the claim. In the recent case of *Van Dalsen v Davy Hickey Properties Ltd and BT Communications (Ireland) Ltd* for example, Fullam J in the High Court dismissed the case finding that a visitor, who had crossed a grassy embankment to enter a premises rather than using the drive way, had acted with "*disregard for his own safety*" and was "*fully responsible for his own injuries*".[39]

Recent media coverage also provides a number of examples of cases which were dismissed where negligence was not proven. For instance, the Irish Times reported in April on a case in which Groarke

[39] [2016] IEHC 717, at para 84.

J in the Circuit Court dismissed a claim brought by a child, through her mother, for a fall in the schoolyard playing chase. In dismissing the case, Groarke J described the incident as "*simply an old fashioned accident and I fail to see any liability on the part of the school for that accident*".[40]

Therefore the Working Group decided that it could not make a recommendation on this issue.

[40] See: https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/game-on-judge-rules-school-yard-chase-should-not-be-banned-1.3036021?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2F

CHAPTER 7 – ISSUES RELATING TO THE MARKET FOR EMPLOYER LIABILITY AND PUBLIC LIABILITY INSURANCE

7.1 Introduction

Issues relating to the market for employer liability and public liability insurance have been raised by stakeholders that have engaged with the Cost of Insurance Working Group. Chapter 4 provides an overview of the overall market for these types of insurance in recent years, albeit that the data is limited. In addition to that overview, stakeholders have outlined a number of disturbing trends in the market over the last number of years, some of which are set out below.

7.2 Significant and Ongoing Increases in Premiums

It was indicated that there have been significant increases in premium rates. The majority of respondents to the Chambers Ireland survey for example, indicated premium increases of between 10% and 40% year-on-year, with some extreme reported increases of 75% or more. Stakeholders also pointed out that there was a lack of transparency in how premiums were calculated with little or no justification or rationale for the premium increases being provided at renewal stage. The unexpected nature of such large increases has created major problems for many businesses both small and large, and has forced them to reconsider other aspects of their business in order to meet these increased premiums.

7.3 Issues relating to the Claims Environment including the Cost of Claims

Stakeholders have stated that uncertainty and volatility in the external claims environment, as well as claims costs and inflation, have been notable features of the employer liability and public liability insurance market in recent years. These issues were covered in the Motor Report extensively, however it should be noted that it is more difficult to compare claims costs in the case of employer liability and public liability insurance claims as these claims can be more complex in nature. For example in a construction related claim, there could be a number of co-defendants; main contractor, sub-contractor, other parties etc. This could therefore lead to potentially higher legal and other costs, due to the numbers of parties involved and/or the severity of the injury.

The Working Group, through its consultations, notes the very particular experiences of stakeholders regarding the claims environment, including in relation to the number and frequency of claims. Their perspective appeared to depend on the business sector and the type of cover they have, with some experiencing increases in the number of claims, and others experiencing no noticeable increase, e.g. the self-insured sector said that they had seen no noticeable increase in employer liability claims, whereas the meat industry commented that there had been a significant increase in such claims.

The data on reported claims from Insurance Ireland for employer liability and public liability insurance by year outlined in Chapter 4 suggests that the number of claims per year has been relatively stable for employer liability and public liability during the period 2011 to 2016 aside from a sharp decline in public liability claims between 2011 and 2012.

The data on the cost of gross incurred claims also set out in Chapter 4 suggests that there has been a significant increase in the cost of claims for employer liability in the last two years resulting in likely losses for insurers, but the data indicates that public liability insurance has most likely been profit making over the majority of the period 2011 to 2016.

The series of mixed messages emerging from the views of the stakeholders and the limited data provided by Insurance Ireland reinforces the need for a fuller understanding of claims costs including data on claims paid and incurred claims to be augmented with data on settlement rates, policy counts, and disaggregated on an accident year basis. As noted above, the Working Group plans to request such data to make a fuller report in 2018.

While such data will assist, the Working Group believes that the views of stakeholders, particularly around the level of awards for less serious personal injury cases as set out in the Irish Book of Quantum, the issue of inconsistency of awards by courts and the legal costs associated with the claims process, need to be further considered. These issues are examined in the chapters that follow.

7.4 Insufficient Availability in the Market for Certain Sectors

The issue of insufficient availability of options for insurance cover has been an ongoing issue in the Irish market for quite a number of years. This is reflected in the fact that in 2005, the Competition Authority's non-life insurance market study,[41] which focused on motor insurance, employer liability insurance, and public liability insurance, found that in general Irish non-life insurance markets were moderately concentrated. It stated that the Irish insurance market is small in international terms, and as such may be viewed as an unattractive one for potential new entrants. It noted that that this could be improved by lowering barriers to entry, making switching between insurance providers easier, and increasing price transparency. To address these issues, the Competition Authority made 47 recommendations, with a particular focus on providing information to consumers to improve consumer awareness of pricing policies and switching possibilities, most of which have been implemented. However the effect of the implementation of these recommendations while helping to generate a more competitive market at times from a price perspective has not on a long-term and consistent basis significantly contributed to a market with a wider choice and better selection of insurers. This is reflected by the fact that the National Competitiveness Council in 2015 indicated that the same basic conditions that applied in 2005 continue to apply in relation to market concentration levels.

Business representative groups indicated that their member's experience was that that some insurers are making decisions to exit certain sectors or subsectors of the market, which means there are less options for businesses to source cover. In particular, it was noted that for public liability purposes that a number of insurers are exiting the late night leisure/bar sector. These views are supported by the comments of the insurers who spoke to the Working Group, and acknowledged that they had exited areas such as large retail and high footfall leisure because of the number of

[41] This Study presented the Competition Authority's analysis of competition in the non-life insurance sector in Ireland. It focused on motor insurance, employer liability insurance and public liability insurance and included 47 recommendations to industry, regulators and Government. It is available at: https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/04/insurance-report-vol2.pdf

claims arising. In summary therefore, it would appear that in respect of public liability cover, for any business where there is an element of social interaction or entertainment; e.g. pubs, nightclubs, hotels, leisure activity risks, it is becoming increasingly difficult to obtain cover from Irish authorised insurers.

A Chambers Ireland survey supports the view that some businesses are having increasing difficulties in obtaining insurance cover. Respondents were asked whether it was more difficult for them to obtain cover (in 2017) than in previous years. In reply, 40% indicated that they had found it more difficult to obtain cover. Respondents pointed out that in general, there were fewer quotes available to them, and many of them were higher than in previous years. A number of respondents also noted that costs were becoming prohibitive and for certain business sectors, there were very few options in terms of insurers willing to underwrite the risk. Similar levels of difficulty were reported by the Vintners' Federation of Ireland's survey, where 37% of those surveyed had experienced difficulty in obtaining insurance.

While undoubtedly, it appears that domestically authorised insurers are moving away from the leisure sector, there does appear to be some scope to obtain such cover through the Lloyd's UK market. However, any such cover is priced to reflect the risk, and the premium may be higher than previous years.

Reinforcing the point above, in relation to the alternative capacity available in the market, the insurers which met with the Working Group confirmed this position with one noting that of the risks which it had lost during the year, eight out of ten of those have been lost to insurers authorised in other member states. Another insurer opined that the flow of these types of risk to the UK market has always been a common feature of the Irish insurance market, as UK insurers are attracted by the higher premiums here. They stated however that quite often such companies only remain in the market for about 3 to 5 years, and then depart as their claim levels increase and their portfolio performance becomes more challenging. The argument was made by the same insurer that this short-term approach to the Irish market by outside insurers has been a contributory factor to the volatility the market has experienced in recent years.

In conclusion, over the past 3 years, the risk appetite of domestic insurers in their efforts to correct the profitability of certain public liability risks and employer liability, has reduced. The main reasons for this is claims experience combined with a lack of underwriting knowledge in certain sectors – this latter factor appears to more pronounced in recent times and almost certainly is part of the explanation as to why insurers are declining to write certain types of business. Another contributory factor to insurers paring back their risk exposure is that parent companies outside the state have instructed their Irish subsidiaries to address the significant losses they have incurred over the last number of years, and as a result these companies are unlikely to expand their capacity until this is done.

7.5 Self-Insurance

There are overlaps between self-insurance and the next sub-section on increasing excesses. This is because a number of businesses voluntarily decide or are forced to cover claims up to such a level, that they in practice cover the bulk of the claims made against them. This perhaps is the context within which a number of stakeholders referred to the increase in the number of businesses (especially in the retail sector) that were self-insuring, as the sense the Working Group got was that many of these businesses are still obtaining insurance cover for catastrophic risks (i.e., risks say above €100,000). This interpretation would therefore be consistent with the view expressed by insurers that self-insurance is not having a huge impact on the standard commercial insurance sector, but that it may be more commonly used by very large businesses.

The group consulted with the Self Insurance Task Force, which draws its membership from semi-state bodies, such as the ESB as well as retail groups and individual large retailers. Members of the Task Force operate self-insurance programmes. The Task Force has been in operation for over 20 years and was set up as an interest group to share information in terms of claims trends and statistics and legislative developments. The Chair of the Task Force noted that there has been a recent increase in its membership, in particular from the retail sector. There has also been some increase in interest from the manufacturing sector. This is consistent with the representations made to the Working Group from these sectors, as they have been experiencing difficulty in accessing insurance and/or have seen significant premium increases.

The Task Force notes that most of its members operate a self-insurance programme purely for employer liability claims, whereas they will use an insurer for their public liability risk. This is presumably as the employer will have a level of control over the employer liability claims, whereas the public liability claims are less predictable.

In terms of recent trends in employer liability and public liability claims, the Task Force did not note any significant increases in incidents/accidents. In fact, their experience reflects a decrease in the cost of employer liability claims arising from those incidents, due to the implementation of safety management programmes. The Working Group notes that this experience diverges from the Meat Industry, which indicated that while it has not experienced any significant increases in incidents, it has however experienced an increase in the number and cost of claims arising from those incidents.

The Task Force's main message was that in their view, the significant increase in premium costs could not be attributed to a corresponding increase in the cost of claims.

7.6 Increasing Excesses

As is the case across other types of non-life insurance, for example home insurance, excesses play a role in the provision of General Liability insurance. An excess is the first amount of any claim that the policyholder must pay, for example, in the event of a home insurance claim, the policyholder may have to pay a standard excess e.g. the first €200.

Another feature of excesses is that a policyholder may be able to opt for a voluntary excess in return for a reduction in premium.

In the context of employer liability and public liability insurance, stakeholders noted that there is an increasing trend for businesses to take on higher excesses to try to reduce the premium level. The excess levels noted were significant, for example an excess per claim of €5,000 - €10,000 for a (mid-size) retailer. Such an excess can have a significant impact on a business as and when claims arise and can be particularly problematic in situations where several claims occur quite close to each other timewise, as a business will have to fund multiple excesses within a short period of time.

The primary reason that policyholders increase their excess is in an effort to combat the increasing cost of their premiums. By doing this, they hope to reduce their premium to a more manageable level, or prevent it from rising significantly. However, the benefit derived from such an exercise is not always to the level expected by a policyholder, as ultimately pricing is done on a pooled risk basis rather than on the actual specific risks of the policyholder in question. Therefore if the insurer is of the view that the risks are high in the sector, then the premium reduction may be minimal, if indeed there is any reduction at all.

A survey carried out by Chambers Ireland provided some insight into the various reasons why the excesses of respondents had increased over the past year. While the survey is quite limited and small in nature its details are helpful in giving some sense as to why excesses are increasing, e.g. insurers' claims experience, for the purpose of reducing premiums, a condition of renewal, or scope or scale of risk has changed.

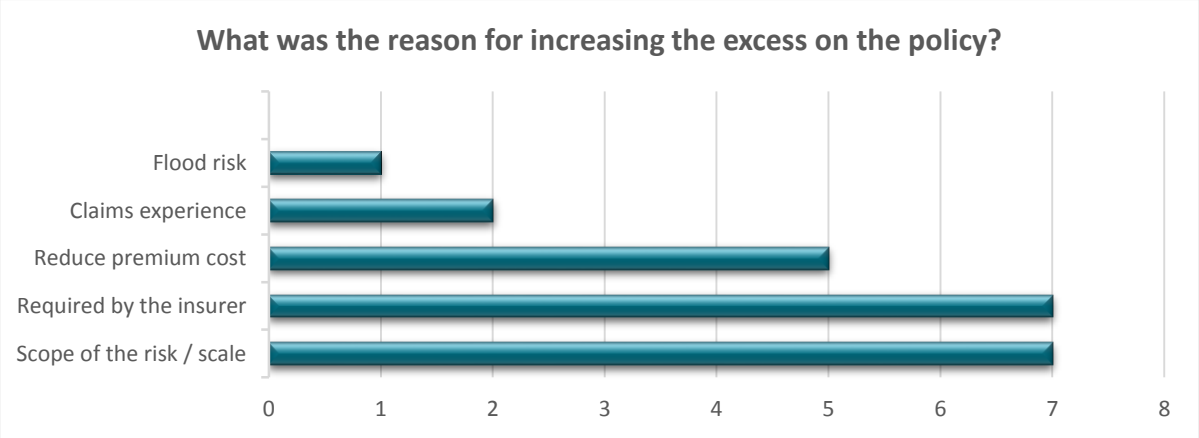


Table 7.1: Derived from Chambers Ireland Survey

7.7 High Level of Costs in Defending Cases in Court

As highlighted in Chapter 2, a large number of stakeholders held strong views that legal costs associated with the claims process are too high and that these costs fed into the overall increase in the cost of insurance. While these issues were covered in the Motor Report extensively, the Working Group noted a stronger emphasis on the issue of legal costs in this phase of its work.

The Working Group was not able to directly corroborate this view as it did not receive any data from Insurance Ireland in relation to legal costs in the employer liability and public liability insurance

sphere. However, as already noted above the Department of Finance's *Motor Insurance Key Information Report* found there was a large overhead in terms of legal and other costs to insurers for private motor business, which averaged around 40% of the amount of compensation. This figure has remained relatively flat since 2013 with no large increase identified. While that data shows that there hasn't been a large increase in legal and other costs as they relate to the level of compensation paid, it does demonstrate that legal and other costs are a major factor in the cost of claims for insurers.

On the basis that employer liability and public liability insurance claims can be much more complex in nature due to the numbers of parties involved and/or the severity of the injury (for example in a construction related claim, there could be a number of co-defendants; main contractor, sub-contractor, other parties etc.), the Working Group believes that the Motor Report provides a good benchmark for what the equivalent legal and other fees in employer liability and public liability insurance are likely to be.

It should be noted that the Law Society in its engagement with the Working Group on legal costs, stated that it has no role in determining levels of solicitors' costs associated with personal injury claims but that "it is certainly the experience of solicitors practising in the area that such costs have reduced over the past five years". It also stated that legislative-based rules which provide details of fees to be charged to clients have improved levels of information and transparency. However, it did not offer an opinion as to whether such provisions have helped to control costs.

It is not in the terms of reference of the Working Group to make recommendations that determine or cap the level of solicitor or barrister fees. However the Working Group believes that the implementation of its recommendations to address other failings in the claims system, particularly those that are aimed at removing incentives to use particular settlement channels over others, should result in lower overall legal costs.

7.8 Insurers' Perspective on Market Issues

As a result of the introduction of Solvency II, insurers are required to publish and make available Solvency and Financial Condition Reports (SFCRs). These reports cover areas such as business performance, system of governance, risk profile, valuation for solvency purposes, capital management etc. The Working Group notes that in a number of these reports, specific points on General Liability insurance and employer liability and public liability insurance have been made. The general thrust of these points which was also reflected in presentations made by a number of insurance company CEOs is that the commercial insurance market has been experiencing adverse loss developments over the past number of years. One of the key reasons given for the significant underwriting losses was the uncertainty and volatility in the external claims environment and claims inflation. This has led to insurers exiting certain lines of business and/or certain sectors or individual risks. Certain insurers have had a "refocus of appetite" for underwriting commercial insurance, which has led to lower volumes of commercial insurance being written.

7.9 Cost of Insurance Working Group Remarks on Market Issues

The Working Group believes that the review of the markets area provides a good insight into what the impact on the ground is for businesses seeking insurance cover. It paints a stark picture as many businesses particularly in the leisure sector are struggling to get cover of any sort, and where available it is very expensive. Other sectors such as retail are faced with having to take on board large excesses as well having to deal with large increases in premium. In response some have moved towards a self-insured model of insurance. The meat industry has indicated that in spite of significantly improving health and safety procedures, there has been an increase in claims. On the other hand, the Self-Insured sector is of the view that claims costs have not significantly increased and therefore they believe that this cannot be used as an excuse for the increase in premiums.

In summary, what is indisputable is that there is a serious problem with the cost and availability of employer and public liability insurance, and the next step is to try and determine what the causes of this problem are and what can be done to address it.

CHAPTER 8 – REVIEWING THE LEVEL OF DAMAGES AWARDED IN PERSONAL INJURY CASES

8.1 Introduction

The preceding chapters have primarily looked at the nature and scale of the employer liability and public liability market in Ireland and have provided background to the various stakeholders that have engaged with the Working Group, including a brief outline of the difficulties they are encountering. This provides the context for looking more specifically at some of the major issues which have been raised by business stakeholders about the claims environment including the inconsistency of awards, the scale of awards, and the role of PIAB.

The next step is therefore to look beneath the surface to try and establish what is going on in the claims environment and to determine what actions can and should be taken to reduce claims costs. If it is determined that the nature of some of the issues is beyond the scope of the Working Group to resolve, these can at least be highlighted and a direction be given for a possible future resolution, if there is a consensus to do so. For instance, an argument put to the Working Group by stakeholders and insurers is that what many people want are low premiums and high personal injury awards, and that there is not always a full understanding of the incompatibility of these two positions. While the Group does not fully subscribe to this position, like many of the views put to it, it cannot be fully dismissed either.

The starting point for looking at this matter in the Working Group's view is the level of awards and particularly how these are reflected in the Book of Quantum as this is one of the major underpinnings of the personal injury compensation system operating in Ireland.

8.2 Book of Quantum

The Book of Quantum is a guide to prevailing levels of damages for various types of injuries in Ireland. It is retrospective in that it reflects what has actually been paid out in the Courts, in direct settlements by the insurance sector, in cases settled by the State Claims Agency, and in cases awarded by PIAB. It was compiled by independent consultants commissioned by the Personal Injuries Assessment Board and was last reviewed in 2016 using 2013 and 2014 data. The Book is a guide which provides a range of values for injury types based on their severity. It does not cover every potential injury scenario nor would this be possible.

Separate legislation sets out the Courts' requirements in relation to the Book of Quantum. Pursuant to section 22(1) of the *Civil Liability and Courts Act 2004*, "*the court shall, in assessing damages in a personal injuries action, have regard to the Book of Quantum*".[42] Section 22(2) specifies that the preceding section does not prohibit a court from having regard to other matters also.

Many stakeholders have argued that the figures in the Book of Quantum are too high and are out of line with international norms. Other comments have been made that the bands are too wide

[42] For full text of the 2004 Act see: http://www.irishstatutebook.ie/eli/2004/act/31/enacted/en/print.html

within the various categories and that therefore are of little assistance. A related argument from stakeholders is that members of the judiciary do not observe these guidelines and in many cases make orders for even higher awards, thus impacting even further upon the cost of insurance. Such court awards, it is contended, can set an even higher benchmark for out of court settlements.

The variations between the broadly comparable figures in the table below, derived from the Irish Book of Quantum and the UK Guideline on General Damages respectively, show *prima facie* that there is a significant issue in relation to the cost of personal injury awards in Ireland for some commonly occurring personal injuries, particularly those of a less severe nature. The comparisons do not take account of any external environmental factors which may, or may not, have a bearing on the comparison.

NECK INJURIES		
Severity or Impact	**Irish Book of Quantum**	**UK Guidelines on General Damages**
Minor	(up to) €19,400	(up to) €7,200
Moderate	€20,400 - €52,200	€7,209 - €35,176
Severe	€76,000 - €139,000	€59,974 - €119,638

BACK INJURIES		
Severity or Impact	**Irish Book of Quantum**	**UK Guidelines on General Damages**
Minor	(up to) €18,400	(up to) €11,435
Moderate	€21,400 - €55,700	€11,435 - €35,425
Severe	€76,000 - €139,000	€35,425 - €63,703

ANKLE INJURIES		
Severity or Impact	**Irish Book of Quantum**	**UK Guidelines on General Damages**
Minor	(up to) €54,700	(up to) €12,554
Moderate	€39,100 - €81,300	€28,589 - €45,742
Severe	€80,500 - €93,300	€45,742 - €63,641

Table 8.1

Notes:

- Irish figures taken from the 2016 edition of the "General Guidelines as to the Amounts that may be awarded or assessed in Personal Injury Claims". UK figures taken from the 12th edition of the "Guidelines for the Assessment of General Damages in Personal Injury Cases", published in 2013
- Irish figures are determined through analysis of claims data from 2013 and 2014 from Irish Courts, PIAB and non-life insurers. UK figures are set by the UK Judicial College
- UK figures were converted to Euro using a rate of £1 = €1.13

- Comparison is an approximation only as the two books are not exactly equivalent in terms of the categories of injury or the levels of severity
- For Neck and Back injuries, the highest frequency of severity is in the "Minor" category of injury and therefore most relevant in terms of comparison. Most ankle injuries fall into the "Moderate" category
- Injuries to neck, back and ankle include soft-tissue, fracture, sprain, etc.

Some of the suggestions offered by stakeholders to lower personal injury awards levels involved an across-the-board reduction in, or limiting of, award levels as reflected in the Book of Quantum. However, the Book is simply a guide which reflects what prevailing award levels are. Currently therefore, the only way that the award levels in the Book can be lowered is if there is first a decrease in the actual level of awards paid out. Logically this decrease would then be reflected in a revised Book of Quantum. Ultimately, it is the Courts that determine award levels with PIAB awards and settlements effectively reflecting Court awards. Nevertheless, the Working Group has already made recommendations in the Motor Report to try and improve both the granularity and the practical application of the Book of Quantum, and these are in the process of being implemented (see below for more details). In a similar vein, it is worth noting that the revised Book in 2016 included additional injury categories and improved granularity of injuries and the aforementioned recommendations in the Motor Report are seeking to build upon these improvements.

Also relevant to this discussion is a benchmarking exercise which is being undertaken by the Personal Injuries Commission ("PIC") which will compare international awards for personal injury claims with the Book of Quantum.[43]

The PIC is also tasked with analysing personal injury award levels and settlement systems in other jurisdictions and assessing whether objective medical diagnosis of soft tissue injuries in Ireland can be improved in personal injury cases. In line with its terms of reference, it has been examining the diagnosis, assessment, reporting on, and treatment of soft tissue injuries with regard to international experience, as well as examining standardised medical reporting and the use of objective tests. A considerable amount of research into approaches in other jurisdictions has been carried out along with a consultation exercise with the medical community and key stakeholder groups. This research and consultation has informed the initial findings of the PIC Report which suggest that adopting a standardised and internationally recognised approach to diagnosis, treatment and reporting on soft tissue injuries, by practitioners who are appropriately competent and trained, will improve the personal injuries environment in Ireland. The PIC delivered its first report on 7th December 2017.[44]

A report in respect of the second phase (which will include the benchmarking exercise) is currently scheduled to be provided in Q1 2018 with a final report due in Q2 2018.

[43] The PIC was established in January 2017 on foot of Recommendation 14 of the Motor Report and is chaired by former President of the High Court, Mr Justice Nicholas Kearns. Its membership includes representatives from the medical, legal and insurance sectors as well as from relevant Government Departments and Agencies.
[44] The First Report of the Personal Injuries Commission is available at: https://dbei.gov.ie/en/Publications/First-Report-of-the-Personal-Injuries-Commission.html

The specific recommendations referred to above from the Motor Report referred to above, which are relevant to the Book of Quantum, are as follows:

Recommendation 18: This involves an exploration with the judiciary of how future reviews of the Book might involve appropriate judicial involvement in its compilation or adoption. This exploration is ongoing and is being carried out by PIAB. The aim of the engagement with the judiciary is to produce a Book which is as appropriate and helpful as possible to all those who are to use it in the assessment of damages. If the Book is utilised and relied upon by members of the judiciary, it follows that it will be used to guide negotiations for out of court settlements and for awards made through the PIAB process. This should introduce a greater level of consistency than is currently being experienced across award levels no matter what settlement channel awards are made in. In turn, this should provide a greater incentive for claimants to make greater use of PIAB as a mechanism for resolving personal injury cases, thus reducing legal costs.

Recommendation 19: This relates to examining the frequency of future Book of Quantum updates in terms of any future changes to its production. In this regard, the General Scheme of the Personal Injuries Assessment Board (Amendment) Bill, which was published on 30th June 2017 makes provision for the Book to be reviewed every three years. The General Scheme of the Bill has been sent to the Office of Parliamentary Counsel for drafting and it is intended that the Minister for Business, Enterprise and Innovation will present the Bill to the Dáil as soon as possible. The purpose of the proposed Bill is to strengthen the operational powers of PIAB in order to ensure greater compliance with the PIAB process and encourage more claims to be settled through it. Regular reviews of the Book will assist in keeping the Book relevant and reflective of ongoing trends in personal injury awards.

Recommendation 20: This then aims to introduce more granularity into the Book. The work of the PIC will feed into the review of the Book in this regard with recommendations arising from the Commission being introduced to enhance the Book, which from now on will be at least every three years.

8.3 Settlement Process

While values in the Book of Quantum are a major factor in the determination of an overall award, they represent a guide to prevailing damages levels only and have not always been adhered to by the judiciary in the past. It is acknowledged, however, that some judges quoted the fact that the Book was not updated for a significant period of time and therefore was of little guidance to them as part of their assessment of damages.[45] In addition to the award levels, there can be considerable additional costs associated with a claim, both medical and legal, which contribute to the overall cost of a settlement.

The Working Group believes that the environment within which awards are settled and made has a major bearing on the cost of insurance. A stable claims and awards environment means that the reserves put aside to meet future claims do not have to be regularly adjusted to reflect new

[45] See for example: Saleh v Moyvalley Meats (Ireland) Ltd [2015] IEHC 762; Omotayo v Griffin [2016] IEHC 482

developments, such as an increase in award levels. Where there is uncertainty about such matters, insurers tend to reserve more prudently, which is ultimately reflected in increased premiums.

Although there is a general lack of data available in relation to direct settlements between insurers and claimants it is reasonable to assert that as a general rule, the earlier a claim is settled the less it will cost. Claims settled at an earlier stage tend to involve minimised medical and legal costs and there may be less potential for a dispute over the nature of the injury and its impact on a person's life, including the anticipated recovery period (which impacts on general damages).

Early settlement by an insurer or resolution of the claim through PIAB is the best way of achieving this objective in appropriate cases. The rationale for the establishment of PIAB was to encourage this early settlement process by trying to remove as many suitable cases as possible from unnecessary litigation. However, it has always been recognised that litigation may be the appropriate forum for resolution where liability is in dispute.

No claims settlement system is perfect, and while an early settlement is generally considered preferable, business stakeholders have pointed out to the Working Group that insurers can be too quick to settle some claims which they would consider of a more questionable nature. Insurers, whilst arguing that it is not in their interests to facilitate such claims, have pointed out that an unpredictable and expensive claims environment can lead them to make what they consider to be economically rational settlement decisions in order to avoid incurring significant costs, both legal and medical and ultimately a higher compensation award. As stated earlier, there is a general lack of data available in relation to direct settlements and the stages and quantum at which they are settled and accordingly the extent of this problem cannot be determined.

Whilst undoubtedly PIAB is effective in removing a significant percentage of personal injury cases from the litigation process, there are still a large volume of cases which come to it initially but which are later released for various reasons into the litigation process. A further unquantified cohort of cases settle directly between parties during the PIAB process. This begs the question as to why so many cases still end up in litigation. There are three main explanations for this: (i) liability is disputed by the respondent/insurer and they do not consent to PIAB assessing the case (section 14 of the *Personal Injuries Assessment Board Act 2003*); (ii) certain cases fall outside the scope of PIAB, e.g. wholly psychological cases, cases of a particularly complex nature (section 17 of the *Personal Injuries Assessment Board Act* 2003); or (iii) the claimant or the respondent does not accept PIAB's assessment of the quantum of damages and wishes to proceed to have the matter heard in court (section 32 of the *Personal Injuries Assessment Board Act* 2003).

The first two scenarios are ones which were considered likely to arise when PIAB was established in 2004. The third scenario is one which was also anticipated, however it is the area that the Working Group believes lies at the heart of the debate about how claims costs can be tackled. This is, because if greater consistency of awards can be achieved through the extensive use of the Book of Quantum, then it can be argued that the numbers in this category should fall.

In examining rejected PIAB awards the Working Group understands from PIAB that it is usually claimants who reject such awards although insurers reject in approximately 10% of cases. A central argument put forward for claimants rejecting the PIAB award and going down the litigation route was that as the Book of Quantum had not been updated for over 10 years, it did not reflect the prevailing level of awards, and therefore going to court was the most effective way to get the most up-to-date award level. However, the counter argument to this is that over 60% of awards were still settled by PIAB during this time, which suggests that the old Book of Quantum was not as redundant as some have perceived it to be. Reinforcing this position is the fact that PIAB has indicated that there has not been a significant increase in its average award levels as a result of the revised Book being published in 2016, nor has there been an increased acceptance rate so far. In the absence of detailed data relating to the settlement of post PIAB rejected awards, it is not possible to accurately determine why awards are rejected but it cannot be discounted that other factors also play a part, such as how costs are dealt with in the courts system as compared to within the PIAB process.

Insurers and business stakeholders have maintained that the failure in the past for the courts to adhere to the Book of Quantum has created a climate whereby plaintiffs feel they have nothing to lose by pursuing litigation as in many cases liability has been admitted and the worst that can happen is that they maintain the award level approved by PIAB, in other words there is little risk to litigating. This is reinforced by the fact that the Working Group is only aware of a small number of cases where the courts have applied section 51A of the *Personal Injuries Assessment Board (Amendment) Act 2007*.[46] This provision provides that a plaintiff will not be entitled to their costs if the award they receive from the courts is not greater than that which they have been awarded by PIAB.

What therefore has become clear to the Working Group is that a key element in containing claims costs in the employer and public liability area is by achieving consistency of award levels through the regular use of the Book of Quantum by all parties. This means that no matter what settlement channel a case is resolved through, the outcome should be the same. In turn, this should mean that there is the potential for greater application of section 51A, which if appropriately used should encourage a greater use of PIAB. Over time, key to the Book of Quantum being adhered to by the judiciary is the implementation of Recommendations 18, 19, and 20 of the Motor Report referred to above, as a result of which it is hoped that the judiciary will take greater ownership of the Book and that, in addition they will also have greater faith in it through more regular updates and the introduction of more granularity. The output and implementation of the work of the PIC is also critical to ensuring the Book of Quantum remains consistently relevant.

The outcome of this process, particularly in relation to relatively minor injuries which represent by far the greatest majority of personal injury cases, should mean that litigation should become less used than it is currently. In other words, as the Book of Quantum has been brought up to date, and there is a process for ensuring that this is maintained, there is little excuse for it not being used for

[46] See, for example, *Power v Cork County Council* (Record No. 2011 4026, 25 July 2012); *Lee Carey v Dublin Bus* (Record No. 2007 07846, 12 November 2008).

most such personal injury claims. In summary, therefore, the Working Group believes that over the next number of years, the clearest signal available that there is a greater consistency in award levels will be an increase in the number of PIAB cases being accepted by claimants.

8.4 Legislative Limit on Damages

In order to provide context for this part of the review, it is important to first set out what the existing limits are and what any change to them would mean in very general terms. In this regard, there is a hard limit on what the District Court or Circuit Court can award in terms of personal injury actions of €15,000 and €60,000, respectively, with no limit on damages by the High Court. However a statutory cap, for instance in respect of specific injuries, would serve to limit, within any pre-existing statutory or constitutional (in the case of the High Court) global jurisdiction, the amount that could be paid out in respect of specific injuries.

It is acknowledged that the idea of considering such a legislative limit on damages is a sensitive one. The Working Group not aware of any recent serious consideration given to this issue in this jurisdiction and there is a temptation to dismiss it without exploring the matter further as there is a general view that there are constitutional limitations to such an approach. However, to do this would be to fail to address the submissions received by the Working Group which have consistently suggested that the level of awards is significantly higher in Ireland than in our nearest neighbour, the UK, particularly for soft tissue injuries, and that this is impacting upon premium levels. The *prima facie* evidence outlined earlier suggests that there is some basis to this claim though this matter is being tested at present as part of the work of the PIC. Consequently, in this context, the Working Group believes that it is important to examine the scope for introducing measures to limit award levels. This would be of particular relevance only if the outcome of the PIC benchmarking exercise indicates that the Irish Book of Quantum is significantly out of line with its equivalents elsewhere.

Any examination of this area must of course take account of the broader societal impact of the existing limits, including the rights of claimants to a full and proper level of compensation where they suffer an injury through the negligence of others. Also, as the Council of the Bar of Ireland pointed out during its consultation with the Working Group, it is important when comparing award levels between different countries that suitable consideration be given to the 'societal choices' made in each jurisdiction, in areas such as social welfare benefit levels and state provision of health care.

8.5 The Concept of Damages in Tort Law

The primary function of the law of torts is to determine if a wrong has occurred and, if so, to provide a remedy. The traditional remedy where such a wrong has occurred is an award of damages which has been defined as the "*sums which fall due to be paid by reason of some breach of duty or obligation".*[47] The primary goal of an award of damages is *restitutio in integrum,* to "*put the plaintiff in the same position as he or she would have been if the tortious act had not occurred*".[48] This

[47] *Hall Brothers SS Co. Ltd v Young* [1939] 1 K.B. 748, at p. 756.
[48] *Reddy v Bates* [1983] IR 141, at p. 150.

formula is considered imperfect as the injured party may have experienced inconveniences or life-altering injuries which cannot be satisfactorily remedied by damages. Despite its imperfection, the approach of placing a monetary value on the claim in the form of an award of damages is the "*established method*"[49] to be applied by courts and is generally the norm across legal systems internationally.

A determination of the appropriate level of damages to be awarded involves an assessment of "*both the harm suffered by the plaintiff and the extent to which the defendant's wrong is deemed to be responsible for bringing about that harm*".[50] There are areas of law where strict liability is applied, where no fault on the defendant is required and the defendant's action can be held to be a wrong simply because of the adverse impact on the plaintiff.[51] However, in general in the area of personal injuries, tort law does not seek to compensate for losses as a result of pure accidents because these losses are not considered to be the result of a 'wrong'.[52] Instead, the law in personal injuries compensates the losses which are deemed to be the result of a wrong which the defendant is held responsible for.

In considering the appropriate level of damages in *Shannon v O'Sullivan* [2016] Irvine J, in the Court of Appeal, stated:

> It has long been accepted that awards of damages must be:-
>
> (i) fair to the plaintiff and the defendant,
>
> (ii) proportionate to social conditions, bearing in mind the common good and
>
> (iii) proportionate within the scheme of awards made for other personal injuries (see MacMenamin J. in Kearney v. McQuillan & North Eastern Health Board [2012] IESC 43 and Denham J. in M.N. v. S.M. [2005] IESC 17).[53]

Furthermore, in another Court of Appeal case, *Payne v Nugent* [2015] Irvine J stated that "*damages awarded for pain and suffering must be reasonable having regard to the injuries sustained*" and must also be "*proportionate to the awards commonly made to victims in respect of injuries which are of significantly greater or lesser import. Modest injuries should attract moderate damages*".[54]

This assessment of damages by a judge has been described as a:

> rational process taking into account, in summary, the severity of the injury, how long it has taken the plaintiff to recover, whether it has short-term or long-term consequences or sequelae and if so their nature, the impact on the plaintiff's life in all its different aspects including his family, his work, his sports or hobbies or pastimes, in addition to any other features that are relevant in the plaintiff's particular circumstances.[55]

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[49] *Ibid.*
[50] Quill, Torts in Ireland, Second Edition, at p. 3.
[51] For example, strict liability has been created by the legislature in relation to defective products and some types of occupational injury.
[52] Quill, Torts in Ireland, Second Edition, at p. 3.
[53] *Shannon v O'Sullivan* [2016] IECA 93, at p. 32.
[54] *Payne v Nugent* [2015] IECA 268, at para 19.
[55] *Nolan v Wirenski* [2016] IECA 56, at para 41.

Quill states that a secondary function of tort remedies is to act as a deterrent against future wrongs.[56] The finding by a court that one party is liable for the injuries of another and the granting of a remedy for the plaintiff serves not only as vindication for the plaintiff but may also serve "*as a warning to the defendant and to others that this type of conduct will not be tolerated and may clarify, for future occasions, the limits of acceptable behaviour".*[57] For some, it is not the award of damages that is important, it is instead the formal recognition that they have been wronged and the responsible party is held accountable for that wrong. While these factors are generally regarded as valid factors for the Court to consider, the Court in *Sinnott v Quinnsworth* warned that general damages must reflect pain and suffering and should not be punitive.[58]

8.6 Public Interest Perspective

The above provides the appropriate context for considering the issue of quantum of damages and the impact that it has on insurance premiums. With regard to this matter, as well as taking account of the interests of business and the rights of injured persons, it is important to appreciate that there is also an effect on community activity. For instance, there is very little civil activity that can be conducted in today's society without a need to have some form of public liability cover. Therefore, the often high cost of such insurance is almost certainly acting as an inhibiting factor to the betterment of broader society. Consequently, for this reason alone there is a compelling public interest in reviewing this issue and in fully understanding the reasons why insurance costs are higher than they should be.

While the stakeholders who made submissions to the Working Group are adamant that a cap on damages is necessary, any assessment of this issue must also consider the rights of injured persons to seek appropriate compensation for those injuries through the justice system. A factor which will be relevant to such an assessment is the outcome of the benchmarking exercise currently being conducted by the Personal Injuries Commission. The Working Group believes that an important aspect in any analysis of this issue is whether a legislative cap on damages, or a similar measure, is necessary for the common good. For instance, an argument can be made that broader economic and societal needs may be impacted upon by lack of access to insurance as a result of the cost. In addition, a further factor could be the danger of creating inappropriate incentives for the small minority of people who may choose to take advantage, fraudulently, of the high level of awards, and the perception that insurance fraud is a victimless crime for which there are no consequences. On the other hand, this argument has to be balanced by the rights of genuine plaintiffs to an appropriate level of compensation. In summary, therefore, the State must be cognisant of the constitutional rights of all parties and must balance those rights to ensure any encroachment on those rights is justified, proportionate and in the common good.

It is recognised that this is a complex public policy issue and that due consideration must be given to the constitutional arguments for and against such a course of action. While the Constitution protects property rights, the Working Group also considers that there are circumstances in which those rights must yield to the exigencies of the common good, as provided for in Article 43.2.2° of

[56] Quill, Torts in Ireland, Second Edition, at p. 4.
[57] *Ibid.*
[58] *Sinnott v Quinnsworth Ltd* [1984] ILRM 523.

the Constitution.[59] Consequently, the common good may require proportionate permanent or temporary interference with the rights, including property rights, of persons where compelling evidence is available to indicate the need for particular actions to be taken.

Decisions which have far-reaching consequences must be considered thoroughly. For the Working Group to recommend that Government commit to propose legislative measures which may limit the property and/or access to justice rights of a plaintiff, and which may engage issues relating to the independence of the judiciary, it is necessary to consider the implications carefully.

To progress this issue, representatives of three Departments (the Department of Justice and Equality, the Department of Business, Enterprise and Innovation and the Department of Finance) who are members of both the Working Group and its legal sub-group, engaged with the Office of the Attorney General (AGO). The aim was to explore whether it was considered legally and constitutionally permissible for the Oireachtas to enact legislation to delimit or cap the amount of damages which a court may award in respect of personal injuries. Arising from this engagement, the three aforementioned Departments discussed the issue within the legal sub-group and the Working Group. The ultimate conclusion reached by the Working Group is that (i) introducing such a measure would constitute a significant development in the law, because any legislation which restricts the rights of citizens must be carefully considered and justified to ensure it would withstand constitutional challenge, (ii) that the main question for a court, if such a measure was challenged, would be whether an appropriate balance was struck having regard to the exigencies of the common good, and (iii) that the appropriate balance can only be struck once all appropriate factors have been taken into account by the Houses of the Oireachtas in considering the legislation.

Due to the complex legal nature of this subject, the Working Group concluded that it was not in a position to undertake the in-depth analysis of all of the issues that would be required to demonstrate to a court that the correct balance of constitutional rights and principles has been struck having regard to the exigencies of the common good.

Consequently, the Working Group took the view that a more appropriate forum to consider this matter would be the Law Reform Commission ("the LRC"), which is currently engaged in a consultation exercise in advance of preparing its fifth programme of law reform. Established pursuant to the Law Reform Commission Act 1975, the role of the LRC is to keep the law under review and to conduct research with a view to the reform of the law. The research of the LRC arises from the Programme of Law Reform which is prepared by the Commission and agreed by Government and laid before the Houses of the Oireachtas under the 1975 Act. In addition, under the 1975 Act, the Attorney General may also request the Commission to examine specific areas of law in addition to those in a Programme of Law Reform.

[59] Article 43, Bunreacht na hÉireann:

1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The research conducted by the LRC is thorough, contains a detailed examination of relevant issues and takes into account all the nuances of an issue such as this. In-depth research is required to inform the Oireachtas before a decision is reached on such a fundamental issue. Consequently, the Working Group decided that there would be value in further research in this topic and that the LRC may be the appropriate body to carry it out.

A somewhat comparable examination was completed almost twenty years ago by the Law Commission in England and Wales, a corresponding body to the LRC. The specific purpose of the Law Commission study was to consider the most effective method to specifically raise the levels of damages awarded for non-pecuniary loss.

The conclusion of that study was that a proposal to enact a legislative tariff, taking the form of "*a list of upper and lower limits of damages for different injuries, coupled with a non-exhaustive list of relevant factors which may legitimately affect the level of award within the range*" in relation to damages for non-pecuniary loss in personal injury cases should be rejected, at least initially. The Law Commission was of the view that the two most important reasons for the rejection were because such a tariff *would "politicise the question of what damages for non-pecuniary loss should be*" and would be *"too rigid*".[60] Instead of pursuing legislative methods, the Law Commission preferred the approach of achieving an increase in damages for non-pecuniary loss through the Court of Appeal and the House of Lords using their existing powers to lay down guidelines, in a case or series of cases, which would raise damages in line with the increases recommended.

It is important to note that the Law Commission outlined what they described as a fall-back position if the minimum increase being sought was not achieved within a reasonable period through the Court of Appeal and House of Lords. This fall-back was the "*legislative implementation of [the] suggested increase in the tariff of awards for non-pecuniary loss in personal injury cases*".[61] The Group recognises, of course, that the constitutional context for legislators is different between Ireland and the UK.

8.7 General and Special Damages

Compensation awards consist of general damages and special damages. General damages are paid in respect of the pain and suffering experienced by the claimant and reflect the nature and severity of the injury, whereas special damages are paid in respect of out of pocket expenses such as loss of earnings and treatment costs. Special damages may also include items such as material and property damage and are usually vouched with receipts.

In this context, a proposal was put forward by one of the stakeholders that there should be some form of linkage or ratio between the levels of general and special damages awarded to a claimant.

This matter was considered by the Working Group. However, it concluded that there is not necessarily a linear relationship between general and special damages as other factors, such as the

[60] The Law Commission, "Damages for Personal Injury: Non-Pecuniary Loss" (Law Com No 257) December 1998, at paras 3.130-3.139.
[61] *Ibid,* at paras 3.165, 3.176 & 3.188.

employment status of the claimant, will affect the special damages but not the general damages. Relevant to this consideration is the fact that the Supreme Court established what is considered a 'ceiling' on the amount a plaintiff could be awarded in general damages in the case of *Sinnott v Quinnsworth*.[62] With the passage of time, the original ceiling has fluctuated, with the court taking into account, for example, inflation levels. Since the establishment of the concept of a 'ceiling' for general damages, the highest general damages that have been awarded by the courts was €450,000 in *Maggie Yang Yun v MIBI* in 2009.[63] In this regard, Irvine J stated "*while it cannot be stated that there is a cap on general damages for pain and suffering, from the awards made in recent times there is at least a perception that the very upper range for compensation of this type rests in or around the €400,000 mark*".[64]

Special damages on the other hand can be much higher depending on the scale of future loss of earnings potential and the cost of future care. In this regard, the 2002 Motor Insurance Advisory Board (MIAB) Report referred to a 1996 Report on the Economic Evaluation of Insurance Costs in Ireland from Deloitte and Touche and the McAuley Report 2001, the Second Report of the Special Working Group on Personal Injury Compensation (Department of Enterprise, Trade & Employment).[65] The MIAB Report refers to the research carried out in these two reports on the relationship between special and general damages in Ireland and effectively found that there was an inverse relationship between special and general damages, i.e. as special damages decrease, the relative level of general damages is higher, but special damages may actually exceed general damages in more severe cases.[66] The McAuley Report made reference to similar research carried out in the UK on the relationship between general damages and special damages which did not find the same inverse relationship.[67]

The proposal put forward aims to set a ratio between general and special damages, which in the view of the Working Group could only be applied effectively by limiting general damages. Consequently, the Working Group does not intend to adopt this proposal at this point in time.

The Working Group considers that the more pertinent issue is whether general damages are too high at the lower end of the scale. Consequently, the output of the Personal Injuries Commission which is tasked with carrying out a benchmarking exercise in relation to the level of damages internationally may be more relevant to the issue of evaluating the appropriateness of damages levels in Ireland.

8.8 Conclusions of the Working Group

In relation to the views put forward by business stakeholders that values in the Book of Quantum are too high compared with other countries and that levels of damages for personal injuries should be capped, the Working Group believes that this is a matter that would benefit from examination by the Law Reform Commission. As mentioned above, the Personal Injuries Commission is carrying out a benchmarking exercise and is scheduled to report in Q1 2018. A further final report of the PIC

[62] *Sinnott v Quinnsworth Ltd* [1984] ILRM 523.
[63] *Yun v MIBI & Tao* [2009] IEHC 318.
[64] *Payne v Nugent* [2015] IECA 268, at para 17.
[65] Report of the Motor Insurance Advisory Board, 2002, at pp 499 – 502.
[66] *Ibid.*
[67] McAuley Report, Second Report of the Special Working Group on Personal Injuries Compensation, at pp 128-129.

is due in Q2 2018. As part of these reports the PIC, dependent on the outcome of its benchmarking exercise, may make recommendations in relation to addressing any imbalances between the levels of damages in Ireland compared with other jurisdictions. The recommendations of the PIC may involve more immediate deliverables or longer term aims. The recommendation for the Law Reform Commission to consider the question of capping damages does not preclude the PIC from making and implementing recommendations. Instead, the Law Reform Commission, if it agrees to consider this matter, should take into account the work of the PIC and the results of its research.

More immediately relevant, however, is the view which has been outlined by various stakeholders of the need to ensure consistent application of the Book of Quantum. While the Working Group does not have statistics on how often the Book of Quantum was departed from, anecdotal evidence does suggest that this has happened. However, as previously indicated, undoubtedly a significant contributory factor for such occurrences was the absence of regular updating processes which led to the Book being considered by the judiciary, and the wider legal profession, as less relevant. In the future, with regular updates this should not present the same problem for the judiciary, and thus in this context there is a much greater likelihood of the Book being consistently applied. If this turns out to be the case, then stakeholders believe it would go a long way towards stabilising the claims process and would thus create the predictability which insurers require in order to avoid excessive reserving for future claims. Consequently, the Working Group believes that it is important for the judiciary to use the Book of Quantum when assessing damages as a general rule, while recognising that as no two cases are exactly the same, there will be occasionally some differentials which will have to be recognised in awards. This consistency of approach in the courts would create a greater incentive for cases to be settled through PIAB, thus reducing legal costs which in turn should lead to a reduction in premiums.

In addition to the Working Group's view that the Book of Quantum should be broadly adhered to in court decisions, the Group would like to reiterate its recommendation from the Motor Report that there should be consultation going forward between the judiciary and PIAB to develop future iterations of the Book.[68] This will ensure that it is a utilised guide which is of assistance to every case involving an assessment of damages. It is also suggested that any relevant recommendations emerging from the PIC report are considered in the context of the next review of the Book.

8.9 Relevant Recommendations from the Motor Report

Recommendation 14 of the Motor Report:

> Establish a Personal Injuries Commission

Recommendation 15 of the Motor Report:

> Assess, within the current review of the PIAB legislation, cases of non-cooperation such as non-attendance at medicals and refusal to provide details of special damages

[68] See Recommendation 18 of the *Report on the Cost of Motor Insurance*, January 2017, at pp. 19 and 116, available at: http://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf

Recommendation 16 of the Motor Report:

> Ascertain and set out the measures necessary to implement Pre-Action Protocols for personal injury cases

Recommendation 17 of the Motor Report:

> Fully assess viable options for referring rejected PIAB assessments into a judicial process on an appeal basis so that the facts established relating to a personal injury in the PIAB process do not require to be re-established

Recommendation 18 of the Motor Report:

> Explore with the judiciary how future reviews of the Book of Quantum/guidelines might involve appropriate judicial involvement in its compilation or adoption

Recommendation 19 of the Motor Report:

> Examine the frequency of future Book of Quantum updates in terms of any future changes to its production

Recommendation 20 of the Motor Report:

> Introduce more granularity in to the Book of Quantum

8.10 New Recommendations

Recommendation 5

THE LAW REFORM COMMISSION TO BE REQUESTED TO UNDERTAKE A DETAILED ANALYSIS OF THE POSSIBILITY OF DEVELOPING CONSTITUTIONALLY SOUND LEGISLATION TO DELIMIT OR CAP THE AMOUNT OF DAMAGES WHICH A COURT MAY AWARD IN RESPECT OF SOME OR ALL CATEGORIES OF PERSONAL INJURIES

A comprehensive submission should be provided to the Law Reform Commission ("the LRC") requesting that research and analysis be carried out on the issue of whether it is (i) justifiable and in the common good and (ii) legally and constitutionally permissible for the Oireachtas to enact legislation to delimit or cap the amount of damages which a court may award in respect of personal injuries. The LRC is currently engaged in a consultation exercise in advance of preparing its next programme of law reform, with a deadline at the end of February 2018 for applications. This application would be made with a view that the LRC would report back within a reasonable timeframe with firm recommendations and conclusions. The Working Group is of the view that the LRC should examine, not only the issue of capping damages generally, but also whether damages can be capped for specific injuries.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
8	Department of Justice and Equality to provide a submission to the Law Reform Commission to request this issue be added to their Fifth Programme of Law Reform	Q1 2018	Department of Business, Enterprise and Innovation, Department of Finance, Department of Justice and Equality, Law Reform Commission	Department of Justice and Equality
9	If the Law Reform Commission commit to exploring this issue, Department of Justice and Equality to consult with the Law Reform Commission as to the status of the project	Q4 2018		

CHAPTER 9 – LIMITATIONS ON COURT ACTIONS FOLLOWING THE PIAB PROCESS

9.1 Background

If a Personal Injuries Assessment Board (PIAB) award is rejected, legal proceedings can be issued by the plaintiff, with the result that the case has to be listed for a court hearing. In doing so, the case is sent forward to be heard in Court *de novo*. This can, in some cases, lead to the introduction of evidence into court that could have been provided at the time of the PIAB assessment but which was not previously submitted. This can result therefore in a situation where the court may be adjudicating on a claim with different associated facts or evidence to that assessed by PIAB. A number of insurance and business representative groups, with whom the Working Group consulted, have argued that this approach effectively enables claimants to present a lesser or different set of facts or evidence to PIAB than they might subsequently present to the court in an ensuing action. The suggestion is that the claimant in such a case is seeking to bypass PIAB with the prospect of achieving a larger award from the courts, along with legal costs (which are not generally awarded by PIAB). Business and insurance stakeholders have argued that this failure to fully disclose at the outset is unfair as an accurate assessment of the claim cannot be made by PIAB or the defendant themselves.

This issue was examined as part of the first phase and resulted in the introduction of Recommendation 17 of the Motor Report which is to fully assess viable options for referring rejected PIAB assessments into a judicial process on an appeal basis so that the facts established related to a personal injury in the PIAB process do not require to be re-established. The lead owners for the implementation of this recommendation are the Department of Justice and Equality and the Department of Business, Enterprise and Innovation who were tasked with reviewing the potential legal and constitutional constraints to the appeal style system by the end of 2017.[69] Representatives from these Departments have been examining this issue as part of the legal sub-group established during the second phase of the Working Group's project. This examination involved engagement by representatives of three Departments (the Department of Justice and Equality, the Department of Business, Enterprise and Innovation and the Department of Finance) who are members of both the Working Group and its legal sub-group with the Office of the Attorney General.

9.2 Consideration of the Proposal in Recommendation 17 of the Motor Report

It is accepted by the Working Group that the rights of individual claimants should be protected, as PIAB is built on the principle that a claimant cannot be disadvantaged from having gone through the process. It must also be borne in mind that the Constitution requires justice to be administered in Court.[70] Therefore, measures to place limitations on court actions following the PIAB process are

[69] See Action Point 38 of Recommendation 17 of the *Report on the Cost of Motor Insurance*, January 2017, at pp. 19 and 115, available at: http://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf

[70] Article 34(1), Bunreacht na hÉireann:
Justice shall be administered in courts established by law by judges appointed in the manner provided by this constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

constitutionally problematic. However, if the desirable public policy outcome is the achievement of greater predictability and certainty of award levels, it is important to allow PIAB to assess damages on the same basis as the courts do (i.e. in accordance with the laws of tort). Any question of a deliberate withholding of information available at the time of the PIAB process would seem to undermine this process.

While the Working Group understands why stakeholders want such a review[71] style system introduced, and agrees that plaintiffs must disclose relevant documentation to PIAB, significant practical implications to the introduction of this measure have surfaced in the Group's consideration and consultations on this matter.

If a review style system from PIAB were to exist, this may result in claims going to a court under a special procedure where the judge would in effect review the PIAB file and conclusions and decide whether it constituted a fair award in the circumstances. While this may seem an efficiency benefit on the face of it, it is not clear that either plaintiffs or defendants would gain if a further layer is added to an already complex legal process. In other words, such a review process could presumably not prevent a plaintiff taking their case further if they were not satisfied with the outcome and having it heard in court *de novo*. In such a situation legal costs would undoubtedly accumulate which would run contrary to the goal of reducing costs in the personal injuries process. A further relevant consideration is the time the review process would take as it could certainly prolong the litigation process, the length of which is already subject to much criticism. Finally, it may be that the existence of a review mechanism might encourage the routine rejection by plaintiffs of the PIAB award with a view to testing the review process for a better result.

An additional question which must be asked is whether there would be much material difference between a review of a PIAB award undertaken by a judge, compared to the actual hearing of the matter in court *de novo* after which a judge would make an award.

Therefore the Working Group believes the best way forward in addressing this issue is the implementation of Recommendation 15 of the Motor Report. It requires the Department of Business, Enterprise and Innovation to assess, within the current review of the PIAB legislation, cases of non-cooperation such as non-attendance at medicals and refusal to provide details of special damages. A public consultation on the operation of PIAB undertaken by the Department of Business, Enterprise and Innovation in 2014 highlighted such non-compliance with the process as an issue that needed to be addressed,[72] as otherwise it was argued that PIAB would not be able to fulfil its original mandate of limiting the cost of administering personal injury claims, where appropriate, in the common good.

In order to address the issues identified in the public consultation process, the General Scheme of the Personal Injuries Assessment Board (Amendment) Bill 2017 was approved by Government on

[71] While the wording of Recommendation 17 of the Motor Report refers to an 'appeal' style system, for the purposes of this Report the term 'review' is used as it better describes the type of system envisaged by the Working Group.
[72] Twenty nine submissions were received from a range of stakeholders including Government Departments and agencies, industry, insurance and legal interests and individuals – the submissions are available at: https://dbei.gov.ie/en/Consultations/Public-Consultation-PIAB-Acts-2003-and-2007.html

June 27th and published on the website of the Department of Business, Enterprise and Innovation on June 30th.[73]

The purpose of the General Scheme is to strengthen the operational powers of PIAB, in order to ensure greater compliance with the PIAB process and encourage more claims to be settled through it. Head 7 is of relevance to this issue as it aims to tackle failure to provide details of special damages or loss of earnings as part of the PIAB process.[74] Due to certain practices wherein parties have not complied fully with requests from assessors for evidence of special damages, the Board is unable to carry out an assessment which accurately reflects the individual characteristics of the claim. In many of these claims, the PIAB assessment is rejected and an authorisation to issue proceedings is issued.

Head 7 provides discretion for the court to impose certain penalties in claims where parties do not comply with the PIAB processes. It provides that where the claimant has failed to comply with a request by an assessor under section 23 of the *Personal Injuries Assessment Board Act* 2003 to provide information or documents and if the claimant subsequently brings proceedings, the court will have regard to the failure to comply by the claimant. The court has discretion as to what evidence or information is admissible in court that was or should have been known to the claimant but not submitted to the Board prior to the making of the assessment. The Head also provides that the court has discretion to determine that no award of costs nor other order providing for costs may be made in favour of the claimant.

In relation to the respondent, the Head provides that where a respondent fails to comply with a request by an assessor under section 23 to provide information or documents, in any subsequent proceedings, the court shall have regard to the failure to comply and has discretion in relation to what evidence or information may be admissible in court. The court also has discretion to determine that no award of costs nor other order providing for costs may be made in favour of the respondent.

The Head also provides that where a claimant fails to attend an independent medical examination as requested by PIAB under section 24 and if he or she brings legal proceedings, the court shall have regard to the failure to comply with the request and has discretion as to what medical evidence may be admissible. The court will also have discretion in relation to costs.

By further strengthening PIAB's ability to undertake assessments which take account of all the relevant facts, more cases may be settled through PIAB and thus ultimately avoid unnecessary litigation and litigation costs.

The General Scheme of the Bill has been sent to the Office of the Parliamentary Counsel for drafting. Following a briefing by Departmental officials on the General Scheme of the Bill in November, the Joint Oireachtas Committee on Business, Enterprise and Innovation agreed that they would not undertake pre-legislative scrutiny of the Bill.

Also relevant to this issue is a measure introduced in the *Personal Injuries Assessment Board (Amendment) Act* 2007. A new section 51A was added to the 2003 Act which provides that where a claimant rejects a PIAB assessment which has been accepted by a respondent, and where he or

[73] The full text of the General Scheme is available at: https://dbei.gov.ie/en/Legislation/Legislation-Files/General-Scheme-for-a-Personal-Injuries-Assessment-Board-Amendment-Bill-2017.pdf

[74] See Appendix 10 for full text of Head 7 of the General Scheme of the Personal Injuries Assessment Board (Amendment) Bill 2017.

she fails in any subsequent proceedings to get more than the amount determined by the PIAB assessment, he or she will not be entitled to legal costs. The rationale behind the legislation was that a claimant should not unnecessarily reject a PIAB award and to introduce consequences for doing so. The imperative for introducing this provision was explained by the then Minister for Enterprise, Trade and Employment Micheál Martin:

> While PIAB awards mirror court awards in that both have regard to a book of quantum to determine the appropriate award to be given, some claimants choose to reject their award and commence litigation proceedings in the hope of receiving greater compensation. It is their right to choose this course of action and the [2007 Act] in no way interferes with that right.
>
> However, as proceedings advance, some claimants are accepting the same amount as the PIAB award but also recovering legal costs and additional costs of up to €1,500 to cover the cost of engaging a solicitor to assist with the original PIAB claim. The proceedings are therefore unnecessary for the claimant to receive the same level of award and this development completely undermines the rationale and positive impact of the PIAB. If it is allowed to continue, the consequences will be far-reaching and the cost burden will fall on the consumer and business.[75]

However, it was submitted to the Working Group that some claimants withhold their special damages as a strategy to create a higher differential of value between PIAB and Court award to avoid application of section 51A. The provisions of the *Personal Injuries Assessment Board (Amendment) Bill* 2017, once enacted, will ensure that PIAB has a full view of the costs pertaining to the claim and thus this should result in a more appropriate PIAB award. It will go some way to rendering this strategy ineffective.

9.3 Other Considerations in this Area

A related proposal put forward by a stakeholder was that a provision be introduced whereby a claimant, who refuses to accept a PIAB assessment, must be awarded a figure of more than, for example, 100% or 150% of the value of that assessment in Court in order to recover their costs. The Working Group discussed this proposal and concluded that there were potentially serious unintended consequences to such an approach, in particular the possibility of significantly increased court award levels. This would be possible because the courts might take the view that a plaintiff should not be penalised for having taken the matter to court for adjudication, and thus make an award at a level which ensures that they can recover their costs. Thus the medium- to long-term impact of such a proposal could be a much higher Book of Quantum values over time, as these higher award levels were incorporated into it.

The above view is reinforced by what would appear to be the limited impact of section 51A of the *Personal Injuries Assessment Board (Amendment) Act* 2007, discussed above, whereby in the event of a plaintiff failing to beat in Court the amount of a PIAB assessment then they would be liable for costs. There is very little evidence of this provision being implemented, and this is probably as much

[75] See Dáil Éireann debate, July 5th 2007 at:
http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2007070500005

to do with the fact that only a small number of cases go to court with an even smaller subset of those cases being rejected PIAB cases – although the overall number of such cases is not known. In summary, therefore, based on what was done in the 2007 Act, there is no evidence to indicate that bringing in the suggested measure will have any positive impact.

Consequently in view of a number of other recommendations being explored at present, such as pre-action protocols for personal injury claims, as well as the potential unintended consequences of the proposal outlined, the Working Group is not recommending the implementation of this proposal at this juncture.

9.4 Conclusions of the Working Group

The concept of a judicial appeal/review style system has been explored as required by Recommendation 17 of the Motor Report. However, as outlined in the analysis above, there is a serious concern that it would simply just introduce another legal layer with associated additional costs, as the Working Group believes it would not prevent a person from taking a *de novo* case if they were unhappy with the outcome of the appeal/review. There is also a worry that appeals to such a body would become routine and would therefore undermine the role of PIAB.

The Working Group believes however that the implementation of Recommendation 15 of the Motor Report to address cases of non-cooperation with PIAB such as non-attendance at medicals and refusal to provide details of special damages through the General Scheme of the Personal Injuries Assessment Board (Amendment) Bill 2017 should go a long way to strengthening the overall role of PIAB in the assessment of damages process.

9.5 Relevant Recommendations from the Motor Report

Recommendation 15 of the Motor Report:

> Assess, within the current review of the PIAB legislation, cases of non-cooperation such as non-attendance at medicals and refusal to provide details of special damages

Recommendation 16 of the Motor Report:

> Ascertain and set out the measures necessary to implement Pre-Action Protocols for personal injury cases

Recommendation 17 of the Motor Report:

> Fully assess viable options for referring rejected PIAB assessments into a judicial process on an appeal basis so that the facts established relating to a personal injury in the PIAB process do not require to be re-established

CHAPTER 10 – NOTIFICATION OF A CLAIM

10.1 Background

From a business stakeholder perspective, a major concern brought to the Working Group's attention was the fact that regularly they, as potential defendants, are not being promptly informed that an incident has occurred. This they say, is particularly relevant to public liability claims and impacts on a defendant's ability to:

- investigate the circumstances of the alleged incident and retain evidence,
- engage with the individual at an early stage which may remove the need to resort to litigation,
- enter into early settlement negotiations which may remove the need to resort to litigation at all,
- address issues as regards health and safety which may have given rise to the incident
- take account of potential increases to their premium as a result of the incident

There are two aspects to this issue which have been raised by such stakeholders and they are:

(i) Statute of Limitations and
(ii) Section 8 of the *Civil Liability and Courts Act 2004*.

These are considered below.

10.2 Statute of Limitations

The statute of limitations is the time limit on the right of action before it becomes statute-barred. In respect of personal injury cases, the limitation period in Ireland is two years.[76] This time period is viewed as too long by a number of stakeholders who assert that they face great difficulty in defending personal injury claims submitted and notified to them months after the event. The passage of time between an event and the notification of a claim and the issuing of proceedings leads to issues in investigating the claim including the loss of access to relevant CCTV footage, for example. As well as the costs associated with the retention of CCTV footage, businesses are also obliged to abide by data protection laws which restrict the length of time in which the footage can be retained. A further significant issue is the unavailability of staff who had been working at the time of an alleged incident. This is often due to the personnel no longer being employed by the particular company or business.

The Working Group considered the option of reducing the limitation period from its current two years to a lesser period.

As part of this examination, it first reviewed the reduction from three to two years which was done under the *Civil Liability and Courts Act 2004 ("*the 2004 Act*").* This was because as first published, the 2004 Bill sought to amend the Statute of Limitations (Amendment) Act 1991 by reducing the limitation period for personal injury actions from three years to one year. However, subsequent to

[76] There are special rules in relation to the statute of limitation to cater for those who are under eighteen years of age but these are not addressed by this report.

detailed discussions in the Houses of the Oireachtas in respect of this matter, the limitation period in the final Act was set at two years. From a review of the relevant Oireachtas debates at the time, it appears that specific issues surrounding cases of medical negligence dominated the discussions around the limitation period and were, in effect, the deciding factor in the conclusion that a one year period was too short.

For instance, during the Seanad debate on June 3rd 2004 in relation to the relevant proposed amendment to set the period at two years, the then Minister for Justice, Minister Michael McDowell, stated:

> I have come to the view that there is merit in [the proposed amendment]. The reason I have come to that view is, among others, that the State Claims Agency, which is located in the National Treasury Management Agency, has communicated with me to the effect that it believes the one-year period is, in the case of medical negligence cases, too tough a limitation period.
>
> Although this Bill has gone through a drafting and scrutiny process in the Attorney General's office, it strikes me, when I think about the effect on medical negligence cases, there could be a question mark over its proportionality in constitutional terms, for example, where somebody in the rehabilitation hospital in Dún Laoghaire has one year in which to decide on these weighty matters.[77]

While, in agreeing to the amendment to set the period at two years in a Seanad debate on June 15th 2004, the Minister stated:

> In a personal injuries case involving medical negligence, I could well imagine someone having a traumatic event in a hospital, taking months to recover from it, then going to a solicitor, the solicitor having to spend months researching what actually happened to the client and then, as frequently happens in a small medical community such as Ireland's, having to get a foreign expert to say negligence has occurred which justifies initiating proceedings and to agree to testify to that effect. All that could take quite an amount of time. If it were all to be done within 12 months there was a danger that the courts might have felt that the Bill was a disproportionate interference with a litigant's right of access to the courts.[78]

It is noteworthy that a number of high-profile historical cases of serious medical negligence had been recently uncovered at the time of these debates in 2004.[79]

When explaining why Government had agreed to amend the limitation period provided for in the Bill as published, the Minister stated:

> I am conscious that the one year period is being introduced in the context of an obligation to send the initial warning letter, which is provided for, and also in the

[77] See Seanad Éireann debate, June 3rd 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004060300005?opendocument

[78] See Seanad Éireann debate, June 15th 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004061500006?opendocument

[79] For example, the Dr Michael Neary case.

> context of an obligation not simply to issue a plenary summons before the expiry of the statutory period, but, in the case of a claim for damages for negligence, at the end of the limitation period to issue the personal injuries summons to which this applies setting out the case *in extenso*. This has to be a very significant statement of one's case and not just a two line formula. In those circumstances, those who may feel disappointed that I am deviating from the one year rule should bear in mind that there are compensating issues, such as the obligation to send an initial letter and the obligation to state one's case in full in the initiating legal document.[80]

The Law Society of Ireland asserted that the statute of limitations "*was reduced as recently as 2005 and has already caused hardship to claimants who have attempted to make claims outside the two year limit*" and therefore should not be reduced further.[81]

As a result of its review of the particular issues raised by stakeholders, and of measures which would assist in alleviating the notification problem identified, the Working Group concluded that it should make no recommendation to change the existing two-year time period. Instead, it agreed that it should focus on the issue of notification of such incidents, in particular what can be done to improve the effectiveness of section 8 of the *Civil Liability and Courts Act 2004*.

10.3 Section 8 of the *Civil Liability and Courts Act 2004*

The essential purpose of section 8 is to ensure that a defendant is informed as early as possible about a claim. The 'initial warning letter' which is referred to above in the Minister's statement on the statute of limitations is the letter of claim introduced by section 8 of the 2004 Act. Section 8 was described as providing that:

> where a plaintiff fails to serve a notice on the defendant within two months of the date of an accident or the date of knowledge, he or she may be – not necessarily must be – penalised in costs. Furthermore, the court may, not must, draw such inferences from the failure as appear appropriate. Under the section, there is a general duty to notify and warn the other side that a claim is in prospect, particularly in cases in which solicitors are involved.[82]

This provision, along with fuller facts required to be included in the plenary summons, was intended to act as a counter balance to the two year limitation period. The Working Group is of the view that while a number of claims will be instituted long after the initial cause of action, for various and in most cases justifiable reasons, the real issue is the failure to notify that an incident has occurred in the first place where there is no reasonable cause for the delay.

Many types of injuries, such as soft tissue and fractures, manifest themselves immediately or within a short time after the accident or incident. While it is acknowledged that in some instances the effects of the accident on the individual may take some time to come to light, this is likely to be the

[80] See Seanad Éireann debate, June 3rd 2004 at:
http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004061500006
[81] See Appendix 21 for full text of questions from the Cost of Insurance Working Group to the Law Society of Ireland and the responses received.
[82] See Dáil Éireann debate, June 30th 2004 at:
http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2004063000022

exception rather than the norm. Therefore, in most cases, it is reasonable to expect a notification to take place within the time periods set out in section 8 of the 2004 Act.

The example of the type of scenario the provision was introduced to address was explained by the Minister at the time, and was that of a person who claimed that they twisted an ankle in a pothole on a street two years previously. The Minister pointed out in the debate that in such a case, "*nobody can contradict the person making the claim because it is far too late to investigate the circumstances*".[83]

The Minister believed that the introduction of section 8 would address such cases. If the defendant receives a notification within two months, there is an opportunity for the defendant to make enquiries regarding the claim. They will be in a position to identify relevant witnesses and staff and for statements to be provided. There is a higher chance that CCTV can be preserved and retained. In essence, notification of the accident within two months gives the defendant a reasonable opportunity to mount a defence, should the defendant decide that the claim should be defended.

Following complaints from stakeholders that there can be delays in receiving notification that an incident has occurred, the Working Group put questions to the Law Society as to the level of compliance with section 8 from their perspective. In response, the Law Society stated:

> Our belief is that Section 8 is followed in the vast majority of cases. However, there are reasons why it cannot always be done, such as long hospital stays, difficulties with identifying defendants, reluctance to sue, etc. If there are cases where such delay cannot be explained, defendants need to apply to the court for the appropriate order. We are aware of no instances in which this has been done. The legislation needs to be enforced not strengthened. It is vital that consumers and victims' rights be balanced against those of potential defendants.[84]

On the other hand, the view of Insurance Ireland, albeit anecdotal, was that section 8 letters of claim do not feature regularly. This is supported by business stakeholders particularly in a public liability context, some of whom were not even aware that such a notification letter was required by statute.

Notwithstanding the views of the Law Society, the Working Group does not believe the section has fully achieved its aim. It takes the view that in many personal injury actions, particularly ones relating to public liability, section 8 is not being complied with. However, it has to be also pointed out that failure to comply with the provision does not appear to have been regularly argued by aggrieved defendants who may be at a distinct disadvantage from only becoming aware of the accident long after it occurred.

Should a defendant plead non-compliance of section 8 as part of their defence, it is then a matter for the plaintiff to plead 'reasonable cause' for non-compliance and for the respective parties then to offer in evidence at trial facts to rebut or support such reasonable cause. In practice, there does not appear to be any consequence for a failure to serve notice on the defendant within two months

[83] See Seanad Éireann debate, June 3rd 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004060300005?opendocument

[84] See Appendix 19 for full text of questions from the Cost of Insurance Working Group to the Law Society of Ireland and the responses received.

of the date of an accident, in spite of a provision which allows cost penalties to be applied. In the Oireachtas debate on the provision when the legislation was introduced, the then Minister for Justice stated that section 8 *"ensures that the lawyers involved in a late claim will find themselves at a serious disadvantage. It is a relevant consideration*".[85] However, in practice the stakeholders who made submissions to the Working Group do not believe that those who are involved in late claims find themselves at any disadvantage at all.

It is clear from the Oireachtas debates at the time that despite the usage of the word "*may*" instead of "shall" in respect of costs penalties being imposed and inference being drawn by late notifications, the intention in the legislation was clearly that the requirement to submit a letter of claim, or an "*initial warning letter*" as described by the then Minister, within two months was meant to have far more 'teeth' than what has transpired in reality.[86]

It is not clear to what extent the implications of non-compliance with section 8 in terms of the impact upon the potential for a defendant to adequately fight a case have been considered in the courts. However, what has become clear to the Working Group is that, particularly for public liability claims, prospective defendants are regularly not informed within two months of a claim and that in such cases the appropriate balance between the rights of the claimant and defendant may be at issue.

In summary, from the submissions made to the Working Group, it is clear that section 8 is a statutory provision which has not been given sufficient emphasis by parties to personal injuries litigation and the courts. As there are currently no other reporting obligations in respect of public liability cases, the Working Group recognises the importance for defendants of receiving this 'letter of claim'.

Consequently a number of recommendations are outlined below to improve the effectiveness of the operation of section 8.

10.4 Notification to, and Engagement with, Policyholders in respect of Claims

A number of business owners consulted as part of the second phase stated that their insurers did not communicate or consult in any meaningful way, if at all, in relation to claims being made against their policies. Indeed, some business owners asserted that the first time they became aware of such a claim was when they received their new (generally increased) premium on renewal, or at least after the claim had been settled, even if the relevant policyholder was of the belief that the claim was contentious to a greater or lesser extent.

Notification and Engagement with Policyholders in the Motor Report

This alleged lack of consultation or even communication between the insurance provider and its policyholder against whom a claim has been made was an issue which also featured during the examination of the motor insurance sector. Accordingly, Recommendation 8 of the Motor Report

[85] See Seanad Éireann debate, June 3rd 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004060300005?opendocument

[86] See Seanad Éireann debate, June 3rd 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004061500006

called for the putting in place of a protocol before the end of 2017 in relation to the requirement for insurers to notify a policyholder of a claim made against them before settlement. The three basic tenets of this protocol are that the relevant policyholder be informed as soon as possible after both a claim is lodged and a claim is settled, and for the policyholder's views to be taken into consideration.

In considering the implementation of Recommendation 8 of the Motor Report, the Department of Finance looked to see if there had been previous examinations of this notification issue. In this regard, it transpired that there was a precedent already established for this type of procedure namely the "*Communication Guidelines for Insurers & Policyholders*" which was agreed between the Irish Insurance Federation ("IIF", the predecessor to Insurance Ireland) and IBEC in April 2003.[87]

Among the obligations which these guidelines placed upon the insurer were to:

- advise the policyholder on receipt of notification of an accident as to the claims reference and the identity of the person handling the claim in the insurer's claims department
- make available for verification by the policyholder, as necessary, any witness statements obtained by the insurer's investigators or any other material documentation relating to the circumstances of the incident
- be available as and when necessary to confer with the policyholder in relation to the case and to discuss assessment of liability and damages
- advise the policyholder of the issue of proceedings and the solicitor nominated to defend the case
- consult with policyholder in advance of proposed settlement discussions whenever practicable
- explain its assessment of the case and the exposure/risks associated with settling and/or defending the case
- take into account any views expressed by the policyholder in finalising its approach to settlement negotiations

These guidelines were used as a starting point when the text for the protocol to be introduced under Recommendation 8 was discussed by Insurance Ireland and the Department of Finance. The response from Insurance Ireland, on behalf of their members, was that the IBEC/IIF guidelines were superseded by the Central Bank of Ireland's Consumer Protection Code.[88] However, the Working Group disagrees that the Code is sufficient to cater for all elements of the intended protocol. This is because its application to policyholders is very limited with as far as the Group can see only one relevant provision within the Code which requires an insurer to inform a policyholder after a claim has been settled. As a result, the Working Group does not believe that the Code compares with the numerous detailed undertakings which insurers had committed to under the IBEC/IIF protocol. Consequently, it finds it difficult to see how the insurance industry can argue that it has been superseded by the Code. In the Working Group's view the key missing issue in the Code is the

[87] See Appendix 12 for full text of the Communication Guidelines for Insurers & Policyholders.
[88] The Consumer Protection Code was revised in 2012. Both the 2006 and 2012 Codes have a section on "Claims Processing".

absence of any requirement for policyholders to receive appropriate communication and engagement with their insurer in relation to claims made against their policies.

As a result, Minister of State D'Arcy on behalf of the Working Group has written to Insurance Ireland outlining the Group's dissatisfaction with the industry response on this issue and has asked that they reconsider fully implementing this very important recommendation as soon as possible. After all, adequate notification of claims and engagement with the policyholder by an insurer is the least a policyholder should expect to receive, given the impact the claims may have on their future premiums.

Notification and Engagement with Policyholders in the Employer and Public Liability Sphere

In comparison with motor insurance, the issue of notification of claims and engagement with policyholders by insurers seems to be an even more significant issue in the liability insurance area based on feedback from business stakeholders. This is because the early notification of an incident can have more of an impact in the area of liability insurance as there is a greater likelihood of the existence of relevant closed circuit televisual (CCTV) footage, for instance, or witnesses to an incident, including employees. Conversely, the passage of time can result in the defendant not being able to investigate the circumstances of the incident, or mean that relevant CCTV recordings have not been retained or that witnesses are no longer available.

The Department of Finance will continue to engage with Insurance Ireland with the aim of agreeing the protocol set out in the Motor Report. However, while this will also apply to some businesses, particularly SME's, the Working Group believe there is a particular requirement for separate guidelines to be drawn up in respect of personal injury claims in the employer and public liability spheres in order to ensure that larger businesses are also appropriately covered . Therefore, the Working Group recommends that Insurance Ireland work with relevant business organisations in order to agree on a set of updated procedures, based on the IIF/IBEC "*Communication Guidelines for Insurers & Policyholders*".

10.5 Pre-Action Protocols

Pre-Action Protocols aim to set out a series of procedural requirements which are a prerequisite to the commencement of litigation. These procedural steps are generally aimed at encouraging settlement by narrowing down the issues in dispute in order to make any subsequent court process, if it occurs, more efficient and cost-effective.

Part 15 of the *Legal Services Regulation Act* 2015 provides for the implementation of Pre-Action Protocols in medical negligence cases. A consultation was undertaken on a draft of the Regulations needed to put Pre-Action Protocols for medical negligence actions into practice. Following this consultation process, the Regulations are being finalised and it is expected that they will be put in place in 2018.

In addition, Recommendation 16 of the Motor Report requires the Department of Justice and Equality and the Department of Business, Enterprise and Innovation to ascertain and set out the

measures necessary to implement Pre-Action Protocols for personal injury cases. The two Departments are currently working on implementing this recommendation and a paper has been prepared in this regard. It is envisaged that, subject to Government approval, the General Scheme of a Bill extending Pre-Action Protocols to personal injury cases will be published in early 2018.

The aims of Pre-Action Protocols, as stated in the 2015 Act, include encouraging the early resolution of enquiries or allegations relating to possible clinical negligence and promoting timely communication between persons who are enquiring into or making allegations about possible clinical negligence and those whom they consider may be liable in respect of it. Among the matters that must be specified in the terms of the Pre-Action Protocol are the giving of notifications of enquiries into, and allegations of, possible clinical negligence.

It is expected that in broad terms the Pre-Action Protocols for personal injuries will be modelled on the medical negligence ones, however due to the much less serious nature of the former type of claim, there will almost certainly be some differences in approach.

10.6 Interlinkage between Pre-Action Protocols in Personal Injury Actions and Section 8

It is important to note that section 220 of the 2015 Act, when operational, will amend section 8 of the 2004 Act to dis-apply it to clinical negligence actions. This is because elements of the Pre-Action Protocols and the requirements of section 8 overlap in that both require a form of notification. The main difference is that section 8 refers to a "plaintiff" and thereby applies when a writ has issued and proceedings are in being, whereas, it is intended that the Pre-Action Protocol for personal injuries will place obligations on all parties to an action, before such actions are brought.

A consequence of this is that when Pre-Action Protocols are provided for in personal injury actions, and are shown to be effective and fully embedded in the overall process, a case can be made that section 8 is no longer relevant. However, the Working Group still believes that there is value in strengthening the wording of section 8 and for it to continue to apply for as long as it remains relevant. When Pre-Action Protocols for personal injury actions are fully operational, a review should be carried out by the Department of Justice and Equality to determine whether there is a continuing requirement for section 8, or whether it has been superseded by Pre-Action Protocols.

10.7 Consideration of the Six-Month Standstill Period provided under Section 50 of the *Personal Injuries Assessment Board Act* 2003

As referenced earlier in this chapter, the statute of limitations for personal injury claims is generally two years. However, the actual period of time within which an action can be initiated can be greater than two years in some cases for the following reasons:

(i) The limitation period is suspended while a claim is with PIAB, up until such time as PIAB may issue an 'authorisation' to allow it to go to litigation, for example where either party rejects an award. In respect of rejected awards this period generally lasts about ten months (90 days allowed for respondents to consent to the process plus an average timeframe of seven months to assess the case) but it can be longer.

(ii) Where PIAB issues an authorisation, the 'clock' in terms of the statute of limitations does not start again for a further six-month period as per section 50 of the 2003 Act. The Working Group understands that the reasoning behind this six-month period was to provide claimants, particularly unrepresented ones, with the necessary time to prepare their case after leaving the PIAB process, and to issue proceedings.

What the above means is that when the additional six-month period is considered in the context of a two-year statute of limitations, and account is taken of the average period of ten months that an assessed case is with PIAB, legal proceedings in respect of a claim may potentially be initiated in excess of three years after the relevant incident/accident.

However, it can be argued that, especially where claims are made using the services of a solicitor, it may not be necessary to have this additional six-month period in addition to any time remaining on the statute, particularly in the case of rejected PIAB awards where details of the injuries and financial losses incurred are already established. For instance, even if a claim is submitted a number of months after the incident first occurs and goes through PIAB, there is still a significant period of time available to the claimant to initiate his or her legal claim within the two-year time period.

Related to this is the fact that a number of stakeholders referred to what they considered to be unnecessary delays as adding additional costs to the process. They also argued that, in their view, a small number of plaintiffs may be deliberately delaying the initiation of proceedings after a PIAB authorisation has issued in an attempt to maximise their award. The counterbalance to this is that the Law Society indicated to the Working Group that, following a rejected award, it can take six to nine months after a PIAB authorisation is issued before proceedings can be initiated and this time inevitably results in higher costs and a higher award.

The Working Group in reflecting on this matter has also been conscious of the fact that when this six-month provision was first developed, it was done so in the context in which the *Civil Liability and Courts Bill 2014* was proposing to reduce the statute of limitation period to one year from three years. The proposed reduced period was to apply to all claims, including clinical negligence actions, however debates in the Houses of the Oireachtas suggested this might be too short a timeframe for such cases. Therefore, the statute of limitations was instead reduced to two years, and not one year, but there was no corresponding change made to the PIAB Bill to remove the six-month period originally considered as an additional protection for claimants in the circumstances of a one-year limitation period.

Furthermore, the Working Group has also taken account of section 221 of the *Legal Services Regulation Act 2015* which will, when commenced, increase the statute of limitations for medical negligence cases to three years. The rationale for introducing this additional year for clinical negligence actions was specifically because of the perceived relative complex nature of such cases generally compared to that of other personal injury actions. As the increased statute of limitations will apply to clinical negligence cases, proposed changes to limitation periods in respect of other personal injury actions will no longer require to be considered in the context of how they may affect clinical cases. Any such changes would also presumably resolve the incongruous situation whereby the current effective limitation period can be longer in respect of 'normal' personal injury actions than that applicable to far more complicated clinical negligence actions, even subsequent to the forthcoming extension of the statute of limitations for the latter.

In conclusion, the missing ingredient in the Working Group's analysis in this area is the absence of any data about how often this additional six-month provision is actually used, particularly where existing time on the statute is also available. Specifically, data is required in relation to the typical or average timeframe it takes from when an authorisation is issued by PIAB to when legal proceedings are initiated, and then the time it takes from the initiation of proceedings to the resolution of the case. It may also be useful to determine the 'age' of the accident when the authorisation was issued to determine the time available to initiate proceedings in addition to the six months. A distinction is required in terms of the type of authorisation issued with a focus on authorisations issued subsequent to a rejected award (section 32 authorisations).

Even with the data, it is unlikely to be possible to establish the intentions of those using this extra period and it may be difficult to make a determination about whether the system is being abused or not. However, the data will provide a better picture as to what is going on. For instance, if the data indicates that proceedings are generally initiated promptly and cases are generally settled promptly then it might lead to the conclusion that there is not a problem; however, if all the time available under the statute is used prior to initiating proceedings and if the case ends up being settled 'on the steps of the court', this may indicate that a case is being drawn out unnecessarily and that measures may need to be taken to address the issue.

Consequently, the Working Group recommends that a review be carried out to assess the operation of section 50 of the 2003 Act which provides for the six-month standstill period. To assist with this review, relevant data will be required from various stakeholders indicating the time period between the date of a PIAB authorisation (for section 32 rejected cases), to the date of initiation of proceedings, to the date of the settlement of the case. Once this data is collected, and reviewed by PIAB, a review is to be undertaken by the Department of Business, Enterprise and Innovation on the operation of the section and what measures, if any, are required as a consequence of the review.

10.8 Conclusions of the Working Group

The Working Group has concluded that the problems arising from the delay in submitting personal injury claims would be better resolved by enforcing the relevant existing requirements in section 8 of the 2004 Act rather than seeking a reduction in the statute of limitations. However, it was agreed that a proposal to reduce the limitation period should be kept under consideration if actions to make section 8 more effective are not successful.

The overarching aim is to strike an appropriate fair and reasonable balance between plaintiff and defendant. The Working Group's understanding is that section 8 is (i) regularly not complied with (particularly in public liability cases) and (ii) that failure to comply, where it arises, is not raised as an issue in court. It is also understood that the incorporation of this provision was one of the main reasons why it was felt that there was no need to reduce the statute of limitations period for personal injury cases to one year in 2004. This was because such a provision would ensure appropriate notification procedures were followed. The aim therefore is to strengthen the requirement for a plaintiff to inform a defendant in writing of the cause of action (i.e. an incident that has occurred that the plaintiff believes the defendant is liable for). Making the existing requirement stricter would increase significantly the likelihood that the defendant is made aware of the incident, thus allowing them to take appropriate action regarding investigation and retention

of evidence while simultaneously putting them on notice that there may be an impact on their premium.

The Working Group believes that parties taking personal injuries litigation should abide by the statutory requirement to issue a letter of claim within the time prescribed in section 8. Where this does not happen, and the defendant is of the view that the failure to comply with the provision has prevented the defendant from having a reasonable opportunity to mount a defence due to the loss of evidence from the passage of time, then they should raise this with the Court. It should then be a matter for the Court to correspondingly take note of section 8 and determine whether or not the parties have adhered to it. In cases where it has not been adhered to, and the court is of the view that there is no reasonable explanation for the delay, effective implementation of the statutory provision in section 8 should require that the penalty provisions be applied. Such systematic application of the penalty provisions in the courts, where justified in accordance with section 8, would also contribute significantly to ensuring that future claimants make the necessary notification in the interests of procedural fairness.

There is also a requirement to develop some form of protocol to ensure policyholders are notified and consulted with regarding claims made against them, along the lines of the IBEC/IIF guidelines of 2003 to cater for policyholders who fall outside of the remit of the protocol recommended under the Motor Report.

In addition, the Working Group is of the view it is necessary to gather data relating to the six-month period post PIAB authorisation and for a review to take place to determine whether there is a need and a justification to alter this period.

10.9 Recommendations

Relevant Recommendations from the Report on the Cost of Motor Insurance

Recommendation 8 of the Motor Report:

> Develop a general protocol around the requirement for insurance companies to notify a policyholder of claims made against them before settlement

Recommendation 16 of the Motor Report

> Ascertain and set out the measures necessary to implement Pre-Action Protocols for personal injury cases

10.10 New Recommendations

Recommendation 6

AMEND THE WORDING OF SECTION 8 OF THE *CIVIL LIABILITY AND COURTS ACT 2004* TO ENSURE THAT DEFENDANTS ARE NOTIFIED OF A CLAIM HAVING BEEN LODGED AGAINST THEM

The Working Group is of the view that section 8 of the 2004 Act should be amended. The intention of the Working Group is not to interfere with the discretion of the courts to deal with cases appropriately where the interests of justice clearly requires it. Rather, the intention is to assist in enhancing the effectiveness of this statutory requirement. While the specific amendments to section 8 will be settled during the drafting process, the Working Group believe the word "*may*" should be replaced with "*shall*". In addition, the words "*or as soon as practicable thereafter*" should be deleted as this allows arguably too much latitude to a plaintiff to delay unnecessarily before notifying the defendant. The Working Group considers that there is sufficient protection for the plaintiff in this provision, even with the deletion of this wording, as only where there is a failure "*without reasonable cause"* can the court draw a negative inference. As many types of injuries, such as soft tissue and fractures, manifest themselves immediately or within a short period of time after the accident or incident, the Working Group does not believe it impacts negatively on plaintiffs.

A further change which may assist is an amendment of the two month time period to one month. This may be justified on the basis of being in alignment with data protection legislation (and the new General Data Protection Regulation which comes into force on 25th May 2018[89]) which provides that data shall not be kept for longer than is necessary for the purposes for which it is obtained. This is relevant for personal injuries cases where CCTV may have captured relevant footage. A data controller must be able to justify the retention period. Generally, the retention period is one month, beyond which retention is only permitted in certain circumstances including for example, in the context of an investigation. For example, the Data Protection Commissioner advises that for a normal security system "*it would be difficult to justify retention beyond a month, except where the images identify an issue - such as a break-in or theft - and is retained specifically in the context of an investigation of that issue*".[90] Aligning these time periods appears to the Working Group to be logical and reasonable in the circumstances.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
10	Department of Justice and Equality to draft the necessary amendments to section 8 of the 2004 Act	Q2 2018	Department of Justice and Equality	Department of Justice and Equality
11	Department of Justice and Equality to bring forward legislation proposing amendment to section 8 of the 2004 Act	Q3 2018		

[89] See for information: https://www.dataprotection.ie/docs/GDPR/1623.htm
[90] See guidance on from the Data Protection Commissioner: https://www.dataprotection.ie/docs/Data-Protection-CCTV/m/242.htm

Recommendation 7

THE RELEVANT COURT RULES COMMITTEE(S) TO CONSIDER AMENDMENT OF THE RULES OF COURT IN RESPECT OF SECTION 8 OF THE *CIVIL LIABILITY AND COURTS ACT 2004* IN ORDER TO ENSURE THAT DEFENDANTS ARE NOTIFIED OF A CLAIM HAVING BEEN LODGED AGAINST THEM

The Working Group also considered whether there were appropriate rules of court in respect of section 8. Order 1A of the *Rules of the Superior Courts (S.I. No 248 of 2005), Order 5A of the Circuit Court Rules (S.I. No. 526 of 2005)* and *Order 40A of the District Court Rules (S.I. No. 17 of 2014)* address the procedure by personal injuries summons. However, no reference is made in these rules to section 8 and the requirement for a letter of claim. The Working Group recommends that the relevant Court Rules Committees consider appropriate amendment of the rules of court relating to personal injuries summonses to take account of the section 8 requirement. Consideration might be given to amending the relevant rules to stipulate that the originating documents must include an explanation of how section 8 was complied with, or failing that, what reasonable cause existed that prevented the plaintiff from complying with the section. This could be modelled on Order 1A (6) of the Rules of the Superior Courts which requires a plaintiff to explain why certain detail is not contained in the summons as required.

In addition, it is recommended the Court Rules Committee consider amending the court rules to outline the procedure if failure to comply with section 8 is pleaded.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
12	Department of Justice and Equality to write to relevant Court Rules Committee requesting consideration of appropriate amendment of the Rules of Court relating to personal injuries summonses to take account of the section 8 requirement	Q1 2018	Department of Justice and Equality	Department of Justice and Equality
13	Department of Justice and Equality to follow up with the Courts Service and produce a report to the Working Group on the implementation of Action Point 12	Q3 2018		

Recommendation 8

ENSURE GREATER GENERAL AWARENESS OF NOTIFICATION OBLIGATIONS UNDER SECTION 8 OF THE *CIVIL LIABILITY AND COURTS ACT 2004*

To assist in raising awareness of the requirement, the Working Group recommends that the section 8 notification obligation be signposted more prominently by relevant bodies, to include the legal professional bodies, the insurance industry, PIAB, citizens' advice bodies, local and state authorities. It should also be set out within any guidelines in respect of making a claim.

This notification issue is much more relevant to a public liability claim than an employer one, as there is generally a contractual obligation for an employee to inform an employer of a workplace accident within a short time of it occurring. The absence of such an equivalent requirement in relation to public liability incidents reinforces in the Working Group's view of the need to bring greater awareness to the notification process where such a legal action is being contemplated in order to ensure that the potential defendant of an incident is informed at the earliest opportunity.

In the context of the initial advice given to clients, it is recommended that the Law Society review its Codes of Conduct and procedural guidelines to include an obligation to ask clients whether they have notified the potential defendant and, if not, be required to advise that there is an obligation for this notification to take place.

To progress this recommendation, the Department of Business, Enterprise and Innovation, Department of Finance and the Department of Justice and Equality are to engage with the aforementioned organisations, relative to the respective remit of each Department.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
14	Relevant Department to engage with relevant bodies, to include the legal professional bodies, the insurance industry, PIAB, citizens' advice bodies, local and state authorities as appropriate, to draw their attention to Recommendation 8 and to seek proposals as to actions they intend to take to promote a general awareness to the public of the notification obligation in section 8	Q2 2018	Department of Business, Enterprise and Innovation, Department of Finance, Department of Justice and Equality, PIAB, State Claims Agency	Department of Finance
15	Relevant Departments to follow up with relevant bodies to seek an indication of what procedures they have put in place to promote a general awareness of the notification obligation to the public on an ongoing basis	Q4 2018		

Recommendation 9

REVIEW OF THE OPERATION OF THE SIX-MONTH STANDSTILL PERIOD PROVIDED FOR UNDER SECTION 50 OF THE *PERSONAL INJURIES ASSESSMENT BOARD ACT 2003*

The Working Group recommends a review be carried out to assess the operation of section 50 of the *Personal Injuries Assessment Board Act 2003* which provides for the suspension of the statute of limitations for a six-month period following the issuing of a PIAB authorisation. To assist with this review, the Working Group recommends the collection of relevant data from various stakeholders in the first instance. The data should be provided to PIAB by the insurance industry, and possibly by the High Court and should, at a minimum, indicate the time period between the date of a PIAB authorisation (for section 32 rejected cases), to the date of initiation of proceedings, to the date of the settlement of the case. Following receipt of the data, and a report by PIAB, a review is to be undertaken by the Department of Business, Enterprise and Innovation on the operation of section 50 of the 2003 Act.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
16	PIAB to report to the Department of Business, Enterprise and Innovation on its findings on the basis of data received from relevant stakeholders in relation to the time period from the issuing of PIAB authorisations (section 32 rejected cases) to the initiation of proceedings, to the settling of the case	Q4 2018	PIAB, Insurance Industry, Courts Service	PIAB
17	On receipt of the report from PIAB, the Department of Business, Enterprise and Innovation to review the operation of the six-month standstill period under section 50 of the *Personal Injuries Assessment Board Act 2003*	Q2 2019	Department of Business, Enterprise and Innovation	Department of Business, Enterprise and Innovation

Recommendation 10

INSURANCE IRELAND AND BUSINESS ORGANISATIONS TO AGREE A SET OF GUIDELINES FOR THE INSURANCE INDUSTRY IN RESPECT OF NOTIFYING AND ENGAGING WITH POLICYHOLDERS REGARDING CLAIMS SUBMITTED AGAINST THEIR POLICY

One of the most frequently cited problems raised by stakeholders business owners and other stakeholders was the lack of engagement with, or even of any basic communication from, insurers in respect of claims being made against their policies. Such frustrations are obviously inflated when the policyholder is of the belief that the claim, which may have already been settled, was of a contentious or dubious nature.

The Motor Report recommended the development of guidelines between the insurance industry and motor insurance policyholders who have had a claim made against their policy. However, the Working Group believes that the wider nature and context of liability insurance means that it is even more important that such policyholders receive appropriate communication and engagement in relation to a claim submitted against their policy, notwithstanding the insurer's right to resolve the case on behalf of the policyholder.

In this regard, it is the Working Group's view that the 2003 IIF/IBEC "*Communication Guidelines for Insurers & Policyholders*" offer an excellent template for a new set of guidelines to be developed between Insurance Ireland and the commercial sector in Ireland. In addition to IBEC, it would be preferable if other organisations – particularly those representing smaller businesses – were involved in drawing up these new guidelines, such as, for example, ISME and RGDATA.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
18	Meeting to be convened by the Department of Finance to begin discussion on the development of guidelines in respect of notifying and engaging with liability insurance policyholders regarding personal injury claims submitted against them	Q1 2018	Insurance Ireland, Department of Finance, Relevant Business Organisations	Department of Finance
19	Agreement of new set of guidelines in respect of notifying and engaging with liability insurance policyholders regarding personal injury claims submitted against them	Q4 2018		

CHAPTER 11 – FRAUD WITHIN THE PERSONAL INJURIES LITIGATION PROCESS

11.1 Background

While the exact extent to which insurance fraud occurs is difficult to ascertain, there is no doubt that it does take place. In this regard, it should be noted that there have been a number of recent high-profile court cases reported in the media in which personal injury actions have been dismissed on the grounds of fraud.[91] Nevertheless, it is an area which needs to be continually monitored and appropriate action taken where necessary in order for it to be discouraged. As described in the Motor Report, the insurance industry estimates that it has spent between €14 and €17 million in each of the years since 2011 in tackling insurance fraud. In addition, they estimate that it costs them in the region of €200 million a year which they claim adds an approximate €50 to each policy.[92]

As part of the Working Group's consultations, examples of fraudulent and exaggerated claims were outlined by stakeholders, including how the impact of such behaviour was having a damaging effect on businesses. One of the frustrations expressed was the absence of appropriate legal sanction being taken against those abusing the system.

11.2 Fraud in the Motor Report

The tackling of fraud was one of the six key objectives identified in the Motor Report. It has become clear to the Working Group that there is a perception issue with insurance fraud insofar as it is often viewed as a victimless crime. There are some people who believe that, in the overall scheme of things, the making of a false claim or the exaggeration of a genuine claim can be viewed as harmless or insignificant. However, this view takes no account of the fact that the cumulative impact of those false or exaggerated claims affects all policyholders through increased premiums. Consequently, the Working Group considered measures which could be taken to tackle insurance fraud in Ireland.

This consideration resulted in the inclusion of Recommendation 25 in the Motor Report for the establishment of an insurance fraud database which would be managed by an independent not-for-profit body, but which would be funded by industry. To progress this recommendation, a Working Group was established which is chaired by the Crime Division of the Department of Justice and Equality. This Group is assessing what can be done to enable insurance companies to share

[91] For example: *Nauris Zeps v Darius Pocivs* (https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/male-stripper-loses-damages-claim-over-rear-ending-injury-1.3291368);
Peter Slattery v Belinda McLoughlin & MIBI, *Ian Doyle v Belinda McLoughlin & MIBI*, *Jessica Byrne v Belinda McLoughlin & Zurich Insurance*, and *Samantha Byrne v Belinda McLoughlin & Zurich Insurance* (https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/rear-ending-crashes-involving-woman-an-orchestrated-fraud-1.3292877); *Angela McDonagh v Catherine O'Sullivan* (https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/court-directs-60k-fraudulent-insurance-claim-be-reported-to-garda%C3%AD-1.3291459)

[92] Insurance Ireland arrived at the figure of €200 million using international industry standards. They have stated that it was calculated based on the estimation by Insurance Europe that fraud represents up to 10% of all claims expenditure in Europe. Total gross incurred claims in Ireland are in excess of €2 billion each year with motor gross incurred claims costing an average €1 billion each year over the past five years and almost €1.2 billion in motor claims paid. If fraud represents 10% of all claims expenditure, it can be estimated that insurance fraud costs €200 million in Ireland each year with motor insurance fraud costing €100 million.

information in order to combat fraud. It is comprised of representatives from Insurance Ireland, MIBI, the Garda National Economic Crime Bureau and the Civil and Criminal Law Reform Divisions of the Department of Justice and Equality.

A second recommendation centred on fraud in the Motor Report is Recommendation 26 which is to explore further cooperation between the insurance industry and An Garda Síochána in relation to insurance fraud investigation. An Garda Síochána are leading on the implementation of this recommendation with consideration being given to the feasibility of a specialised and dedicated insurance fraud unit within An Garda Síochána, which would be funded by industry.

The two recommendations from the Motor Report outlined above relate generally to the identification of fraud. As part of this second phase of work, the Working Group turned its attention to the legislative provisions relating to the investigation and prosecution of fraud within the personal injuries process and the extent to which the legislative provisions are utilised and enforced.

11.3 Legislative Provisions relating to the Investigation and Prosecution of Fraud

While undoubtedly the vast majority of claims are genuine with claimants deserving of compensation, stakeholders expressed the view that there is a perception that there is no deterrent to those who exaggerate their injuries or those who pursue fraudulent claims. The view that exaggerating injuries or initiating false claims is a risk-free enterprise appears to grow out of a view that insurers are too willing to settle early, for fear of incurring significant legal costs, and that where matters do end up in court, there is a perceived lack of action or consequences being taken against a witness or a claimant giving false or exaggerated evidence under oath.

There are in fact a variety of offences on the Irish statute book which can be utilised to fight against fraud. These include:

- **Sections 14 and 25 of the *Civil Liability and Courts Act 2004*** ("the 2004 Act") (discussed in more detail below).
- **Perjury** – discussed in more detail below
- The ***Criminal Justice (Theft and Fraud Offences) Act 2001*** which provides for offences of:
    - **Making gain or causing loss by deception (section 6)** which provides that a person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception induces another to do or refrain from doing an act is guilty of an offence. A person guilty of this offence is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.
    - **Obtaining services by deception (section 7)** which provides that a person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception obtains services from another is guilty of an offence.
    - **Forgery (section 25)** which provides that a person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person.

- **Using false instrument (section 26)** which provides that a person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.
- **Copying false instrument (section 27)** which provides that a person who makes a copy of an instrument which is, and which he or she knows or believes to be, a false instrument with the intention that it shall be used to induce another person to accept it as a copy of a genuine instrument and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.
- **Using copy of false instrument (section 28)** which provides that a person who uses a copy of an instrument which is, and which he or she knows or believes to be, a false instrument with the intention of inducing another person to accept it as a copy of a genuine instrument and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or another person is guilty of an offence.
- **Custody or control of certain false instruments (section 29(1))** which provides that a person who has in his or her custody or under his or her control an instrument which is, and which he or she knows or believes to be, a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence. The definition of 'instrument' is contained in section 24 and includes a certificate of insurance.
- A person guilty of an offence under sections 25, 26, 27, 28 and 29(1)is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

- In addition, persons may be charged with the common law offence of conspiracy to defraud in appropriate cases.

11.4 The Offence of Perjury

The offence of perjury has been the subject of media commentary recently, with stakeholders calling for new legislation to be put in place in order to make it easier to prosecute such an offence. In Ireland, perjury is an offence at common law. The offence is committed when a person, to whom a lawful oath or affirmation is administered by a person having authority to do so in a judicial proceeding, swears absolutely and falsely in a matter material to the issue or cause in question. Section 2 of the Perjury Act 1729[93] provides that the maximum penalty for perjury is 7 years imprisonment. According to the Garda Síochána Guide from 2008,[94] in order to maintain an

[93] Full text of the Act is available at: http://www.irishstatutebook.ie/eli/1729/act/4/enacted/en/html
[94] Garda Síochána Guide, Seventh Edition, by Inspector Joe Ward BL., Sergeant Michael Daly, LL. B and Sergeant Brian Murphy, at pp 20-21.

indictment for perjury, it is required to prove the authority to administer the oath, the occasion of administering and taking of the oath, the substance of the oath, the materiality of the matter sworn, the falsity of the matter sworn, and the corrupt intention. The Guide details the proof required to prove the falsity of the statement, specifically that two witnesses are needed to corroborate the falsehood of the statement made on oath or one witness who is substantially corroborated by proof of other material and relevant facts. In addition, the guide states that to justify a conviction for perjury, there must be clear evidence that what a witness states is not only not true, but that it is wilfully and deliberately false. The mere fact that two witnesses contradict each other does not provide a basis for such a charge.

11.5 Status of Perjury in Ireland

For an offence to be investigated by An Garda Síochána and subsequently prosecuted by the Director of Public Prosecutions, it must first be referred to An Garda Síochána. However, the levels of investigation and prosecution for perjury in this country are extremely low. The Working Group were informed that few allegations of perjury are referred to An Garda Síochána for investigation. According to Central Statistics Office data, the average number of recorded perjury offences over the past ten years is 3.3 per year, with none at all being recorded during 2016 and just 2 in the year before. In addition, figures provided by the Courts Service indicate that there was a total of 8 convictions in the District Court for perjury in the years 2005 to 2016, with no convictions being recorded in 2015 and 2016. The number of cases sent forward to the Circuit Court for trial was less than one per year on average over the 12 years to 2016 as illustrated in Table 11.1 below.

Year	No of offences	No sent forward for Trial to Circuit Court	No of Convictions	No of Non Convictions
2005	2	1	1	0
2006	0	0	0	0
2007	4	3	0	1
2008	2	2	0	0
2009	5	3	1	1
2010	2	0	2	0
2011	2	0	1	1
2012	0	0	0	0
2013	2	0	2	0
2014	1	0	1	0
2015	0	0	0	0
2016	2	2	0	0
Total	**22**	**11**	**8**	**3**

Table 11.1: Table displays figures provided by the Courts Service in respect of proceedings in the District Court related to the offence of perjury)[95]

[95] Data can only be provided in respect of instances whereby standard offence codes on CCTS are used by prosecutors, not when prosecutors may have used uncoded free text code.

By comparison, it would appear that there are significant numbers of convictions for perjury in England and Wales each year, as the figures below for 2004 to 2008 indicate:

Year	Proceeded Against	Found Guilty
2004	155	145
2005	138	126
2006	109	91
2007	122	91
2008	83	82
Total	**607**	**535**

Table 11.2: Table displays the number of defendants proceeded against at magistrates' courts and found guilty at all courts for perjury in England and Wales between 2004 and 2008.

While it is accepted that there are differences between our criminal justice systems, and that prominent perjury convictions in the UK[96] related not to personal injuries cases but featured in cases within a broader context, these figures nevertheless suggest that the existence of legislation codifying the offence in the UK may be a fundamental contributor to the number of prosecutions pursued and convictions secured there.

As a result of the low numbers of perjury prosecutions in Ireland, stakeholders have called for the introduction of new legislative provisions to create an updated perjury offence. For example, ISME have strongly advocated for the introduction of a statutory perjury offence and published a policy paper titled "*The Case for a Perjury Act*" in June 2017.[97] They argue that it is difficult to prosecute perjury and, as a result, the State has only resorted to prosecution in the most serious cases. They make the point that while such a statutory offence would not by itself solve the issue of false and exaggerated claims, it would be a significant brick in the defensive wall against such claims.

ISME go on to say that it is not only personal injury cases which are affected by the absence of a statutory offence of perjury in Ireland. They state that the then Competition Authority sought the codification of the offence of perjury in its submission on White Collar Crime to the Department of Justice in 2011, arguing that the existing basis made it very difficult to mount a successful prosecution. The view of the Competition Authority was that a statutory perjury offence would have widespread application in the prosecution of white collar crime.

The Working Group can also see the sense in legislating for a modern offence of perjury as part of the framework of deterrents to exaggerated and fraudulent claims. However it believes that perjury has a much wider application than solely personal injuries, and therefore needs to be considered as part of a broader criminal offences agenda which is outside the remit of the Working Group.

Instead the Working Group believes it should focus specifically on fraud within a personal injuries context. In this regard, section 25 of the 2004 Act is of particular relevance. In essence, section 25 is, in the personal injuries context, a statutory offence in the nature of perjury. It is acknowledged that it has rarely been used and therefore the Group believe it should be examined with a view to

[96] See for example: Lord Archer, Jonathan Aitken (former MP and Government Minister), Tommy Sheridan (former MSP)
[97] Full text of ISME's policy paper is available at: https://isme.ie/case-perjury-act

seeing what can be done to make it a more effective legislative provision, while at the same time reviewing sections 14 and 26 of the same Act.

For the reasons outlined, and in consideration of its own remit, the Working Group is of the view that any legislative change regarding perjury could be developed in the general context of the reform of criminal law by the Department of Justice and Equality. Concentration of energy in the personal injuries context should focus on getting systematic use and implementation of the existing statutory offence in the nature of perjury which is already there in section 25.

11.6 The *Civil Liability and Courts Act 2004*

Section 14(1) of the 2004 Act requires the plaintiff to swear a verifying affidavit as to the truth of all assertions, allegations and information provided to the defendant. Section 14(2) similarly requires the defendant to swear a verifying affidavit in respect of the assertions and allegations made in their pleadings. Section 14(4) stipulates that the verifying affidavit must be lodged in court not later than 21 days after for the lodgement of the service of the pleading concerned. The court may direct or the parties may agree a longer period but the general rule is 21 days.

Section 14(5) goes on to state that if either party makes a statement in the verifying affidavit that is false or misleading in any material respect, that he or she knows to be false or misleading, he or she shall be guilty of an offence.

Section 25 of the 2004 Act creates an offence for anyone to knowingly give or adduce (or cause to be given or adduced) false or misleading material evidence in a personal injuries action, or to a solicitor, or person acting on behalf of a solicitor, or an expert, if done with the intention of misleading the court.

The penalties for the offences in section 14 and 25 are set out in section 29 of the Act, which provides for a fine of up to €100,000 and imprisonment of up to ten years.

Section 26 of the Act requires the court to dismiss any personal injuries claim where the plaintiff knowingly gives or adduces (or causes to be given or adduced) evidence that is false or misleading in any material respect, unless dismissal of the action would result in an injustice.[98] The section is mandatory in nature. If a defendant forms the view that a plaintiff has given false or misleading evidence, a section 26 application can be made to have the proceedings dismissed. Once the court is satisfied that, on the balance of probabilities, the claimant is fundamentally dishonest in relation to the claim, the claim must be dismissed in its entirety unless dismissal would result in an injustice. While sections 25 and 26 essentially cover the same behaviour, the provisions operate separately and independently of one another.

Sections 25 and 26 were assessed by the Working Group during its examination of the motor insurance sector but no relevant recommendations ensued and the Working Group was ultimately satisfied that they did not need further review.[99] However, the issue of false and exaggerated claims was raised in a far more pronounced way in the context of the employer liability and public liability insurance environment. As a result, it was decided that they should be subject to a more extensive

[98] See Appendix 13 for full text of relevant fraud provisions in the *Civil Liability and Courts Act 2004.*
[99] See the *Report on the Cost of Motor Insurance*, Chapter 9, at p. 126, available at: http://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf

scrutiny by the Working Group and that section 14 should also be examined, with a view to assessing whether it is meeting the objectives that it was put in place to address.

11.7 Intention of Sections 14, 25 and 26

Tackling fraud was the main reason for the introduction of these three provisions. This was made clear by former Minister for Justice, Equality and Law Reform, Michael McDowell, when he stated in the Dáil debate on the Bill:

> People must understand that if they take personal injuries actions, they will lose out if they come other than with clean hands as genuine claimants. If they come with dishonest intent either to exaggerate or tell lies about their case, they will get nothing.[100]

Furthermore, in the judgment of *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald* Irvine J stated:

> What is clear from the Act as a whole is that it was designed to ensure that false or misleading assertions, allegations or information will not be lightly tolerated in the context of personal injuries litigation, and that any material failure to meet the statutory requirements will be met, save in the limited circumstances […], with a mandatory sanction provided for, whose objective is to deter and eliminate false and/or misleading claims.[101]

Section 14 was described as a "*key element*" of the 2004 Act and was designed to "*combat false and exaggerated personal injury claims*".[102] The introduction of this provision represented a change in that it requires an individual to affirm by oath the content of the pleadings "*so that even if the action is settled, a very serious offence has been committed if the other side has been induced to settle by means of a falsehood*".[103]

Contributors to Oireachtas debates appeared to broadly welcome the obligation for plaintiffs to swear an affidavit and the penalties for falsely or misleadingly doing so, with one such contributor, Senator Sheila Terry, describing section 14 as "*the most important provision in the Bill. The success of the legislation will either stand or fall on the basis of this section*", albeit that she added the caveat that "*a measure such as this is only as strong as its level of enforcement*".[104]

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[100] See Dáil Éireann debate, June 30th 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2004063000022

[101] *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald* [2017] IECA 221, at para 58

[102] See Dáil Éireann debate, June 30th 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/dail2004063000022

[103] See Seanad Éireann debate, March 11th 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004031100007?opendocument

[104] *Ibid.*

The introduction of section 25 was described in the Seanad on March 11th 2004 as fulfilling an "*essential element of the Bill*", namely "*the necessity to reduce the number of false and bogus claims for personal injuries*".[105]

The common law entitlement of a plaintiff to recover damages as a result of injuries sustained due to the actions of the defendant has been "*statutorily qualified*" by section 26.[106] In relation to section 26, the courts have made it clear that it is not to be used as an opportunity for the defendant to evade liability. O'Neill J in *Smith v. Health Service Executive* warned of this attempt by defendants where he stated that section 26:

> should not be seen as an opportunity to prey on the frailty of human recollection or the accidental mishaps that so often occur in the process of litigation, to enable a concoction of error to be assembled so as to mount an attack on a worthy plaintiff in order to deprive that plaintiff of the award of compensation to which they are rightly entitled.[107]

In relation to the application of section 26, if a trial judge determines that false or misleading evidence has been given and such evidence is material in the context of the claim, he or she must consider whether dismissal of the claim would result in an injustice. If no such injustice would result, the trial judge "*cannot proceed to award damages for that part of a claim which is not infected by the misleading evidence. The legitimate parts of the claim cannot survive*".[108] This view is supported by *Meehan v. BKNS Curtain Walling Systems Ltd.*, in which Ryan J stated "*the legitimate part of the claim cannot survive with only the false or misleading elements dismissed".*[109] Ryan J was of the view that it is not open to the Court to "*separate out the good from the bad".*[110]

It is clear therefore that if an application under section 26 is successful, the claim as a whole must fail. Hanna J has commentated in the case of *Gammell v. Doyle* that section 26 "*is silent as to the existence or nature or extent of any injury".*[111] Hanna J considers that the section "*must contemplate a situation where a genuinely injured plaintiff who grossly exaggerates a claim to the extent of giving materially false or misleading evidence can fall foul of its provisions*".[112] The impact of a dismissal of the entirety of the action is perhaps why the section has been described as "*draconian*"[113] and may give some context to the infrequency of its use by the courts. However, it can be argued that the need to create a "*significant deterrent to claimants who might be minded to achieve an unjust result by misleading the court and/or their opponent concerning the truth of their claim in some material respect"*[114] justifies what can be a severe consequence to a plaintiff. It may be draconian but "*it is deliberately so in the public interest*".[115]

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[105] *Ibid.*
[106] *Higgins v. Caldark Limited* [2010] IEHC 527, at para 81.
[107] *Smith v. Health Service Executive* [2013] IEHC 360, at para 92.
[108] *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald* [2017] IECA 221, at para 71.
[109] *Meehan v. BKNS Curtain Walling Systems Ltd.* [2012] IEHC 441, at para 34.
[110] *Ibid.*
[111] *Gammell v. Doyle* [2009] IEHC 416, (Unreported, High Court, Hanna J., 28 July 2009), at para 58.
[112] *Ibid.*
[113] *Carmello v Casey* [2007] IEHC 362, at para 57; *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald* [2017] IECA 221, at para 59.
[114] *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald* [2017] IECA 221, at para 59.
[115] *Carmello v Casey* [2007] IEHC 362, at para 57.

In terms of the type of injustice contemplated by section 26 which may prevent a dismissal of the action, Quirke J found *in Higgins v. Caldark Limited* that:

> The fact that the dismissal of an action will deprive a plaintiff of damages to which he or she would otherwise be entitled cannot, by itself, be considered unjust. Section 26 of the Act contemplates and requires such a consequence.[116]

This view is supported by the Court of Appeal in *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald.*[117]

11.8 The Extent of the Use of Sections 14, 25 and 26

The understanding of the Working Group is that the requirement under section 14 is not strictly enforced or abided by. Furthermore, it would appear to the Working Group that non-compliance with section 14 is not frequently raised in court as an issue. No instance of a prosecution or conviction pursuant to section 14 was found by the Working Group. Therefore, the Working Group concluded that this legislative provision appears not to be having the effect in combating personal injury fraud that was originally envisaged by the Houses of the Oireachtas.

After examining section 14 closely, the Working Group believes that there is nothing fundamentally wrong with how the provision is drafted. What is important however, is that it is used more regularly, as stricter enforcement of the section would assist in the fight against fraud as it would force parties to the action to consider the veracity of the statements they have made in their pleadings. It is not unreasonable, in the view of the Working Group, that such an affidavit be prepared and lodged within 21 days after the service of the pleading concerned. In fact, the 2004 Bill as initiated had 7 days as the time period for this requirement, but this was amended to prolong the period allowed.

While the section is powerful, given the existence of the offence in section 14(5), the Working Group believe it would be beneficial to amend the section to allow for the court to draw inferences from non-compliance with the 21 day deadline to lodge the verifying affidavit. This could be modelled on similar provisions in section 8 of the 2004 Act, subject to the agreement of the Office of the Attorney General.

In relation to section 25, the Motor Report stated that:

> information made available by the Courts Service, the Office of the DPP and An Garda Síochána indicates that very few allegations of offences under Section 25 are being made to An Garda Síochána, with the result that the number of recorded prosecutions and convictions for this offence is very low.[118]

The Working Group reviewed cases in which section 26 was discussed. From this review, it would appear that thirteen cases have been dismissed as a result of a section 26 application. In four others, section 26 was raised but the claims were dismissed on liability grounds. A further sixteen

[116] *Higgins v. Caldark Limited* [2010] IEHC 527, at para 87.
[117] *Jason Platt v. OBH Luxury Accommodation Limited and Ciaran Fitzgerald* [2017] IECA 221, at para 73.
[118] See the *Report on the Cost of Motor Insurance*, January 2017, Chapter 9, at p. 126, available at http://www.finance.gov.ie/wp-content/uploads/2017/07/170110-Report-on-the-Cost-of-Motor-Insurance-2017.pdf

applications under section 26 were unsuccessful. If the arguments made by stakeholders and insurers as to the extent of the fraud problem within personal injuries in Ireland are accurate, the section has been invoked on fewer occasions than would have been expected at the time the Act was commenced in 2004.[119]

The Working Group consulted a number of insurers on their use of section 26. The responses in general indicated that, while they may use section 26 as a negotiating strategy at an earlier stage in the process, there is a reluctance to make applications under section 26, due to a number of factors. For instance, some insurers are of the view that the burden of proof on defendants for section 26 is higher than the usual balance of probabilities for civil cases in that it is too difficult to prove that a plaintiff knew evidence was false or misleading. In addition, they argue that they have to contend with a judicial view of the draconian nature of section 26 that it is unjust for a claim to be dismissed in its entirety in cases where a plaintiff was genuinely injured but misled the court as to the extent of their suffering and loss.

11.9 Aggravated Damages in a Section 26 Context

A specific factor brought to the attention of the Working Group by some stakeholders is the potential for aggravated damages being awarded if a defendant's section 26 application is not successful. Aggravated damages are awarded in exceptional cases for the distress or additional harm caused to the plaintiff as a result of either the manner in which the harm was inflicted or the behaviour of the defendant towards the plaintiff after the tort was committed.[120]

It is clear from discussions with insurers that the perceived threat of having aggravated damages awarded against the defendant has contributed to a general reluctance to make a section 26 application, even in circumstances where fraud or exaggeration appears evident from the hearing of the action. The Working Group has noted a number of dicta from cases where there is at least the possibility that they would have the effect of deterring defendants from raising section 26 in proceedings for fear of attracting an award of aggravated damages, even where they may have a genuine belief that false or misleading evidence has been used.

Some views expressed by judges in this regard are set out below. In the judgment of *Lackey v Kavanagh* in 2013, Cross J stated:

> I am of the view that since the introduction of the 2004 Act which clearly impacts upon a Plaintiff disproportionately more than on a Defendant, the issue of aggravated/exemplary damages must always be in the mind of a court where it is alleged that the Plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invokes the provisions of s.26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent to an irresponsible or indeed an overenthusiastic invocation of such a plea.[121]

[119] See Appendix 15 for a list of cases where section 26 was discussed – this list is non-exhaustive and does not include judgments where the section was mentioned but not discussed.
[120] Quill, Torts in Ireland, Second Edition, at p. 518.
[121] *Lackey v Kavanagh* [2013] IEHC 341, at para 47.

In a separate judgment, in 2015, Cross J claimed that "*it is probable, in practice, that [section 26] will be rarely successfully invoked*".[122]

An acknowledgement of how defendants have been reluctant to invoke section 26 came in a judgment by Noonan J in 2014 in which he observed that the section:

> undoubtedly confers litigation advantage on Defendants and has long been complained of by Plaintiffs' lawyers as violating the principle of 'equality in arms' in personal injury litigation. However, the recent jurisprudence of this court reveals an emerging trend towards a more level playing field by the threat of sanctioning Defendants who invoke the section without just cause by way of aggravated or punitive damages.[123]

In the relevant case, Noonan J stated that the defendants were:

> very conscious of the risk of making a s. 26 application were it to prove unsuccessful. Instead they chose to pursue an alternative course which they hoped may achieve the same result without incurring the risk identified. They declined to grasp the nettle.[124]

The Working Group considers that the "*alternative course*" referred to was the avoidance of utilising section 26. This is supported by the comment included in the judgment that "*[c]ounsel expressly stated that he was not relying on s. 26*".[125] Instead of making an application under section 26, the defendant argued that the "*[p]laintiff's case was so tainted by lack of credibility and profound non-disclosure that it should be dismissed*".[126] The judge was of the view that "*it would seem to follow that a s. 26 application must lie*".[127]

The threat of awarding aggravated damages to "*level [the] playing field*" between defendants and plaintiffs in relation to the application of section 26 contrasts with Minister McDowell's response when challenged in a Seanad debate that the relevant 2004 Bill "*was, in its conception, more pro-defendant than pro-plaintiff*".[128] Minister McDowell asserted that:

> we are not dealing with a symmetrical situation. For instance, it is not the case that defendants are getting away with unscrupulous defences too much and that this is a major social problem. Our problem is that jobs and the competitiveness of the country…..are being seriously prejudiced by the fact that the balance was tilted in the other direction. While I would always claim to be introducing balanced legislation, I am not trying to recalibrate this Bill in a way that leaves the balance more or less as it is. I believe the balance was excessively pro-plaintiff and I am moving the balance back…..so it will be more significant, in an adverse way, from the point of view of plaintiffs. Plaintiffs will now be on their mettle. The rules were too soft in the past…..I

[122] *Saleh v Moyvalley Meats (Ireland) Ltd* [2015] IEHC 762, at para 66.
[123] *Daly v HSE* [2014] IEHC 560, at para 61.
[124] *Ibid,* at para 62.
[125] *Daly v HSE* [2014] IEHC 560, at para 44.
[126] *Ibid.*
[127] *Ibid,* at para 61.
[128] See Seanad Éireann debate, March 11th 2004 at: http://oireachtasdebates.oireachtas.ie/debates%20authoring/debateswebpack.nsf/takes/seanad2004031100007?opendocument

> was a practitioner of the law and on the basis of my career as a barrister I would say the system was slanted towards the plaintiff.[129]

In considering these issues, the Working Group sought to establish the extent to which aggravated damages are actually awarded where a section 26 application is made. As far as the Working Group can establish, since the introduction of the 2004 Act, aggravated damages have only been awarded against a defendant in a personal injuries action on one occasion, where the court considered that the defendant had, in essence, accused the plaintiff of putting forward a fraudulent claim.[130] In this case, a formal application under section 26 was not made.[131] So while the threat remains a threat only, it does appear to have had an inhibiting effect on insurers as it has made them reluctant to use section 26.

11.10 Working Group Perspective on Section 26

The Working Group acknowledges that the decision to apply section 26 is a difficult one as there are a range of considerations to be taken account of by a judge in determining whether fraudulent or misleading evidence given in any claim is 'material' to the claim on the basis of the evidence put before him/her, or whether there is any injustice which would be caused if the claim is dismissed. The group also accepts that very inappropriate behaviour by a defendant can warrant the application of aggravated damages. As a result, it is inevitable that the results of a court's consideration of and decision on the application or otherwise of section 26 can give rise to discontent for any party to a claim. This is understandable but what the Working Group is concerned about is that there appears to be a genuine reluctance by insurers to make applications to court under section 26 based on their experience to date, in particular the underlying threat of the use of aggravated damages. The question which then arises is whether section 26 is sufficiently achieving its purpose of acting as a disincentive to fraud, or alternatively is the section 26 challenge so demanding, that insurers are taking the easy way out and settling too many questionable cases on the steps of the court.

In the absence of relevant information about where cases are settled and for what amount (other than PIAB or the courts), it is very difficult for the Working Group to come to a definitive conclusion on this matter other than to say that as this issue has been raised by so many different stakeholders, the Working Group believes there has to be some underlying basis to the view that section 26 is not working as effectively as it should be.

In addition, the Working Group believes that in order for section 26 to achieve more effectively its aim of tackling personal injury fraud, there is a major onus on defendants to challenge misleading evidence, where appropriate by taking it to court, rather than settling on the court steps for fear of an unsatisfactory outcome. Moreover, while it is fully accepted that the rights of plaintiffs must always be protected, and applications under section 26 must only be made where the defendant has a genuine view that the element of fraud in the case is such that it warrants a dismissal of the case, the Working Group is of the view that there should be no question of 'penalising' defendants

[129] *Ibid*.
[130] *Martin Stokes v South Dublin County Council* [2017] IEHC 229.
[131] *Ibid.*

for raising a provision which they are statutorily permitted to raise, where they believe that it is appropriate.

11.11 Mechanism for the Investigation and Prosecution of Fraud

The Working Group concluded that the major issue in the personal injures area is a lack of investigation and prosecution for fraud where it occurs. Presently, there does not appear to be a commonly understood process for the use of the offences in sections 14 and 25. Neither is there any follow up procedure, in the direction of a section 25 criminal process, where a case is dismissed under section 26.[132]

In considering these issues, the legal sub-group of the Working Group organised a Fraud Roundtable to bring together all of the relevant actors in this area. The intention was to discuss the various measures being implemented as part of the Motor Report and those which might be proposed by this Report to determine whether the proposals are cohesive and complete or whether there are gaps and how those gaps could be addressed.

Attendance at the Fraud Roundtable included; Mr Justice Nicholas Kearns, Chairperson of the Personal Injuries Commission together with the Law Society and the Bar Council nominated members of that Commission; the Crime Division and the Civil Law and Courts Policy Division of the Department of Justice and Equality; members of the legal sub-group which include the Department of Finance, PIAB, Department of Business, Enterprise and Innovation and the State Claims Agency; a representative of the Office of the Director of Public Prosecutions, representatives from the Garda National Economic Crime Division of An Garda Síochána, a representative of the Courts Service and representatives of Insurance Ireland.

It became apparent at the Fraud Roundtable that there was a need to examine what mechanisms exist to allow for follow up investigations, and if appropriate, prosecution, following fraudulent or misleading evidence being given in a personal injuries action.

11.12 2004 Protocol between An Garda Síochána and the Insurance Industry

Relevant to this area is an old protocol which was agreed between the Irish Insurance Federation (IIF) and the Garda Bureau of Fraud Investigation (GBFI) in 2004, titled "*Criteria and guidelines for the reporting of suspected fraudulent insurance claims to An Garda Síochána*".[133] It appears that the purpose of this leaflet-type document was to inform individual insurance providers of the procedures for the reporting and investigation of suspected insurance fraud.

The step-by-step format of the guidelines are set out under sectional headings, including:

- To what Station or Section within An Garda Síochána should a formal complaint be made?
- What should be included in the formal report?

[132] It should be noted that in a recent Circuit Court case, the court directed an insurance claim be reported to An Garda Síochána for investigation: https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/court-directs-60k-fraudulent-insurance-claim-be-reported-to-garda%C3%AD-1.3291459

[133] See Appendix 16 for full text of the Guidelines for the reporting of suspected fraudulent insurance claims to An Garda Síochána.

- What steps are taken by the Gardaí on receipt of a formal complaint?
- What should the insurance company do?
- How should evidence be handled?

Regarding whom exactly within An Garda Síochána to contact, "*formal complaints of a less serious nature*" and incidences of suspected fraud arising from a previously reported crime were to be submitted to the Superintendent in charge of the local relevant District, with a copy sent to the Assessment Unit of the GBFI. In respect of "*more serious or complex cases*", a formal report was to be made to the Detective Superintendent in charge of the GBFI.

Three of the main criteria used to classify a suspected fraudulent case as being of a "*less serious*" nature were the monetary value involved, "*where the crime alleged is confined to a small geographical area*", and "*cases which do not involve complicated questions of law or procedure*".

However, insurers were encouraged to discuss and seek advice informally from the staff at the Assessment Unit of the GBFI directly, particularly "*in the early stages of an enquiry*".

Other relevant aspects of the guidelines include a commitment by An Garda Síochána to both acknowledge receipt of a formal complaint and communicate to the insurance company concerned "*as soon as possible*" of the decision in relation to whether a Garda investigation has been determined as being warranted or not. It is also recommended that the relevant insurance company "*should nominate a senior person responsible for the management of the case*", that "*each company will channel all such referrals through one individual with the expertise required to handle them*", and that the company "*should provide full assistance to the Gardaí as required and be prepared to follow the case through to prosecution*".

The Working Group is of the view that these guidelines have only been used to a very limited extent over the years, and it would appear more recently that they have almost fallen completely into abeyance. This is probably due to a number of factors including an unwillingness by industry to pursue complaints in some cases, and in others where they have gone down this route, they seemed to have encountered problems with the practical functioning of the guidelines. For instance, while there were some incidents where a case was referred and led to a prosecution, sometimes successful, other insurers reported instances of receiving no acknowledgement of the referral to the Garda or no details of a follow-up investigation communicated to the reporting insurer.

Consequently, the Working Group believes that it is now time for a new set of guidelines to be developed between the successor bodies to the IIF and the GBFI, i.e., Insurance Ireland and the Garda National Economic Crime Bureau, respectively. The contents of the 2004 protocol can be used as some form of template for the updated agreed document which, if adhered to by both parties, could greatly assist the effective investigation and prosecution of cases involving insurance fraud. It is proposed that a meeting be convened, similar to the Fraud Roundtable discussion which took place in October 2017, in order to progress this matter.

In making this recommendation, the Working Group accepts that the decision to proceed with a full investigation should always lie with An Garda Síochána based on available evidence, and that as a result in some cases it may be decided than a full investigation or a referral to the DPP is not warranted. However, in such cases the Working Group is of the view that the decision not to conduct a full investigation or make a referral to the DPP should be communicated to the insurer at

the earliest opportunity. In addition, the Working Group acknowledges that an increased focus on personal injury fraud type cases will require appropriate resource allocation within An Garda Síochána and that a prosecution by the DPP will not be appropriate or justified in every case.

11.13 Role and Responsibilities of the Insurance Industry in Tackling Fraud

One of the most significant complaints made to the Working Group by business stakeholders is their view that it is not uncommon for insurers to settle dubious claims too easily. In response, insurers have pointed out that sometimes this is the most economically efficient decision as it avoids (i) extensive legal costs being incurred, and (ii) ending up in court where almost certainly the amount awarded will be larger and sometimes significantly larger than what they can pay to settle a case early. However, the Working Group also notes specifically the point argued by policyholders that this has significantly contributed to a culture where a small percentage of people may be able to make fraudulent claims without any real consequences should they be unsuccessful.

From its engagement with insurers on the issue of fraud, it is clear to the Working Group that a range of different resource levels are applied to challenging fraud by companies in the Irish market. One particular company has made it a major priority and is devoting a significant level of resources to tackling the problem, however, the Working Group is of the view that there is undoubtedly additional scope for other companies to also further prioritise tackling fraud. While it is acknowledged that there are significant costs associated with adopting a more robust approach to questionable claims, if the situation is as bad as companies argue, then it seems logical that this additional investment will be rewarded over time. It seems to the Group that an increased focus across the whole industry is necessary in order to avoid the risk of the fraudsters moving to and exploiting the insurers with the weakest standards.

Whilst it is not within the remit of the Working Group to make an enforceable recommendation on this matter, it seems to the Group that there is a huge self-interest motivation for the industry to tackle this problem more vigorously and that every effort should be made to do so. In addition, the Group believes that the already negative perception of the sector will be compounded if they continue to complain about the problems they face whilst not doing more to tackle areas over which they have greater control.

In summary, if fraud is to be addressed more comprehensively industry has to play a very significant role. They have to invest more resources in detection. They have to build strong evidence bases which they need to refer to the Gardaí at the appropriate time. They have to follow up such cases with the Gardaí at regular intervals. In addition, they have to, where appropriate, use section 26 of the 2004 Act, and where successful refer such cases with a significant case file for an investigation and prosecution under section 25 of that Act.

While it is accepted that insurance fraud will never be fully eliminated and that by its nature it is always evolving in response to the challenges it meets, a concerted approach to tackle the problem while inevitably resulting in short-term costs should over time be rewarded with reduced claim levels. It is acknowledged that the role of the State is also important to achieving this outcome but it cannot do it on its own.

11.14 Conclusions of the Working Group

One of the overall aims of this report is to promote an understanding in society that fraud in the personal injuries area is not a victimless crime and that it has a broader impact on society through higher insurance costs. As part of process it is essential to get the message across that giving false or misleading evidence on oath is unacceptable and that it is behaviour which should be discouraged and prosecuted. Section 25 is essentially a perjury provision in a personal injuries context, and must be treated accordingly. Specifically, the aim is to discourage the giving of fraudulent and misleading evidence on oath and to address the lack of consequences for those who have given such evidence. The Working Group is of the view that appropriate use of the legislative provisions in the 2004 Act could be facilitated by encouraging industry to make complaints to An Garda Síochána where they believe fraud to have featured in claims. In addition, the Working Group believe more can be done to establish a nexus between the relevant stakeholders to allow for the claims of fraud to be investigated, and if appropriate, prosecuted.

Further, the Working Group is of the view that the operation of the provisions in the 2004 Act should not be permitted by any of the key players to lead to a real fear on the part of defendants of aggravated damages being awarded against them if they seek, appropriately and justifiably, to invoke section 26 before the courts. As a matter of public policy it is not conducive to the effective tackling of insurance fraud if there is a systematic view (from wherever that view comes) among defendants or their legal advisors that raising an allegation of fraud under section 26 of the 2004 Act may carry a risk of awards of aggravated damages.

There is also a need to increase the level of priority – and, accordingly, perhaps levels of resources – given to investigating and prosecuting fraud in personal injury cases. For instance, the GNECB and the proposed dedicated insurance fraud unit which may result from the motor insurance recommendations could play an important role in this regard. With or without the creation of a dedicated insurance fraud unit, guidelines – based on the 2004 IIF and GBFI protocol – should be drawn up for insurance companies in order to standardise and improve the development of cases for submission to An Garda Síochána.

11.15 Relevant Recommendations from the Motor Report

Recommendation 25 of the Motor Report:

> Establish a fully functioning integrated insurance fraud database for industry to detect patterns of fraud

Recommendation 26 of the Motor Report:

> Explore the potential for further cooperation between the insurance sector and An Garda Síochána in relation to insurance fraud investigation

11.16 New Recommendations

Recommendation 11

AN GARDA SÍOCHÁNA TO COMMENCE PRODUCING STATISTICS ON COMPLAINTS AND INVESTIGATIONS RELATING TO FRAUD WITHIN THE PERSONAL INJURIES AREA

It has proven extremely difficult to establish the number of complaints made to and the number of investigations undertaken by An Garda Síochána in relation to fraud within personal injuries cases. There is also a lack of figures in relation to the number of cases referred to the DPP for prosecution.

Therefore, the Working Group recommends that An Garda Síochána commences the collection and collation of such data in order to produce statistics on a regular basis. This should not be limited to the offences within the 2004 Act, but should also include any other offences which can be used to prosecute fraud within personal injuries, to include the offences listed in section 11.3.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
20	Department of Justice and Equality to consult with An Garda Síochána in respect of the request to produce relevant statistics on complaints and investigations relating to fraud within the personal injuries area	Q1 2018	Department of Justice and Equality, An Garda Síochána, Courts Service	Department of Justice and Equality
21	Department of Justice and Equality to report to the Working Group about the status of the request and the timeline for delivery	Q2 2018		

Recommendation 12

THE COURTS SERVICE TO COMMENCE PRODUCING STATISTICS ON PROSECUTIONS AND CONVICTIONS RELATING TO FRAUD WITHIN THE PERSONAL INJURIES AREA

Accurate statistics regarding the extent to which fraud within the personal injuries area has been prosecuted and convictions which have resulted have been difficult to obtain. The Working Group recommend that the Courts Service commence tracking and producing statistics on the number of prosecutions brought involving personal injuries fraud. This should not be limited to the offences within the 2004 Act, but should also include any other offences which can be used to prosecute fraud within personal injuries, to include the offences listed in section 11.3.

In addition, the Working Group recommend the Courts Service commence tracking applications made under section 26 of the 2004 Act, whether those applications are successful, and in the event that the application is successful, to communicate that fact to An Garda Síochána.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
22	Department of Justice and Equality to consult with the Courts Service in respect of the request to produce relevant statistics on prosecutions and convictions relating to fraud within the personal injuries area	Q1 2018	Department of Justice and Equality, Courts Service	Department of Justice and Equality
23	Department of Justice and Equality to report to the Working Group about the status of the request and the timeline for delivery	Q2 2018		

Recommendation 13

INSURANCE IRELAND, AN GARDA SÍOCHÁNA AND THE DPP TO AGREE A SET OF GUIDELINES FOR THE INSURANCE INDUSTRY IN RESPECT OF THE REPORTING OF SUSPECTED FRAUDULENT INSURANCE CLAIMS

If there is fraud or exaggeration on the part of a plaintiff, the defendant in the case is the victim of that fraud or exaggeration. Therefore, the Working Group believe there is an onus on the insurance industry to be more active in making complaints to An Garda Síochána where this arises.

The Working Group accepts that the decision to proceed with an investigation should always lie with An Garda Síochána based on available evidence, and that as a result in some cases it may be decided than a full investigation or referral of the file to the DPP is not warranted. However, in such cases the Working Group is of the view that the decision not to conduct a full investigation or make a referral to the DPP should be communicated to the insurer at the earliest opportunity.

In circumstances where there has been no response by An Garda Síochána to a complaint by an insurer within a reasonable period of time, the Working Group would encourage industry as a general rule to follow up a complaint in order to establish the views of the Gardaí in relation to the case. Where a full investigation is carried out by An Garda Síochána, it will, if deemed appropriate, forward the matter to the DPP for a determination on whether a prosecution should be pursued.

The Working Group recognises that by encouraging industry to be more pro-active in making complaints, and following up on those complaints, there will be an impact on resources for An Garda Síochána. In addition, whilst recognising that the distribution of resources is a matter for the Garda Commissioner to consider, the Working Group acknowledges that there is a broader resourcing issue within An Garda Síochána which could be addressed, or partially addressed, through the implementation of Recommendation 26 of the Motor Report, in particular through the establishment of a dedicated insurance fraud unit within An Garda Síochána funded by industry.

In relation to the above, the Working Group considered that some form of 'nexus' should be created to streamline the process and ensure that complaints are received by the relevant sections in An Garda Síochána. In this regard, the Working Group is aware that a protocol was agreed between the Irish Insurance Federation and the Garda Bureau of Fraud Investigation in 2004, titled *"Criteria and guidelines for the reporting of suspected fraudulent insurance claims to An Garda Síochána"*. It is now recommended that the contents of this protocol be used as a template for a new set of guidelines to be developed between Insurance Ireland and the Garda National Economic Crime Bureau, to streamline referrals to An Garda Síochána. This protocol could be developed through further meetings of the Fraud Roundtable, as referred to in section 11.11.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
24	Meeting with appropriate stakeholders to begin discussion on the development of guidelines in respect of the reporting of suspected fraudulent insurance claims to An Garda Síochána by the insurance industry using the previous protocol as a starting point for this consideration	Q1 2018	Department of Justice and Equality, Insurance Ireland, An Garda Síochána, Office of the DPP	An Garda Síochána
25	Agreement of new set of guidelines in respect of the reporting of suspected fraudulent insurance claims to An Garda Síochána by the insurance industry.	Q3 2018		

Recommendation 14

AMENDMENT OF SECTION 14 OF THE *CIVIL LIABILITY AND COURTS ACT 2004* TO IMPROVE THE USE AND EFFECTIVENESS OF THE PROVISION

Section 14 of the 2004 Act requires a plaintiff in a personal injury case to swear a verifying affidavit as to the truth of all assertions, allegations and information provided to the defendant. It also requires the defendant to swear a verifying affidavit in respect of the assertions and allegations made in their pleadings. The provision creates an offence if either party makes a statement in the verifying affidavit that is false or misleading in any material respect that he or she knows to be false or misleading.

The section was designed to combat false and exaggerated personal injury claims and in this respect it has the potential to be a powerful tool. However, the consultation process indicated to the Working Group that the procedural requirements in section 14 are not strictly enforced or abided by. Furthermore, no prosecutions appear to have taken place pursuant to section 14. The provision is therefore completely ineffective due to its underutilisation.

The Working Group do not believe there is anything fundamentally wrong with the text of section 14. The problem appears to arise from its lack of use. The Working Group therefore recommends that if a defendant or a plaintiff believes that the other party has made a false or misleading statement in any material respect that he she or knows to be false or misleading, then this provision should be used to challenge such a statement in court. If this section is used where appropriate, it should ensure that all parties to an action consider more carefully the evidence they are including in their pleadings, as there will be a greater understanding that including false or misleading evidence, which they know to be false or misleading, may attract criminal proceedings and potential conviction.

In addition, the Working Group understands that in many cases the requirement to submit the affidavit within 21 days after for the lodgement of the service of the pleading concerned is not complied with. The Group is of the view that this requirement is not an unreasonable requirement, in particular since at the time the 2004 Bill was initiated it had been proposed that there be a seven-day lodgement requirement. Consequently, the Working Group believes it would be beneficial to amend the section to allow for the court to draw inferences from non-compliance with the 21-day lodgement deadline. This could be modelled on similar provisions in section 8 of the 2004 Act, subject to the agreement of the Office of the Attorney General.

It is hoped that providing for potential financial consequences to be applied for non-compliance with the procedural requirements will force parties to the action to strictly adhere to the requirements set out.

The aim of this amendment is to reinforce the original intention of the provision as a measure to combat fraud and exaggeration in personal injury claims.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
26	Department of Justice and Equality to propose amendment to section 14 of the 2004 Act to allow for the court to draw inferences from non-compliance with the requirement to lodge the verifying affidavit within 21 days after the lodgement of the service of the pleading concerned	Q3 2018	Department of Justice and Equality	Department of Justice and Equality
27	Department of Justice and Equality to report to the Working Group about the status of the legislation and its timeline for delivery	Q4 2018		

CHAPTER 12 – COURTS AND JUDICIAL ISSUES

12.1 Background

It was suggested by stakeholders that some form of training information and supports for the judiciary in the assessment of damages should be provided. This may be relevant particularly in respect of newly-appointed judges whose field of practice as a solicitor or barrister may have had a focus on, or specialisation in, an entirely different area of law. While judges are undoubtedly highly qualified individuals, the view was that such training information and support would be hugely beneficial and contribute to a level of consistency or calibration across the factors that are considered by the judiciary in their assessment of damages in any given case.

The Working Group is aware that training for the judiciary is managed by the judiciary themselves and that monies are provided for this purpose via the annual estimates process. The upcoming Judicial Council Bill, as and when it becomes law, will further formalise the systems for judicial training (see below).

In the meantime the Working Group would suggest that the Minister for Justice and Equality, or his Department as appropriate, might raise in an appropriate manner with the judiciary that they would consider including specific and appropriate training or seminars in the assessment of damages in existing judicial training initiatives.

12.2 Judicial Council Bill

The Judicial Council Bill 2017 was introduced in the Seanad on 30 May 2017 by Senator Jerry Buttimer, on behalf of the Government. The Bill provides for the establishment of a judicial council which would establish best practice for the education support and training of judges, and provide a code of conduct and a structure to deal with complaints about judges. It should be noted that the former Chief Justice Susan Denham was vocal in her support for the establishment of a Judicial Council Bill and the need for a dedicated training unit for judges.[134]

The Bill provides for the functions of the Council which include the promotion and maintenance of *"high standards of conduct among judges […] and to ensure equality of treatment of all persons before the courts*".[135] The functions of the Council also include the "*continuing education of judges*".[136]

Under the Bill as drafted, the Judicial Council "*shall develop and manage schemes for the education and training of judges*" and "*prepare and disseminate information and materials among judges for their use in the exercise of their functions*". A further task assigned is "*to promote an understanding*

[134] See for example: https://www.irishtimes.com/news/crime-and-law/judicial-council-imperative-says-chief-justice-1.2379537, https://www.rte.ie/news/2016/0926/819192-judicial-council/ and http://www.irishexaminer.com/breakingnews/ireland/irish-judicial-infrastructure-is-neglected-and-remains-cinderella-of-state-pillars-susan-denham-799878.html

[135] See Appendix 17 for full text of section 7 of the Judicial Council Bill 2017.

[136] *Ibid.*

of sentencing principles and practice among judges and persons other than judges in such manner as it considers appropriate".

Section 17 of the Bill relates to the establishment of the Judicial Studies Committee, the function of which is to "*to facilitate the continuing education and training of judges with regard to their functions*".[137] Section 17(3) of the Bill lists some of methods which can be used by the Committee to facilitate the continuing education and training of judges. These include:

> (a) prepare and distribute relevant materials to judges,
>
> (b) publish material relevant to its function,
>
> (c) provide or assist in the provision of education and training on matters relevant to the exercise by judges of their functions, including but not limited to information technology

The Working Group is of the view that an explicit promotion of an understanding of the principles and practice regarding the assessment of damages could be proposed, by way of a Committee Stage amendment, or by other amendment as deemed appropriate, by the Department of Justice and Equality. Such a provision would be consistent with the overall aim of ensuring that judges have access to the most comprehensive and up to date tools and information available leading to the maximum degree of consistency across the board in the setting of damages in personal injuries cases.

The Department of Justice and Equality is examining this possibility of bringing forward an appropriate amendment during the passage of the Bill through the Houses of the Oireachtas.

12.3 Costs in Personal Injury Actions

The rules in relation to the awarding of costs are detailed in Order 99 Rule 1(1) of the Rules of the Superior Courts and Order 66(1) of the Circuit Court Rules. In general the awarding of costs in litigation is at the discretion of the Court. Order 99 Rule 1(4) provides that:

> Subject to sub-rule 4(A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event.[138]

The discretion of the court is exercised in favour of the winning party, generally referred to as the 'costs follow the event' principle. This means that the successful party is entitled to an order for costs against the unsuccessful party. However, the principle can be departed from where the court considers there is good reason to do so and the court may make no order as to costs.

However, the Working Group understand that there are cases where the discretion of the court is not exercised in favour of the winning party, in circumstances where there may often be no good reasons expressed for such a departure. Business stakeholders expressed frustration at the lack of consistency in the application of this general principle because where a claim is dismissed, but the insurer still has to meet its own costs, these costs will be ultimately reflected in an increase in the

[137] *Ibid.*

[138] Full text of Order 99 is available at: http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a55af2a6669ec72180256d2b0046b408?OpenDocument

premium of policyholders, even though the claim has been found to have no basis. It is acknowledged that the determination of who is to pay costs is ultimately at the discretion of the judge in any given case on the basis of the relevant facts. It is also accepted that in certain cases costs not following the event can be appropriate, for example, in cases involving the State where an important legal principle has been raised. However, there was a view expressed that inconsistency in the application of this principle may lead insurers to settle an otherwise defendable case, unilaterally, or in consultation with the policyholder, solely because that strategy is more cost efficient than successfully defending an action, but with the risk of not recovering their costs.

Based on submissions received by the Working Group, there is a view that judges may make no order as to costs in some cases because they feel that the unsuccessful plaintiff has been 'punished' sufficiently or that the likelihood of the costs being recovered from the unsuccessful plaintiff is negligible. However, in such circumstances, it can be argued that there is no consequence or risk to taking a claim which is exaggerated or fraudulent. A strict application therefore of the 'costs follow the event' principle could lead to a reduction in questionable cases ending up in court unnecessarily, thus resulting in more cases being settled through early settlement talks, negotiation and PIAB, at a much lower cost than those which end up in court.

Furthermore, the Working Group believes that a consistent application of the 'costs follow the event' principle – recognising as noted above that it should remain a matter for the independent judiciary to be the key decision makers in this regard – would probably be one of the most effective ways of tackling fraud and exaggerated claims, as it would give insurers the confidence to challenge more robustly cases which they have doubts about. It would also remove the common excuse insurers make that uncertainty in relation to legal costs forces them to settle regularly on the court steps rather than to dispute a case in court. In addition, it would mean that the minority of plaintiffs who seek to exploit the system through fraud or exaggeration would have to think more carefully about the consequences for themselves, should they lose the case. Finally, the Working Group believes that such an approach should have no bearing or impact on plaintiffs who have a deserving case, and genuinely feel it needs to be settled in court.

12.4 The *Legal Services Regulation Act 2015*

The *Legal Services Regulation Act 2015* makes extensive provision, in Part 10, for a new and enhanced legal costs regime that will bring greater transparency to how legal costs are charged by legal practitioners, along with a better balance between the interests of legal practitioners and those of their clients. Part 11 then addresses legal costs in civil proceedings. Section 168 details the power to award legal costs. Section 169 then puts the general principle of 'costs follow the event' on a statutory footing. In other words, a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties.[139]

This section will become operational once the Office of the Legal Costs Adjudicator is established – currently projected for Q3 of 2018. This provision will hopefully help to address the concerns raised

[139] See Appendix 18 for full text of section 169 of the *Legal Services Regulation Act 2015*.

by stakeholders regarding costs not always following the event, as it will require the court in circumstances where it does not follow this general principle to outline the reasons why.

In the meantime, the Working Group is of the view that insurers should be more prepared to challenge claims in court where they believe that they are fraudulent or exaggerated, rather than settling early for fear of incurring significant legal costs. This is critical if a significant reduction in costs for businesses over time is to be achieved. Key to this, however, is for the judiciary to recognise the disincentive to insurers of the uncertainty around consistency of the application of the 'costs follow the event' principle. Therefore, notwithstanding that section 169 has not yet been commenced, the Working Group believes that courts should apply the general principle of awarding costs to a successful party. If the court choses to depart from the general principle in the interest of justice, reasons should be stated in the order.

12.5 Case Management Issues

There were a number of issues raised by stakeholders related to the management and conduct of personal injury cases which have impacted on the efficiency and cost burden of these cases. Examples include the impact that an unexpected adjournment can have, or the necessity for staff members of a defending business having to attend trial for several days. This problem, it is understood, can be exacerbated by the listing of personal injuries actions with clinical negligence cases. As the clinical negligence cases tend to be complex and lengthy, the hearings often run longer than the period scheduled for, with a knock on effect on other listed cases. The Working Group understands consideration is being given to such issues as part of the review of civil justice being undertaken by a group chaired by the president of the High Court, Mr Justice Peter Kelly.

The aim of the review group is to examine the current administration of civil justice in the State with a view to:

(a) Improving access to justice;
(b) Reducing the cost of litigation including costs to the State;
(c) Improving procedures and practices so as to ensure timely hearings;
(d) The removal of obsolete, unnecessary or over-complex rules of procedure;
(e) Reviewing the law of discovery;
(f) Encouraging alternative methods of dispute resolution;
(g) Reviewing the use of electronic methods of communications including e-litigation;
(h) Examining the extent to which pleadings and submissions and other court documents should be available or accessible on the internet;
(i) Identifying steps to achieve more effective outcomes for court users with particular emphasis on vulnerable court users including children and young persons, impecunious litigants who are ineligible for civil legal aid and wards of court

In this regard, a number of interesting proposals related to case management issues were put forward by the Council of the Bar of Ireland during its consultation with the Working Group. Two examples were that interlocutory matters would be dealt with by courts personnel other than judges and that appropriate "writing days" be introduced to enable the judiciary to properly compose their judgments in a timely manner on the conclusion of a case.

While this group is not due to report before 2019, the Working Group understands that this provides an opportunity to address case management issues such as those referred to in the preceding paragraphs.

12.6 Conclusions of the Working Group

The Working Group supports the emphasis on continued training supports for the judiciary and the establishment of the Judicial Council. The requirement for judges to undertake continued education is not a new concept, as it is an issue which former Chief Justice Susan Denham has spoken about on several occasions. It is imperative therefore that everything possible be done to prioritise the Judicial Council Bill in respect of which, as indicated above, the Department of Justice and Equality is considering bringing forward a specific amendment to refer to training and information supports in the area of damages assessment.

In addition, the Working Group believes that consideration could be given by the judiciary as to existing available education or training arrangements which could be utilised to make provision for training and information supports in the area of the assessment of damages.

In regard to the 'costs follow the event' principle, the Working Group believes the issue will be substantially alleviated on the commencement of section 169 of the Legal Services Regulation Act. However, until that time, it is recommended that the judiciary opt to provide reasons in their order where they are going against the general principle.

12.7 New Recommendation

Recommendation 15

DEPARTMENT OF JUSTICE AND EQUALITY TO CONSIDER PROPOSING AN AMENDMENT TO THE JUDICIAL COUNCIL BILL TO FACILITATE TRAINING AND INFORMATION SUPPORTS FOR THE JUDICIARY IN RELATION TO THE ASSESSMENT OF DAMAGES IN PERSONAL INJURY CASES

The Working Group recommends that the Department of Justice and Equality consider proposing an amendment to the Judicial Council Bill 2017 to facilitate training and information supports for the judiciary in relation to the assessment of general damages in personal injury cases.

In the meantime, as part of the measures towards achieving greater consistency in the setting of damages, the Working Group believes that the judiciary could give consideration, as appropriate, to the provision of specific training and information supports for judges in this area. This could be facilitated by the judiciary deciding to utilise existing judicial education or training arrangements to make provision for appropriate training events or seminars.

Action Point No.	Action Point	Deadline	Relevant Bodies	Lead/Owner
28	Department of Justice and Equality to consider proposing an amendment to the Judicial Council Bill 2017 for the purposes of including an explicit reference to the assessment of general damages in personal injury cases	Q1 2018	Department of Justice and Equality	Department of Justice and Equality
29	The Department of Justice and Equality to bring to the attention of the judiciary in an appropriate manner the recommendation that consideration be given to training pending the enactment of the Judicial Council Bill	Q2 2018		

CHAPTER 13 – ALTERNATIVE DISPUTE RESOLUTION AND MEDIATION

13.1 Background

The Working Group received requests from stakeholders to introduce an alternative option to the Court process by way of mediation or an alternative dispute resolution mechanism. It is important in this regard to highlight what is currently available throughout the personal injuries litigation process.

13.2 Sections 15 and 16 of the Civil Liability and Courts Act 2004

The 2004 Act provides for mediation conferences in personal injuries actions. Section 15 of that Act provides that a court may direct the parties to a personal injuries action to meet in a mediation conference to discuss and attempt to settle a case. A chairperson of the conference may be agreed by the parties or, in the absence of such agreement, appointed by the court. The notes of a chairperson of a mediation conference and all communications during it shall be confidential and cannot be used in evidence in any subsequent civil or criminal proceedings.

Section 16 provides that, if necessary, the chairperson of a mediation conference must prepare and submit to the court a report of the conference, which will also be provided to the parties involved in the action. The report shall outline whether the conference took place, what issues, if any, were agreed and, where an agreement has been reached, contain a copy of the settlement terms signed by all parties. In cases where a party has failed to comply with a direction of the court under section 15 to participate in a conference, the court may direct that party to pay costs incurred after the direction.[140] These sections are supported by court rules outlining the procedural aspects of the process.[141]

13.3 The Mediation Act 2017

The general objective of the *Mediation Act 2017* ("the 2017 Act) is to promote mediation as a viable, effective and efficient alternative to court proceedings thereby reducing legal costs, speeding up the resolution of disputes and relieving the stress involved in court proceedings. The Act will be commenced in early 2018.

The 2017 Act provides that solicitors must advise clients of mediation as an option. The intent is to inform clients of the ways in which the dispute can be resolved and encourage resolution without resorting to litigation.

Section 3 of the 2017 Act details the scope by listing the areas that are excluded from application of the Act. Personal injuries claims are not listed as excluded from the scope. Therefore the obligations introduced by the 2017 Act will apply to personal injuries litigation. It follows that once the 2017 Act comes into operation, solicitors will be under an obligation to advise their clients "*to consider*

[140] See Appendix 19 for full text of sections 15 and 16 of the *Civil Liability and Courts Act 2004*.
[141] See Appendix 20 for text of relevant court rules in relation to Mediation.

mediation as a means of attempting to resolve the dispute", "to provide the client with information in respect of mediation services" and of the "*benefits of mediation"*.[142]

13.4 Pre-Action Protocols and Mediation

Pre-Action Protocols aim to set out a series of procedural requirements which are a prerequisite to the commencement of litigation. These procedural steps are generally aimed at encouraging settlement by narrowing down the issues in dispute in order to make the court process, if it even occurs, more efficient and cost-effective. As noted elsewhere in this Report, the Motor Report recommended that draft legislation be published to extend Pre-Action Protocols to personal injury cases. One of the aims of the extension to personal injury cases is to encourage alternative forms of dispute resolution ("ADR") such as mediation.

As the legislation to lay the ground work for Pre-Action Protocols in personal injury cases is not yet enacted, the exact specification or form the Pre-Action Protocols will take has not been formalised. However, the protocol developed for clinical negligence cases is of relevance as an indication of how they will interlink with mediation processes.

According to the draft Pre-Action Protocol on clinical negligence, at each stage of the process, and as set out in detail in Part 11, a party may, in writing, propose to seek resolution of the matter by means of an alternative dispute resolution or mediation mechanism. Once proposed, the parties must agree, in writing, on whether to use ADR/mediation or not, or to propose an alternative form of ADR/mediation.

Where the parties agree to ADR/mediation, the Pre-Action Protocol sets out the details which must be agreed prior to the commencement of the ADR/mediation including: the manner of its conduct, the facilitator, the costs, the place/time and issues around confidentiality and termination.

Should the ADR/mediation process still result in proceedings, the court may require all parties to provide evidence of consideration of using ADR/mediation mechanisms.

The Working Group understands that it is envisaged by the Department of Justice and Equality that the Pre-Action Protocol on personal injuries will deal with ADR/mediation in the same manner.

13.5 Conclusions of the Working Group

Nothing in the 2004 Act and the provisions of the *Mediation Act 2017* conflict to prevent the use of mediation in personal injuries actions. The 2017 Act will encourage mediation at an early stage during the process. The provisions of the 2004 Act will come into play at a later stage of the proceedings. The two procedures can thus work in tandem. In addition, mediation or other forms of alternative dispute resolution will be facilitated through Pre-Action Protocols. Therefore, the Working Group conclude that there is sufficient legislative provision to allow for ADR/mediation in personal injuries cases and no further measures require to be introduced at this stage.

[142] Full text of the *Mediation Act 2017* is available at:
http://www.irishstatutebook.ie/eli/2017/act/27/enacted/en/html

13.6 Relevant Recommendation from the Motor Report

Recommendation 16 of the Motor Report:

> Ascertain and set out the measures necessary to implement Pre-Action Protocols for personal injury cases

CHAPTER 14 – REGULATION OF THE LEGAL PROFESSIONS

14.1 Background

A number of stakeholders questioned the role of the Law Society of Ireland in the personal injuries litigation process. The Law Society is currently both the representative body and also the regulatory body for solicitors. It is thus a self-regulating profession. Throughout the consultation process, questions were consistently raised in regard to the way in which some solicitors approach personal injuries litigation. Claims were made to the Working Group of certain solicitors who represented often-related clients allegedly involved in multiple fraudulent claims. In addition, there was the view expressed that some solicitor firms, as a matter of policy, refuse to accept a PIAB award and instead move the case through to the litigation process. These claims were made on the basis of the personal experiences of the businesses who attended the Working Group.

14.2 Law Society Interaction with the Cost of Insurance Working Group

As a result of these very strongly held views, the Law Society was invited to attend and present at a meeting of the Working Group. The Law Society President Stuart Gilhooly attended on its behalf and subsequently provided responses to specific questions submitted by the Working Group.[143] (Mr Gilhooly subsequently attended a further meeting later in the consultation process, accompanied by his successor as President, Michael Quinlan). The specific questions put to the Law Society, both at its first meeting with the Working Group and the subsequent written follow-up questions, were partly based on the assertions put to the Working Group by stakeholders. Given the extent of the complaints made against the legal profession, specifically solicitors, the Working Group felt it was necessary to put those claims to the appropriate representative and regulatory body for the profession. The total set of questions covered a number of different topics and the full text of the written response from the Law Society is contained in Appendix 19. However, a few of the key questions and answers are set out below.

(i) What is your view on solicitors firms, specialising in personal injuries, who adopt a strategy of not negotiating until the case reaches the High Court (or Circuit or District Court as the case may be having regard to the jurisdictional limits of those courts)? (i.e., Recommending to a client that they reject any award offered by PIAB and only engaging with the defendant once High Court costs have been incurred)? We have received anecdotal reports of this from consultations.

Response: We are not aware of any such strategy. It is, however, often the case that proceedings must be issued in order to comply with time limits, but the claim is not ready to be settled because the injuries have not settled down an extent where a prognosis can be given.

[143] See Appendix 21 for full text of questions from the Cost of Insurance Working Group to the Law Society of Ireland and the responses received.

(ii) Do you believe that some solicitors are contributing to a "claims culture" in Ireland by possibly encouraging clients to pursue what are perceived by the public as frivolous claims? What, if any, volume of complaints have been made to the Law Society in this type of area in the last 3 years and what have the outcomes of those complaints been (it is not necessary to identify any names, only outcomes)?

Response: We have no evidence whatsoever that solicitors are encouraging clients to bring frivolous claims and have already called upon the CIWG to provide us with any evidence that they have received.

The Law Society does not maintain specific statistics on complaints about claims which are alleged to be frivolous. Such claims are not sufficiently numerous to justify a dedicated category on our complaints database. Therefore, we cannot provide a definitive statistical analysis, either in terms of numbers or outcomes.

We estimate that we receive typically no more than two or three complaints per annum from members of the public alleging spurious or fraudulent or exaggerated claims. Our experience is that clear prima facie evidence of fraud or illegality is never provided in such complaints, which generally consist of unsubstantiated allegations. As a general rule, such complaints are made by a defendant against the plaintiff's solicitor with the objective of disrupting progress of the case and removing their opponent's solicitor from the case, thereby putting their opponent at a disadvantage. It would not be proper for the Law Society to facilitate such an objective. In any event, it is not possible to conduct a fair investigation of such complaints due to the duty of client confidentiality owed by the plaintiff's solicitor. Such complaints are usually made while the case is still pending, in which case it is for the court rather than the Law Society to decide whether or not the claim is fraudulent. To the best of our knowledge we have received no complaints where a finding has been made by a court that a claim was fraudulent.

(iii) Does the Law Society believe the current legislative measures and/or penalties are adequate in terms of tackling fraudulent personal injury claims? Does the Law Society believe that particular sections of relevant legislation need to be amended?

Response: Yes, the current legislation is very strong and has even been described by the Judiciary as "draconian". The punishments available include complete dismissal of the case and prosecution for providing false or misleading evidence. The difficulty lies with Defendants not seeking to avail of sections 14, 25 and 26 of the Civil Liability and Courts Act 2004. If they believe a case is fraudulent, they should run the case in court, have it dismissed, and use the evidence to encourage Gardaí to bring a prosecution. It is perfectly clear that the tools for this exist in the legislation, but there appears to be a reluctance to test the provisions on behalf of defendants.

(iv) The CIWG has been advised by certain stakeholders that the current timeframe permitted to make a personal injury claim under the Statute of Limitations facilitates the bringing of claims that cannot be adequately defended due to the time elapsed since the alleged incident. Do you think it is appropriate for the Statute of Limitations to be decreased?

Response: The Statute of Limitations was reduced as recently as 2005 and has already caused hardship to claimants who have attempted to make claims outside the two year limit. Although these situations are rare, when they happen, they often occur because victims are reluctant to litigate but only do so when they have no alternative. It would most likely be an anti-consumer measure to reduce it any further, particularly given the provisions of Section 8 of the Civil Liability and Court Act 2004, which if properly enforced would ensure that any instances of claims not being notified to defendants would be minimised to these rare cases where claims are initiated close to the Statute limit for the reasons stated above.

(v) Section 8 of the Civil Liability and Courts Act 2004 requires a plaintiff to notify the defendant of his claim within two months of the accrual of the cause of action, or as soon as practicable thereafter. What is the view of the Law Society in relation to this requirement? We have received feedback that this rule is not followed. Are there ways in which we can ensure that the 2 month period of claim will be better observed?

Response: Our belief is that Section 8 is followed in the vast majority of cases. However, there are reasons why it cannot always be done, such as long hospital stays, difficulties with identifying defendants, reluctance to sue, etc. If there are cases where such delay cannot be explained, defendants need to apply to the court for the appropriate order. We are aware of no instances in which this has been done. The legislation needs to be enforced not strengthened. It is vital that consumers and victims' rights be balanced against those of potential defendants.

<u>The following are some of the other points made by the Law Society, in relation to the regulation of solicitors:</u>

- Relevant legislation includes section 62 of the Solicitors Act 1954 and the Solicitors (Advertising) Regulations 2002
- Enforcement procedures used include: referring a solicitor to the Solicitors Disciplinary Tribunal for an inquiry into alleged misconduct; applying to the High Court for an order prohibiting contravention of the regulatory provisions; issuing a written reprimand; and, directing that all advertising commissioned by a solicitor must be pre-approved by the Law Society for a specified period
- Since 2014 over 500 advertising matters have been formally considered by the Law Society, mostly related to websites

- The Society also typically reviews about 500 advertisements per annum published in the national and local print media – in 2016, 19 of these reviews resulted in investigations being opened
- Since 2014, 14 "claims harvesting" websites have been taken down as a result of the Law Society's investigations – and the Society has instituted High Court proceedings against non-solicitors relating to two of the leading "claims harvesting" websites
- Since 2014, 52 matters have been considered by the Advertising Regulations Division of the Regulation of Practice Committee of the Law Society relating specifically to advertising by individual solicitors
- Two solicitors are currently before the Solicitors Disciplinary Tribunal on grounds of alleged misconduct in respect of advertising of legal services

14.3 The Legal Services Regulatory Authority

The establishment of a new and independent body, the Legal Services Regulatory Authority, with responsibility for oversight of both solicitors and barristers will have a major impact on the functions of the Law Society of Ireland (and the Council of the Bar of Ireland). The Authority, whose establishment date was 1st October 2016, will have transparent governance and reporting structures appropriate to a modern regulatory body. The eleven members of the Authority, which has a lay majority including its Chair, Dr. Don Thornhill, were put forward by designated nominating bodies under the *Legal Services Regulation Act 2015* and their appointment approved by motions of the two Houses of the Oireachtas.

In respect of disciplinary matters, alongside a new framework to deal with complaints about professional misconduct independent of both the Law Society and the Bar Council, a new Legal Practitioners' Disciplinary Tribunal is to be established to deal with both legal professions. Members of the public who wish to make complaints will, therefore, no longer do so through the Law Society or the Bar Council as they do at present, but through the new and independent Legal Services Regulatory Authority. This will include the handling of consumer-type complaints about some excessive costs which the Regulatory Authority will seek to help resolve by informal means – this will provide ordinary consumers with an alternative to the more expensive process of going through an adjudication process.

However, the charging of "grossly" excessive fees by a legal practitioner will be dealt with under the new complaints regime of the 2015 Act as a matter of professional misconduct, which may also come before the new Legal Practitioners' Disciplinary Tribunal.

14.4 Conclusions of the Working Group

In summary, the Working Group has heard two different perspectives on a range of issues related to the personal injury claims process from business stakeholders who have had claims taken against them and the Law Society who represent the solicitors who act on behalf of both plaintiffs and defendants in this general area. As it is impossible for the Working Group to reconcile these conflicting positions in the absence of any clear evidence, all it can do is set out the differing views on these matters.

Finally, the Working Group is satisfied that the implementation of the *Legal Services Regulation Act 2015* will bring a fundamental change to the regulation of the legal profession and is particularly supportive of the idea of the Legal Services Regulatory Authority and the separation of the representative and disciplinary bodies for the legal profession.

PART 3
APPENDICES

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APPENDIX 1 – Members of the Cost of Insurance Working Group

Eoghan Murphy TD	Minister of State at Department of Finance
(*replaced by Michael D'Arcy TD*)	
Michael D'Arcy TD	Minister of State at Department of Finance
Aidan Carrigan	Department of Finance
(*replaced by Michael McGrath*)	
Michael McGrath	Department of Finance
Cathal Sheridan	Department of Finance
Michael Taggart	Department of Finance
Annemarie McNulty	Department of Finance
Rose O'Connor	Department of Finance
Colm McGennis	Department of Finance
Colm Forde	Department of Business, Enterprise and Innovation
(*replaced by Eadaoin Collins*)	
Eadaoin Collins	Department of Business, Enterprise and Innovation
Derval Monahan	Department of Business, Enterprise and Innovation
Eoghan Coyne	Department of Business, Enterprise and Innovation
Etain Finn	Department of Business, Enterprise and Innovation
Conan McKenna	Department of Justice and Equality
Tracy O'Keeffe	Department of Justice and Equality
Gerry Cross	Central Bank of Ireland
Mary Burke	Central Bank of Ireland
Attracta Jennings	Central Bank of Ireland
Deirdre Mullally	Central Bank of Ireland
Conor O'Brien	Personal Injuries Assessment Board
Stephen Watkins	Personal Injuries Assessment Board
Ciarán Breen	State Claims Agency

APPENDIX 2 – List of Groups who Attended Meetings at Working Group or Official Ministerial Level

AIG
Aviva Insurance
Brokers Ireland
Central Statistics Office
Chambers Ireland
Construction Industry Federation
Consumers' Association of Ireland
Council of the Bar of Ireland
Courts Service
FBD Insurance
Garda National Economic Crime Bureau
Health and Safety Authority
IBEC
Insurance Ireland
Irish Hotels Federation
Irish Public Bodies Insurance
ISME
Law Society of Ireland
Liberty Insurance
Licensed Vintners' Association
Lloyd's
Meat Industry Ireland
Office of the Attorney General
Office of the Director of Public Prosecutions
Panda Waste Management
Personal Injuries Commission (Chairperson)
Retail Excellence
Retail Ireland
RGDATA (Retail, Grocery, Dairy and Allied Trades Association)
Self-Insurance Task Force
Vintners Federation of Ireland
Zurich Insurance

APPENDIX 3 – Members of the Sub-Groups of the Cost of Insurance Working Group

Markets Sub-group

Cathal Sheridan	Department of Finance
Michael Taggart	Department of Finance
Rose O'Connor	Department of Finance
Deirdre Mullally	Central Bank of Ireland

Legal Sub-group

Conan McKenna	Department of Justice and Equality
Tracy O'Keeffe	Department of Justice and Equality
Cathal Sheridan	Department of Finance
Annemarie McNulty	Department of Finance
Colm McGennis	Department of Finance
Louise Boughton	State Claims Agency
Stephen Watkins	Personal Injuries Assessment Board
Conor O'Brien	Personal Injuries Assessment Board
Colm Forde (*replaced by Eadaoin Collins*)	Department of Business, Enterprise and Innovation
Eadaoin Collins	Department of Business, Enterprise and Innovation
Derval Monahan	Department of Business, Enterprise and Innovation
Etain Finn	Department of Business, Enterprise and Innovation

APPENDIX 4 – The Work of the Sub-Groups

Work of the Markets Sub-Group

The Markets sub-group was established to examine issues raised by stakeholders relating to the operation of the insurance market. The sub-group consisted of the Department of Finance and the Central Bank of Ireland. It met on 12 occasions during 2017 and consulted with bodies such as Brokers Ireland, Chambers Ireland, the Self-Insurance Task Force, and representatives from Lloyd's of London.

In the course of its work, it examined such issues as the competitiveness of the market, the availability of insurance in particular for particular sectors, and other issues such as increased excesses, the role of brokers, and self-insurance. In addition, it made a request to Chambers Ireland to carry out a survey of its members, the results of which were incorporated into the report.

The sub-group also made a request for certain data from Insurance Ireland. It consulted members of the Working Group's data sub-group, which was working on the implementation of existing recommendations, during the course of this work to ensure a consistency of approach with regard to the reporting of the data returned.

Work of the Legal Sub-Group

The Legal sub-group was established in order to examine issues in respect of which it was felt that ensuing potential recommendations may have significant constitutional and/or legislative implications. Examples of some of the legally complex proposals put forward by stakeholders were ones to cap personal injury award levels, to reduce the statute of limitations, and to improve the PIAB process. Much of the work undertaken by the legal sub-group related to whether various sections of the *Civil Liability and Courts Act 2004* should be strengthened and/or amended – in respect of, for instance, tackling fraud and enforcing claims notification requirements.

The sub-group was chaired by the Department of Justice and Equality and consisted of representatives from the Department of Finance, the Department of Business, Enterprise and Innovation, the State Claims Agency, and PIAB. It met on a total of 18 occasions during 2017 and consulted with bodies such as the Law Society of Ireland, the Council of the Bar of Ireland, and the Office of the Director of Public Prosecutions.

Separately, the sub-group also organised the Fraud Roundtable which took place on 12th October 2017 and included representation from An Garda Síochána, Insurance Ireland, Department of Justice and Equality, the Department of Finance, the Department of Business, Enterprise and Innovation, the State Claims Agency, PIAB, the Office of the Director of Public Prosecutions, the Law Society of Ireland, the Council of the Bar of Ireland, the Courts Service and the Chair of the Personal Injuries Commission.

APPENDIX 5 – Impact of the Cost of Insurance on the Competitiveness of Particular Business Sectors – Case Studies

Agriculture

The agri-food sector is Ireland's largest indigenous industry, generating €26 billion in turnover each year as well as employing over 170,000 people (8.6% of employment in the state). As part of the consultation process, the Working Group received submissions from the Irish Farmers' Association (IFA), as well as food producers and mart operators.

The IFA, which represents over 70,000 farmers, highlighted that insurance costs represent a significant part of their overall input costs annually. It noted in particular that the motor insurance premium increases in the past few years have added to the overall cost of production directly and indirectly through increased transport costs for agricultural produce.

Another business which is important to the farming sector is the mart. As one mart owner pointed out to the Working Group, many marts are there as a service to the community and are not profit making. Consequently they are particularly price sensitive to large insurance increases. They have indicated that one of the key issues faced by marts is the reduction in the number of insurers willing to offer cover. Insurance Ireland has advised that the withdrawal of capacity is attributable to an unattractive claims frequency in marts arising from them having a significant exposure to injuries to employees and members of the public. They also indicated that insurers are working with the sector to develop active risk management programmes in order to try to reduce the level of accidents and injuries in marts.

One food producer stated that the agriculture and retail sectors are both sectors which are highly competitive and operate with tight margins. In this regard, it noted that to remain competitive it was important that businesses be able to control their costs. It stated that this was difficult in an environment where costs are high and awards vary. This inability to control the cost of insurance it is argued has an impact on job creation as well as the maintenance of current levels of employment.

Meat Industry

The meat industry is an important sector of the agricultural economy of Ireland, representing almost 27% of Gross Agricultural Output. Meat Industry Ireland (MII)[144] outlined, in its submission to the Working Group, the difficulties which the cost of employer liability insurance in particular was causing the sector. The sector employs over 10,000 people directly, with significant additional indirect employment generation. This employment is in rural regions across the country and is essential in maintaining the local economy in many rural towns and surrounding areas.

MII stated that the meat processing industry is undergoing a period of immense uncertainty because of the lack of clarity around the impact of Brexit. It is of the view that their significant exposure to the UK market when combined with the weakening of sterling makes their sector particularly vulnerable from a competitiveness perspective. In this context, it stated that it is imperative that in addition to seeking out new markets for Irish products, there must be a strong focus, at government level, on the competitiveness of Irish business versus UK and other competitors.

[144] Meat Industry Ireland (MII) is the IBEC sector association representing the meat processing industry.

This therefore is the context in which rising insurance costs has put significant extra pressure on the meat processing sector in recent years, particularly in relation to employer liability insurance. MII stated that this has become a massive issue for the sector and is a major cost, competitiveness and resource burden. Apart from carrying increasing excesses, companies have been forced, in some cases, to self-insure as they are finding it increasingly difficult to get insurance or have faced astronomical year-on-year premium increases.

What is particularly interesting is that MII informed the Working Group that while the number of accidents or incidents in the sector have not increased in recent years due to improved health and safety measures, the proportion of those which result in a claim has increased significantly. It also shared the results of a survey of its members which showed that the reserves which companies in the beef processing sector have had to set aside as provisions for ongoing legal cases and expected settlements / legal costs has increased from €8.1m in 2009 to €19.2m. MII noted that this is money which cannot then be utilised by the sector for market access development, growth and expansion, investment in new facilities and health and safety, which has a negative impact on the competitiveness of the industry as a whole.

Retail Sector

The retail sector employs over 280,000 people making it the largest employment area in Ireland. It is also the largest contributor to the Irish Exchequer generating 23% of total tax receipts. As part of the Working Group's consultations, it met with RGDATA, Chambers Ireland and Retail Ireland (a business unit of IBEC).

Retail Ireland highlighted that few sectors were as hard hit by the economic downturn, and that its recovery has been modest with retail sales values significantly off their peak. It notes that for the majority of retailers their biggest input costs are labour, rent, rates and insurance. In the case of insurance, Retail Ireland states that there is growing concern amongst retailers that the level of personal injury claims is making it difficult for the sector to remain competitive as they add an unnecessary cost burden as well as limiting the sector's ability to grow, create jobs and deliver value and choice to Irish consumers.

RGDATA carried out a survey of its members in 2016 on the cost of insurance which found that retailers are facing increasing premiums and have limited options to shop around to obtain more affordable cover. This finding is in line with the comments of some of the insurers which attend the Working Group who stated that they had exited high footfall areas like retail due to their poor claims experience. On that point, it was RGDATA's view that the propensity of insurers to settle claims easily adversely impacts on retailers' claims history, precluding them from sourcing alternative cover. Directly related to this was their concern about what they see as the prevalence of fraudulent claims and the general claims culture in Ireland.

On the overall cost of insurance, RGDATA noted that insurance costs are not limited to the initial premium outlay. Excess payments on claims are also a real burden as for many businesses, an excess on a retailer can range from €5,000 to €10,000 per claim. What this means is that while the bulk of the claim may be covered by the insurer, the retailer has to find up to €10,000 to pay toward each claim directly. The impact of this is multiplied for a retailer facing multiple claims. For example, a

retailer facing four claims of €25,000 each could have to fund excess payments of between €20,000 and €40,000 depending on the level of excess.

Both RGDATA and Chambers Ireland pointed out that the increase in insurance prices was posing viability issues for some businesses due to their inability to sometimes be able to absorb these costs. Chambers Ireland also outlined their concerns around the claims culture.

Pub / Late-Night Venues

As part of its consultations, the Working Group met with the Licenced Vintners Association (LVA), the Vintners' Federation of Ireland (VFI) and the Irish Hotels Federation (IHF) who shared their perspective on how the cost of insurance is impacting on the competitiveness of their sector and what can be done to address this, as well as the impact of health and safety issues on the cost of insurance, and other pertinent market issues.

Tourism is one of Ireland's largest indigenous industries and hospitality is an important component of that. In a recent survey of its members (mainly publicans outside of Dublin), the VFI found that insurance was ranked as the number one issue for businesses, ahead of commercial rates, TV subscriptions, IMRO and water charges. It also found that 37% of those surveyed had experienced difficulty in obtaining insurance. This view was shared by the LVA, which represents approx. 600 Dublin publicans. It stated in its presentation that its primary concerns were:

- the availability of public liability insurance (particularly for those in the late bar scene), and
- the rate of premium growth.

As with the retail sector, several of insurers who met with the Working Group acknowledged leisure was one of the areas which they had exited in recent times. They said that the leisure sector had seen recent losses, with one insurer reporting that high footfall leisure in some cases had double the loss ratio level of other trades.

The IHF told the Working Group that the international tourism industry in which it operates is exceptionally competitive and that the costs of conducting business within the economy has a major impact on the viability of the sector and its ability to attract visitors. It noted that increasing insurance costs are posing enormous difficulties for the sector with implications for the wider tourism industry. The IHF cited insurance costs as one of the greatest challenges it faces after Brexit. It was further noted that insurance is not on the agenda at an EU level in HOTREC (the umbrella association representing hotels, restaurants, cafés and similar establishments in Europe) meaning competitors in other countries are not feeling the same burden of insurance costs. This is particularly important to an export industry like the hotel sector.

APPENDIX 6 – Stakeholders' Comments provided through the Consultation Process

RGDATA:

"RGDATA is aware of shops that are shutting because of high insurance and claim costs".
"Irish awards and settlements are out of kilter with international norms particularly for simple injuries".
"Insurers continue to show scant regard for retailers' interests when managing claims – a consistent concern is that there is a lack of consultation by insurance companies with retailers on how claims should be managed – insurers are too eager to settle claims rather than contest them either on liability or damages".[145]

Keelings:

"Additional costs due to excessive award levels, inconsistent award levels, excessive legal costs and intervention fees, increased number of claims and exaggerated and fraudulent claims are putting increased pressure on this already highly competitive market".

"In order for businesses to be competitive and grow they need to be in control of their costs. It is difficult to do this when awards vary and costs are excessive. The increased costs of awards, legal costs and insurance are severely affecting job creation and maintenance of current levels of employment and are forcing some businesses to close down".

"The courts are handing out inflated awards. In many cases even where it is evident the claim is exaggerated or possibly fraudulent the court is making an award. Where an award is made costs follow, thus the employer has to pick up the bill".

"There is a question on the jurisdiction of the courts. Many claims are being submitted to a higher court than is necessary thus ensuring higher legal fees for the claimants' solicitors".[146]

Retail Ireland, IBEC:

"Many have opted for very high excess levels on employer liability and public liability insurance policies. This is in effect a move towards self-insurance. By doing so, they not only keep their annual insurance premium down, but they also have more say on whether or not to contest a questionable claim. Committing to self-insurance can be very risky for retailers, especially small retailers who need to ensure that they have sufficient cash reserves available to cover any losses".[147]

Licensed Vintners Association:

"It is clear that insurance premiums are a very significant cost for the Dublin licensed trade and that premiums are escalating at an unsustainable pace. It is clearly hampering the competitiveness of our industry and is threatening the viability of some pubs".

[145] RGDATA Submission to the Cost of Insurance Working Group, March 2017
[146] Keelings Group Submission to the Cost of Insurance Working Group, May 2017
[147] Retail Ireland Submission to the Cost of Insurance Working Group, May 2017

"Over the past 3-5 years there has been a significant reduction in the number of insurance companies willing to provide cover for the licensed trade and indeed, the wider hospitality sector. This development is particularly felt in the late bar scene, with our members reporting that it is increasingly difficult to obtain cover, even at exorbitant premiums. This development is a real threat to the viability of some pub and late bar businesses".[148]

Vintners' Federation of Ireland:

The VFI state that "insurance remains one of the biggest costs affecting business" and a survey of its members revealed that insurance costs represent the main type of "costs which currently cause…most concern" to them.[149]

Chambers Ireland:

"Price volatility causes uncertainty [and] can even bring viability into play or need to close down aspects of a business (e.g., night club in a hotel)".[150]

Irish Hotels Federation:

"Rising insurance premiums and a growing compensation culture are having a detrimental impact on cost competitiveness within our sector. This is one of the greatest challenges facing our sector (after Brexit)".

"In addition to rising insurance premiums, other concerns include:

- *the levels of excess required by insurance providers*
- *insufficient competition within the market catering for hotels*
- *increasing numbers of fraudulent and exaggerated claims*
- *excessive legal costs associated with defending claims".*[151]

Construction Industry Federation:

"Practically, the issues arising for employers [include]:

- *Continued increase in premium over and above what would be expected by increase in payroll*
- *Concern about the impact this has on business viability – it is expected that some companies will experience a 100% increase in premium over 12 months*
- *Effectiveness/ ineffectiveness of the Injuries Board – the IB (formally PIAB) was initially very effective in controlling costs but the view is that this is no longer the case and the system is not effective in dealing with spurious claims and that awards are too high*

[148] Licensed Vintners Association Submission to the Cost of Insurance Working Group, March 2017
[149] Vintners' Federation of Ireland Submission to the Cost of Insurance Working Group, October 2016
[150] Chambers Ireland Submission to the Cost of Insurance Working Group, March 2017
[151] Irish Hotels Federation Submission to the Cost of Insurance Working Group, March 2017 and *Insurance Claims Issues in Ireland:* a report and recommendations to the Irish Hotels Federation by BLM, December 2017.

- *Immediate withdrawal / release of cases involving mental trauma [from PIAB process] so ending up in the Court system – concern that this is being abused*
- *Legal costs too high and prolonged involvement in cases pushes up costs*
- *Insurance companies are seen as not being proactive enough in fighting spurious cases – this encourages 'copy-cat' cases. Early and easy settlement of spurious cases also encourages more cases.*
- *General frustration at the apparent lack of return for large investment in health and safety management*
- *Lack of consistency of Judges relating to awards*
- *In compensation cases (particularly because of the nature of construction projects) the net is spread wide and totally innocent, unconnected companies incur costs extracting themselves from cases".*[152]

[152] Construction Industry Federation Submission to the Cost of Insurance Working Group, May 2017

APPENDIX 7 – Calendar Year versus Accident Year

Financial statements report data on a calendar year basis. However, payments and reserve changes may be made on accidents that occurred in prior years, thus not giving an accurate picture of the business that is currently insured. Therefore, it is important to understand the difference between calendar year and accident year losses.

An accident year grouping of claims means that all the claims relating to events that occurred in a 12-month period are grouped together irrespective of when they are actually reported and irrespective of the year in which the period of cover commenced.

Calendar Period Losses consist of payments and reserve changes that are recorded on the Company's financial records during the period in question, without regard to the period in which the accident occurred. Calendar period results do not change after the end of the period; even as new claim information develops.

Accident Period

Losses consist of payments and reserves for losses that occurred in a particular period (i.e., the "accident period"). Accident period results will change over time as the estimates of losses change due to payments and reserve changes for all accidents that occurred during that period. Projection of ultimate losses by accident period is an important part of the reserve analysis.

A loss/claims triangle is the primary method in which actuaries organise claims data that will be used in actuarial analysis. The reason it is called a triangle is that a typical submission of claim data from an insurer shows numeric values forming a triangle when viewed.

An accident year paid loss triangle sets out data on two dimensions, the first is accident year, i.e. all paid losses from all claims occurring in that accident year and the second is calendar year, i.e. the total of payments for each accident year as at the end of that calendar year.

Accident year experience is used to indicate whether premiums effectively cover an insurer's losses. A negative stat indicates that the premiums were not enough to cover losses. Accident year experience typically includes losses when they occur, not when they are reported.

Calendar year experience includes losses incurred during the calendar year and premiums earned during the same period of time. Losses include incurred but not reported (IBNR) losses, and changes to loss reserves.

APPENDIX 8 – Relevant Insurance Ireland Data

Chart 1: Employer Liability Insurance – Key Metrics

EL Data in millions - Financial Year								
Metric No.	**Metric Name**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2011-2016**
1	**Gross Earned Premium (GEP)**	161.2	164.6	162.0	169.7	171.4	187.6	1,016
2	**Investment income**	19.6	33.7	12.1	18.7	15.3	10.5	109.9
3	**Total Expenditure**	136.7	183.5	157.9	202.4	318.5	295.7	1,294.6
4	**Gross Incurred Claims**	92.9	134.0	105.4	154.6	269.7	243.0	999.6
5	**Gross Commission**	15.5	14.6	18.2	18.7	20.1	22.4	109.6
6	**Gross Mgmt Expenses**	28.3	34.8	34.4	29.0	28.7	30.3	185.4
7[1]	**GEP - Total Expenditure**	24.5	(18.9)	4.1	(32.7)	(147.1)	(108.1)	(278.2)
8[2]	**GEP + Inv Income - Expenditure**	44.1	14.8	16.2	(14.0)	(131.8)	(97.6)	(168.3)
9[3]	**Claims as % of GEP**	58%	81%	65%	91%	157%	130%	98%
10[4]	**Total Expenditure as % of GEP**	85%	111%	97%	119%	186%	158%	127%
11[5]	**Commission + Mgmt Expenses as % of GEP**	27%	30%	32%	28%	28%	28%	29%
12[6]	**Average Earned Premium (AEP)**	N/A	N/A	N/A	N/A	N/A	N/A	N/A
13[7]	**Inv. Income as % of GEP**	12.1%	20.5%	7.5%	11.0%	8.9%	5.6%	10.8%
14[8]	**Mgmt Expenses as % of GEP**	17.5%	21.2%	21.2%	17.1%	16.7%	16.1%	18.2%
15[9]	**GEP year-on-year change**		2.1%	-1.6%	4.7%	1.0%	9.5%	3.1%
16[10]	**Gross Commission as % of GEP**	9.6%	8.9%	11.2%	11.0%	11.7%	11.9%	10.8%

Metric No.	**Metric Name**	**Formula / Description**
1	**Gross Earned Premium (GEP)**	Written premium pro-rata'd to the years on cover - gross of reinsurance and commission
2	**Investment Income**	Insurer income received from investments by calendar year
3	**Total Expenditure**	Gross Incurred Claims+Gross Commission+Gross Mgmt Expenses
4	**Gross Incurred Claims**	
5	**Gross Commission**	Commissions paid to brokers to cover business acquisition costs
6	**Gross Management Expenses**	Other expense - typically representing operating expense of insurers
7[1]	GEP - Expenditure	1 - 3
8[2]	GEP + Inv Income - Expenditure	1 + 2 - 3
9[3]	Claims as % of GEP	4 ÷ 1
10[4]	Total Expenditure as % of GEP	3 ÷ 1
11[5]	Commission + Mgmt Expenses as % of GEP	(5 + 6) ÷ 1
12[6]	Average Earned Premium (AEP)	N/A
13[7]	Inv. Income as % of GEP	2 ÷ 1
14[8]	Mgmt Expenses as % of GEP	6 ÷ 1
15[9]	GEP year-on-year change	Year-on-Year % change of metric 1
16[10]	Gross Commission as % of GEP	5 ÷ 1

Chart 2: Public Liability Insurance – Key Metrics

PL Data in millions - Financial Year								
Metric No.	Metric Name	2011	2012	2013	2014	2015	2016	2011-2016
1	Gross Earned Premium (GEP)	280.2	249.6	300.0	314.9	342.3	370.3	1,857
2	Investment income	30.2	73.9	37.3	45.7	22.7	18.7	228.5
3	Total Expenditure	210.9	384.1	314.2	279.7	225.1	373.9	1,787.8
4	Gross Incurred Claims	143.6	315.4	238.2	200.5	144.6	284.3	1,326.7
5	Gross Commission	21.1	21.1	30.2	33.0	34.2	41.3	180.9
6	Gross Mgmt Expenses	46.1	47.7	45.8	46.2	46.3	48.3	280.3
7[1]	GEP - Expenditure	69.3	(134.6)	(14.2)	35.2	117.3	(3.6)	69.4
8[2]	GEP + Inv Income - Expenditure	99.5	(60.7)	23.1	80.9	140.0	15.1	298.0
9[3]	Claims as % of GEP	51%	126%	79%	64%	42%	77%	71%
10[4]	Total Expenditure as % of GEP	75%	154%	105%	89%	66%	101%	96%
11[5]	Commission + Mgmt Expenses as % of GEP	24%	28%	25%	25%	24%	24%	25%
12[6]	Average Earned Premium (AEP)	N/A	N/A	N/A	N/A	N/A	N/A	N/A
13[7]	Inv. Income as % of GEP	10.8%	29.6%	12.4%	14.5%	6.6%	5.0%	12.3%
14[8]	Mgmt Expenses as % of GEP	16.5%	19.1%	15.2%	14.7%	13.5%	13.0%	15.1%
15[9]	GEP year-on-year change		-10.9%	20.2%	5.0%	8.7%	8.2%	5.7%
16[10]	Gross Commission as % of GEP	7.5%	8.4%	10.1%	10.5%	10.0%	11.2%	9.7%

Metric No.	Metric Name	Formula / Description
1	Gross Earned Premium (GEP)	Written premium pro-rata'd to the years on cover - gross of reinsurance and commission
2	Investment Income	Insurer income received from investments by calendar year
3	Total Expenditure	Gross Incurred Claims+Gross Commission+Gross Mgmt Expenses
4	Gross Incurred Claims	
5	Gross Commission	Commissions paid to brokers to cover business acquisition costs
6	Gross Management Expenses	Other expense - typically representing operating expense of insurers
7[1]	GEP - Expenditure	1 - 3
8[2]	GEP + Inv Income - Expenditure	1 + 2 - 3
9[3]	Claims as % of GEP	4 ÷ 1
10[4]	Total Expenditure as % of GEP	3 ÷ 1
11[5]	Commission + Mgmt Expenses as % of GEP	(5 + 6) ÷ 1
12[6]	Average Earned Premium (AEP)	N/A
13[7]	Inv. Income as % of GEP	2 ÷ 1
14[8]	Mgmt Expenses as % of GEP	6 ÷ 1
15[9]	GEP year-on-year change	Year-on-Year % change of metric 1
16[10]	Gross Commission as % of GEP	5 ÷ 1

Chart 3: Employer and Public Liability Insurance – Reported Claims

Metric Name	2011	2012	2013	2014	2015	2016	Average
EL Reported Claims	7,121	6,467	6,148	6,847	6,707	5,550	6,473
PL Reported Claims	18,360	12,028	14,455	14,821	14,005	14,430	14,683

APPENDIX 9 – CSO Data Collection and SPPI Classification

Services Producer Price Index (SPPI)

According to Eurostat, the SPPI is a business cycle indicator which provides information on the development of prices for numerous service industries. This information is used for the analysis of inflation and its sources, but also for the deflation of value measures in the service sector. It includes service producer prices for all uses (B2All indicators), i.e. services consumed by private consumers, by business consumers and others. However, the bulk of the service industries covered by the indicator are those which are mainly demanded by businesses (B2B indicator), they include for example freight transport, legal and accounting services, advertising and market research. The collection and compilation of SPPI data is governed by the scope of the European Parliament and Council Regulation (EC) No 1165/1998, and currently insurance is not part of this index.

The Working Group understands that the CSO is involved in the negotiation of a new legislative proposal in the European Council at the moment. The aim of this proposal is to expand the coverage of the SPPI (along with many other surveys related to business statistics), however the Working Group understands that it is not planned to expand the scope to include non-life insurance. The European Commission, in correspondence with the CSO, set out that it did not collect financial sector related data as the ECB already collect data for the financial sector and that they did not want to replicate work and create unnecessary costs and burden. The Working Group noted however that the ECB are more concerned with financial supervision and balance sheets rather than producing business cycle statistics such as price indices.

CSO Structural Business Statistics

The Annual Service Inquiry (ASI) collects information on the operating costs of businesses broken down into various categories - one of which is insurance. This information is not published. Furthermore, the insurance field is not broken down into employer liability and public liability therefore includes all insurance types, including motor and premises.

CSO Balance of Payments Survey

The CSO Balance of Payments (BOP) Survey collects Profit & Loss and Balance Sheet information from non-life and life insurance companies operating in Ireland. [153] The purpose of this survey is to compile statistics on transactions between Irish residents and the rest of the world.

Since 2016, information on the premiums by type of insurance written (life, house, health, transport and travel, other insurance) and category of customer (households, firms, NPISH, government) is collected from insurance companies who sell over €10 million worth of premiums to Irish customers annually. The purpose of the data collection is to provide summary data by insurance type previously provided in the Central Bank's Insurance Statistics publication which is used in the compilation of personal consumption figures in the national accounts.

[153] Balance of Payments Survey, Central Statistics Office, available at: http://www.cso.ie/en/methods/balanceofpayments/

This additional data is not published and the Working Group understands that the CSO does not plan to publish it in the future. The CSO believes that while this data may be used as an indicator of the value of insurance premiums earned by Irish Insurance companies from Irish firms, it will be difficult to use as an indicator of premium inflation as the CSO does not have information relating to the premiums paid by the firms or the firms' characteristics that are behind the premium revenue generated. Another possible limitation would be that the Survey does not include information on insurance premiums that Irish Firms are paying to non-Irish resident Insurance companies.

SPPI Classification

The SPPI covers a limited range of service industries - the following industries are selected (based on the Nace Rev 2 Classification):

H – Transportation & Storage
49.4 Freight transport by road and removal services
50.1/50.2 Sea and coastal transport
51 Air transport
52.1/52.24 Warehousing, storage and cargo handling
53.1/53.2 Postal and courier activities

J – Information & Communication
62 Computer programming and consultancy

M - Professional, Scientific & Technical Activities
69.1/69.2/70.2 Legal, accounting, public relations and business management and consultancy
71.1/71.2 Architecture, engineering and technical testing
73.1/73.2 Advertising, media representation and market research

N – Administrative and Support Services Activities
78 Employment activities
80 Security and investigation activities
81.2 Industrial and building Cleaning

APPENDIX 10 – *Personal Injuries Assessment Bill (Amendment) Bill 2017* – Relevant Provisions

To provide that –

Section 25 of the Principal Act is hereby amended by –

The addition of the following subsections:

"(3) If a claimant fails to comply with a request under section 23 and if the claimant brings proceedings in accordance with this Act,

(a) the court shall have regard to the failure of the claimant to comply with the request, and
(b) the court, in its discretion, shall determine what evidence of information that was or should have been known to the claimant but not submitted to the Board prior to the making of an assessment will be admissible in evidence in said proceedings, and
(c) the court, in its discretion, may determine that no award of costs nor other order providing for costs may be made in favour of the claimant.

(4) If a respondent fails to comply with a request under section 23 for additional information and if the claimant brings proceedings in accordance with this Act,

(a) the court shall have regard to the failure of the respondent to comply with the request, and
(b) the court, in its discretion, shall determine what evidence of information that was or should have been known to the respondent but not submitted to the Board, upon request, prior to the making of an assessment will be admissible in evidence in said proceedings, and
(c) the court, in its discretion, may determine that no award of costs nor other order providing for costs may be made in favour of the respondent.

(5) If a claimant fails to comply with a request under section 24 (2) and he or she fails to attend a medical examination without reasonable cause, and if the claimant brings proceedings in accordance with this Act,

(a) the court shall have regard to the failure of the claimant to comply with the request under section 24 (2), and
(b) the court, in its discretion, may determine what medical evidence may be admissible in evidence in any Court proceedings, and
(c) the court, in its discretion, may determine that no award of costs nor other order providing for costs may be made in favour of the claimant.

APPENDIX 11 – *Civil Liability and Courts Act 2004* – Relevant Notification Provisions

Letter of claim.

8.—(1) Where a plaintiff in a personal injuries action fails, without reasonable cause, to serve a notice in writing, before the expiration of 2 months from the date of the cause of action, or as soon as practicable thereafter, on the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her, the court hearing the action may—

(*a*) draw such inferences from the failure as appear proper, and

(*b*) where the interests of justice so require—

(i) make no order as to the payment of costs to the plaintiff, or

(ii) deduct such amount from the costs that would, but for this section, be payable to the plaintiff as it considers appropriate.

(2) In this section "date of the cause of action" means—

(*a*) the date of accrual of the cause of action, or

(*b*) the date of knowledge, as respects the cause of action concerned, of the person against whom the wrong was committed or alleged to have been committed,

whichever occurs later.

Section 8 of the 2004 Act was amended by section 220 of the Legal Services Regulation Act 2015. Section 220 has not yet been commenced.

Other amendments of Civil Liability and Courts Act 2004

220. (1) Section 8 of the Civil Liability and Courts Act 2004 is amended—

(a) in subsection (1), by substituting "Subject to subsection (3), where" for "Where", and

(b) by inserting the following subsection after subsection (2):

"(3) This section does not apply to a clinical negligence action within the meaning of Part 2A."

(2) Section 17 of the Civil Liability and Courts Act 2004 is amended—

(a) in subsection (1), by substituting "Subject to subsection (6A), the" for "The", and

(b) by inserting the following subsection after subsection (6):

"(6A) This section does not apply to a clinical negligence action within the meaning of Part 2A if an offer to settle the claim had, before the bringing of the action, been made by any party to the action in accordance with the pre-action protocol."

(3) The Civil Liability and Courts Act 2004 is amended by inserting the following section after section 17:

"Pre-action offers of settlement in clinical negligence claims

17A. (1) In a case of an action to which section 17 does not apply by virtue of subsection (6A) of that section, a copy of the offer of settlement shall be lodged in court by, or on behalf of, the party by which it was made.

(2) The terms of the offer of settlement shall not be communicated to the judge in the trial of the clinical negligence action until after he or she has delivered judgment in the action.

(3) The court shall, when considering the making of an order as to the payment of the costs in the action, have regard to—

(a) the terms of the offer of settlement, and

(b) the reasonableness of the conduct of the party by whom the offer was made in making the offer.

(4) This section is in addition to and not in substitution for any rule of court providing for the payment into court of a sum of money in satisfaction of a cause of action or the making of an offer of tender of payment to the other party or parties to an action".

APPENDIX 12 – IIF/IBEC Communication Guidelines for Insurers & Policyholders

IIF/IBEC COMMUNICATION GUIDELINES FOR INSURERS & POLICYHOLDERS

- SAFETY AT WORK AND ON THE ROAD
- HANDLING OF PERSONAL INJURY CLAIMS
- LIABILITY & MOTOR POLICY RENEWALS

INTRODUCTION

These guidelines have been prepared jointly by the Irish Insurance Federation (IIF) and the Irish Business and Employers' Confederation (IBEC) to help business and commercial insurance policyholders and their insurers to improve communication and understanding as to how arrangements in respect of insurances, especially the handling of personal injury claims, will be dealt with.

Premiums are principally driven by claims costs. Claims costs are determined by the frequency and average cost of claims (including both compensation paid and legal and other delivery costs). Policyholders have statutory and contractual obligations to take reasonable steps to minimise the risk of accidents, and it is in all parties' interest to reduce claims frequency by improving risk management and the effectiveness of safety policy. Claims costs can be moderated by prompt and professional investigation of claims, a shared determination to defend suspected fraudulent and exaggerated claims - while at all times ensuring fair treatment of all claimants - and mutually agreed procedures for handling and settling claims.

GENERAL SAFETY POLICY

The **Policyholder** undertakes to comply with all relevant legislation, and in particular to adopt and abide by a safety statement. Adoption of the Workplace Safety Group's Voluntary Code of Practice is recommended and encouraged.

The **Insurer** will support policyholders' safety efforts with appropriate risk improvement and loss control advice.

AFTER ANY ACCIDENT

The **Policyholder** undertakes to:

- notify the accident to the insurer immediately and submit to the insurer a completed accident report form as soon as possible, where required;
- record the accident as soon as practicable, incorporating all relevant details, and notify the Gardaí in the case of road accidents where required by law to do so;
- preserve the *locus* of the accident for inspection wherever possible, or photograph the *locus* if it is not possible to preserve it for inspection by the insurer;
- where applicable, preserve any relevant CCTV or video recording for inspection by the insurer;
- identify witnesses to the accident and take witness statements if possible and appropriate;
- pass on unanswered to the insurer any correspondence or other communication from the injured employee or his/her legal or medical advisers as soon as it is received.

The **Insurer** undertakes to:

- where investigation of the circumstances of the accident is deemed necessary, carry out the investigation as soon as possible; when carrying out investigations, consideration will be given to any action which might prevent future accidents and any recommendations will be communicated to the policyholder;
- avoid undue disruption to the workplace or work processes of the policyholder during the investigation;
- advise the policyholder on receipt of notification of the accident as to the claims reference and the identity of the person handling the claim in the insurer's claims department;
- make available for verification by the policyholder as necessary, any witness statements obtained by the insurer's investigators or any other material documentation relating to the circumstances of the accident.

CLAIMS HANDLING AND LITIGATION

The **Policyholder** undertakes to:

- notify the insurer of any claim made or of any potential claim. If the claim arises from a gradually operating cause (e.g. illness which arises from exposure to a particular hazard over a period of time) all insurers who may have had an exposure at any material time should be notified;
- provide all relevant information in relation to the plaintiff's employment and accident history, the circumstances of the accident, witness details etc. as soon as possible.

The **Insurer:**

- will be available as and when necessary to confer with the policyholder in relation to the case and to discuss assessment of liability and damages;
- undertakes to advise the policyholder of the issue of proceedings, and the solicitor nominated to defend the case.

SETTLEMENTS

The **Insurer** undertakes to:

- consult with the policyholder in advance of proposed settlement discussions whenever practicable;
- explain its assessment of the case and the exposure/risks associated with settling and/or defending the case; and
- take into account any views expressed by the policyholder in finalising its approach to settlement negotiations.

The **Policyholder** may:

- offer views as to the timing and amount of any settlement, which the insurer will take into account in approaching the settlement process;
- provide and/or draw attention to any material facts relevant to assessment of liability and/or quantum of damages.

In cases deemed to be fraudulent (spurious OR exaggerated), the **Insurer** and the **Policyholder** jointly undertake to make every reasonable effort to defend the case fully and to recover costs.

Nothing in these Guidelines overrides or amends in any way the contractual rights of either party in relation to claims settlement or any rights of subrogation acquired and/or exercisable by the **Insurer** before or after payment of any claim.

LIABILITY & MOTOR POLICY RENEWALS

Where the insurance is arranged directly by the Policyholder with the Insurer, the **Insurer** undertakes to issue renewal terms to the Policyholder at least 15 working days in advance of policy renewal date.

Where the insurance is arranged through an insurance intermediary (e.g., insurance broker), the **Insurer** undertakes to issue renewal terms to the intermediary in time for the intermediary to provide the information to the Policyholder at least 15 working days in advance of policy renewal date.

If any information is required by the Insurer in order to calculate renewal terms it will be sought at least 25 working days before renewal. The obligation on the Insurer under paragraph one or two above is conditional on the Policyholder providing any such information in good time.

The **Policyholder** may, at any time within 15 working days of renewal date, contact the Insurer or insurance intermediary, as appropriate, to confirm renewal terms.

OTHER ISSUES

1. ***REHABILITATION***

In the case of a workplace injury to an employee of the Policyholder, the **Insurer** will, in accordance with the Workplace Safety Group's Voluntary Code of Practice, support appropriate measures to facilitate the injured employee's rehabilitation from injury and return to work.

2. ***COMPENSATION FOR LOSS OF EARNINGS***

Policyholders and **Insurers** will actively support measures to ensure that only earnings losses supported by proof of declared earnings history from the Revenue Commissioners and records of benefits sought under social insurance are payable in the event of a claim for personal injury covered by motor or liability insurance.

NOTE: In putting these guidelines into practice, insurers and policyholders should allow for and plan insurance intermediary involvement. All parties should be aware that corresponding *via* intermediaries may add to the time needed to communicate claims and renewal information. It is therefore necessary to define clearly the role of the intermediary in the claims and renewal processes. In suitable cases, regular reviews of all outstanding claims involving the policyholder, intermediary and insurer may be appropriate and should be scheduled.

APPENDIX 13 – *Civil Liability and Courts Act 2004* – Relevant Fraud Provisions

Verifying affidavit.

14.—(1) Where the plaintiff in a personal injuries action—

(*a*) serves on the defendant any pleading containing assertions or allegations, or

(*b*) provides further information to the defendant,

the plaintiff (or in the case of a personal injuries action brought on behalf of an infant or person of unsound mind by a next friend or a committee of the infant or person, the next friend or committee) shall swear an affidavit verifying those assertions or allegations, or that further information.

(2) Where the defendant or a third party in a personal injuries action serves on another party to the action any pleading containing assertions or allegations, the defendant or third party, as the case may be, shall swear an affidavit verifying those assertions or allegations.

(3) Where a personal injuries action is brought on behalf of an infant or a person of unsound mind by a next friend or a committee of the infant or person, an affidavit to which *subsection (1)* applies sworn by the next friend or committee concerned shall, in respect of assertions, allegations or further information, of which he or she does not have personal knowledge, state that he or she honestly believes the assertions, allegations or further information, to be true.

(4) An affidavit under this section shall be lodged in court not later than—

(*a*) 21 days after the service of the pleading concerned or such longer period as the court may direct or the parties may agree, or

(*b*) in the case of a requirement to which *subsection (8)(b)* applies, 7 days before the date fixed for the trial of the personal injuries action concerned.

(5) If a person makes a statement in an affidavit under this section—

(*a*) that is false or misleading in any material respect, and

(*b*) that he or she knows to be false or misleading,

he or she shall be guilty of an offence.

(6) The reference to court in *subsection (4)* shall—

(*a*) in the case of a personal injuries action brought in the High Court, include a reference to the Master of the High Court, and

(*b*) in the case of a personal injuries action brought in the Circuit Court, include a reference to the county registrar for the county in which the proceedings concerned were issued.

(7) An affidavit sworn under this section shall include a statement by the deponent that he or she is aware that the making of a statement by him or her in the affidavit that is false or misleading in any material respect and that he or she knows to be false or misleading is an offence.

(8) This section applies to personal injuries actions brought—

(*a*) on or after the commencement of this section, and

(*b*) before such commencement, where a party to the action requires (not later than 21 days before the date fixed for the trial of the action) another party to the action to swear an affidavit in accordance with this section.

False evidence, etc.

25.—(1) If, after the commencement of this section, a person gives or dishonestly causes to be given, or adduces or dishonestly causes to be adduced, evidence in a personal injuries action that—

(*a*) is false or misleading in any material respect, and

(*b*) he or she knows to be false or misleading,

he or she shall be guilty of an offence.

(2) If, after the commencement of this section, a person gives, or dishonestly causes to be given, an instruction or information, in relation to a personal injuries action, to a solicitor, or person acting on behalf of a solicitor, or an expert, that—

(*a*) is false or misleading in any material respect, and

(*b*) he or she knows to be false or misleading,

he or she shall be guilty of an offence.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

(4) This section applies to personal injuries actions—

(*a*) brought on or after the commencement of this section, and

(*b*) pending on the date of such commencement.

Fraudulent actions.

26.—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—

(*a*) is false or misleading, in any material respect, and

(*b*) he or she knows to be false or misleading,

the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under *section 14* that—

(*a*) is false or misleading in any material respect, and

(*b*) that he or she knew to be false or misleading when swearing the affidavit,

dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.

(3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.

(4) This section applies to personal injuries actions—

(*a*) brought on or after the commencement of this section, and

(*b*) pending on the date of such commencement.

Offences.

29.—(1) A person guilty of an offence under this Part shall be liable, upon conviction on indictment, to a fine not exceeding €100,000, or imprisonment for a term not exceeding 10 years, or to both.

(2) The District Court may try summarily a person charged with an offence under this Part if—

(*a*) the court is of the opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,

(*b*) the person, upon being informed by the court of his or her right to be tried with a jury, does not object to being tried summarily, and

(*c*) the Director of Public Prosecutions consents to the person being tried summarily for the offence.

(3) A person who is tried under and in accordance with *subsection (2)* shall be liable, upon conviction, to a fine not exceeding €3,000, or imprisonment for a term not exceeding 12 months, or to both.

(4) Section 13 of the Criminal Procedure Act 1967 shall apply in relation to an offence under this Part as if, in lieu of the penalties specified in subsection (3)(*a*) of that section, there were specified therein the penalties provided for in *subsection (3)*, and the reference in subsection (2)(*a*) of the said section 13 to the penalties provided for by subsection (3) shall be construed and have effect accordingly.

APPENDIX 14 – *Criminal Justice (Theft and Fraud Offences) Act 2001* - Relevant Offences

Obtaining services by deception.
7.—(1) A person who dishonestly, with the intention of making a gain for himself or herself or another, or of causing loss to another, by any deception obtains services from another is guilty of an offence.
(2) For the purposes of this section a person obtains services from another where the other is induced to confer a benefit on some person by doing some act, or causing or permitting some act to be done, on the understanding that the benefit has been or will be paid for.
(3) Without prejudice to the generality of *subsection (2)*, a person obtains services where the other is induced to make a loan, or to cause or permit a loan to be made, on the understanding that any payment (whether by way of interest or otherwise) will be or has been made in respect of the loan.
(4) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 5 years or both.

Forgery.
25.—(1) A person is guilty of forgery if he or she makes a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, to the prejudice of that person or any other person.
(2) A person guilty of forgery is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Using false instrument.
26.—(1) A person who uses an instrument which is, and which he or she knows or believes to be, a false instrument, with the intention of inducing another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.
(2) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Copying False Instrument.
27.—(1) A person who makes a copy of an instrument which is, and which he or she knows or believes to be, a false instrument with the intention that it shall be used to induce another person to accept it as a copy of a genuine instrument and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.
(2) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Using copy of false instrument.
28.—(1) A person who uses a copy of an instrument which is, and which he or she knows or believes to be, a false instrument with the intention of inducing another person to accept it as a copy of a genuine instrument and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or another person is guilty of an offence.
(2) A person guilty of an offence under this section is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both.

Custody or control of certain false instruments, etc.
29.—(1) A person who has in his or her custody or under his or her control an instrument which is, and which he or she knows or believes to be, a false instrument with the intention that it shall be used to induce another person to accept it as genuine and, by reason of so accepting it, to do some act, or to make some omission, or to provide some service, to the prejudice of that person or any other person is guilty of an offence.

APPENDIX 15 – List of Judgments in which Section 26 of the 2004 Act was discussed

Cases where a section 26 application was successful:

1. Carmello v. Casey [2007] IEHC 362, [2008] 3 I.R. 524
2. Gammell v. Doyle [2009] IEHC 416, (Unreported, High Court, Hanna J., 28 July 2009)
3. Farrell v. Dublin Bus [2010] IEHC 327, (Unreported High Court, Quirke J., 30 July 2010)
4. Higgins v. Caldark Limited [2010] IEHC 527, (Unreported, High Court, Quirke J., 18 November 2010)
5. Folan v. Ó Corraoin [2011] IEHC 487, (Unreported, High Court, Murphy J., 16 November 2011)
6. Nolan v. Mitchell [2012] IEHC 151, (Unreported, High Court, Smyth J., 20 January 2012)
7. Rahman v. Craigfort Taverns Limited [2012] IEHC 478, (Unreported, High Court, Ó Néill J., 11 October 2012)
8. Montgomery v. Minister for Justice [2012] IEHC 443, (Unreported, High Court, Ó Néill J., 23 October 2012)
9. Meehan v. BKNS Curtain Walling Systems Ltd. [2012] IEHC 441, (Unreported, High Court, Ryan J., 26 October 2012)
10. Salako v. O'Carroll [2013] IEHC 17, (Unreported, High Court, Peart J., 25 January 2013)
11. Ludlow v. Unsworth [2013] IEHC 153, (Unreported, High Court, Ryan J., 12 April 2013)
12. Waliszewski v. McArthur and Company (Steel and Metal) Ltd. [2015] IEHC 264, (Unreported, High Court, Barton J., 24 April 2015)
13. Platt v. OBH Luxury Accommodation Ltd. [2015] IEHC 793, (Unreported, High Court, Barton J., 11 November 2015). Also, Platt v. OBH Luxury Accommodation Ltd. [2017] IECA 221.

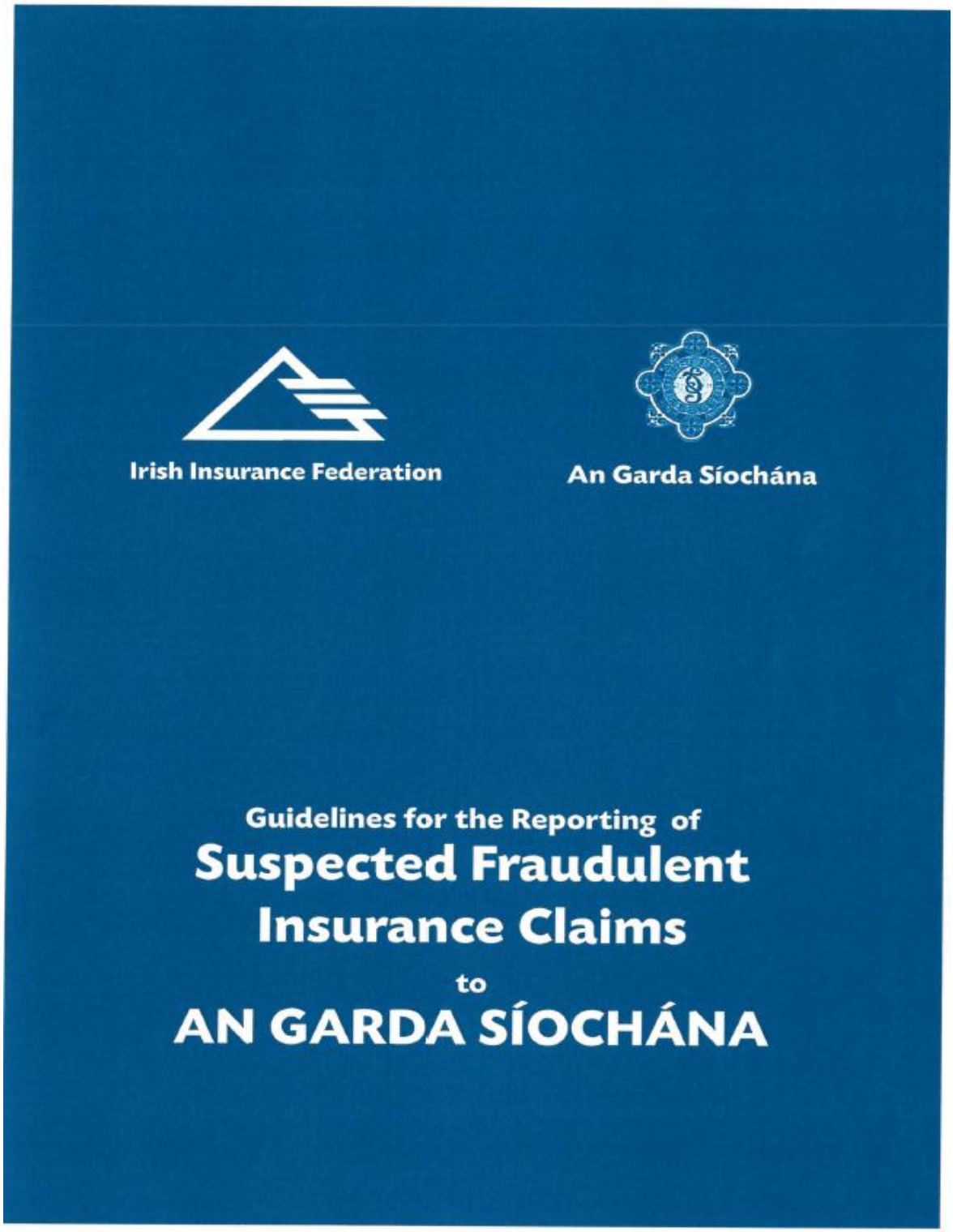
Cases dismissed due to liability rather than section 26:

14. Behan v. Allied Irish Banks plc [2009] IEHC 554, (Unreported, High Court, Murphy J., 18th December 2009) – *Section 26 was discussed but the case was dismissed on liability grounds*
15. Flanagan v. Bus Átha Cliath [2009] IEHC 98, (Unreported, High Court, Peart J., 5 February 2009) – *dismissed on liability grounds. Judge therefore found it was unnecessary to address the section 26 allegation.*
16. Danagher v. Glanties Inns Limited [2010] IEHC 214, (Unreported, High Court, Irvine J., 26 March 2010) – *dismissed on liability grounds. Judicial comment included however that the court would have been obliged to dismiss the claim under section 26 if it had not been dismissed on liability grounds.*
17. De Cataldo v. Petro Gas Group Limited [2012] IEHC 495, (Unreported, High Court, Ó Néill J., 30 November 2012) – *dismissed on liability. No specific mention of section 26 or Act in judgment, but the Judge viewed the evidence put forward by the plaintiff as "completely unreliable"*

Unsuccessful section 26 applications:

18. Mulkern v. Flesk [2005] IEHC 48, (Unreported, High Court, Kelly J., 25th February 2005)
19. Ahern v. Bus Eireann [2006] IEHC 207; (Unreported, High Court, Feeney J., 16 May 2006) Ahern v. Bus Eireann [2011] IESC 44, (Unreported, Supreme Court, 2 December 2011).
20. Corbett v. Quinn [2006] IEHC 222, (Unreported, High Court, Finnegan P., 25 July 2006)
21. Nolan v. Kerry Foods Limited [2012] IEHC 208, (Unreported, High Court, Irvine J., 30 March 2012)
22. Goodwin v. Bus Eireann [2012] IESC 9, (Unreported, Supreme Court, 23 February 2012)
23. Smith v. Health Service Executive [2013] IEHC 360, (Unreported, High Court, Ó Néill J., 26 July 2013)
24. Lawlor v. Carroll System Buildings (1970) Ltd. [2014] IEHC 579, (Unreported, High Court, Herbert J., 27 November 2014)
25. Looby v. Fatalaski [2014] IEHC 564, (Unreported, High Court, Barr J., 3 December 2014)
26. Kurzyna v. Michaelski [2015] IECA 135, (Unreported, Court of Appeal, 24 June 2015)
27. Hamill v. O'Callaghan [2015] IEHC 542, (Unreported, High Court, M. White J., 30 July 2015)
28. Boyle v. Governor of St Patrick's Institution [2015] IEHC 532, (Unreported, High Court, Barr J., 31 July 2015)
29. McLaughlin v. McDaid [2015] IEHC 810, (Unreported, High Court, Hanna J., 10 December 2015)
30. Maloney v. White [2016] IEHC 44, (Unreported, High Court, Barr J., 28 January 2016)
31. Plonka v. Norviss [2016] IEHC 137, (publication pending in 2016 IR)
32. Nolan v. O'Neill [2016] IECA 298, (Unreported, Court of Appeal, 21 October 2016) - to (overturned a High Court dismissal under s26)
33. Darragh v. Feeney [2017] IEHC 514, (Unreported, High Court, Meenan J., 31 July 2017)

APPENDIX 16 – Guidelines for the Reporting of Suspected Fraudulent Insurance Claims to An Garda Síochána



Criteria and guidelines for the reporting of suspected fraudulent insurance claims to An Garda Síochána

Introduction

Working together, An Garda Síochána and the Irish Insurance Federation (IIF) have agreed the following procedures for the reporting and investigation of suspected insurance fraud.

To what Station or Section within An Garda Síochána should a formal complaint be made?

- Any complaint can be discussed informally with the staff at the Assessment Unit of the Garda Bureau of Fraud Investigations (GBFI) at telephone number: (01) 6663740/41/42/43.
- Formal complaints of a less serious nature (described below) should be reported to the Superintendent in charge of the district in which the offence occurred, with a copy of the complaint sent to the Assessment Unit of the GBFI for information purposes. The Garda Website (www.garda.ie) has details of all Garda Stations and Garda Districts in the country. Each Garda District is under the control of a Superintendent who is based at the District Headquarters station.

While it is difficult to lay down a precise definition, the following are among the criteria which would classify the less serious frauds:

i Monetary value;
ii Cases where the crime alleged is confined to a small geographical area; and,
iii Cases which do not involve complicated questions of law or procedure.

- In more serious or complex cases, the formal report should be made to the Detective Superintendent in charge of the GBFI. Following Assessment, it will be decided if a Garda investigation is warranted and if so, who will investigate the case.
- Reports of suspected fraud which arise from a previously reported crime such as burglary, theft, auto crime, criminal damage or a report of lost property should be reported to the Superintendent in charge of the Garda District dealing with the original occurrence.
- If the insurance company is in any doubt as to where or to whom the report should be made, the GBFI will be pleased to advise. Insurance companies should be aware that approaches for advice are most beneficial when made in the early stages of an enquiry.
- Where it is suspected that a number of fraudulent claims are related, the case should be referred to the GBFI.

What should be included in the formal report?

The official complaint should be in writing and outline the events giving rise to the suspicion of fraud. The events should be laid out in chronological order and reported as soon as possible after the event. The formal report should contain all relevant information surrounding the case. This should include the nature of the allegations being made, including the full name, address and date of birth of the claimant. The report should also include:

1 All available details of any other parties suspected of involvement in the alleged

fraudulent claim(s), including the reasons for suspicion;

2. A brief summary of the allegations including the value of the claims with relevant dates;
3. A full description of the nature of the claim and the circumstances surrounding it. This should include full details of any investigation already taken by the insurance company; loss adjusters or anyone acting on their behalf;
4. Copies of all relevant documents including copies of any available photographs and independent reports, each individually numbered and identified in the summary;
5. Names and addresses of all witnesses identified;
6. Details of any previous claims known to have been made to any insurance company;
7. The name of the senior liaison person in the insurance company who will liaise with the investigating Garda.

Delays in reporting a suspected fraud may assist the culprit and therefore the report should be made as soon as possible.

What steps are taken by the Gardaí on receipt of a formal complaint?

- Where a formal complaint has been made, it will be acknowledged on receipt. Following receipt of the complaint, the Gardaí may wish to talk to a number of people in the complainant company to ascertain the facts.
- The Gardaí will then, after consideration of the facts and their assessment of the complaint, decide if a Garda investigation is warranted.
- This decision will be communicated to the insurance company concerned as soon as possible.
- Should an investigation be undertaken, the investigating Garda will then contact the insurance company concerned to arrange for a detailed statement of complaint.
- Where following investigation, the Gardaí refer a case to the Office of the Director of Public Prosecutions, the final decision as whether criminal charges are to be brought will be taken by the DPP. In less serious cases the Gardaí themselves decide whether or not to institute a criminal prosecution.

What should the insurance company do?

- The insurance company should nominate a senior person responsible for the management of the case to whom the Gardaí can refer if necessary. It is envisaged that each company will channel all such referrals through one individual with the expertise required to handle them.
- Once the complaint has been reported to the Gardaí for investigation, the company should provide full assistance to the Gardaí as required, and be prepared to follow the case through to prosecution. This may involve the giving of evidence in court by witnesses from the insurance company.
- All original documents should be identified, handled with care and stored in a safe place.
- The insurer should be prepared to supply all original documents to the Gardaí on request.

Wherever possible the gathering of evidence should be carried out by persons who are familiar with the rules of evidence in criminal cases and have expertise in criminal investigations. Where there is nobody within the organisation with this knowledge or expertise then the person dealing with the case should consult with the Gardaí at an early stage for advice and guidance. Insurance companies without a specific fraud investigation department may find that the evidential qualities of their reports can be improved by using nominated staff who have received training in this area.

How should evidence be handled?

It is vital that all evidence is properly preserved and made available to the investigating Gardaí. In recent years great advances have been made in the field of forensic science and it is now possible to glean valuable evidence from an expert forensic examination of documents. Forensic tests include:

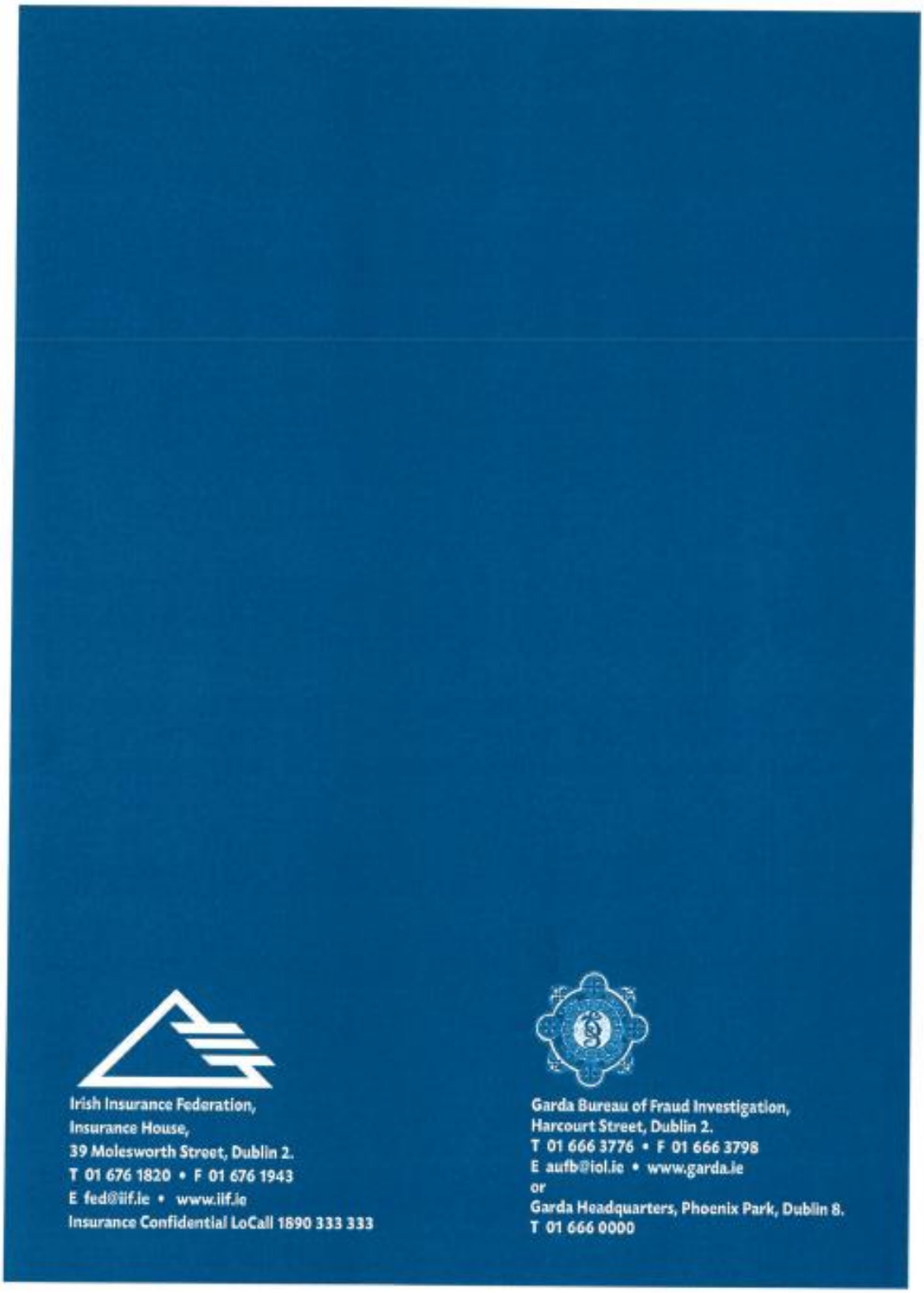
- Fingerprint analysis;
- Identifying alterations;
- Identification of handwriting;
- Identifying indentations;
- Comparison of inks.

Further advice and guidance on the investigation of fraud and the handling of evidence is available in a joint Garda Síochána / PricewaterhouseCoopers publication entitled Fraud Alert which is available at www.pwc.ie

EVIDENCE MUST BE HANDLED WITH CARE

The following are some important rules to adopt when handling evidence:

- ✔ Suspects should not be given access to documents or other evidence uncovered in the case.
- ✔ Preserve documents in the same state as you find them.
- ✔ Avoid unnecessary handling.
- ✔ Place each document in a clear plastic envelope.
- ✔ Ensure no unauthorised access to the document is permitted.
- ✔ No pencil or other marks should be made to the original document.
- ✔ The fewer people who have access to the document the better.
- ✔ Original documents will be required by the Gardaí wherever possible.
- ✔ A careful note should be maintained of the movements of all documents which may be required for production as evidence in court.
- ✔ Details of payments made on foot of fraudulent claims will be required including original cheques where available.
- ✔ Everything, no matter how insignificant it may appear should be documented. Details can be crucial – you can never take too many notes but you can often take too few.
- ✔ Notes made contemporaneously may be used as a "memory jogger" while giving evidence in the event that the case results in a prosecution. So, it is important to make notes at every stage of the investigation.


Irish Insurance Federation,
Insurance House,
39 Molesworth Street, Dublin 2.
T 01 676 1820 • F 01 676 1943
E fed@iif.ie • www.iif.ie
Insurance Confidential LoCall 1890 333 333
Garda Bureau of Fraud Investigation,
Harcourt Street, Dublin 2.
T 01 666 3776 • F 01 666 3798
E aufb@iol.ie • www.garda.ie
or
Garda Headquarters, Phoenix Park, Dublin 8.
T 01 666 0000

APPENDIX 17 – *Judicial Council Bill 2017* – Relevant Provisions

Judicial Studies Committee

17. (1) The Council shall establish a committee to be known as the Judicial Studies Committee.
(2) Subject to such directions (if any) as the Council may give to it, the function of the Judicial Studies Committee shall be to facilitate the continuing education and training of judges with regard to their functions.
(3) Without prejudice to the generality of subsection (2), the Judicial Studies Committee may—

(a) prepare and distribute relevant materials to judges,
(b) publish material relevant to its function,
(c) provide or assist in the provision of education and training on matters relevant to the exercise by judges of their functions, including but not limited to information technology,
(d) establish, maintain and improve communication with—

(i) bodies representing judges appointed to courts of places other than the State, and
(ii) international bodies representing judges.

APPENDIX 18 – *Legal Services Regulation Act 2015* – Relevant Provisions

Costs to follow event

169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—

(a) conduct before and during the proceedings,
(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,
(c) the manner in which the parties conducted all or any part of their cases,
(d) whether a successful party exaggerated his or her claim,
(e) whether a party made a payment into court and the date of that payment,
(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and
(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

(3) Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—

(a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or
(b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay under paragraph (a).

(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.

APPENDIX 19 – *Civil Liability and Courts Act 2004* – Relevant Mediation Provisions

Mediation Conference.

15.—(1) Upon the request of any party to a personal injuries action, the court may—

(*a*) at any time before the trial of such action, and

(*b*) if it considers that the holding of a meeting pursuant to a direction under this subsection would assist in reaching a settlement in the action,

direct that the parties to the action meet to discuss and attempt to settle the action, and a meeting held pursuant to a direction under this subsection is in this Act referred to as a "mediation conference".

(2) Where the court gives a direction under *subsection (1)*, each party to the personal injuries action concerned shall comply with that direction.

(3) A mediation conference shall take place—

(a) at a time and place agreed by the parties to the personal injuries action concerned, or

(b) where the parties do not agree a time and place, at a time and place specified by the court.

(4) There shall be a chairperson of a mediation conference who shall—

(*a*) be a person appointed by agreement of all the parties to the personal injuries action concerned, or

(*b*) where no such agreement is reached—

(i) be a person appointed by the court, and

(ii) (I) be a practising barrister or practising solicitor of not less than 5 years standing, or

(II) a person nominated by a body prescribed, for the purpose of this section, by order of the Minister.

(5) The notes of the chairperson of a mediation conference and all communications during a mediation conference or any records or other evidence thereof shall be confidential and shall not be used in evidence in any proceedings whether civil or criminal.

(6) The costs incurred in the holding and conducting of a mediation conference shall be paid by such party to the personal injuries action concerned as the court hearing the action shall direct.

Report of chairperson of mediation conference.

16.—(1) A person appointed under *section 15 (4)* to be the chairperson of a mediation conference shall prepare and submit to the court hearing the personal injuries action concerned a report, which shall set out—

(*a*) where the mediation conference did not take place, a statement of the reasons as to why it did not take place, or

(*b*) where the mediation conference did take place—

(i) a statement as to whether or not a settlement has been reached in the personal injuries action concerned, and

(ii) where a settlement has been entered into, a statement of the terms of the settlement signed by the parties thereto.

(2) A copy of a report prepared under *subsection (1)* shall be given to each party to the personal injuries action at the same time as it is submitted to the court under that subsection.

(3) At the conclusion of a personal injuries action, the court may—

(*a*) after hearing submissions by or on behalf of the parties to the action, and

(*b*) if satisfied that a party to the action failed to comply with a direction under *section 15 (1)*,

make an order directing that party to pay the costs of the action, or such part of the costs of the action as the court directs, incurred after the giving of the direction under *section 15 (1).*

APPENDIX 20 – Rules of the Court in relation to Mediation

Part VI of Order 1A of the Rules of the Superior Courts regulates mediation under section 15.

Rule 12

"(1) A request by a party for a direction of the Court under section 15 of the Act that a mediation conference be held shall be made by motion to the Court on notice to the opposing party or parties, grounded upon an affidavit sworn by or on behalf of the moving party.

(2) Where the Court directs that a mediation conference be held, it may adjourn the proceedings for such time as it considers appropriate to enable the mediation conference to be held.

(3) Where the Court directs that a mediation conference be held, it may extend the time for compliance by the parties or any of them with any provision of these Rules or any order of the court in the proceedings.

(4) The report under section 16 of the Act of the person appointed under section 15(4) of the Act to be the chairperson of a mediation conference shall be by way of affidavit which shall verify:

(a) his or her appointment as mediator;

(b) whether the mediation conference was or was not held;

(c) if not held, the reasons why the mediation conference did not take place;

(d) if held:

(i) the time and place at which the mediation conference was held;

(ii) the parties in attendance;

(iii) whether or not a settlement has been reached in the action;

And

(iv) the terms of any settlement signed by the parties."

See also counterpart rules in Circuit Court Rules (Order 5A Rule 9) and District Court Rules (Order 40A rules 9 and 10).

APPENDIX 21 – Composites of Questions from the Working Group to the Law Society of Ireland and Responses Received

Role of Law Society and Solicitors

1. **In the recent past there have been media reports on the practice of claims harvesting. Can you outline what the role of the Law Society is in relation to the regulation of solicitors in terms of:**
    a. **Solicitors who receive "leads" on potential personal injury claims from entities who advertise services relating to the handling of personal injury claims**
    b. **Advertising by solicitors relating to personal injury claims**
    c. **Potential promotion of personal injury claims by offering inducements such as funding a potential personal injury case**

    Please outline any recent actions you have taken in relation to any breaches of regulations relating to the above practices.

Response:

1.

(a) Section 62 of the Solicitors Act 1954 prohibits solicitors from rewarding or agreeing to reward unqualified persons for the introduction of legal business. Prohibited agreements are void. A breach of section 62 constitutes professional misconduct and may be referred to the Solicitors Disciplinary Tribunal. A solicitor who pays for a "lead" on a potential personal injury claim from a non-solicitor entity advertising services related to handling of personal injury claims would be in breach of section 62.
The Law Society is taking a proactive approach to breaches of section 62. The Law Society published a practice note on claims referrals and section 62 on 2 June 2017 to ensure that the profession is fully informed about the section. The Law Society has notified claims referral companies found to be targeting solicitors of the statutory prohibition on solicitors paying referral fees.

(b) The Solicitors (Advertising) Regulations 2002 prohibit solicitors' advertisements expressly or impliedly referring to claims or possible claims for damages for personal injuries or the possible outcome of claims for damages for personal injuries or the provision of legal services by a solicitor in connection with such claims or expressly or impliedly soliciting, encouraging or offering inducements to make such claims or to contact the solicitor with a view to such claims being made. Solicitors' advertisements may include the words "personal injuries" when providing factual information on legal services provided. These regulations are actively enforced by the Law Society.

(c) As stated, the Solicitors (Advertising) Regulations 2002 prohibit solicitors' advertisements offering inducements to make personal injuries claims. The regulations also prohibit solicitors' advertisements including words or phrases such as "no win no fee", "no foal no fee", "free first consultation" and other words or phrases of a similar nature which could be construed as meaning that legal services involving contentious business (which includes personal injuries claims) would be provided by a solicitor at no cost or reduced cost to the client. As stated, these regulations are actively enforced by the Law Society. While "no win no fee" may not be advertised, there is no prohibition on agreeing "no win no fee" terms with a client. This is a vital right to ensure access to justice in the absence of a comprehensive scheme of civil legal aid.

Recent actions

Since 2014 over 500 advertising matters have been formally considered by the Law Society. The substantial majority of these matters relate to solicitors' firms' websites. The solicitors responsible were almost always quick to amend breaches once notified.

In addition, the Society typically reviews about 500 advertisements per annum published in the national and local print media. In 2016 19 of these reviews resulted in investigations being opened.

Since 2014 14 "claims harvesting" websites have been taken down as a result of the Law Society's investigations.

The Law Society has instituted High Court proceedings against non-solicitors relating to two of the leading "claims harvesting" websites. One case resulted in a High Court order directing permanent closure of the website and the other case is on-going.

Since 2014 52 matters have been considered by the Advertising Regulations Division of the Regulation of Practice Committee of the Law Society relating specifically to advertising by individual solicitors.

Two solicitors are currently before the Solicitors Disciplinary Tribunal on grounds of alleged misconduct in respect of advertising of legal services.

In appropriate cases in connection with the advertising of legal services the Law Society can and does use enforcement procedures which include the following:

(i) Referring a solicitor to the Solicitors Disciplinary Tribunal for an inquiry into alleged misconduct.
(ii) Applying to the High Court for an order prohibiting contravention of the regulatory provisions.
(iii) Issuing a written reprimand.
(iv) Directing that all advertising commissioned by a solicitor must be pre-approved by the Law Society for a specified period.

2. We understand that IBEC attempted to develop a code of practice for solicitors in relation to Pre-Action Protocols but that this was unsuccessful. We would welcome your views on how best we might apply Pre Action Protocols to this area and if you think a code of practice or the extension of Part 15 of the Legal Services Regulation Act 2015 to personal injury cases might be something that the CIWG should consider?

Response: The Law Society is not aware of any attempts by IBEC to introduce any pre-action protocols. We would be obliged for copies of any such proposals. We would welcome any reasonable initiative to achieve fair settlements earlier in the process. In relation to a code of practice or extension of Part 15, it is important to note that PIAB itself plays a crucial role in streamlining claims and achieving earlier settlements that is not available to medical negligence cases. Indeed, the majority of cases that proceed to court do so because it is either too soon to settle at PIAB stage or because liability is an issue. Basically, numerous settlement opportunities are available for those cases that can be settled and it is only more serious, complex, unusual or liability cases that proceed past PIAB. It would be hard to see what further pre action protocols could be introduced, but we are open to suggestions, all the while bearing in mind that it is essential that any such protocols would not simply frontload costs and have the opposite effect to that intended.

3. What is your view on solicitors firms, specialising in personal injuries, who adopt a strategy of not negotiating until the case reaches the High Court (or Circuit or District Court as the case may be having regard to the jurisdictional limits of those courts)? (I.e. Recommending to a client that they reject any award offered by PIAB and only engaging with the defendant once High Court costs have been incurred)? We have received anecdotal reports of this from consultations.

Response: We are not aware of any such strategy. It is, however, often the case that proceedings must be issued in order to comply with time limits, but the claim is not ready to be settled because the injuries have not settled down an extent where a prognosis can be given.

4. **Do you believe that some solicitors are contributing to a "claims culture" in Ireland by possibly encouraging clients to pursue what are perceived by the public as frivolous claims? What, if any, volume of complaints have been made to the Law Society in this type of area in the last 3 years and what have the outcomes of those complaints been (it is not necessary to identify any names, only outcomes)?**

Response: We have no evidence whatsoever that solicitors are encouraging clients to bring frivolous claims and have already called upon the CIWG to provide us with any evidence that they have received.

The Law Society does not maintain specific statistics on complaints about claims which are alleged to be frivolous. Such claims are not sufficiently numerous to justify a dedicated category on our complaints database. Therefore, we cannot provide a definitive statistical analysis, either in terms of numbers or outcomes.

We estimate that we receive typically no more than two or three complaints per annum from members of the public alleging spurious or fraudulent or exaggerated claims. Our experience is that clear prima facie evidence of fraud or illegality is never provided in such complaints, which generally consist of unsubstantiated allegations. As a general rule, such complaints are made by a defendant against the plaintiff's solicitor with the objective of disrupting progress of the case and removing their opponent's solicitor from the case, thereby putting their opponent at a disadvantage. It would not be proper for the Law Society to facilitate such an objective. In any event, it is not possible to conduct a fair investigation of such complaints due to the duty of client confidentiality owed by the plaintiff's solicitor. Such complaints are usually made while the case is still pending, in which case it is for the court rather than the Law Society to decide whether or not the claim is fraudulent. To the best of our knowledge we have received no complaints where a finding has been made by a court that a claim was fraudulent.

5. **Does the Law Society believe the current legislative measures and/or penalties are adequate in terms of tackling fraudulent personal injury claims? Does the Law Society believe that particular sections of relevant legislation need to be amended?**

Response: Yes, the current legislation is very strong and has even been described by the Judiciary as "draconian". The punishments available include complete dismissal of the case and prosecution for providing false or misleading evidence. The difficulty lies with Defendants not seeking to avail of sections 14, 25 and 26 of the Civil Liability and Courts Act 2004. If they believe a case is fraudulent, they should run the case in court, have it dismissed, and use the evidence to encourage Gardaí to bring a prosecution. It is perfectly clear that the tools for this exist in the legislation, but there appears to be a reluctance to test the provisions on behalf of defendants.

Legal Costs

6. **What actions does the Law Society believe could be taken to reduce the amount of solicitors' costs associated with (a) litigated personal injury claims and (b) settled personal injury claims?**

Response: Costs which are associated with personal injury claims are determined by an expert independent adjudicator, either the Taxing Master in High Court claims or the County Registrar in the Circuit Court. The Law Society has no role in determining such costs and nor should it. It is certainly the experience of solicitors practising in the area that such costs have reduced over the past 5 years.

7. **With reference to statutory provisions in the Solicitors Acts and/or any rules which the Law Society has issued rules on providing details of the fees to be charged to clients. In your opinion has this helped to control costs and will the forthcoming commencement of section 150 of the LSR Act 2015 make things any better?**

   Response: The rules which apply to the provision of details of fees to clients are governed by Statute. The Law Society enforces such rules at present. In due course, section 150 of the Legal Services Regulation Act, 2015 will be enacted. When Part 6 of the Act comes into force, the Legal Services Regulation Authority will be responsible for the enforcement of the new legislation. This legislation will increase the amount of information and degree of transparency required in this area.

8. **Does the Law Society capture any information on the amount, or the range of legal fees/costs that solicitors charge in relation to personal injury cases? Does it see a benefit in such information being captured going forward and, if so, how this might be done by the legal profession or otherwise?**

   Response: The Law Society does not capture this information. If it were to do so, it would be likely to be contrary to competition law.

Other Legal Issues Mentioned by Stakeholders

9. **The CIWG has been advised by certain stakeholders that the current timeframe permitted to make a personal injury claim under the Statute of Limitations facilitates the bringing of claims that cannot be adequately defended due to the time elapsed since the alleged incident. Do you think it is appropriate for the Statute of Limitations to be decreased?**

   Response: The Statute of Limitations was reduced as recently as 2005 and has already caused hardship to claimants who have attempted to make claims outside the two year limit. Although these situations are rare, when they happen, they often occur because victims are reluctant to litigate but only do so when they have no alternative. It would most likely be an anti-consumer measure to reduce it any further, particularly given the provisions of Section 8 of the Civil Liability and Court Act 2004, which if properly enforced would ensure that any instances of claims not being notified to defendants would be minimised to these rare cases where claims are initiated close to the Statute limit for the reasons stated above.

10. **Section 8 of the Civil Liability and Courts Act 2004 requires a plaintiff to notify the defendant of his claim within two months of the accrual of the cause of action, or as soon as practicable thereafter. What is the view of the Law Society in relation to this requirement? We have received feedback that this rule is not followed. Are there ways in which we can ensure that the 2 month period of claim will be better observed?**

    Response: Our belief is that Section 8 is followed in the vast majority of cases. However, there are reasons why it cannot always be done, such as long hospital stays, difficulties with identifying defendants, reluctance to sue, etc. If there are cases where such delay cannot be explained, defendants need to apply to the court for the appropriate order. We are aware of no instances in which this has been done. The legislation needs to be enforced not strengthened. It is vital that consumers and victims' rights be balanced against those of potential defendants.

APPENDIX 22 – The Irish and EU Legislative Framework

European Legislation

- *Solvency II Directive (2009/138/EC)*
- *Omnibus II Directive (2014/51/EU)*
- *Commission Delegated Regulation (EU) (2015/35)*
- *Solvency II specific implementing regulations*
- *Financial Conglomerates Directive (2002/87/EC)*
- *Insurance Mediation Directive (2002/92/EC)*
- *Distance Marketing Directive (2002/65/EC)*

Irish Legislation

The principal domestic legislation includes:

- *Assurance Companies Act, 1909*
- *Insurance Act, 1936*
- *Insurance (No. 2) Act, 1983*
- *Insurance Act, 1964*
- *Insurance Act, 1989*
- *European Communities (Non-Life Insurance) Framework Regulations 1994*[154]
- *Part IV of the Finance (Miscellaneous Provisions) Act 2015*
- *European Communities (Financial Conglomerates) Regulations 2004*
- *European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004*
- *European Communities (Insurance Mediation) Regulations 2005*
- *Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) Regulations 2007*
- *European Union (Insurance and Reinsurance) Regulations 2015*
- *European Union (Insurance Undertakings: Financial Statements) Regulations 2015*
- *Central Bank (Supervision and Enforcement) Act 2013 (Section 48(1)) (Insurance Undertakings National Specific Templates Reporting Arrangements) Regulations 2016*

In addition to the specific pieces of legislation set out above, Irish authorised non-life insurance undertakings are required to adhere to requirements, guidelines (and policy) issued by EIOPA and the Central Bank of Ireland.

[154] Subject to s. 20 the *Finance (Miscellaneous Provisions) Act 2015* and notwithstanding art. 310 of the Solvency II Directive, this Regulation shall, in so far only as they apply to a relevant undertaking, continue in force as if this Regulations had not been repealed.

ADDENDUM TO THE REPORT ON THE COST OF MOTOR INSURANCE

ADDENDUM TO THE REPORT ON THE COST OF MOTOR INSURANCE ON THE SUBJECT OF TELEMATICS

Introduction

The Report on the Cost of Motor Insurance ("Motor Report") considered the use of telematics to benefit consumers from a road safety perspective with a particular focus on exploring its potential to make the motor insurance market more affordable to younger people. Insurance Ireland were asked to review the current use of telematics by industry and prepare a report for the Cost of Insurance Working Group ("Working Group") by the end of 2017.

As part of its implementation of the Motor Report, as well as the development of its Report on the Cost of Employer Liability and Public Liability insurance, the Working Group has engaged with the Personal Injuries Commission ("PIC"). One of the issues of common interest to the Working Group and the PIC has been how to tackle fraud and exaggeration within the personal injuries area. The fraud related recommendations in the Employer Liability and Public Liability Report are supported by the PIC.

However, there was also a view expressed by the PIC that telematics could play a major role in combating personal injury fraud in a motor insurance context, and the Working Group concurred with this general idea. A more detailed perspective on the matter is set out below.

Use of Telematics to combat motor insurance fraud

It is hardly surprising that innovations in technology have an important role to play in bringing down the cost of insurance and the cost of motor insurance in particular. Like all information technology, what today seems novel and pioneering in the case of telematics may shortly be seen as essential in the effort to improve safer driving and combat fraud, thereby ensuring availability of motor insurance at more competitive prices. The Working Group and the PIC believe that telematics has the potential to play an important role by improving road safety, reducing fraudulent claims and by deterring the bringing of such claims. It is also an opportunity to identify risk before any serious incident has occurred and potentially deal with it.

Telematics may best be summarised as the use of devices from which real-time vehicle telemetry data can be transmitted to a central organisation where it can be harvested, speedily analysed and reliably interpreted. The technology is varied and will in broad terms give the 'controller' an opportunity to identify risk and, where an incident has occurred, provide the real tools to establish its authenticity. In simple terms the technology involves fitting into a motor vehicle a "black box" device which monitors and communicates data on the behaviour of the vehicle. The data includes information in respect of speed, positional and accelerometer measurements, locations visited,

braking behaviour, multiple impacts, swerving and a wide range of other information which permits driver safety standards to be improved and, in the case of motor accidents, provides an in-depth snapshot of what occurred. This can permit identification of fraud and collusion by one or more of parties involved in a road traffic incident. Telemetry data, when combined with predictive analytics, can allow insurers to more accurately determine claim values which should in turn improve their reserving methodology and assist with calculation of their liabilities. This in turn allows insurers to identify individual risk and price correctly.

In the UK market a 20% increase in policies providing "black box cover" was noted in the year 2016. A 2015 report from ABI Research in the U.K. suggested that the number of drivers monitored by telematics could reach 89 million globally by end 2017. The cost of installing such a device (which is separate from the vehicle's own I.T. and electronics) is modest at around €100 – €150 but dependent on individual suppliers. In some cases, the initial cost can be a lot less than this with a monthly cost being attributed to the vehicle insurance policy that again accurately identifies individual risk and in turn individual pricing.

The technology is being actively pursued by a number of insurers in the Irish market at present. Efforts are directed in the main at younger drivers between the ages of 18 – 25 who, unless opting for a "black box policy", may be unable to obtain insurance at an affordable rate. High-risk drivers outside of the younger driver age bracket who wish to demonstrate a reduced level of risk and the general low mileage driver who wishes for a properly priced policy should also be considered. Digital integration to provide a fuller offering, e.g. phone apps, should improve supply chain efficiencies and provide an appropriate digital channel for the insurer to communicate with their policyholder. Insurers should consider the potential benefits in terms of engaging with and retaining their customers. In turn the customer is given a readily accessible channel to liaise with their insurer throughout the life of the policy and not just at renewal.

If the use of telematics is significantly increased, insurers and consumers will then enjoy the sort of protection which CCTV provides on buildings and shop premises, both in terms of deterring dishonest behaviour and in uncovering it when it has occurred. It should result in the lowering of premiums for drivers who drive within the law and the terms of their motor policy. This is the obvious *quid pro quo* which will persuade the motorist to opt for "black box insurance" as a standard feature of their use of motor vehicles.

Insurance Ireland have not yet conducted any surveys on how marketable telematics may be in the Irish market but there has been a growing determination among some Irish member insurers to bring forward the use of the technology as a condition of insurance contracts. The Working Group and PIC believe that as a first step insurers should explore the potential of telematics further including educating road users about its benefits and at the same time ascertain what level of acceptance may be likely on a voluntary basis. The two groups believe that the primary burden of developing awareness and acceptance of the technology must rest with insurers who have the means to conduct market studies and surveys in terms of the likely response of Irish motorists to the benefits of the technology.

Privacy Concerns

While obvious concerns on privacy issues may arise from the deployment of telematics in motor vehicles, these may be addressed by tailoring any individual policy to the requirements and limitations demanded by the insured motorist when a policy is incepted. It is open to insurers to specifically provide a term or representation in any insurance policy that the use of information gleaned from telematics will be confined exclusively to such information as derives from an accident or claim and nothing more. Other motorists may prefer a condition which permits their insurer to access all information derived from telematics, particularly when they believe they are good and safe drivers whose record over a 12-month period may entitle them to be considered for a further reduction in premium. In short, a "stepped" or "gradualistic" introduction of the technology in co-operation with Irish road users may suggest itself as the preferred option in the short term.

Court Proceedings

Ultimately, should there be a significant increase in the uptake of telematics by policyholders, a significant educational programme for judges and practitioners unaware of telematics technology could be launched. For instance telematics has particular benefits which may assist the judiciary in the resolution of cases where fraud is in issue. For solicitors, the technology may help weed out the occasional fraudulent claim from the vast majority which are genuine. In summary, the use of telematics has the potential to create substantial savings can in litigation costs if implemented to a sufficient level.

Recommendation

It is recommended that Insurance Ireland and the insurance industry prepare a report on what can be done to increase the use of telematics in the Irish market with a view to combatting fraud. As part of this exercise, they should research what is happening in other countries and extract what lessons can be learned for the Irish market.

This Report should be submitted to the Working Group by 1 September 2018.

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