

## FOUR YEARS OF THE PERSONAL INJURIES ASSESSMENT BOARD: ASSESSING ITS IMPACT

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### I. INTRODUCTION

Since the Personal Injuries Assessment Board (PIAB) began operating in 2004, there has been considerable change and controversy injected into Ireland's personal injury claims regime. Linked to wider measures designed to tackle a perceived runaway "compo culture" and spiralling insurance premiums,<sup>1</sup> PIAB was specifically presented as a means of reducing the high levels of legal costs associated with negligence claims.<sup>2</sup> Debate over the Board's fairness and efficacy persists. Legal practitioners maintain that its lawyer-sceptical ideology is a snub to the legitimate rights of victims. As parties hold the option of retaining

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<sup>1</sup> See Ryan, "The Impact of the Act on 'Compensation Culture': Big or Small?" in Craven and Binchy (eds.), *The Civil Liability and Courts Act 2004*, (Dublin: Firstlaw, 2004), p. 138.

<sup>2</sup> As per then Minister for Enterprise, Trade and Employment, Mary Harney: "The purpose of establishing this alternative mechanism is to reduce the cost of delivering claims and expedite the delivery of a person's entitlements ... The purpose of not providing legal costs or fees in this case is to reduce costs. The Insurance Industry Federation informed us that €340 million, an incredible sum, was paid in legal costs and fees, while IBEC stated in 2002 that personal injuries were costing employers €2 billion, of which legal costs accounted for €600 million. The PIAB will not hold oral hearings in which claimants will have to advocate or someone will have to advocate on their behalf". Debates of the Select Committee on Enterprise and Small Businesses, Dáil Eireann, 10<sup>th</sup> December 2003 (34 SESB1, No. 4). Available at <http://www.gov.ie/committees-29/c-enterprise/20031210/Page1.htm>.

legal representation (albeit at their own expense) and to ultimately reject awards in favour of initiating litigation, the Board's impact is inherently tied to public acceptance of the new paradigm.

This paper examines the publicly-available data on PIAB and court litigation, which despite containing notable lacunae, reveals a number of significant insights. Firstly, an analysis of the outcome of PIAB applications will be undertaken. Secondly, questions will be posed concerning the manner in which savings of time and money have been calculated. Thirdly, rates of higher court litigation will be reviewed to determine the Board's impact, and comparisons will be drawn between the adjudication of compensation under the two regimes. Finally, the paper will consider the media debate between the proponents of PIAB and the legal profession, both to contextualise the manner in which public data has been presented, and to comment on its possible impact on the Board's operational aspirations. Ultimately, it will be argued that the Board seems to adjudicate principally on cases that would previously have settled out of court. Due to a paucity of data on the cost and expedience of cases settled privately, it becomes difficult to draw precise comparisons between the old and new regimes. PIAB's claimed improvements must be read in light of this caveat. In considering PIAB outcomes such as "early resolution" and "rejected awards", the paper will argue that there is perhaps a more nuanced relationship between the legal profession and the Board than previous media coverage might suggest. Indeed, it will be argued that there may be enhancements to the efficacy and equity of the PIAB process through enhancing the formal role of legal representation within current practices.

## **II. BACKGROUND**

The combination of the Personal Injuries Assessment Board Act, 2003 (the "PIAB Act"), and the Civil Liability and Courts Act, 2004, created a new personal injury litigation regime in Ireland. The latter statute reformed litigation procedures, introduced a system for the early notification of defendants, reduced the limitation period for initiating actions from three years to two, and introduced penalties designed to combat

fraudulent claims.<sup>3</sup> An accompanying press release from the Minister for Justice, Equality and Law Reform described this legislation as part of “efforts to tackle insurance costs and insurance fraud ... (and) the ‘compensation culture’ that has developed in this country”.<sup>4</sup> This legislation thus sought to target certain aspects of the litigation system perceived of as facilitating unmeritorious claims. By contrast, the PIAB Act sought to limit the use of litigation as a means of resolving personal injury claims in the first place. PIAB was to become an adjudicatory body of first instance in all cases concerning motor, employer and public liability claims. Where liability is not contested, it makes awards on the basis of medical reports and an established book of quantum, supposedly without involving legal professionals.<sup>5</sup>

The insurance and wider business communities were the principal lobbyists for the establishment of the Board. They produced statistics indicating that the attendant costs of defending litigation amounted to an average additional 42% of compensation paid out.<sup>6</sup> PIAB, it was argued, would greatly reduce these costs and resolve cases with greater expedience than the sluggish court system,<sup>7</sup> reducing the need to tie up funds in “reserves” for long periods. Personal injury claims were to be

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<sup>3</sup> For a detailed discussion of this Act’s provisions and the background to its promulgation, see Craven and Binchy (eds.), *The Civil Liability and Courts Act 2004* (Dublin: Firstlaw, 2004).

<sup>4</sup> Quoted in Ryan, “The Impact of the Act on ‘Compensation Culture’: Big or Small?” (note 1), p. 139.

<sup>5</sup> For a detailed discussion of the PIAB Act, pro and con arguments and its likely effects for practitioners see Gilhooly, “The new personal injury litigation regime: Pitfalls for practitioners” (2005) 1 *Journal of Civil Practice and Procedure* 10; Fay, “PIAB One Year on – A Happy Anniversary”, (2005) 23 I.L.T. 247; Pierse, “Guessing Damages in Personal Injury Cases – A Practitioner’s View”, (2005) 23 I.L.T. 23; and Quigley and Binchy (eds.), *The Personal Injuries Assessment Board: Implications for Legal Practice* (Dublin: Firstlaw, 2004).

<sup>6</sup> Department of Enterprise, Trade and Employment, *The Final Report of the Motor Insurance Advisory Board* (2002); IBEC Research and Information Services, *IBEC National Survey of Personal Injury Claims 2000* (2001).

<sup>7</sup> See Dowling, “The Personal Injuries Assessment Board: A Win, Win Solution”, in Quigley and Binchy (eds.), *The Personal Injuries Assessment Board: Implications for Legal Practice* (Dublin: Firstlaw, 2004), p. 34.

resolved wherever possible without litigation, lawyers or legal fees. Instead, PIAB would charge a small fee (now €50 for claimants and €900 for defendants, in addition to the cost of medical reports). It was proposed that savings would be passed to consumers in the form of reduced insurance premiums. Whilst these arguments hold logical appeal, it must be noted that they have been contested by representatives of the legal professions. There is disagreement both over the existence of a “compensation culture” and the role of litigation costs in high insurance premiums.<sup>8</sup> Bodies representing both the insurer’s business and legal practitioners have been at loggerheads over the veracity of the “problem”, who is to “blame” and what should be done to address it.

In the run-up to the drafting of the PIAB Act, its proponents had claimed that compensation costs were threatening the competitiveness of Irish business,<sup>9</sup> and indeed the national economy itself.<sup>10</sup> The underlying implication has been that the problems of the “compensation culture” stem from a volume of unfounded claims underwritten by the encouragement of unscrupulous lawyers, as opposed to deficiencies in standards of safety or legal constructions of liability. Before PIAB, the Solicitors (Amendment) Act, 2002, placed restrictions on the manner in which legal services could be advertised, prohibiting specific appeals to personal injury litigants. The Law Society regulations, drawn up under the auspices of this Act, outlawed the use of terms such as “no foal, no fee”, or references to settling out

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<sup>8</sup> For more on the “compensation culture” debate in other jurisdictions see Williams, “State of fear: Britain’s ‘compensation culture’ reviewed”, (2005) L.S. 499; DeWees, Duff, and Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996); Government of Australia, *Review of the Law of Negligence Report* (“The Ipp Report”) (2002), available at <http://revofneg.treasury.gov.au/content/home.asp>; Lewis, Morris and Oliphant, “Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom?” (2006) 14 *Torts Law Journal* 158.

<sup>9</sup> Brennan, “Compensation culture costs business £600m a year – SFA”, *Irish Times*, 8 November 2000.

<sup>10</sup> Walsh, “Economy could be endangered by compensation culture, says Quinn”, *Irish Times*, 31 January 2003.

of court.<sup>11</sup> The legal profession had retrenched from an earlier position of defiance where prominent members had made strong defensive arguments: “I’m sick and tired of solicitors being made scapegoats for the failure of others to discharge their duties ... If there were no accidents there would be no claims. There are [*sic*] an unacceptable level of accidents in this country and there is not so much a compensation culture as a negligence culture”.<sup>12</sup>

The caricature of the lawyer as “ambulance chaser” has undoubtedly underpinned moves to exclude the legal profession from the administration of personal injury claims. Identifying themselves, however, as defending their clients’ constitutional rights<sup>13</sup> to justice and legitimate entitlement to fair compensation, the legal profession has been critical of attempts to exclude them from the process of personal injury adjudication. Reference has been made to the relative disadvantage of lay applicants claiming damages against insurance companies with in-house expertise, and the fact that defendants have the opportunity to revisit the issue of liability if they are dissatisfied with a PIAB award.<sup>14</sup> Legal academics have pointed to the suitability of the previous litigation regime, noting that it could be further reformed to achieve the aims of increased expedience and economy. It has been pointed out that the law of tort is designed to award compensation only in relation to legitimate claims,<sup>15</sup> and that the Irish courts have taken an increasingly restrictive approach to

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<sup>11</sup> Coulter, “New rules will place limits on solicitors’ advertising”, *Irish Times*, 8 October 2002.

<sup>12</sup> Brennan, “Compensation culture costs business £600m a year – SFA”, *Irish Times*, 8 November 2000.

<sup>13</sup> Legal academics do not contest the overall constitutionality of PIAB, see for example Gwynn Morgan, “Constitutional and Administrative Law Framework of the Personal Injuries Assessment Board”, (2006) 6 J.S.I.J. 32.

<sup>14</sup> Murphy, “The PIAB: A Solicitor’s Perspective”, in Quigley and Binchy (eds.), *The Personal Injuries Assessment Board: Implications for Legal Practice* (Dublin: Firstlaw, 2004), pp. 14-20. Legal practitioners note the occasional need to seek a “preservation order” so as to facilitate the technical examination of evidence at a later date, should issues of liability arise post PIAB process: see Richardson, “Preservation Orders” [2005] *Law Society Gazette* (January/February) 18-21.

<sup>15</sup> Morris, “Spiralling or Stabilising? The ‘Compensation Culture’ and our Propensity to Claim Damages for Personal Injury” (2007) 70 M.L.R. 349, 355.

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public liability even without legislative intervention.<sup>16</sup> It has been further argued that habitual defendants have been slow to address their grievances within the pre-existing litigation paradigm, which could be achieved through establishing principles to limit liability such as *ex turpi causa*, or the voluntary assumption of risk.<sup>17</sup> Further arguments have criticised the fact that the new personal injury regime fails to innovatively address the notion of liability in any significant way, in contrast to developments in other jurisdictions.<sup>18</sup>

### III. METHODOLOGY

In order to assess the outcomes of the new personal injuries claim regime, a number of research questions have been formulated:

- (a) How has PIAB performed year-on-year, based on the number of claims it processes and their presented outcomes?
- (b) To what degree is the new personal injury regime more efficient, economic and expedient than the old?
- (c) To what extent has PIAB diverted cases from the traditional court-based system of personal injury litigation?

In attempting to answer these questions, pertinent indices have been produced from the relevant publicly available data: the statistics sections from both the *Reports of the Court Service 2002-2007*<sup>19</sup> and the *Annual Reports of the Personal Injuries Assessment Board 2004-2007*.<sup>20</sup> All appropriate and comparable figures were entered into the statistical software package SPSS,

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<sup>16</sup> Binchy, "The Implications of the Act for Tort Law and Practice" in Quigley and Binchy (eds.), *The Personal Injuries Assessment Board: Implications for Legal Practice* (Dublin: Firstlaw, 2004), pp. 116-117.

<sup>17</sup> Binchy, "The Implications of the Act for Tort Law and Practice" (previous note), p. 119.

<sup>18</sup> Buckley, "The Greater Fault Bar System – An Alternative to the PIAB?", (2004) 22 I.L.T. 278.

<sup>19</sup> Available at <http://www.courts.ie/>.

<sup>20</sup> Available at <http://www.injuriesboard.ie/>.

and a number of trend graphs produced. This task was rendered more complex by changing reporting practices relating to both sets of data year-on-year: differences in labelling and the inclusion and omission of different figures over different years. Where possible, missing values were calculated using ancillary data. For example, the *PIAB Annual Report 2006* does not report the total number of applications received by the board for that year; the 2007 report, however, records a total of 23,345 applications, which is said to be an increase of 10% on the previous year.<sup>21</sup> So it can be assumed that there were roughly 21,223 applications made in 2006. Thus, whilst there are bound to be some small inaccuracies around the figures presented in this paper, the broad trends discerned should not be affected. PIAB's reporting practices, and the format in which they present their statistics, have altered more radically than those of the Courts Service year-on-year.

#### IV. PIAB PERFORMANCE

The PIAB annual reports indicate a newly-formed organisation that has rapidly adapted to working at full capacity. Its 2005 figures cover the first year and a half of its operation, during which time it reports receiving 20,000 applications.<sup>22</sup> Of these, 1,600 had been initially released to the courts, 3,300 were resolved "early" through settlement, and 7,900 were in the process of assessment.<sup>23</sup> At this stage 951 awards had been made, of which 666 had been accepted.<sup>24</sup> The figures for 2006 do not provide a detailed breakdown of applications, although they show that 5,573 awards were made, of which 3,403 were accepted.<sup>25</sup> In 2007, 23,345 applications were received, of which approximately 7,000 were immediately released to the courts and

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<sup>21</sup> *Personal Injuries Assessment Board Annual Report 2007* (Dublin: Stationery Office, 2008), 14.

<sup>22</sup> *Personal Injuries Assessment Board Annual Report 2005* (Dublin: Stationery Office, 2006), p. 10

<sup>23</sup> *Personal Injuries Assessment Board Annual Report 2005*, p. 10.

<sup>24</sup> *Personal Injuries Assessment Board Annual Report 2005*, pp. 14-15.

<sup>25</sup> *Personal Injuries Assessment Board Annual Report 2006* (Dublin: Stationery Office, 2007), p. 16.

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8,000 were resolved early.<sup>26</sup> These are significant figures, demonstrating that in 2007 PIAB only considered approximately 36% of applications made for an award, as 34% were settled early in the PIAB process. That year 8,208 awards were made, of which 5,000 were accepted, meaning that only approximately 21% of applications made to the Board resulted in an accepted award.<sup>27</sup> There has been a notable increase in the value of accepted awards between 2006 and 2007, which rose from €6,732,000 to €102,000,000.<sup>28</sup> Interestingly, the PIAB Annual Report 2007 comments on trends separately relating to the three categories of claims it processes. It reports that motor liability claims are most likely to proceed the full distance to award; that employer liability claims are “suitable” for early settlement, as the parties often resolve when copied with each others’ particulars; whereas public liability claims are more likely to involve disputed liability and proceed to court.<sup>29</sup> Such observations indicate that it would be useful to reflect on whether PIAB is the appropriate body of first instance for the full range of cases within its ambit.

#### V. REJECTION RATES

The *PIAB Annual Report 2005* dealt with the rates at which awards are rejected in some detail, citing a 30% rejection rate (25% for public liability, 33% for motor accident). It reported that 24% was attributable to claimant rejections, 4% to respondent rejection and 2% to both.<sup>30</sup> The practice of reporting these figures directly has since been discontinued, but analysis indicates that this rate rose to approximately 40% for 2006 and 2007.<sup>31</sup> It is also clear from an analysis of the figures that rejection seems to be more likely in claims of a higher value. Where the rejection rate is

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<sup>26</sup> *Personal Injuries Assessment Board Annual Report 2007* (Dublin: Stationery Office, 2008), p. 14.

<sup>27</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 16.

<sup>28</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 22.

<sup>29</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 17.

<sup>30</sup> *Personal Injuries Assessment Board Annual Report 2005*, p. 15.

<sup>31</sup> A newspaper article states that the rejection rate has fallen from 45% to 35% as a result of the PIAB (Amendment) Act, 2007: see Cullen, “One third of claimants reject state board awards”, *Irish Times*, 21 February 2008.



expressed in terms of the value (as opposed to incidence) of rejected awards, it rises to 42% for 2006 and 44% for 2007.

## **VI. EARLY RESOLUTION**

A significant issue in the analysis of these performance figures is the revelation that approximately one third of PIAB applications resolve early in the process, settled privately between the parties before an official award has been issued. This means of claim resolution occurs more frequently than the full assessment and acceptance of an award. The 2007 PIAB annual report thus refers to a change in culture<sup>32</sup> of personal injury resolution. Anecdotal accounts from those working in the field have suggested that private settlements were often protracted affairs which finally resolved “on the steps of the court”, shortly before liability hearings were to commence. The conditions for this practice were in part supported by the length of time available to claimants and their legal teams to notify respondents and initiate proceedings, and equally the unpredictability of compensation award levels. The inception of the PIAB system and parallel reforms in litigation procedures have addressed these factors through the requirements of early notification and the provision of a rational book of quantum to calculate damages. Whilst it is clear that rapidly-settled claims would generate significant savings in time and costs, there is an unaddressed issue of equity. PIAB promotes itself as an impartial adjudicator of claims, accessible to the public directly, without recourse to the legal profession. Whilst PIAB Annual Reports tend to comment favourably on the early resolution process, it is unclear what mechanisms are in place to monitor settlement offers, and by extension justice for claimants. As will be later discussed, claimants have tended to favour the retention of legal representation to take their claim through PIAB. The involvement of solicitors may in fact be a key facilitating factor in these early resolutions, which claimants may be less likely to accept in the absence of professional assurance around adequacy of compensation.

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<sup>32</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 76.

### VII. CLAIMED ADVANTAGES

PIAB emphasises its greater expedience and economy over the litigation system in both annual reports and representations to the media, offering statistical data to substantiate these contentions. In its 2005 Annual Report, PIAB reported that the average time from accident to award was 16.9 months; the average time from complete application to award was 7.6 months, and the average time from consent to award was 5.1 months.<sup>33</sup> Beneath these figures is a comparison between the statutory period within which PIAB makes its awards (nine months) and the average litigation timeframe of 36 months.<sup>34</sup> In its 2006 Annual Report, PIAB reported that the average period “from the date of consent (of the respondent to submit to the process) to date of award” was 7.4 months, and the average period “from the date of application to date of award” was 10.2 months, again the 36 month “pre-PIAB” timeframe provides a means of comparison.<sup>35</sup> In the 2007 report there is simply a comparison between “the average time taken to make an assessment” of “approximately 7 months” and the 36 month figure, this time accompanied by a piece of text stating that the speed of the system is a key benefit to claimants and that research shows that the prompt resolution of claims aids recovery.<sup>36</sup> It must be noted that certain cases would have settled in less than 36 months under the old regime, particularly in the absence of contested liability, and the nature of private settlements ensures that there is no data with which to make precise comparisons.

Another item to feature prominently in PIAB literature is the cost-benefit analysis undertaken by Dr Vincent Hogan on its behalf.<sup>37</sup> Using data from the *Report of the Legal Costs Working Group*,<sup>38</sup> it noted that under the previous litigation system the

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<sup>33</sup> *Personal Injuries Assessment Board Annual Report 2005*, pp. 17-18.

<sup>34</sup> *Personal Injuries Assessment Board Annual Report 2005*, p. 17.

<sup>35</sup> *Personal Injuries Assessment Board Annual Report 2006*, p. 20.

<sup>36</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 25.

<sup>37</sup> Hogan, *A Cost-benefit Analysis of the Personal Injuries Assessment Board*, (PIAB, 2006), available at <http://www.injuriesboard.ie/>.

<sup>38</sup> *Report of the Legal Costs Working Group* (Dublin: Stationery Office, 2005), Appendix 2; See also *Report of the Legal Costs Implementation Group* (Dublin: Stationery Office, 2006). The issue of legal fees is being considered

level of damages awarded was the most significant factor determining related legal costs, not the complexity of the case prepared. Further determining factors included the level of court and whether the claim was contested. Figure 1 below is extracted from the cost-benefit analysis, and it represents the PIAB process as generating considerable savings in legal cost per claim (88% for Circuit Court litigation and 97% for High Court).

		Circuit Court	High Court
1.	Average Award (€)	16,022	60,636
2.	Plaintiff's Solicitor's Instructions Fee (€)	3,257	14,124
3.	Plaintiff's SC's Brief Fee (€)	0	1,804
4.	Plaintiff's JC Brief fee (€)	1,077	1,203
5.	Total Plaintiff Fee (€)	4,334	17,132
6.	Total Respondent Fee (€)	2,889	11,421
7.	Total (€)	7,223	28,553
8.	PIAB Admin & Registration Fee (€) <sup>9</sup>	850	850
9.	Saving (€)	6,373	27,703
	% Saving	88%	97%

Fig.1 PIAB legal cost savings

Source: Cost Benefit Analysis, Personal Injuries Assessment Board, 2006, p. 11

These figures reflect the high cost of litigation to both plaintiff and defendant, and lend significant weight to arguments that the PIAB process stands to benefit both parties to litigation. There is, however, an issue with the sampling procedures utilised to produce these figures. The sample used to calculate average legal costs in the above table was drawn from the mere 10%, according to the author's calculations, of personal injury cases that reached the courts or taxing master.<sup>39</sup> By implication, a large majority of cases of unknown cost and complexity did not fall

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by state bodies. Would reform lessen the relative cost savings generated by PIAB?

<sup>39</sup> Hogan, *A Cost-benefit Analysis of the Personal Injuries Assessment Board* (note 37), p.8.

under the supervision of an adjudicatory body, and were thus excluded from the analysis. Moreover, it is not clear why the author chose to cite the €50 standard administration and registration fee as a means of comparison, where in the same report it is stated that the average cost of using the PIAB system to the defendant was €1,280, and a highest cost of €5,235 had been recorded.<sup>40</sup> Whilst, these figures are significantly below the calculated average cost of defending high court litigation, represented here as €8,553, they suggest that the margin of savings is not quite as high as stated. Hogan's calculated proportionate savings are not used to produce the "cost savings" which feature rather consistently in the PIAB annual reports. Rather, the figure of 46% of compensation costs is used to measure attendant defence costs under the old litigation system.<sup>41</sup> It may be that the Hogan figures speak to the savings that are made when cases are litigated in full to the award of damages, whereas the other figures express an average of costs for fully litigated and settled cases. In spite of this, the stated cost savings generated by PIAB year-to-year on the basis of accepted claims remain noteworthy: €6,130,000 for 2006 and €9,750,000 for 2007.<sup>42</sup> The increase is linked to the growth of the value of accepted claims upon which alone savings are calculated.

A key issue with PIAB's figures on time and money savings is the fact that they do not account for those awards, rejected by either party, which may then be litigated through the courts or settled privately. As PIAB is not integrated into the court system, in these cases it may represent a fresh layer of delay and expense that did not exist previously. Since rejection rates may run as high as 40% and seem to favour claims of higher value, it can be argued that a significant variable has been omitted from the reckoning. It is also curious why cases of "early resolution" are excluded from the calculation of time and cost savings. This outcome occurs more frequently than accepted

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<sup>40</sup> Hogan, *A Cost-benefit Analysis of the Personal Injuries Assessment Board* (note 37), p. 7.

<sup>41</sup> See, for example, *Personal Injuries Assessment Board Annual Report 2007*, pp. 22-23. This figure is attributed to the calculations of the *Final Report of the Motor Insurance Advisory Board (MIAB)* in 2002.

<sup>42</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 23.

award, and would imply similar cost savings to respondents with greater expedience than claims fully processed.<sup>43</sup> Whilst there is little doubt that PIAB resolves personal injury claims with greater economy and expedience than the previous system of settlements and litigation, it is unclear as to whether the savings are quite as straightforward as represented. Ultimately, only a detailed study using robust sampling methods, of a large number of personal injury claims pre- and post- PIAB, with full details of cost and length over a wide variety of circumstances, would yield data from which precise measurements could be drawn.

### VIII. TRENDS IN PERSONAL INJURY LITIGATION

An examination of personal injury litigation rates through the courts provides a further indication of PIAB performance. Courts Service Annual Reports data on this issue is presented somewhat inconsistently, and thus missing values have prevented a more detailed trend analysis. It is furthermore difficult to directly judge the impact of PIAB on litigation rates, where “time-lag” between the initiation and resolution of cases obscures the relationship. Further complications are presented by the “spike” in cases in and around 2003-4 (see figures 2 and 3), when claimants rushed to file their cases under the familiar old regime, avoiding the need to apply first to PIAB. This is indicative of an initial reticence on the part of the legal profession, and possibly the general public, to engage with the uncertainties of the new regime. The number of personal injury cases initiated in the High Court was 11,245 for 2003 and 15,293 for 2004 (no doubt mostly before the initiation of PIAB that summer).<sup>44</sup> The figure dropped to a mere 746 for 2005<sup>45</sup> but has begun to rise steadily: 2,673 for 2006<sup>46</sup> and 5,951 for 2007,<sup>47</sup> due most likely to claims initially

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<sup>43</sup> Perhaps there may be difficulties in including these cases in calculations where PIAB may not always be aware of the outcome agreed privately between parties.

<sup>44</sup> *Courts Service Annual Report 2004*, p.102.

<sup>45</sup> *Courts Service Annual Report 2005*, p. 94.

<sup>46</sup> *Courts Service Annual Report 2006*, p. 102.

<sup>47</sup> *Courts Service Annual Report 2007*, p. 88.

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released by PIAB and rejected awards that are now being litigated  
(see figure 2 below).

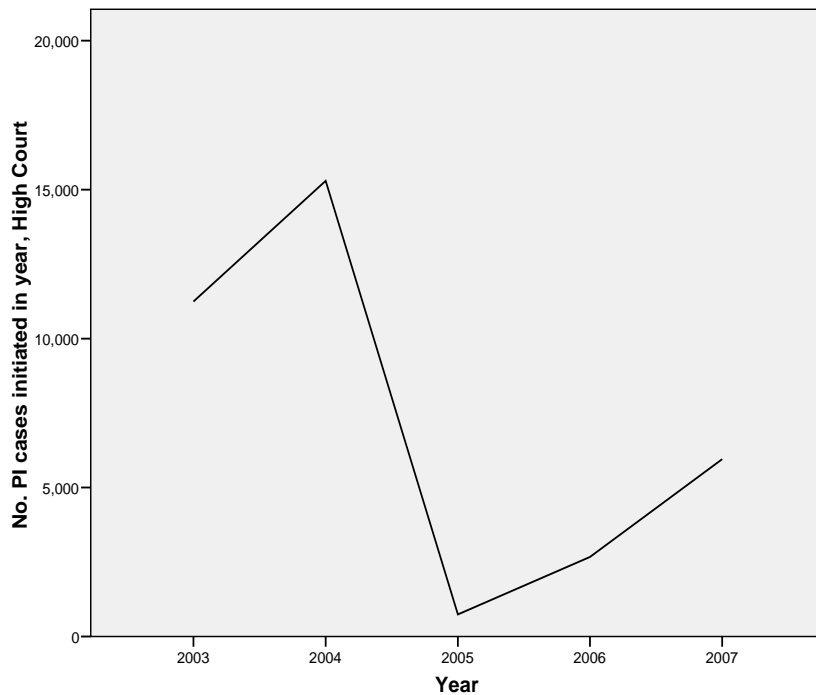


Fig.2 Trend in personal injury cases initiated in the High Court

In terms of the number of personal injury cases disposed of by the High Court, due to “time lag” it would not be expected for trends to have been affected as dramatically by the inception of the Board. Figure 3, below, demonstrates that other than a significant spike in 2003, which the next year’s report identifies as relating to a large number of cases where the Notice of Trial was struck out as the case was not ready to proceed,<sup>48</sup> the pattern is more constant. In 2001 there were 9,323 personal injury cases disposed of in the High Court,<sup>49</sup> falling to a low of 4,969 in 2005<sup>50</sup> and rising to 8,045 for 2007.<sup>51</sup>

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<sup>48</sup> *Courts Service Annual Report 2004*, p. 107.

<sup>49</sup> *Courts Service Annual Report 2001*, p. 76.

<sup>50</sup> *Courts Service Annual Report 2005*, p. 95.

<sup>51</sup> *Courts Service Annual Report 2007*, p. 89.

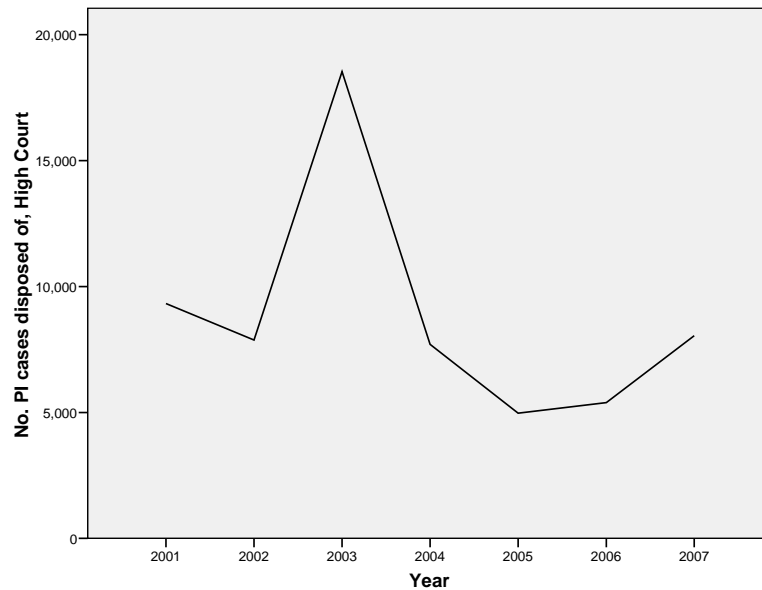


Fig.3 Trend in personal injury cases disposed of by the High Court

An *Irish Times* article reports that the number of court writs served annually has dropped from 30,000 pre-PIAB to 7,000-8,000 under the present regime.<sup>52</sup> This dramatic reduction might be explained by the fact that the cases which previously settled out of court, nevertheless commenced with a writ. Under the new regime, claims are initiated through PIAB and are settled or resolved in many instances without the need to begin court proceedings. Figure 4, below, analyses the total number of cases in which an award was managed by an adjudicating or assessing body. That is the cases where PIAB makes an accepted award and where the Circuit or High Courts make an award or approves a settlement. There are temporal issues to consider here again, the bodies will be adjudicating on claims that will have been initiated in different years. Figure 5 examines the same objects, but measured on the total value of awards made as opposed to the number of claims. There is an observable drop in

<sup>52</sup> "Happy insurance firms and irritated lawyers – but what about consumers?", *Irish Times*, 28 February 2007.

the number of cases in which damages were awarded through both the High and Circuit courts. These graphs demonstrate, however, that PIAB makes awards in many more cases, and for a greater cumulative value, than the High and Circuit courts combined. Moreover, the global figure of supervised claims has now more than doubled since the inception of the Board.

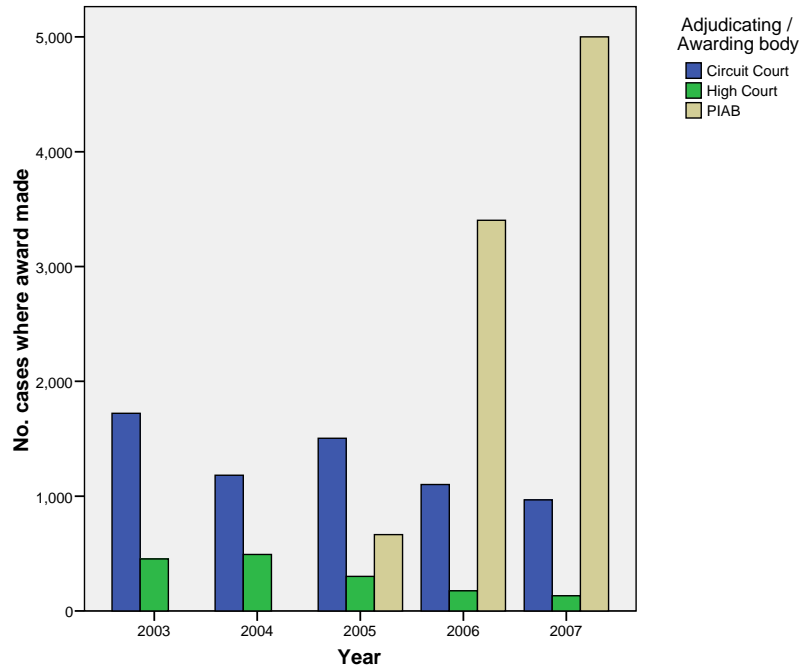


Fig.4 Number of cases where final award is made or supervised



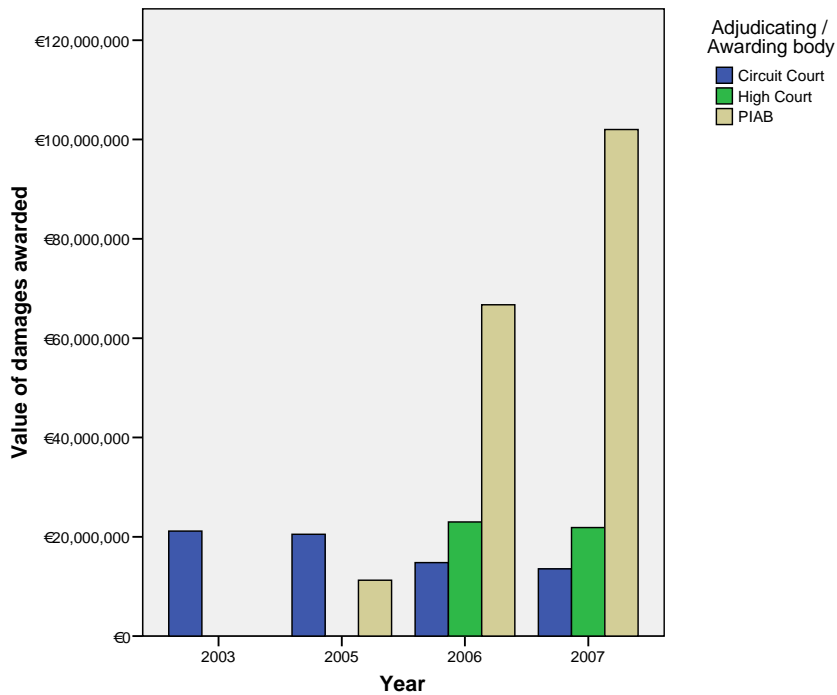


Fig.5 Total value of awards or damages and approved settlements

One possible explanation for this increase is that PIAB deals with a large number of cases of low value, which would not have entered the higher courts. There is no public domain data on personal injury cases through the District Court, which has jurisdiction for claims up to €6,348. In 2005, 23% of PIAB's awards, approximately 219, were for figures under €10,000.<sup>53</sup> In 2007, 64.5% of PIAB's awards, or 5,293, were for figures under €20,000.<sup>54</sup> Thus, whilst this explanation may account for the relative height of the PIAB columns in the graphs above, it does not account for the global increase in supervised awards. A more complete explanation is that the new regime has substantially altered the system of personal injury claims resolution. Under the courts system most claims would have been

<sup>53</sup> *Personal Injuries Assessment Board Annual Report 2005*, p. 16.

<sup>54</sup> *Personal Injuries Assessment Board Annual Report 2007*, p. 20.

settled privately between claimant and respondent.<sup>55</sup> There is clear indication that PIAB has “bureaucratised” the settlement process. In other words, a significant proportion of those cases which would have previously settled without full litigation, are now resolved through PIAB awards (and an even greater number settle prior to the issue of an award). Thus PIAB does not so much reduce the number of cases finally litigated, but creates an alternative mechanism for the resolution of those cases which would not have travelled the full distance to litigation.

This finding confirms the difficulties inherent in calculating the precise savings of time and money generated by the Board. It is, however, evidence of a significant alteration in claims resolution culture. A large proportion of claims (roughly 13,000 in 2007) are now resolved without recourse to court paperwork, senior counsel, expert witnesses (with the exception of medical assessments) and complex negotiations. Instead a system designed to be “user friendly” is employed to determine the issues surrounding a claim, whereupon a PIAB award (or respondent settlement offer), issued according to a transparent system of injury grading, is proffered and accepted. In such a manner, it can be envisaged that there are considerable savings in time and costs generated by the PIAB system, although it becomes further evident that its outcomes should be compared principally to cases which previously settled prior to full litigation. A further benefit of “bureaucratisation” is the retention of data on claims resolution which did not exist previously, although it is evidently important that the Board collect data on those cases which settle prior to award. It could be asked, furthermore, if PIAB could more accurately articulate its function as an alternative to private settlement as opposed to an alternative to litigation proper.

The impact of PIAB’s inception on court litigation rates has been such that, even after four years, it is difficult to determine a stable pattern. It will be necessary to review data for a number of proceeding years, when the effects of the litigation “spike” have fully subsided. It might already be concluded however, that whilst

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<sup>55</sup> *Court Service Annual Report 2007*, p. 90, notes that “listed High Court actions settled before hearing” numbered as follows: 2,781 (2006); 2,623 (2007). This suggests that a large proportion of High Court litigation routinely settles before hearing.

the existence of PIAB will translate into a reduction of the number of cases finally adjudicated in the High and Circuit courts, it will not do so in a radical manner.

### IX. THE CONTINUING CONTROVERSY

Since PIAB began operating, its performance has been closely monitored and commented upon in the media. Particularly controversial have been questions around its expedience and efficiency,<sup>56</sup> the degree to which awards are rejected,<sup>57</sup> and the continuing resistance exhibited by certain sectors of the legal profession.<sup>58</sup> PIAB's executive has extensively contributed to these media discussions, emphasising the parities in levels of compensation between the old and new regimes, its independence, impartiality, openness and transparency.<sup>59</sup> Public confidence in its usability and fairness is likely to impact on its operational efficacy through influencing the degree to which claimants accept its awards. PIAB proponents seek to appeal to notions of common sense and rationality, constructing litigation as expensive, outmoded and unconstructive. Where questions are raised as to the Board's shortfalls, blame is levelled at certain sections of the legal profession who are labelled as "kicking back" against a system which deprives them of income.<sup>60</sup> On the other hand, a critical posthumous statement by a judicial figure linked the background to PIAB's establishment, the composition of its governing board, and the "tone of their interaction with the community" to concerns around compensation culture, as opposed to equity for victims.<sup>61</sup>

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<sup>56</sup> Cullen, "Injuries board denies claim of huge backlog", *Irish Times*, 1 November 2006.

<sup>57</sup> O'Halloran, "Claimants, insurers reject one third of PIAB awards", *Irish Times*, 18 May 2006.

<sup>58</sup> Brennan, "Six law firms behind challenges to PIAB rulings", *Irish Times*, 19 October 2006.

<sup>59</sup> Byron, "Settling claims in a non-adversarial manner", *Irish Times*, 12 January 2007.

<sup>60</sup> Byron, "Settling claims in a non-adversarial manner" (previous note).

<sup>61</sup> O'Leary, "Supreme Court judges must show 'spirit of independence'", *Irish Times*, 3 January 2007.

Indeed, the establishment of the Board was inspired by lobbying from the insurance and business sectors, and was not initially welcomed by the legal profession. The new regime represents a cultural shift for a public accustomed to a model of claiming through the courts, assisted by legal representation. The Board was designed to be accessed by claimants directly, and to this end it recently re-branded itself as “injuriesboard.ie”. Perhaps PIAB has attempted to tap into a burgeoning trend in e-commerce, where consumers interact directly with product/service providers online, when previously an intermediary agent would have been involved. PIAB’s media representations have arguably exhibited impatience towards claimants’ demonstrated preference for retaining legal representation. A spokesperson attributed the high incidence of rejected awards to those “unwilling or perhaps incapable of embracing the new reality”.<sup>62</sup> The same statement implied that it is unnecessary for claimants to retain solicitors, and financially imprudent to incur their fees. The Board itself contains representatives of the insurance industry, business, governance, trade unions and consumers, but does not include representation from the legal professions. From the outset PIAB made it clear that it would not provide for the cost of lawyers, excepting only vulnerable claimants. Indeed, it was PIAB policy not to directly correspond with claimants’ solicitors, although this necessarily changed following the ruling in *O’Brien v. Personal Injuries Assessment Board*.<sup>63</sup> In this case the High Court held that refusing to respect a claimant’s instruction to communicate directly with an appointed solicitor was an unlawful interpretation of the PIAB Act. The ruling was upheld on appeal to the Supreme Court, which emphasised the importance of the claimant’s right to legal representation.<sup>64</sup>

It has nevertheless been reported by PIAB that 90% of claimants retain the services of a solicitor.<sup>65</sup> The Board continues to represent certain sections of the legal profession as hindering

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<sup>62</sup> Brennan, “Six law firms behind challenges to PIAB rulings”, *Irish Times*, 19 October 2006.

<sup>63</sup> [2007] 2 I.R. 1.

<sup>64</sup> [2008] IESC 71.

<sup>65</sup> Brennan, “Six law firms behind challenges to PIAB rulings” (note 62).

its efficacy. Representatives of the profession argue that they must serve the best interests of their clients, which may in some cases involve seeking a higher level of compensation through the courts, than amounts awarded by PIAB.<sup>66</sup> Board proponents however, have aired the suspicion that having recourse to the courts may be a strategy to recover the legal costs which would not be awarded under the PIAB process.<sup>67</sup> There is now less scope to secure legal costs in such a fashion following the Government's enacting of Personal Injuries Assessment Board (Amendment) Act, 2007. This legislation provides that the courts cannot award legal costs against a personal injury defendant where the court award is lesser than, or equal to, an award previously issued by PIAB and subsequently rejected by a claimant. In such a manner, a PIAB award is to function much like a lodgement to court. Further complications may arise for solicitors who traditionally received compensation payments on behalf of their clients, and thus had fee security, and habitually provided "undertakings" to lending institutions in relation to client loans. Overall, it is public confidence in the efficiency and efficacy of the board that is most likely to impact on whether claimants will feel it prudent to engage a solicitor. This is, no doubt, damaged by media reportage of the minority of applicants who report "nightmare" experiences in their dealings with the Board.<sup>68</sup>

Curiously, the public debate on PIAB does not seem to have included the issue of "solicitor-client" fees, which tended to be extracted from compensation payments in addition to the legal costs paid by respondents. It is unclear as to how precisely the new regime has altered fee arrangements and impacts on the net levels of compensation receivable by claimants. Ironically, while media reportage has focused on tensions between PIAB and elements of the legal profession (no doubt due to the drama inherent in such a narrative), there are nuanced aspects of their relationship that could significantly impact on the operation and

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<sup>66</sup> Cullen, "Thousands of personal injury cases still go to court", *Irish Times*, 28 February 2007.

<sup>67</sup> Cullen, "Solicitors 'disrupting lawyer-free system'", *Irish Times*, 9 August 2007.

<sup>68</sup> "Payout problems", *Irish Times*, 9 March 2007.

equity of the PIAB system. First, it should be recognised that in the majority of cases it would appear that solicitors and PIAB have been working together smoothly. Indeed, it could be argued that the involvement of legal professionals has to some extent facilitated the development of the “early resolution” process. It can reasonably be assumed that the vast majority of claimants accepting such a settlement would have retained the services of a solicitor, and would have been guided towards accepting this outcome. Otherwise, there would have been no monitoring or scrutiny of a PIAB-facilitated award in a large number of instances, which would raise significant queries about the system’s equitable assumptions. Equally, questions remain as to the equity of PIAB’s broad position on legal representation. Given that PIAB finally supervises awards in a limited number of cases (21% for 2007), it is clear that liability and settlement issues continue to occupy a position of prime importance in the personal injury resolution process. For this reason, questions must be raised as to why the provision of independent legal advice, suitable guidance, support and advocacy would not be constructed as an important initial exercise.

#### **X. IMPACT ON PREMIUMS**

The Financial Regulator’s *Private Motor Insurance Statistics 2006* indicate that claims costs in this sector have fallen by 15% for comprehensive cover and by 17% for third party, fire and theft over the years 2005 and 2006.<sup>69</sup> These figures show a continued decrease in premiums payable for both services since peaking in 2003.<sup>70</sup> Thus it should be noted that insurance

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<sup>69</sup> See *Private Motor Insurance Statistics 2006* (Dublin: Financial Regulator, 2008), available at: <http://www.ifsra.ie/>.

<sup>70</sup> *Private Motor Insurance Statistics 2006*, p. 2: “Overall, average premiums reduced by 7% to €18 for comprehensive cover and by 6% to €71 for third party fire and theft. This is the third and fourth successive annual decrease in premiums for comprehensive and third party fire and theft cover, respectively. This followed a period of rapid escalation between 1997 and 2003 where average premiums increased by 44% to €64 for comprehensive cover and by 60% to €1,005 for third party fire and theft cover”. There is scope to believe that insurance premiums in the motor sector may increase in 2009, according

premiums have been falling since before the inception of PIAB, although the report acknowledges the role of PIAB in growing and accelerating the reduction. Media reports have taken a cynical tone on the issue, reporting rises in insurance profits in their coverage of the Board's performance, including a pronouncement by a PIAB spokesperson that cost savings should be increasingly passed to consumers.<sup>71</sup> Where insurance companies are slow to do so, this is likely to colour public perceptions of PIAB.

## XI. CONCLUSIONS

Mid-year figures released by the Board for 2008 (January to June) show that it has issued 4,652 awards at a value of €13 million.<sup>72</sup> The press release indicates that PIAB is making an increasing number of awards, in claims of increasing value, whilst reducing rates of court litigation. Assessing the degree to which the efficacy, economy and expedience of Ireland's personal injury litigation regime has been altered by PIAB, however, remains a complex task. First, the polemic nature of the debate creates an environment in which issues are contested. Secondly, there is a paucity of accurate and detailed public data on claim resolution pre- and post- PIAB through which firm comparisons may be made. Thirdly, PIAB's performance seems to be subject to its nuanced relationship with claimant confidence and the continued preference for the retention of legal representation.

Anecdotal evidence suggests that the resolution of personal injury claims overall has increased in both expedience and economy. It is not possible, however, to determine precisely to what extent this is attributable to PIAB's initially envisaged functions, or to wider pertinent reforms and cultural changes. The savings of time and money generated by the PIAB system are significant, although a number of issues with their particular calculations have been identified. In this regard, the finding that PIAB would seem to adjudicate principally on those claims which

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to research undertaken by Deloitte, see [http://www.deloitte.com/dtt/press\\_release/0,1014,sid%253D2765%2526cid%253D230119,00.html](http://www.deloitte.com/dtt/press_release/0,1014,sid%253D2765%2526cid%253D230119,00.html).

<sup>71</sup> See for example Cullen, "Thousands of personal injury cases still go to court", *Irish Times*, 28 February 2007.

<sup>72</sup> [http://www.injuriesboard.ie/eng/News\\_Press\\_Releases](http://www.injuriesboard.ie/eng/News_Press_Releases).

would have settled previously out of court, is salient, indicating that figures should be calculated with this firmly in mind. Where there has been an observable decline in higher court activity in the area of personal injury litigation, it is yet unclear as to whether this will be generous and sustained. The PIAB mechanism can perhaps be properly understood as a “bureaucratization” of the claims settlement process, albeit without the negative connotations such a description might generate. It is comparably more rational and transparent than traditional pre-hearing settlements, and carries with it the previously discussed improvements in expedience and economy. Nevertheless, PIAB’s statutory functions are articulated with broader scope and questions of equity remain. Is it appropriate for a statutory body to represent that it is not necessary to obtain legal advice prior to the registration of a claim, where it is likely that solicitors will play a significant role in the eventual resolution of a majority of personal injury claims?

While the reform of the Irish personal injuries regime has been multifaceted, including the introduction of PIAB in parallel to reviews of court litigation procedures and the organisation of legal representation and fees, it has nevertheless been somewhat conceptually limited. There has been no meaningful debate on the retention of a fault-based system of legal liability. Moreover, a fine-tuning of PIAB’s articulated function and attendant policies and procedures may lead to greater efficacy, economy and equity. In order to substantiate its claims to parity of compensation, PIAB needs to at least monitor, or possibly supervise, compensation offers made as part of the early resolution process. It would serve the cause of reform well to open the scope of debate, and to acknowledge that the public have demonstrated a preference for the involvement of legal professionals in the claims process. A policy of providing for an initial legal consultation on a fixed fee basis (in much the same manner as the Board provides for a medical examination) would represent a means of addressing the equity issue. It may, indeed, make economic sense to do so, if the public and legal profession are incentivised to engage with the PIAB process. This may lessen any existing inclinations to reject awards and initiate litigation. Personal injury reform need not rest on current arrangements, but can strive to improve them further.