

Personal injuries reform on the agenda

By Killian O'Reilly (Partner)

Government plans for reform of the insurance sector and related reforms in the arena of liability claims look set to crystallise in the New Year. The package of reforms has the overall objective of reducing the costs of awarding compensation and reducing insurance premia for businesses and consumers.

The Personal Injury Assessment Board ("PIAB") will provide a mechanism for removing uncontested personal injuries claims from the courts system thereby reducing the cost of delivering compensation.

The Civil Liability and Courts Bill, 2003, the heads of which were published in July of this year, aims to streamline procedures for personal injury actions and reduce fraudulent and exaggerated claims.

Personal Injury Assessment Board

The Tánaiste and Minister for Enterprise, Trade and Employment published the Personal Injuries Assessment Board Bill on 18 November 2003. Announcing its publication, the Minister emphasised that the purpose of the Bill is not to reduce the amount of compensation made to claimants but instead to reduce legal costs by providing a streamlined system for finalising personal injury assessments. By eliminating the need for litigation costs where liability issues are not in dispute, the PIAB will reduce the cost of delivering compensation to genuine claimants and reduce the time taken for claims to be assessed.

The Bill is currently at Committee Stage and the Tánaiste has expressed her intention not to allow any amendments. It is hoped to have the Bill passed through both Houses prior to the Christmas recess. Though the actual commencement date has not yet been specified, it is envisaged that the PIAB will be operational early in the New Year.

An increase in the number of court proceedings can be expected in advance of the operative date. Indeed, solicitors have recently been warned of their potential personal liability in circumstances where they have given undertakings on foot of claims where they have not yet issued proceedings.

Operation of PIAB

Initially, the PIAB will deal only with employer liability cases but its ambit will later extend to motor accidents and public liability. The role of

the PIAB will be confined to claims where liability issues are not disputed by the respondent.

The following is the modus operandi of the PIAB as outlined in the Bill:

- From the planned effective date all relevant claims (where liability is not contested), which would currently go to court for assessment, will be subject to mandatory referral to PIAB before proceedings can be issued.
- Compensation will be assessed on a "documents only" basis and at current levels, but done with greater expediency so as to eliminate the litigation overhead.
- Assessment of general damages will primarily be based on the medical report from the claimant's doctor. In some cases the claimant will be examined by a member of the Independent Medical Panel which is being established by the PIAB.
- A Book of Quantum will be compiled and published as a guideline to General Damages which should assist parties to reach reasonable negotiated settlements without recourse to either the PIAB or the courts.
- Assessors in the PIAB will calculate allowable Special Damages for items such as wage losses and medical expenses on the same basis as the courts, taking into account the pending amendments to legislation on credit for collateral benefits received.
- Parties who do not accept the outcome of the PIAB assessment may reject the award and be given authorisation by the PIAB to commence proceedings within a certain time frame to pursue the case further.
- The PIAB assessors will have powers to investigate claims, to ensure that the true facts of the case are uncovered and to ensure that the claimant gets that to which they are entitled, no more and no less.
- PIAB costs will be covered by fees levied on respondents on a case-by-case basis and will reflect the complexity of the case and the work involved.
- Claimants will pay a small administrative fee which must accompany their application for assessment if they have not been able to secure a satisfactory settlement direct ie claims will initially be made direct in the usual way against the respondent.

Civil Liability and Courts Bill, 2003

The Civil Liability and Courts Bill aims to tackle the problem of fraudulent and exaggerated personal injury claims and their impact on the cost of insurance for consumers.



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LITIGATION NEWS

Corporate killing offence

The Law Reform Commission has issued a consultation paper in which it recommends the creation of an offence of corporate killing. The Commission recommends that the offence apply where a death was caused by the gross negligence of an organisation which created a serious risk of causing substantial injury. The Tánaiste has said that she will support the recommendation for the creation of the new offence and that health and safety legislation currently being drafted should take account of the Commission's recommendations.

Smoking ban

The Government's plans to outlaw smoking in the workplace are unlikely to come into force until mid-February 2004. The Minister for Health and Children has confirmed that prisons, cells in Garda stations, hotel rooms, nursing homes, hospices and psychiatric institutions will be exempt from the ban. Publicans are still expressing concern over their role in the enforcement of the ban.

Disclosure of medical records

By Declan Devereux
(Senior Associate)

The Supreme Court has given the green light to defendants to seek full access to plaintiffs' relevant medical records and information as soon as the plaintiff serves proceedings. This includes the right to have the plaintiff medically examined and to interview the plaintiff's treating doctors to get information relevant to their medical condition. So held the Supreme Court in a judgment it delivered on 24 July 2003 in the case of *McGrory v ESB*, suspending the proceedings until the plaintiff agreed to submit to a medical examination on the usual terms.

Facts

Mr. McGrory suffered permanent brain damage in an accident at work. Before delivering a defence, ESB's solicitor wished to get a medical report on the plaintiff from Mr. Christopher Pidgeon, consultant neurosurgeon. The solicitor requested an examination and confirmation that Mr. Pidgeon could consult with the plaintiff's doctors, including a consultant neurologist and neurosurgeon, on the usual terms. The plaintiff's solicitors agreed to an examination but would not consent to any discussion of the case between the defendant's and the plaintiff's doctors. The plaintiff's solicitors contended that an exchange of medical reports could take place in the normal way after the pleadings had closed. The defendant applied to the court to suspend the proceedings until the plaintiff agreed to a joint consultation between the respective doctors.

The application

Apart from the exchange of correspondence between the solicitors, the defendant relied on a letter from Mr. Pidgeon and a Practice Statement from the Litigation Committee of the Law Society. In his letter, Mr. Pidgeon stated that he needed to consult with the plaintiff's doctor as he did not have access to x-ray and test results which were important for him to examine. The Law Society statement clarified the meaning of a medical examination "on the usual terms". It noted that the usual procedure is for doctors to communicate by telephone and for the plaintiff's doctor to provide his notes to the defendant's doctor to enable him prepare a report.

Shortly before the hearing of the application the defendant sought voluntary discovery of pre and post accident medical records of the plaintiff. The High Court refused the defendant's application, as they had not cited any legal authority in support. The judge accepted the plaintiff's argument that the defendant would be allowed adequate opportunity to have the plaintiff

properly assessed following the exchange of medical reports on foot of the disclosure of expert reports procedure. The defendant appealed to the Supreme Court, no doubt because of the serious injuries and the potential value of the claim.

Supreme Court appeal

In delivering the judgment of the court, Keane CJ noted that the parties accepted that no Rules of Court governed the situation nor was there any Irish case law on the subject. Following a review of a number of UK decisions, the Chief Justice held that the courts have an inherent power to suspend proceedings where justice requires it. He adopted the following principles from these decisions:

1. A plaintiff waives his right to confidentiality over his medical condition once he commences proceedings.
2. A plaintiff must not unfairly and unreasonably impede a defendant in the preparation of his defence by refusing:
 - consent to a medical examination
 - access to relevant medical records
 - permission to interview his treating doctors.

Keane CJ stated that the defendant's right to examination, records and information did not depend on liability being in dispute or the prior delivery of a defence. The defendant could avail of the right at any stage after proceedings commenced. He was unimpressed with the plaintiff's argument that the defendant could access records and information by the discovery and disclosure procedures after he delivered his defence. The proper conduct of litigation requires that parties provide access to relevant material at an early stage. The early availability of material facilitates early settlement as it enables the defendant to form a view as to the amount of damages the plaintiff is likely to recover and as to any lodgement he should make.

Keane CJ also approved an English Court of Appeal decision, which held that one side cannot prevent the other side interviewing one's own witness. However, this did not require a party to disclose any communications with and reports of the witness which are covered by legal professional privilege.

What now?

This far-reaching decision of the Supreme Court

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Heads of the Bill were published in July 2003 and while initially it was hoped that the legislation would be enacted by the end of the year, this is not now likely to occur until 2004.

The main provisions of the Bill include:

- Dismissal of actions or defences where a court is satisfied that a party to a personal injury claim has knowingly given evidence which is materially false or exaggerated.
- All court pleading documents, which contain statements of fact, must be supported by an affidavit verifying the information they contain and must be in plain and narrative form.
- The creation of new offences of:
 - False swearing of an affidavit.
 - Tendering or adducing false evidence.
 - Falsely instructing a solicitor with a view to deceiving a party to a claim.

Each of these offences will carry a maximum penalty of 10 years imprisonment and/or a fine.

- Reduction of the limitation period for a personal injury action from 3 years to one year so that claims are brought speedily and without delay.
- Alteration of the procedure for taking a personal injury claim to ensure that defendants are notified at an early stage and the information provided is full and descriptive.
- Introduction of a power to convene a mediation conference to settle claims before they reach trial.
- Powers for courts to accept written statements of evidence.

- Powers for courts to have pre-trial conferences to reduce the length of the trial.
- Provision for parties to make 'final offers' before trial.
- Exclusion from the determination of damages of any income which was not declared for tax purposes.
- Taking into account of all insurance benefits paid to a claimant in assessing damages to be awarded.
- Appointment of neutral medical assessors.
- A provision that a court, in determining damages for a personal injury, shall have regard to any damages previously awarded to a plaintiff in such an action.

The Minister is also considering the inclusion of other provisions, including a possible provision that the Attorney General may intervene in the public interest in certain types of litigation. He is also considering restricting liability in certain cases such as sporting, community and domestic activities to wilful default or gross negligence.

Conclusion

2004 will see significant changes in the procedures for claimants and respondents in the area of personal injuries actions. Only the passage of time will tell whether the objectives of the Government's reform in this area will achieve the desired impact of reducing litigation costs, providing a streamlined procedure for both claimants and respondents alike and reducing the costs of insurance in Ireland.

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Defamation

The Minister for Justice is currently looking at proposals to change the basis upon which defamation actions are dealt with by the courts. It remains to be seen whether further details of the proposed Press Council or a new privacy law emerge in 2004.

Fifth Motor Insurance Directive

The EU Council of Ministers have agreed a proposal which will make it easier for motorists to get car insurance for temporary stays in other Member States. It will also make it easier to get short-term insurance covering cars bought outside the owner's Member State of residence, thus improving cross-border competition in the sale of cars. The European Commission looks set to adopt the Directive in the New Year.

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It is unlikely that couples, when preparing for their wedding day, ever imagine that their marriage may in the future run into difficulties. Unfortunately, statistics show that 1 in 5 Irish marriages have encountered problems. In light of such statistics, couples are increasingly seeking to ensure the protection of property and assets in the event of a marriage breakdown.

In Ireland, prenuptial agreements are considered to be contrary to public policy on the basis that they are anti-marriage. Any contract being operative upon the breakdown of marriage is deemed to be unconstitutional.

Enforceability

While provisions of the Family Law Act, 1995, and the Family Law (Divorce) Act, 1996 have eroded the State's interest in preserving marriage, it remains a fact that prenuptial agreements are contrary to public policy.

No Irish case law exists on the enforceability of prenuptial agreements. While we may look to the UK courts for guidance, it is also worth noting that, officially, such agreements are also unenforceable in that jurisdiction.

In the 1999 UK case of *N v N* the High Court was of the view that such agreements contravene public policy because "they undermine the concept of marriage as a lifelong union". The UK government undertook a review of the law relating to prenuptial agreements in 1998. It was suggested that such agreements might become binding but so far no legislation has been introduced.

Government proposals at that time provided that, for a prenuptial agreement to be binding, it would have to be signed by both parties at least 21 days before the wedding, to avoid any suggestion that one party had been put under pressure at the last minute.

In some UK cases the courts have looked to prenuptial agreements when re-ordering assets, and the situation seems to have been further bolstered in the last year, with the case of *K v K*.

Irish courts may be influenced by this decision in the future.

K v K

In *K v K* the UK High Court upheld a prenuptial agreement between a wealthy property developer and his wife. The husband had been uncertain about marrying his wife who had become pregnant after a short affair. Initially, they agreed to marry once the baby had been born but following his wife's threat to terminate the pregnancy they negotiated an agreement as to financial settlement in the event that the relationship foundered. The marriage lasted only fourteen months. The wife then sought to secure more advantageous terms than provided for in the agreement while the husband sought to rely upon its terms. The judge decided that the wife should only have the capital sum that she was entitled to under the agreement.

The case is important as it sets out for the time a checklist of questions to be posed by judges when deciding to give effect to a prenuptial agreement. The checklist includes the following:

- Did the parties understand the agreement?
- Were the parties given proper advice on its terms?
- Was either party pressurised into signing the agreement?
- Was the agreement signed willingly?
- Was there full disclosure of assets?
- Were there any grounds for holding that injustice would be done by holding the parties to the terms of the agreement?

The agreement

Recent developments in Ireland further indicate that the courts here may take into account provisions of prenuptial agreements. In the 'big money' divorce case of *T v T*, the Irish Supreme Court did not refer specifically to prenuptial agreements. However, the case highlighted the courts attitude that, in cases where there are ample resources, they are more amenable to "clean breaks", with a lump sum payment for full and final settlement. The court looked to UK case law in this regard.

It is likely that the Irish courts will look to the checklist provided in *K v K* in the event of their consideration of prenuptial agreements in divorce proceedings. Accordingly, the following should be borne in mind when drafting prenuptial agreements:

- Each party should receive separate, independent, legal advice prior to signing the agreement.
- The agreement should contain a clause that both parties acknowledge and consent to the matter being legally binding, notwithstanding any current or future statutory provisions.
- The duration of the agreement should be specified, as should the division of present and future property and assets.
- Provisions to deal with the death of the spouses should be included ie the legal right share, under the Succession Act.
- Provisions relating to maintenance payments, pensions entitlements and discharge of debts should be dealt with and agreed upon by both parties.
- The agreement should include a clause to review the agreement on a periodic basis.
- The agreement should include a clause to ensure that, if any part is found to be invalid or unenforceable, the remainder of the agreement will still continue to be upheld.

Exclusions

Prenuptial agreements which contain provision for children and maintenance will not be binding. The courts will ultimately protect the welfare of children and any contract limiting the scope of the court in this regard will not be upheld.

Conclusion

In the absence of legislation, both in Ireland and the UK, it is anticipated that the courts may consider prenuptial agreements, provided that the couple have knowingly and willingly entered into the agreement, both parties have sought independent legal advice and that there is full disclosure of all assets and interests.

Disclosure of medical records

entitles a defendant to the fullest disclosure of relevant medical records and information from the outset. It appears that the right to interview the plaintiff's doctors is not limited to the defendant's doctors but includes also the

defendant's solicitors. What is unclear is whether the courts will suspend proceedings where the plaintiff's doctor declines to be interviewed despite having the plaintiff's consent. These rights are very useful tools in

the defendant's kit. While they may be used extensively to get the fullest medical picture on the plaintiff, common sense should guide their use. If not, it may give occasion to the courts to refine these rights.