McLarens

The Irish Market 2020 – 2021

Casualty Claims Review and Opinion

October 2021

Executive Summary

In March 2020, we learned about Coronavirus and living through a pandemic. The first lockdown commenced on the 12th March 2020, announced by then Taoiseach Leo Varadkar. We adapted to follow the rules to keep everyone safe. The impact on people and the economy was dramatic, over 150,000 construction workers found themselves out of work.

The government immediately created the Pandemic Unemployment Payment (PUP) and by the 5th May over 600,000 people had applied for this payment. As 2020 closed, the numbers receiving the payment had reduced to 278,000 because of businesses reopening for Christmas, however the further lockdown in January 2021 resulted in these numbers again rising. In addition to the PUP, the government launched the Employment Wage Subsidy Scheme (EWSS), supporting 410,000 workers, and the COVID Restriction Support Scheme (CRSS) for businesses provided over €115 million. This will have to be paid back.

By the third quarter of 2020, with the easing of restrictions, the Irish economy had rebounded by almost 11.1%. This was unfortunately followed by a contraction in the economy quickly by 5% in the first quarter of 2021 and 2.2% in the second quarter. Construction was the key driver in relation to this initial 'bounce' however with subsequent lockdowns the rebound was short lived. The unemployment rate was 21.9%, a very stark position bearing in mind that prior to Coronavirus unemployment stood at approximately 4.8%, which in economic terms is practically full employment.

4.8%

prior to the pandemic the unemployment rate was practically at full employment

Businesses had to change operationally almost overnight and ensure that employees had the facilities to work remotely. Mental well-being became one of the top challenges and brought a whole new aspect to an employer's duty in health and safety. For many years we have been trained to manage physical risks while psychiatric injury due to 'IT burnout' was not something of prevalence. Most involved in our profession can work remotely satisfactorily and maintain productivity. This has led to savings in travel time and cost, however operating remotely is not the answer to everything. A hybrid model is more viable.

Amid this revolution, our profession is also dealing with legislative reform. The action plan for Insurance Reform was published by the government in December 2020 and identified aspects requiring consideration such as justice, finance, competition, the reduction of fraud and increasing transparency. To assist with this the government has established a subgroup attached to the Cabinet committee on economic recovery and investment and is chaired by the Tánaiste (the Deputy Prime Minister). It identified objectives which we will touch on in this review:

1. The commencement of the **Consumer Insurance Contracts Act 2019**

2. The publication and adoption of the **Personal Injury Guidelines** with the added emphasis on the fact that the court shall, when assessing damages, have regard to these guidelines and if it departs from those then detailed reasons for that departure need to be provided.

3. Examine potential changes to the **Occupiers Liability Act 1995** to strengthen the waivers and notices to increase protections for consumers and businesses.

4. The examination of penalties for insurance fraud and the enactment and commencement of the **Perjury and Related Offences Bill 2018**.

The reforms overall are positive, and these have resulted in some businesses finding it easier to obtain and

afford various forms of insurance cover. However, there are still some businesses struggling particularly in hospitality leisure and tourism, ironically also the businesses worst affected by the pandemic.

In the US Courts 'virtual justice' was an emergency response but going online has made courts safer and more transparent, accessible and convenient. Witnesses and litigants no longer need to miss hours from work. However, for this to be viable, adequate broadband needs to be available to everyone. There is also a requirement that proceedings must be heard in public so it may be necessary to livestream over YouTube. Legislation has been enacted and we will touch on that later.

The Personal Injury Guidelines have been the greatest advancement in personal injury claims in the last 20 years, however more recently the level of legal costs has also been a driver in the increase in premium rates. In a recent High Court case Mr. Justice Michael Twomey identified the disproportionate level of legal costs in the High Court. The Civil Justice Review Group has been tasked with dealing with this and is currently divided as to a solution. The majority believe that the cost could be addressed by the publication of non-binding guidelines, however a minority including Former High Court President (Mr. Peter Kelly) say a mandatory maximum cost should be set by an independent committee established in the statute. Mr. Justice Kelly had previously remarked that the only people who can litigate in the High Court are either "paupers or millionaires".

The recently published National Claims Information Database report, in relation to Employers' and Public Liability, confirmed that, on average, insurers lost money in the five years to 2019, having no option but to increase premiums. It also ascertained that 63% of the total spend on settling claims that went before the Courts related to legal costs. More detail on this later.

Following the publication of the Personal Injury Guidelines, government and business have placed tremendous pressure on the insurers to reduce premium costs. There has been a phenomenal reduction in the level of awards being made by the Injuries Board in compliance with the guidelines, however what has not been published yet is the take-up to those awards and how many have been rejected (with litigation on the way). A solution must be found to ensure that insurance cover can be provided at a reasonable cost.

This was recently highlighted by the only remaining company providing independent inspection certification service for playgrounds and play centres not being able to operate because the bodily injury aspect of their professional indemnity cover has been withdrawn. We have a situation whereby an independent inspection of children's playgrounds, to ensure that they are safe, is not possible because of the off-chance that the inspector misses something and leaves themselves open to being sued. This is a prime example of the impact of our litigation culture is to the most vulnerable in the community, our children.

The Personal Injury Guidelines will have a positive effect on the transaction of litigation in Ireland, however this will take time to become visible and there are obstacles to overcome. Reducing the level of reserves for existing claims may be premature. We need to understand the acceptance of Injuries Board awards and how the judiciary will implement the guidelines. What we can state with certainty is that, with greater volumes of personal injury claims to the District and Circuit Courts because of the reduction in damages levels. Local knowledge (in relation to the judges hearing the cases) will be of great value.

We hope the information and opinion given is of benefit and should you want to discuss in greater detail please do not hesitate to make contact.

Glenn Goggin FCII Dip.L BCL CIP CID
Managing Director - Ireland
glenn.goggin@mclarens.com

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Legislation – Oireachtas (Parliamentary) and Case Law

Occupiers Liability and the Duty of Care

There has been concern in relation to the balancing of the duty of care imposed on property owners under the Occupiers and Civil Liability legislation, with lobbying from small- and medium-sized businesses for a rebalancing of this duty as it is proving extremely onerous and fueling spurious claims.

The government has given a commitment to consider changing the legislation to strengthen waivers and notices to protect property owners and community groups. International practice worldwide is currently being examined in that regard.

The case of **Leah Mulcahy (A Minor) v Cork City Council High Court 2018** is interesting in relation to this and suggests a change in mindset. The background to this case had the claimant in July 2017 sustaining a fractured arm whilst playing in and around large boulders close to where the claimant lived. The claimant sustained a displaced fracture above the elbow which required manipulation and the insertion of metalwork which was removed approximately four weeks later.

The High Court heard the action on appeal from the Circuit Court. The boulders had been in situ for over 25 years to prevent dumping or unauthorised visitors camping in the area. The plaintiff's legal team took the view that these were an enticement to children and should have been removed. There was discussion as to whether the claimant should be considered a visitor or a recreational user under the Occupiers Liability Act. The judge took the view that she should be considered a visitor on the basis that the land was provided by the local authority as part of the amenities of the housing estate. This would impose a higher common duty of care, whereas the duty towards recreational users would be purely not to injure them intentionally or with reckless disregard.

The judge took the view that the common law duty of care does not require an occupier to remove all dangers. There must be an acceptance that children will investigate and climb, run or jump. He took the view that if you follow the Plaintiff's logic where children are ***"jumping on rocks on a regular basis, all day every day… And presumably having fun doing it (otherwise why do it), to one where things that they can jump on have to be removed and we end up with a bland and featureless landscape***". The judge took the view that ***"danger plus allurement plus knowledge plus lack of legitimate purpose do not in themselves add up to negligence in the absence of a final legal policy factor, which is that the danger is one that it is reasonable for the law to require a defendant to obviate"***. The judge therefore dismissed the claim because it did not succeed under the 1985 Act and affirmed the order of the Circuit Court.

Recoverable Benefits and Consent Orders

When Recoverable Benefits first became an issue back in 2014 practically every professional involved in litigation provided an opinion. It was quite a departure in that it made settlement of claims more difficult as loss of earnings etc. would now in some instances be paid back to the state (quite rightly), as opposed to being paid to the claimant, and therefore it had a financial impact.

Systems developed over time which allowed reductions or alterations to the total amount of benefit recoverable on the basis of consent orders before the court for various reasons. However, there was not any great certainty up until recently.

In the case of **Matthews v Eircom High Court 2019** Mr**.** Justice Kevin Cross has given some certainty to the process and by doing so has disagreed with several of his learned colleagues. Where liability is very much

an issue, and a settlement is agreed based on an apportionment, then that same apportionment should apply to the recoverable benefits aspect of the claim. For that to happen a Court Order will be required to confirm its legitimacy. Some High Court Judges have taken the view that it would be necessary to hear the evidence and not just rule on the agreement that had been reached between the parties. In such a scenario, complications arise particularly when it is borne in mind that the judiciary is already working under stretched capacity.

In the Matthews case, when it came before the court based on the case being struck out with an order for costs to the plaintiff, it was confirmed that it had been settled between the parties on a 50-50 basis and as a result a corresponding reduction of the amount of the recoverable benefits for which the defendant was responsible was requested.

In considering the jurisdiction of the court Mr. Justice Cross stated ***"… Since the introduction of the Recoverable Benefits Scheme in 2014 this Court and indeed to my knowledge all of my colleagues in the personal injury list have made orders on consent with determinations either as to the liability of the parties or the amount of recoverable benefits paid. This Court has also pronounced on a number of occasions that it has jurisdiction under the provisions of Section 343R and at law to make such determinations. One of the duties of a Judge is to solve problems and not to create them. Certainly, it is not the function of a Judge to cause problems were none exist".***

By this judgement he has contradicted his colleagues and other legal commentators, in particular Mr. Justice Twomey who had taken the view that a Court Order in the context of the RBA required independent determination of evidence including cross-examination i.e., the normal adversarial process you would find before any court. Ultimately the only party that could agree to such an order would be the party who was suffering, in this instance the Department of Social Welfare and the appropriate Minister.

Thankfully Justice Cross disagreed and has taken the view that if the parties have agreed a reasonable settlement between them then the basis of that settlement should also be the basis of the requirement to reimburse the recoverable benefits. Under the principle of stare decisis it is unusual for a judge to depart so readily from decisions that have already been made by colleagues of the same level as happened in this instance, but it is doubtful that it will be the last that we hear of it.

UK Whiplash Reforms

Just as our litigation legislation has been changing there have also been changes in the UK. The whiplash reforms contained in Civil Liability Act 2018 were implemented with effect from 31 May 2021. From the perspective of the Irish Jurisdiction, it gives an interesting definition of what a whiplash injury is "***an injury of soft tissue in the neck, back or shoulder that is… a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or any injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder".***

It should be noted that the injury does not include an injury of soft tissue which is a part of or connected to another injury and the other injury is not an injury of soft tissue in the neck, back or shoulder.

The legislation increases the small claims tariff limit from £1,000 to £5,000. This applies for pain, suffering and loss of amenity for the injury alone. There are several exclusions such as injuries to children or those involving vulnerable road users (which include motorcyclists and pillion sidecar passengers, cyclists, pedestrians, horse riders, mobility scooters etc.). The tariff or damages have been set according to the duration of the injury and there are two distinct categories i.e., injuries that include psychological injury and those that do not. The following table explains this in greater detail.

Duration of injury	Lower Tariff	Upper Tariff
Not more than 3 months	£240	£260
More than 3 months but not more than 6 months	£495	£520
More than 6 months but not more than 9 months	£840	£895
More than 9 months but not more than 12 months	£1,320	£1,390
More than 12 months but not more than 15 months	£2,040	£2,125
More than 15 months but not more than 18 months	£3,005	£3,100
More than 18 months but not more than 24 months	£4,215	£4,345

UK Whiplash Reforms from the Civil Liability Act 2018

The expectation here is that with the increased value, and the fact that people will be able to submit their claims through the new portal, there will be no requirement for a lawyer. This will reduce the cost as more firms may withdraw from this part of the market as it may not be economically viable for them.

We have made the same argument in this jurisdiction with the number of cases that should now end up within the District Court following the new Personal Injuries Guidelines. However, what about the McKenzie friends? Will there still be a requirement for some form of legal advice to be given to the legitimate claimants? We had similar issues back in 2004 with the introduction of The Personal Injuries Assessment Board (PIAB) and the Book of Quantum and the belief that legal advice should not be required, however within a very short period of time the involvement of lawyers again became the norm.

Consumer Insurance Contracts Act 2019

The **Consumer Insurance Contracts Act 2019** was signed into law in January 2021 but some aspects will not come into force for 12 months to allow the insurance industry time to comply.

The legislation provides for a new 14 day cooling off period for customers to new insurance contracts and from a claimant's perspective, more importantly, insurers will not be able to settle third-party claims without the policyholder knowing. This happens particularly in commercial lines insurance. The insurance company will also have to notify the policyholders of the outcome of a claim including the amount it has been settled for.

Section 21 of the Act allows third parties to pursue insurers directly where no privity of contract exists

The biggest change is in relation to the principle of Utmost Good Faith and Insurable Interest. It is no longer necessary for the onus to be placed on the policyholder to disclose all material facts when incepting a policy or renewing the policy. The onus is now on the insurer to ask the question as otherwise the prospective policyholder does not have to disclose information.

Section 21 of the Act allows third parties to pursue insurers directly where no privity of contract exists. Previously in Ireland, Section 62 of the Civil Liability Act 1961 allowed for a third party to pursue an insurer where an insured party had either died or been declared bankrupt or where a company/partnership had either been wound up or dissolved, if there was a valid claim. The reference to a valid claim is important as the terms and conditions of the policy remained and if there was a breach of those conditions which were precedent to liability then a third party could not succeed **(HU v Duleek Formwork Ltd (2013)**.

Under the 2019 Act a party is entitled to pursue an insurer directly and it is not necessary for the liability of the insured to be first established by way of separate proceedings. Where a policy is taken out by an insured against a possible third-party liability and, if a liability subsequently arises, then if the insured cannot be

located, is insolvent or deceased or if a Court finds it just inequitable to do so, it can transfer the rights of the insurer under the policy to the third party to whom the liability is owed (Section 21 (1)).
Another interesting change is that if a third party decides to directly pursue the insurer and a term or condition exists that a policyholder is required to fulfil as a condition precedent (for example the payment of an excess) the third party may now step into the shoes of the insured and fulfil the condition precedent.

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An important aspect is that the insurer can rely upon the same defences as the insured itself and the insurer is entitled to set off any liabilities incurred by the person in favour of the insurer against any liability owed by the insurer to the third party.

Where an insured becomes insolvent the Act provides that any money payable to the insured under an insurance policy must only be used for the purpose of discharging in full all valid claims by the third party against the insured in respect of which those monies are payable and no part of those monies shall be assets of the person or applicable to the payment of the debts.

The legislation is very similar to that enacted in the UK under the Third Party (Rights Against the Insurers) Act 2010. Under the legislation in Ireland an insurer cannot now rely upon the fact that an insured did not notify them of the claim in order to refuse to indemnify an insured and leave the third party in a situation whereby they are unable to recover damages.

Legal Services Regulation Act 2015

For many years we have advocated the use of Calderbank letters or offers where plaintiffs were being unreasonable in relation to settlement amounts and were insistent on the case going before a court and incurring the associated costs. The opportunity to make a lodgment/tender has meant that the use of a Calderbank letter has been less frequent in more recent years, however it has its uses when the opportunity to submit a tender is not possible and we have used the tool whilst waiting for the case to come to hearing on the day of the hearing.

Calderbank offers are written offers of settlement made without prejudice save as to costs. We have used these to assist in trying to facilitate an early resolution of a claim because of their flexibility when compared with a tender.

Section 169 (1) (F) of the Legal Services Regulation Act 2015 has now put the position of the Calderbank offer on a firm footing. This section states "***a party who is entirely successful in civil proceedings is entitled to an award of costs against the party who was 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***".

That section of the legislation then lists various factors that must be considered by the court one of which includes ***"whether a party made an offer to settle the matter the subject matter of the proceedings, and if so, the date, terms and circumstance of that offer***". This is therefore a welcome development.

National Claims Information Database

The long-awaited publication of the National Claims Information Database happened on Wednesday 14th July. This has shown the necessity of researching a subject in detail and not accepting populist commentary at face value. Populist commentary has led to 'finger pointing' at the insurance industry and created much of

the public frenzy within the Irish market. Whilst yes, insurers writing motor business have made profits over the last number of years, those writing casualty business, and particularly Employers Liability, have been loss-making since 2014.

Under the 'Statistical Analysis' section, we will consider costs etc. This report has highlighted that it was advantageous for injured parties to issue legal proceedings in Employers Liability cases rather than to try and settle. Litigated Employers Liability settlements averaged approximately €70,000, almost double the value of the Injuries Board settlements.

Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020

This Act was partly commenced on 21st August 2020 and the remainder was commenced on 14th September 2020. It provides for remote hearings in civil proceedings and for the increased use of video link in criminal proceedings. The Act provides that a Court may direct that any category of civil proceedings be dealt with remotely. This power may be exercised on behalf of a Court by the Chief Justice or the Presidents of the Courts.

In civil matters, rules of court may provide for electronic filing and electronic issuing of documents and orders. Where provision is made for transmission of documents electronically, rules of court may provide for a statement of truth to be made and transmitted electronically. The Act also provides for appeals before the Court of Appeal and Supreme Court in criminal proceedings, European Arrest Warrant and Extradition Act proceedings to be heard remotely.

Creane v Harty, Victoria Hospital Cork and the Health Service Executive Court of Appeal 2020

This is an interesting decision by the Court of Appeal. Whilst the circumstances surround a medical malpractice case, it has implications for all personal injury litigation and the way defences are pleaded.

The background to this case had the claimant undergoing a hip replacement operation in 2015 which was carried out by Mr. James Harty. The claimant had two previous operations and after the 2015 operation developed peripheral neuropathy in his right leg. The allegation made by the claimant was that the third operation had significant risks associated with it due to previous surgeries and that the defendants failed to inform him of this. As a result, he pleaded that the surgery had been performed without his informed consent.

Separate defences were filed on behalf of all defendants, all very similar in relation to the informed consent allegation as 'bold denial'. The plaintiff went to the High Court which refused the plaintiff's Application for Particulars on the basis that the pleading in question was a denial rather than a positive ground of defence. They wanted to know what advice was allegedly given to the plaintiff, who had given it, and had this been provided in writing. They argued in the Court of Appeal that the Civil Liability & Courts Act 2004 was enacted to ensure detailed disclosure of personal injury litigation so that any surprises could be avoided. They argued Section 13 (1) (B) of the Act required the defendants to give full and detailed particulars to a denial.

In the Court of Appeal, Mr. Justice Maurice Collins determined that the particulars were necessary for the plaintiff to establish a case he had to meet at trial. The Court took the view that the denial by the defendants in the case was a positive plea that the defendants had obtained informed consent prior to the operation and therefore the particulars were necessary to prosecute the case.

Sheila Murphy v the Health Service Executive 2019

This case is interesting as it involved a medical negligence aspect with an issue surrounding the renewal of

the Personal Injuries Summons and the interpretation of Order 8 of the Rules of the Superior Courts.

The plaintiff issued medical negligence proceedings against the defendant in August 2018. The summons stated that the plaintiff had not received the required medical reports to detail the claim and the summons was only issued to avoid being statute barred. There followed a period of inactivity waiting for the relevant medical reports and this was exacerbated by the fact that the plaintiff failed to provide the outlay to pay for the medical reports. It should be noted at this stage that the plaintiff was elderly and considered vulnerable.

The summons expired in August 2019 without being served and it was only in January 2020 that the defendant was notified of the claim against it. The summons was subsequently renewed and served on HSE in February 2020. The defendant brought an application to set aside the renewal of the summons claiming that the five-month period between the expiry and the renewal was excessive. In the High Court Mr. Justice Kevin Cross refused the application taking the view that the delay in receiving the medical reports could be described as a "special circumstance" which justifies renewal.

This was subsequently appealed to the Court of Appeal because previous High Court decisions had interpreted the rule as requiring a “two-pronged” approach. Firstly, there had to be special circumstances to justify the extension and secondly, there had to be good reasons to renew the summons.

In the Court of Appeal Mr. Justice Robert Houghton took the view that obtaining the correct medical evidence takes time and legal practitioners cannot settle medical negligence summons without sufficient expert evidence to do so. He therefore took the view that the High Court was incorrect in its view that there was no significant delay in circumstances where the solicitor was awaiting medical reports.

Therefore, the Court of Appeal ruled that the only test which a court should apply in the context of renewal of an application is whether there are special circumstances which justify the renewal of the proceedings. The opinion was that the two-step approach was incorrect and that the previous cases had been incorrectly decided. There was only one aspect to consider and that is are there special circumstances.

Pre-Action Protocols in Clinical Negligence Claims

The Legal Services (Regulation) Act came into force in 2015, however Section 219, in relation to pre-action protocol in medical negligence cases, has still not been commenced. The view is that once these are introduced most cases will settle during this stage. This will decrease the burden on the courts, which are currently stretched, and will have a better overall experience for claimants and defendants.

In October 2020 the Report on the Administration of Civil Justice was published. This review was chaired by Mr. Justice Peter Kelly a former president of the High Court and a key recommendation of that group was that the Minister should introduce regulations prescribing the pre-action protocol in clinical negligence cases as quickly as possible. The view was that the early communication between the claimants and defendants will lead to an early identification of issues which will lead to full disclosure of information and medical records and therefore an ability to resolve and settle cases as early as possible.

71.5%

of cases resolved prior to the issue of court proceedings

Similar protocols were introduced in England and Wales in 1999 as part of Lord Woulfe's proposals. This has been a tremendous success and during the 2019/2020 year 71.5% of cases were resolved prior to the issue of court proceedings using the pre-accident protocols. 27.9% were resolved post proceedings only 0.6% proceeding to trial. We would hope that the protocol will be introduced in Ireland as quickly as possible.

Deliberate Act - Burnett R. Grant (Respondent) v International Insurance Company of Hanover Ltd (Appellant) (Scotland) (2021) UK SC12

This is a judgement from the Supreme Court in the UK on the definition of 'deliberate act' which is something we often come across with security firms. The background to this case had the respondent's husband in 2013 being ejected from an Aberdeen bar by door stewards. In the following altercation, one of the stewards applied a neck hold which subsequently resulted in his death by asphyxia.

The steward in question was subsequently convicted in the Scottish High Court for assault but the jury did not accept that the accused had asphyxiated or caused the death. The deceased's widow commenced proceedings against the door steward, his employer (Prospect Security Ltd) and the operating company of the bar. In the Court of first instance, it was held that the exclusion only applied when "***the outcome giving rise to liability, namely death, was the intended objective".***

This was subsequently appealed to the First Division of the Inner House where the deliberate acts exclusion was interpreted in a similar way ***"(the exclusion) is not intended to deal with a case where a door steward attempts to restrain a customer or would be customer but in doing so negligently, or even recklessly, goes beyond a reasonable level of force. The use of the word deliberate in the exclusion indicates that the employee's acts should be intended to cause the type of harm suffered by the victim unless the harm suffered was of the general nature intended by the employee, it cannot be said that the liability for that harm arose out of the deliberate act of the employee"***.

The matter was subsequently appealed to the United Kingdom Supreme Court where it held that the case turned wholly on the interpretation of the phrase deliberate acts. The insurer's case was that the act (i.e., causing the injury) must have been intended to cause injury or carried out recklessly as to whether it would cause injury. The respondent's case was that the act must have been intended to cause the specific injury which resulted (in this case death or serious injury) which in any event did not include reckless acts.

With reference to the criminal case law the court held that the steward's conviction for assault stood as evidence of intention to perform the act of the assault (i.e., the neck hold) but not capable of establishing any intention beyond that. The court held that the policyholder was a door security company. To follow insurers arguments on reading recklessness into the deliberate act exclusion would be to denude the policyholder of much of its cover.

HSE Cyber Attack by the Conti Cybercrime Group

On 14th May the HSE became aware of a significant ransomware attack on some of its systems resulting in more than 85,000 computers being shut down to contain the attack. The attack was carried out by the Conti cybercrime group requesting a ransom of $20 million to be paid in bitcoin which was refused.

Subsequently some of that stolen data, including sensitive patient information, appeared on the dark web. The HSE and the Mercy Hospital both secured High Court injunctions to stop personal medical information that may have been stolen from being shared, sold, or published online.

A case has now been taken by Glanmire based Solicitor Micheál O' Dowd on behalf of a cancer patient against the Mercy University Hospital. There has been quite a public backlash in relation to this case being taken with a suggestion being that it is being unpatriotic on the basis that the entire country and health system was under attack. Proceedings have been served and we wait to see how this case progresses.

CCTV and Discoverability

One of the most pleasing outcomes in relation to personal injury claims during the past 12 months was the case involving **Dudgeon v Supermac's Ireland Ltd (2020) IEHC43 60.0**

The background to this case had the claimant allegedly sustaining injury whilst on the defendant's premises when a chair on which she was sitting broke. The claimant sought sight of the CCTV footage and this was refused by the defendant on the basis that it would only be used by the plaintiff to "mend" the case appropriately. This is something we have been advocating for quite some time. In our view a plaintiff will know what happened and will be able to advise their legal advisers accordingly. There is no need for further information which may ultimately only colour the scenario. It may also be the situation that the plaintiff's lawyer wants to make sure that they have a case before they spend too much time trying to make one!

In this case the defendant had failed to preserve the chair in question and failed to explain why. The court took the view that the fact that the broken chair was no longer available for production or inspection by the plaintiff's engineer was irrelevant as liability was not an issue between the parties and that the only reason the CCTV had been requested was to assist the plaintiff with her claim and ascertain whether or not she actually fell to the ground, as alleged.

The court took the view that it was not a case in which the plaintiff could establish liability without the access of CCTV footage. She was not rendered unconscious at the time and should be able to give a full account of precisely what happened. If liability was an issue the CCTV would be crucial.

This is an interesting judgement and should be considered where we are looking at assessment only. If liability is at issue then CCTV will be discoverable. It should be noted however also that the Data Protection Commissioner following the judgement stated that the case did not affect a person's right under GDPR and that the decision was made in the context of the law of discovery and the data controller remains obliged to fulfil access requests in relation CCTV footage.

If liability is at issue, CCTV will be discoverable

Another case of interest in a similar vein is that of **McCorry v McCorry (2021) IEHC 104.** In this case the High Court ruled that a defendant's entitlement to seek a plaintiff's pre- and post-accident medical records could be ordered without a supporting medical opinion. The court opined that it had discretion to award post-accident discovery if the category sought was relevant and necessary.

Accident Investigation Reports and Legal Privilege

An important decision from an Employer's Liability perspective recently came out through the case of **Ladislav Kunzo v Keypak Longford Unlimited Company (2021) IEHC180.** The court held that an accident investigation report form completed by the employer following a workplace accident was protected by litigation privilege.

The plaintiff was employed by Keypak and he suffered a back injury rendering him unfit for work. He sought discovery of the accident report and the defendant asserted a claim of legal professional privilege over the document. The defendant treated every accident on the basis that it may become a formal claim and it was confirmed on the form that any investigations were carried out in contemplation of litigation. The accident report forms included an interview with the injured party and witnesses and photographic evidence which would ultimately be provided to the defendant's insurers/solicitors should a formal claim develop.

Mr. Justice Barr took the view that for litigation privilege to arise it was not necessary that proceedings be in

being prior to the document coming into existence nor was it necessary that proceedings had been formally threatened against the party claiming the privilege. The view was that it would be sufficient if the documents were produced because legal proceedings were reasonably anticipated by the defendant.

Employer's Liability and the COVID-19 Infection Risk

Employers should take cognisance of a recent case from the Work Relations Commission (WRC) on COVID-19 which may have repercussions going forward. The employee was an office-based worker who had no option but to resign from her job during the first lockdown after her request to work remotely from home was rejected. The WRC adjudication officer ordered the employer to pay the woman €3,712 in compensation for her unfair dismissal on 12th May 2020. The amount of compensation was not high as the employee got and started a new job within a short period of time.

The employee had written to her employer advising that their refusal to allow her work remotely had increased the infection risk of COVID-19 for all three operations coordinators. She believed if one of the three employees got sick, she would be putting her own family (her husband was an asthmatic) at risk. Because of the decision taken by the employer, it was found that the employee had no option but to resign.

The WRC adjudicator found that the employer had failed to implement proposals made by the three office workers that could have eliminated the risk of transmission of COVID-19. The proposal from the three was that two could work remotely at any one time. The finding was that requiring the employee to attend the workplace without adequate consideration for the elimination of risk posed by COVID-19 amounted to a repudiation of the contract as there was a duty on the employer to provide a safe place of work which is fundamental in all contracts of employment.

This raises a general issue surrounding remote working and more recently the increasingly relevant 'right to disconnect'. A new strategy has been published by the government in this regard and we believe that legislation will be following shortly in the last quarter of 2021. Under the proposals it is believed that employees will be entitled to apply to their employer for remote working arrangements. An employee will not be entitled to these arrangements but the employer will be obliged to explain why a request cannot be facilitated. A dissatisfied employee will have the right of appeal to the WRC.

The government is set to introduce protection for employees to be able to disconnect from emails and phones during downtime. This new 'right' is to be regulated by a legally enforceable statutory code of conduct. More on this as it develops.

Working remotely has also increased duties and created potential liabilities for employers with their employees working from home using electronic devices and communicating virtually with colleagues and clients. When using such technology employers can be held vicariously liable for the actions of their employees. Recent legislation, the **Harassment and Harmful Communications and Related Offences Act 2020** provides that employers and company officers can be held criminally liable for the acts committed by its employees.

This vicarious liability may see employers exposed to significant damages to third parties (not to mention potential criminality) if they are found to be in breach of various pieces of legislation such as the Equal Status Acts, Data Protection Act legislation, Defamation legislation and of course the Harassment and Harmful Communications and Related Offences Act 2020. Again, something to watch as this area develops.

COVID-19

COVID-19 has affected every aspect of human life including insurance claims/litigation. For personal injury actions before the High Court, only those that were extremely urgent went ahead. The decision was taken during the second lockdown in October 2020 at which stage there were more than 300 cases in the backlog. The call over for the cases was done remotely, a very different forum from the usual packed courtroom. Settlement negotiations that would traditionally have taken place in the Law Library and corridors in and around the courts have also had to take place online.

We have no doubt that the way the pandemic was handled will lead to claims. Business interruption claims have been at the fore so far, however we could see personal injury actions over the coming years for:

- the manner of care provided in nursing homes
- employees having to work from home without proper ergonomics being carried out leading to potential RSI and other soft tissue injuries
- 'techno-stress' from staff not switching off when working from home
- insistence on employees (particularly some front-line workers in retail) attending stores and contracting the illness with appropriate safeguards not having been put in place.

When we consider the fact that we may enter recession with unemployment being quite high and some businesses not reopening at all, such aspects are conducive to an increase in personal injury actions. Conversely during the last 18 months there have been fewer cars on the road and hospitality venues have not been open. This reduction in the level of activity has seen a reduction in the number of claims on average. Are we about to catch up?

Business interruption claims have stolen the headlines more recently. The reality however is that most small- and medium-sized businesses, business interruption policies are property damage based and as a result very few will pay out in relation to the pandemic. Some did provide cover in relation to the notifiable diseases and/or where there was a denial of access. Some policies listed specified diseases and if that was the case COVID-19 would not have fallen into that category. However, some policies that did not specify diseases and detailed a specific distance or radius from the business e.g., 25 miles, would more than likely have cover.

Between the Supreme Court ruling in the UK in January 2021 in relation to business interruption cover and April 2021 insurers have paid out £472 million. We were also advised that there were 21,140 claims accepted by UK insurers at that stage. We do not have similar figures for Ireland.

£472 million
paid out by UK insurers

The seminal case in Ireland was by four plaintiff publicans against the FBD insurance company. The insurer had refused cover on the basis that imposed closure was not caused by a COVID-19 outbreak on the Plaintiff's premises or within a 25-mile radius. The section of the policy around which the case revolved was Section 3 and read as follows.

"The company will also indemnify the insured in respect of (A), (B), or (C) above as a result of the business being affected by:

1. Imposed closure of the premises by order of the local or government authority following:

a) Murder or suicide on the premises.
b) Food or drink poisoning on the premises.
c) Defective sanitary arrangements, vermin, or pests on the premises.
d) Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same".

The insurer argued that the cause of the loss was the enforced closure of the pub and not the contagious or infectious disease i.e. the losses would have arisen even if the pubs were open because of the existence of COVID-19 in the community and the restrictions imposed. Mr. Justice Denis McDonald took the view that the clause must be read as a whole as would a reasonable person and that the cause or peril was not the imposed closure alone. It was the imposed closure following the outbreaks of disease with 25 miles.

The insurer also argued that the government's decision to close public houses was not because of a localised outbreak but because of a nationwide concern. The court did not agree and took the view that there were outbreaks within 25 miles of the premises which, at a minimum, were part of the decision-making process to close each public house.

The insurers did however win one point. The plaintiffs when considering the indemnity period were arguing that they were entitled to be compensated after the period of the imposed closure for losses that arise as a result of changes in society stemming from the pandemic. The court held that FBD was committed to indemnify the insured in relation to loss of gross profit until the period of imposed closure came to an end, or the indemnity period of 12 months came to an end, whichever was the earlier. That would have been the norm in relation to such insurance policies.

More recently the High Court has dismissed the case taken by the **Headfort Arms Hotel**, in Co Meath against Zurich for disruption to its business, including forced closure, due to the pandemic. The insurer took the stance that the policy did not cover a claim for business interruption caused by the pandemic. They argued that the policy only operated in the event of damage occurring at the hotel premises. The defendants also highlighted to the Court that the hotel did not request cover under any of the business interruption extensions providing cover for business interruption caused by notifiable diseases.

Mr. Justice Denis McDonald agreed with the insurer stating that the case made by the hotel involved a very strained and unnatural reading of the policy's provisions and that it had failed to show that its inability to operate its business during the closure could be defined as a 'damage' in the policy.

One further aspect to bear in mind in relation to this is that in April of this year the Minister for Public Expenditure and Reform Michael McGrath publicly confirmed that COVID-19 supports were never intended to be a subsidy for insurance companies. Some insurers had endeavored to deduct such payments from claims. However, the converse may also be true, it is something insurers should look into by paying some elements of business interruption claims in situations where policyholders have also recovered COVID-19 supports then there is a form of double indemnity. Will it only be a matter of time before the government comes looking for recovery of these supports where another form of compensation was available?

This is what happens with the RBA system for personal injury claims. If a policyholder has already been compensated then insurers should consider not paying out under a policy for that aspect, however it will be important for the insurer to keep their reserves in place as the government may come calling.

There is another case ongoing between **Premier Dale Ltd trading as The Devlin Hotel and the RSA insurance company**. This case is before Justice Denis McDonald and policy wording is different to that of the FBD case. Insurers have refused to indemnify as, under the terms of the policy, there must be an outbreak of a notifiable infectious human disease on the insured premises, which is not the case. We will watch the outcome of this case with great interest.

The settlement of cases for several children taken against the **Minister for Health, the HSE and GlaxoSmithKline** was an interesting development, in relation to the swine flu jab administered when they were infants. The initial case in November 2020 involved **Benjamin Blackwell** and was the test case for 80 other actions over the vaccine developed in responses to the swine flu pandemic between 2009 and 2010.

The claims surrounded the administering of Pandemrix which resulted in side effects for some people. This included behavioural changes such as mood swings and narcolepsy. The parents claimed that they would not have consented to the vaccination if various matters were made clear to them, particularly that Pandremix had allegedly never been adequately tested on children of the claimants' age.

What is also unique about this case is that liability and quantum were decided through mediation, with the award subsequently being ruled by Mr. Justice Kevin Cross in the High Court. The Mediator awarded a gross figure of €1.98 million with liability being decided on a 50-50 basis and the payment being made was €990,000. There have since been two further cases agreed upon and ruled in the same manner.

Brexit

Britain left the European Union (EU) in January 2020. At 23:00 on 31st December 2020 they lost all access to the European block. From the start of 2021 the blanket access for British financial firms to the EU ended and has been replaced by a system known as Equivalence. The EU will allow market access to foreign financial firms if their home rules are deemed by the EU to be as robust as regulations in the EU. It is unfortunately very different to the 'passporting' that was once in place.

Faced with uncertainty, many firms, including brokers and insurers, have moved from London into cities within the EU. January came and went without a trade deal, having a major impact on trade, the fishing industry, the economy and, of course, Northern Ireland.

Dublin

is the biggest beneficiary of Brexit relocations

Dublin is the biggest beneficiary of Brexit relocations. Over 400 financial firms in Britain shifted activities, staff and over £1 trillion in assets to hubs in the EU. The EU has offered Britain very little in the way of direct market access for financial services not included in the trade deal. Approximately 7,500 jobs have moved from Britain or have been created at new hubs within the new cities. COVID-19 has affected some of the travel arrangements in this regard. Dublin has been the biggest beneficiary with 135 relocations followed by Paris 102 Luxembourg with 95, Frankfurt with 63 and Amsterdam with 48.

Brexit negotiations did not feature, what is perhaps Britain's most competitive industry, Finance and therefore other solutions had to be found. As a result, most financial institutions have found ways to navigate Britain's departure from the EU, and London continues to be the centre of the world when it comes to finance.

As far as insurance and the relationship between the Republic of Ireland and UK is concerned, the transfer of personal data is of primary importance. The trade and cooperation agreement between the EU and the UK allows the free flow of data between the EEA and UK to continue after 2020. The transfer of personal data from the EEA to the UK will not be considered as a transfer to a third country. Therefore Irish-based data processors can continue to transfer the personal data to the UK without the requirement to apply additional safeguards such a standard contractual clauses, administrative arrangements or other safeguards outlined in chapter 5 of the General Data Protection Regulations. The plan is that the EU commission shall adopt an adequacy decision which will mean that personal data can flow from the EEA to the UK without any further safeguard being necessary i.e., the transfer is the same as if it were carried out within the EEA.

The Northern Ireland Protocol is now questionable once again. Unionist parties and many UK politicians have turned hostile towards the protocol taking the view that the EU is only considering the protocol from a north/south perspective, when looking at the Good Friday Agreement, but not looking at east/west part. This has fundamental constitutional problems for both sides of the Irish Sea.

The crux of the issue is the anxiety around an unsafe product finding its way into the EU, which is traced back to Northern Ireland, and the safeguards have not worked. If that happens this is going to be an issue for Northern Ireland, the UK and the Republic of Ireland. Finding a solution will not be easy.

So what is the Northern Ireland Protocol? In October 2019 the UK explained ***"an open border is maintained on the island of Ireland, a key objective for all sides in this negotiation…. Any processes normally required on goods entering the EU will be implemented at the Northern Ireland/rest of the world border (i.e., ports and airports) or on the trade moving East West between Great Britain and Northern Ireland for as Northern Ireland participates in the customs arrangements and regulatory zone there will therefore be processes to ensure the goods entering Northern Ireland destined for the EU pay the right duty and that all goods comply with the appropriate rules".*** This has proven much easier to say than do.

Financial services links between London and Dublin have been strong for several decades. They mirror each other in terms of regulatory regimes and Dublin's long-standing role as a service centre for global capital markets. Dublin's strong middle and back-office capabilities, innovation and fintech developments have complemented London's dominance for front office operations. More recently these front-office regulated operations have grown substantially.

We have seen amalgamations and acquisitions of Irish companies by larger UK firms to ensure that they have a foot within the EU. The ability for Ireland to provide a highly motivated and educated workforce has also been a deciding factor for many of these companies. Showing a strong and efficient governance and compliance foundation has proven very attractive for companies to invest in Ireland.

As mentioned earlier the service industry was left outside of any Brexit agreement. Any insurer within the UK transacting business in Ireland has to ensure that parties handling their claims are compliant with the **Insurance Distribution Regulations, the Consumer Protection Code, and the Minimum Competency Code**.

The onus is on the insurer to ensure that the service provider is compliant and they (not the outsourced company) are responsible to the Central Bank of Ireland. Our interpretation is that it ensures that claims emanating from insurance contracts entered within EU countries are dealt with in EU countries. The run-off period for insurers who no longer wish to transact business in Ireland is set at three years which should be considered as the long-term nature of casualty business may not be completed internally within that period. Statutory instrument number 229/2018 – European Union (Insurance Distribution) Regulations 2018 can be accessed via this link.

The **Consumer Protection Code** is key when it comes to claims handling in the Republic of Ireland. This, coupled with the recently enacted **Consumer Insurance Contracts Act 2019,** places a substantial burden on insurers and those handling claims to ensure they are handled in the appropriate manner. The key sections as far as claims handling is concerned are Section 7.6 to 7.21 and can be accessed via this link.

Coupled with the Consumer Protection Code is the Minimum Competency Code. To handle and adjudicate claims in Ireland it is necessary to have the appropriate qualifications detailed within the code. Details of the Central Bank of Ireland recognised qualifications under the code can be accessed via this link.

Personal Injury Guidelines/Judicial Council

I have been working in this profession for over 30 years and I have not come across anything from a legislative perspective (other than emergency public health legislation) to match the speed with which the Judicial Council Act 2019 was enacted. This haste has left some potential loopholes that I have no doubt will be challenged legally (and we will touch on this later) but for the most part both the legislation and the speed are more than welcome.

The government has been under tremendous pressure from business for quite some time to deal with the level of awards and over the past 5 years committees and commissions had been established to consider the current position, where we stood in relation to similar jurisdictions, and to come up with a plan. All of this happened at the usual sedate speed with which the wheels of government turn, and then, almost overnight we had the legislation enacted. The power of social media is phenomenal.

Irrespective of how it got here, the legislation is very welcome and even if there is a 'claw back' constitutionally (for example those claimants who had claims submitted to but not assessed by the Injuries Board before the 24th April 2021), the impact in relation to the level of damages will be substantial.

You might take the view that all this was discussed back in 2004 when the Personal Injuries Assessment Board (PIAB) was established with the Book of Quantum in tow. However, the thinking behind this legislation is very different. Back in 2004 the emphasis was to exclude the requirement for legal representation in personal injury actions, thereby reducing the total claims spend by more than 50%. There was less consideration to the level of damages and more concentration on categorizing and quantifying the damages for certainty as regards quantum. Basically, what the Book of Quantum provided was a picture in time of judicial judgements handed down over the preceding number of years. It did not tackle the value or the fact that the views of the ordinary man and woman (which had been previously represented by a jury) had been replaced by those of a judge.

When it comes to all newly enacted legislation in Ireland the first question always to be asked is, is it constitutional? That is why the PIAB legislation was not as successful in the level of damages and the level of legal costs. Constitutionally, every citizen is entitled to legal representation and this is therefore one of the primary reasons the PIAB fell at the first hurdle.

Once in, lawyers identified other loopholes to ensure that cases proceeded to litigation, such as withholding special damages from the PIAB and pleading psychiatric injury. The re-vamp of the Book of Quantum in 2016 compounded matters by not tackling the level of damages and considering proportionality which even at that stage had begun to gather momentum (particularly under the guidance of Ms. Justice Mary Irvine who is now chair of the Judicial Council).

The new legislation and the levels of quantum identified in the Personal Injury Guidelines have tackled both aspects head on. Constitutionally every citizen is entitled to legal representation, however the crucial difference now is that because of the level of the potential compensation there will be a proportionate application of legal costs. Cases that previously fell into the High Court and Circuit Court will now fall into the Circuit Court and District Court respectively with much lower levels of costs. You would question whether it would be economically viable for solicitors to get involved in District Court cases which could see an uptake in the acceptance of PIAB assessments.

The only fly in the ointment, as far as the legislation is concerned, continues to be our Constitution. Having a written constitution is of course not a negative thing and has provided fundamental rights over the past eighty plus years. What this has meant is that public policy was rarely seen to trump the rights of the individual. There will be legal challenges to the levels of damages now being promoted. The Judicial Council

was far from unanimous in its acceptance of the Personal Injury Guidelines.

In the space of 24 hours, 23rd – 24th April, a person's expectation to general damages fell substantially. Could this be an unconstitutional infringement on their property rights, or should public policy hold sway? Without this change, insurance will not be available, businesses will not be able to operate, people will lose their jobs and unemployment will grow thereby affecting the economy negatively.

The ground swell of public opinion is that this is the right thing to do, for our economy to operate and grow so that we may all be better off in the long run. There may be some re-alignments e.g., allowing all claimants who had a claim within the PIAB process on or before the 24th April to fall into the old system and not just those that the PIAB had assessed or declined at that stage. A claimant cannot be held responsible for delays within the PIAB process.

These may have been aspects not considered by the legislature when enacting the legislation and hence my earlier comment in relation to the unusual speed of the process. However personally speaking I would much rather the legislation be enacted quickly, and issues dealt with as they arise, rather than procrastination. All in all, an extremely positive development.

An extremely positive development

Back in September 2020 in relation to proposals being made for the capping of general damages, the Law Reform Commission concluded that it would be permissible under Irish constitutional law. However, it would be the responsibility of the government, with advice from the Attorney General, to legislate for it. It identified the possibility that interference with the judiciary may result in constitutional challenges and the recommendation was that the primary legislation would set a scale to include a discretionary option for the judges, which in the view of the Judicial Council would withstand any constitutional challenge.

Proportionality was also extremely important as far as the Law Reform Commission was concerned. Our experience has been that whilst this has had some influence on the upper courts, in particular the Court of Appeal and with some of the judiciary in the High Court, it has had little or no effect on those at the lower courts.

As mentioned, the speed with which the Personal Injury Guidelines were introduced was quite dramatic. When initially drafted they were to come into force by October 2021, however, because of the pressures placed on the government by businesses and insurers it was agreed that they would be put in place by 31st July 2021. In fact, they were in place by 24th April 2021, underlining the importance of this legislation and the focus on it by both the government, businesses, and industry. This speed could be a double-edged sword and have contributed to the vote within the Judicial Council (because they had less time to review) which was much closer than people would have anticipated.

What has also been identified out of these various reviews and commissions is that the level of legal fees being charged is questionable. Not only has this been identified through statistical analysis but also individually by a number of High Court judges. The proposals that have been made were twofold, either firstly the publication of non-binding guidelines or, secondly, the prescription of maximum cost levels. Both are currently under consideration by the government.

We mentioned earlier the issue of proportionality and the fact that it had found some traction in the Court of Appeal. Quite a number of personal injury cases that reached the Court of Appeal during 2020 found the awards being slashed, overturned and, in some instances, the cases being remitted to a lower court for further consideration. Following an analysis carried out by the Irish Independent newspaper it was ascertained that it was over five years since Court of Appeal increased the size of an award.

In one Court of Appeal judgement Mr. Justice Seamus Noonan advised that it was ***"a fact of life***" for legal

practitioners that some judges were viewed as more generous than others: ***"It cannot be fair to either plaintiff or defendant that the value of their case depends on the identity of the trial judge. Personal injury litigation should not be a lottery and plaintiffs and defendants alike are entitled to reasonable consistency and predictability".***

The first meeting of the Judicial Council, comprised of 166 judges, took place on 5th February 2021 to consider Personal Injury Guidelines. A decision was not reached as members required more time to consider the proposals. A second meeting on 19th February discussed the draft proposals. It was clear that there was opposition from quite a number of senior judges. Again, agreement could not be reached and they adjourned until 6th March.

Proposals were also put forward that new scales of legal costs be independently drawn up. The recommendation is that these will not only set limits on what can reasonably be charged but also provide clarity on the potential costs. The review group was chaired by Mr. Justice Peter Kelly.

When the Judicial Council finally met again, they voted 83 in favour and 62 against, formally adopting the Personal Injury Guidelines. These guidelines replaced the Book of Quantum but it should be noted that the court retains its independence and discretion when it comes to making an award for general damages. It will now be mandatory for a court in assessing damages in a personal injuries action to:

1. Have regard to the personal injury guidelines and
2. Where it departs from those guidelines, state the reasons for such departure in giving the decision.

Challenges

There were always going to be constitutional challenges to the legislation, not only because of its speed but because of the dissenting nature of a high number of judges within the Judicial Council. The view of the Law Reform Commission back in late 2020 was that providing a judge with some element of discretion in relation to damages within a 'band' would be enough to see off any potential constitutional challenges, however this is far from resolved.

In the case of ***Delaney v Waterford City Council 2020*** the plaintiff fell on a public footpath in Dungarvan on 12th April 2019. Her claim was submitted to the PIAB in June 2019, however this was not assessed until July 2021 when they awarded a figure of €3,000. In the claimant's opinion (and her legal advisers') an appropriate award would have been between €18,000 and €24,000 as per the Book of Quantum.

The allegation being made by the claimant and her legal advisers is that the assessment by the PIAB was delayed as they were awaiting the adoption of the new Personal Injury Guidelines. A further allegation now being made by the claimant and her legal advisers is in relation to constitutionality as there is a delegation from the judiciary of the administration of justice to the council itself. Coupled with this there is an allegation that the guidelines have violated her constitutional right of access to the courts. There is also the reasonable contention that she should not have been penalised because the PIAB were not in a position to assess her claim on or before 24th April 2021.

A further twist to this case is that the judge allocated to hear the action, Mr. Justice Meehan, has taken the view that, as he was a member of the Judicial Council, he should excuse himself from the case. As a result, only recently appointed judges to the High Court that were not on the Judicial Council on 6th March 2021 may be able to hear such cases.

A second case of ***Mulligan v Dublin Aviation Authority 2020*** involved a nurse, Carmel Mulligan, who fell at Dublin airport in February 2019 fracturing her shoulder. The matter has yet to come before the court,

however we believe that the allegation being made is that the legislation under which the Judicial Council could formulate the guidelines violated the separation of powers and the independence of the judiciary. Similar to the last case, even though the claimant had her claim before the PIAB in October 2019, because of what are described as "protracted delays", the injury was subsequently assessed by way of the Personal Injury Guidelines after 24th April 2021.

Article 35.2 of the constitution confirms that all judges should be independent in the exercise of their functions. The fact that they have been involved in the formulation of these guidelines for cases that they are not adjudicating themselves could be classified as unconstitutional.

In the content below we have given a detailed analysis of the journey we have taken and where we are now when it comes to general Damages levels in Ireland.

- The Past – the Journey to the Personal Injury Guidelines
- The Present – the Personal Injury Guidelines and their Immediate Impact
- The Future - the Future Impact of the Personal Injury Guidelines.

The Past – the Journey to the Personal Injury Guidelines

These are examples of recent awards for various injuries prior to the enactment of the Personal Injury Guidelines:

Matter	Injury	Award (General Damages)
O'Toole v Tipperary County Council [2018] IEHC 447	Puncturing of the lungs, bleeding from the ear and tinnitus as well as a rotator cuff injury (52 years old)	€85,000 (Full liability)
Doyle v Tesco Ireland Ltd. [2018] IEHC 788	Soft tissue injury to lower back which accelerated and/or exacerbated a pre-existing condition	€50,000 (Assessment only)
Naghten v Cool Running Events Ltd [2018] IEHC 452	Multiple lacerations and scarring to right hand and fingers (10 years old)	€65,000 (Full liability)
Keane v Dermot McGann Groundworks Ltd [2018] IEHC 747	Loss of left index finger – possible future surgery required	€100,000 (Full liability) included an amount to cover loss of opportunity
Kenny v Cretaro & anor [2018] IEHC 789	Soft tissue injuries of the upper thoracic area with some pre-existing degenerative changes	€60,000 (Full liability)
Treacy v Minister for Public Expenditure and Reform [2019] IEHC 62	Fracture at the base of the middle phalanx (left hand). Persistent pain (39 years old)	€32,500 to date + €7,500 for future pain and suffering (Assessment only)

The Judicial Council

These concerns led to the establishment of the Judicial Council in December 2019, pursuant to the Judicial Council Act 2019, an Independent body whose members comprise the Irish Judiciary. This in turn led to the establishment of the Personal Injuries Guidelines Committee.

The judges nominated to form the Committee were as follows:

- Ms Justice Mary Irvine (Chair), Supreme Court
- Mr Justice Seamus Noonan, Court of Appeal

- Mr Justice Michael McGrath, High Court
- Mr Justice Senan Allen, High Court
- Judge Seán Ó Donnabháin, Circuit Court
- Judge Brian O'Shea, District Court.

The principal function of the committee was to prepare and submit to the Board of the Council, draft Personal Injuries Guidelines by 9th December 2020. It was agreed that these guidelines would be reviewed within three years of the council adopting them, and every three years thereafter. This is to account for the criticism aimed at the Book of Quantum which was not reviewed between 2004 and 2016 and, as a result, was not taken into consideration by many judges.

The Present – the Personal Injury Guidelines and their Immediate Impact

The Personal Injury Guidelines, more affectionately referred to as PIG, were adopted by The Judicial Council on 6th March 2021. The vote was far from unanimous with 83 in favour (57%) v 63 against (43%) and therein lies the danger of a constitutional challenge. The comprehensive document running to 60 pages can be accessed via this link.

Application & Implementation

The Personal Injury Guidelines replace the Book of Quantum but a twin track approach will apply initially. S.99 of the Judicial Council Act 2019 has commenced with the **deadline day 24th April 2021.**

The new Personal Injury Guidelines will apply to:

- Any relevant case not yet assessed by PIAB before this date
- Any case released (S17 Authorisation) by PIAB and where legal proceedings had not yet been commenced before this date.

Book of Quantum will apply to:

- Any action commenced (legal proceedings) before the date
- Any action commenced (legal proceedings) after the date whereby a PIAB assessment was made but was not accepted or deemed not to have been accepted (applies to both the respondent and claimant).

The Personal Injury Guidelines Categories

Categorisation of Injuries		
1 Injuries resulting in foreshortened life expectancy	5 Injuries affecting the senses	9 Facial injuries
2 Injuries involving paralysis	6 Injuries to internal organs	10 Non-facial scarring and burns
3 Head injuries	7 Orthopaedic injuries	11 Damage to hair
4 Psychiatric damage	8 Chronic pain	12 Dermatitis and other skin conditions

Considerations affecting the level of the award:

- Age
- Interference with quality of life and education
- Impact on work
- Impact on interpersonal relationships
- Whether medical assistance has been sought
- Nature, extent and duration of treatment undertaken and/or medication prescribed
- Likely success of treatment
- Prognosis to include any future vulnerability

Book of Quantum v Guidelines

The most significant reductions are for minor soft tissue injuries and the more common injuries such fractures to the arm, wrist, leg, and foot. This is where the volume of claims lies and many of these cases would have once been within the Circuit Court Jurisdiction (€15,000 - €60,000 or €75,000 for defamation) are now falling within the District Court (<€15,000) with the associated substantial reduction in legal costs.

There has also been an increase on the cap for general damages in respect of certain categories of catastrophic injuries to €550,000. There are several new categories of injury which were not dealt with by the Book of Quantum, a notable inclusion being psychiatric injury.

Book of Quantum v Personal Injury Guidelines

	Wrist Injuries	
	Book of Quantum	**Personal Injury Guidelines**
Minor	up to €43,500	€500 - €18,000
Moderate	€21,900 - €75,500	€20,000 - €40,000
Serious	€54,200 - €70,100*	€40,000 - €60,000
Severe	€68,400 - €78,000	€60,000 - €80,000

	Ankle Injuries	
	Book of Quantum	**Personal Injury Guidelines**
Minor	up to €54,700	€500 - €20,000
Moderate	up to €87,600	€20,000 - €45,000
Serious	up to €89,300	€45,000 - €70,000
Severe	up to €93,900	€70,000 - €100,000

Recent Settlement Examples

Loss of Tooth: €15,545 'all-in' prior to receiving the PIAB Formal Notice. The special damages aspect of the claim were submitted at just under €15,000. Old Book of Quantum general damages valuation was €10,000 - €15,000. New Personal Injury Guidelines value a Loss of Tooth at €1,500 - €3,000.

Perforation of Bowel, significant scarring, permanently restricted in lifting, changes to bowel movements, PTSD: €60,000 'all-in' before the PIAB 90-day decision period expired. Old Book of Quantum valued injuries to the bowel alone at between €21,300 - €93,900. New Personal Injury Guidelines refer to moderate bowel injury at €55,000 - €80,000.

The Future - the Future Impact of the Personal Injury Guidelines.

There have been challenges (constitutional and otherwise) to the legislation and there will be more. We believe that public opinion, with the power of social media, will support the changes which will give us:

- Reduced general damages in relation to those minor/volume cases.
- Reduced legal costs as the cases will fall into the jurisdiction of the lower courts
- Reduced plaintiff solicitor involvement as it may not be economically viable given the reduction in the level of damages and associated costs.
- Increased competition in the insurance market
- Speedier and more economic settlements

All in all, an extremely positive and exciting development.

Occurrence V Claims Made V Manifestation

When does damage occur under an occurrence-based policy wording? Traditionally, the market took the view that an occurrence-based policy is triggered when the 'damage' occurs. So, if causation is down to defective workmanship then the 'damage' occurs when the resulting physical damage first manifests. For a defective product, it would be when the product is used, installed, or incorporated into another object and it is the date it results in the injury or damage.

The potential long tail nature of these claims has caused insurers concern as the cost of rectifying the damage may be more expensive than it would have been when the damage (defective workmanship) occurred. Therefore it is not commensurate with the premium that was charged when the policy was incepted. We are seeing 'claims made' policy wordings being used in the professional indemnity market (even though retroactive dates will generally apply) with products liability policies being underwritten on the same basis.

Some insurers rely on policy wordings taking the view that the word 'damage' relates to apprehended damage or visible damage, known as 'run-off' covers. This is more akin to the claims made based policy wordings as the claim would be dealt with by the insurer that was on cover when a claim is made which would generally happen closely following the manifestation of the damage.

This could create problems for the policyholder who may have ceased trading during the intervening period or changed their operating model and their current insurer may not cover the risk as it is no longer being undertaken by the policyholder.

With professional indemnity insurance there is normally an option to keep such cover in place in these scenarios for a specific period, at a reduced premium as the risk is no longer an on-going one, however that is currently not an option for most public liability or products liability policies which predominantly form part of a commercial combined policy. There is a debate ongoing in the market on this issue, there are even differing views within insurers and other professions dealing with these claims.

In relation to legal liability, it is settled law that if the claimant can prove that the damage to their property was as a result of a defective product or defective workmanship then they will be successful. When it comes to building contracts the owner of the premises may be able to benefit from the **Sale of Goods and Supply of Services Act 1980** which could imply into the contract, between the parties, specific terms on the quality of the work and the materials which may not have been applied at common law. Any contract between the builder and property owner does not mean that the owner's rights are purely confined to the terms of that contract, the owner may also have a case in tort. The authority for this is the case of ***Siney v Dublin Corporation (1980)*** **IR400**.

Whether there is a different owner of the property, a person with whom the insured had no contractual relationship, is irrelevant. In the case *of* ***Colgan v Connolly Construction Ltd (Ireland) (1980)*** **ILRM33** the plaintiff was the second owner and occupier of the dwelling house and the High Court had no difficulty in applying the case of ***Donoghue v Stephenson*** to the case.

As the case law developed there was some discussion as to whether personal injury would actually be required before a case could be pursued, however the case of ***Ward v McMaster (1985*****) IR29** Costello J concluded ***"… Applying this concept to the present case it seems to me that the duty of care which the defendant owed to a purchaser of the bungalow which he built was one relating to hidden defects not discoverable by the kind of examination which he could reasonably expect his purchaser to make before occupying a house. But the duty was not limited to avoiding foreseeable harm to persons or property other than the bungalow itself (that is a duty to avoid a dangerous hidden defect in the bungalow) but***

extended to a duty to avoid causing the purchaser consequential financial loss arising from hidden defects in the bungalow itself, (that is a duty to avoid defects in the quality of the work)."

Therefore, as far as the law in Ireland is concerned, if the plaintiff is to prove their case, and it must be remembered that it may be difficult for them to prove this case depending on the lapse of time between the original work being undertaken and the damage becoming apparent, then they will be successful.

The next question is how the courts and insurers generally considered the application of 'occurrence' made policies and 'claims made' policies. Our opinion is that the intentions of the parties to a contract must take centre stage and, also, how the claim is pleaded i.e., in tort, alleged breach of statute or breach of contract. Once this intention is realised, we must then consider the interpretation of the policy wordings and it must be remembered that if there is any ambiguity it will be construed against the drafter who for most part will be the insurance company.

Some insurers take the view that damage only occurs when it manifests itself visibly. When dealing with a first party claim, that would be easy to reconcile. It gets more complicated when looking at third-party claims and Public Liability and Products Liability sections of policies. It is because of this we need to look at the intention of the parties closely.

The intention of any party incepting a Public Liability and/or Products Liability policy is to provide security for themselves should an action be taken against them in negligence for breach of duty (not an intentional act) whilst carrying out their work. This is what allows business to operate, with the insurance cover facilitating the transfer of risk and potential liabilities associated with negligence. Therefore, when a business Insured incepts a policy, they are entitled to believe that any liability that they may incur because of negligence stemming from defective workmanship or defective products during that period of insurance, noting that the cost of repairing the defective works or replacing the defective product is normally excluded, would be covered under their policy. If that were not the case, then why would a business incept such a policy? The question often posed against the 'manifestation' theory is that where 'damage' has become apparent on the last day of the policy period, it would be covered under the policy. However, where the 'damage' arising from the same defective work or negligent act was only to manifest or become noticeable or discoverable on the day after expiry, this would fall outside the Policy cover. It is recognised that the results of negligence do not always fall neatly into a policy period and this has led to insurers more recently to underwrite Products Liability policies on a claims made basis.

As mentioned earlier, this 'manifestation theory' can raise some issues for a policyholder. What would happen if the insured ceased trading? Should they be required to continue to hold a 'run-off' Public Liability policy to cover potential liabilities arising from works undertaken up to the date of their cessation and maintained to the end of the relevant limitation period? Or, what happens if the insured diversifies and changes their business model and activities? Again, should they required to hold a policy to cover risks that associated with their previous trading or operating activities? Under a 'claims made' policy, that policy will deal with any claim that is made during the period of insurance irrespective of when the legal liability and damage may have arisen. That is the primary difference between an 'occurrence' made policy and a 'claims made' policy.

In his book Insurance Law, Austin Buckley at paragraph 10/81 states ***"most Public Liability policies issued in Ireland provide cover on an "occurrence" basis. Such policies provide cover in respect of loss, injury or damage arising from an event or accident occurring during the period of the policy even though the negligent act or omission may have been committed some time previously. "Claims made" policies, on the other hand, provide cover in respect of claims first made during the period of the policy, regardless of when the injury or damage giving rise to the claim occurred."***

The section under which this paragraph arises applies to Public Liability policy interpretation and is in line

with market practice which leans to follow the use of the 'manifestation theory'. The starting point should remain the consideration of the policy wording and construction, specifically the definitions applied to the terms 'occurrence' and 'damage', with any reference to the actual manifestation of the damage.

...it comes down to the interpretation of the policy wording and, I would suggest, the intention of the parties when incepting the policy.

Within the same text of Buckley, in the Products Liability Insurance section it states ***"...many insurers offer Products Liability insurance on a "claims made" basis only. A "claims made" policy wording is one under which the claim must be made against the insured during the period of the policy, or within a specified period after expiry, irrespective of when the act or event giving rise to the claim happened. An "occurrence" wording, on the other hand, requires that the event causing the injury or damage occurred during the currency of the policy, although the actual claim may be made after the period of insurance has expired, or even after the policy has elapsed."*** Fundamentally again this comes down to the interpretation of the policy wording and, we would suggest, the intention of the parties when incepting the policy.

Some commentators have reported that in the recent case of **Brandley and WJB Developments Limited v Hubert Deane T/A Hubert Deane & Associates and John Lohan T/A John Lohan Ground Works Contractors (High Court 2010/10994P and Appeal 2015/245)** The Supreme Court took the view that 'damage' occurs only when it becomes manifest. It must be recognised that The Supreme Court in that case were primarily addressing manifestation as it would apply to the statute of limitations.

The background to the **Brandley and WJB Developments Limited** case had the plaintiff developers initiating proceedings against the defendant contractors on 30th November 2010, claiming damages for breach of contract and negligence arising from the construction of two houses in County Galway. The plaintiff argued that the large irreparable cracks, which had appeared in the external walls of the houses were a result of defective foundations and the negligence of the defendants. The defendants pleaded that the developers' claim was "statute barred" under the Statute of Limitations 1957, meaning that the time limit of six years for the developers to initiate proceedings had already passed. The foundations were completed in March 2004 and certified in September 2004. In December 2005 cracks were observed in the house and on the 30th November 2010, proceedings were issued.

In the High Court the defendants argued that all the necessary elements of negligence existed in March 2004 whereas the plaintiff argued that this was not present until December 2005 when the damage became manifest. If 2004, the case was statute barred but if 2005, it was not. The High Court found in favour of the defendant however this was ultimately overturned by both the Court of Appeal and the Supreme Court. The case was specific to its own circumstances however the Court did give some guidance generally and identified the difference between occurrence due to a latent defect and manifestation:
Mr. Justice McKechnie stated: ***"... I accept that there is a definite distinction between a "defect" and the subsequent damage which it causes. Time runs from the manifestation of damage, rather than of the underlying defect. Thus, it is not the latent defect which needs to be capable of discovery: it is the subsequent damage caused by that latent defect...without loss or damage attaching to... defects, no cause of action exists. The damage was completed in December, 2005..."***

Taking this view a step further, the potential legal liability only arises once physical damage or loss is manifest and where it is traced to being attributable to a pre-existing defect then a cause of action arises at the time of physical damage.

In the English case **Groupe Royal inc. c. Crewcut Investments Inc., 2019 QCCA 1839** the Court of Appeal considered the question of when policy liability in an occurrence-based policy is triggered. Between 1996

and 2000, three companies supplied extruded polymer 'window spacers' used to manufacture sealed glass units to Multiver, a company that specialised in glass manufacturing, and to Bocenor a company that specialised in windows and doors. The case related to the 'yellowing' of the window spacers and the presence of chemical condensation.

The premature deterioration of the spacers resulted in defects in the glass units which led to hundreds of thousands of units being recalled and replaced by Multiver and Bocenor. The sellers and manufacturers of the glass units then sued the suppliers of the defective spacers. The Court found the suppliers and the manufacturer of the spacers jointly and severally liable for the defects.

One of the suppliers had liability cover with one insurer for damage that occurred between 1st July 1995, and 30th March 2004 and a different insurer for the period from 30th March 2004, to 30th March 2008, on the same conditions. The Court found that it was impossible to determine the exact moment when the 'damage' occurred. It applied the 'continuous trigger' theory and apportioned the damages on a pro rata (Time on Risk) basis for the coverage periods in question.

First, the Court of Appeal confirmed that the application of the 'continuous trigger' theory was appropriate in this case. In the circumstances, it held that the 'damage' started to occur once the spacer was incorporated into a sealed glass unit and continued while the unit was incorporated. The damage did not start when the owner of the unit noticed the yellowing or the appearance of condensation. The Court of Appeal added that the opposite argument would have the effect of turning the date of loss into the date of the occurrence of damage, which the Court found was contrary to the definition of property damage in the policy.

It could be taken that this decision of The Court of Appeal is at odds with the manifestation theory, however, it must be recognized that they had only implemented the use of the 'continuous trigger' theory (Time on Risk) to facilitate the apportionment of damages over several insurance periods in cases only where it is not possible to identify the precise moment when the damage occurred.

There remains potential that the application of the manifestation theory could leave policyholders involved in the provision of services and/or products, without the security of insurance cover for potential liabilities arising from work carried out during the policy period for which they paid a policy premium, even though their liability for 'damage' arising from such negligence will continue up to and including a six-year limitation period after the 'damage' has become apparent and manifest.

The widely reported decision in **Brandley and WJB Developments Limited -v- Deane** has brought a degree of clarification in relation to the statute of limitations taking the view that the 'clock starts ticking' when the damage becomes apparent (manifests itself) to the ordinary layman. What it did not do is confirm when the liability accrued to the builder/developer i.e. when the defective work was executed or when it became apparent.

Therefore, clarity is still required with opinions being offered on both sides of the argument. In the interim individual case circumstances and the application of the specific policy wording will continue to be key.

Statistical Information

The National Claims Information Database (NCID) allowing for the collection of data relating to all types of non-life insurance, including both Public Liability and Employers' Liability, is now up and running. The most recent report in relation to Employers' Liability, Public Liability and Commercial Property being published in July 2021 can be accessed vis the Central Bank.

We have also reviewed both the Personal Injuries Assessment Board (PIAB) Annual Report 2020 and the Court Services Annual Report 2020 which can be accessed from the PIAB and Court Services. The PIAB report confirms a substantial reduction (16%) in the number of personal injury claims submitted to it during 2020. This is not surprising due to lockdowns. During COVID-19 over 6,000 medical appointments had to be rescheduled. This has affected all settlement streams and has been a challenge because of the knock-on effect with reserving.

16%

reduction in personal injury claims

The PIAB deals with Motor, Employers' Liability and Public Liability claims. During 2020 it made 8,587 assessments, a reduction of 34% year on year from 2019. COVID-19 has been a factor in the reduction however, given the systems involved and the ability to work remotely, such a reduction is questionable and has already been a key aspect to the legal challenges brought against the legislation incorporating the Personal Injury Guidelines. The total value of awards made by PIAB in 2020 reduced by just under €70 million from €275 million to €206 million because of the decline in claims. 70% of the awards made during 2020 related to Motor, 17% for Public Liability and 13% for Employers' Liability. This breakdown is on par with previous years.

19%

reduction in litigation

The Court Services Report has also reported on a substantial reduction in the number of cases resolved during 2020 (61%). This is more understandable because of COVID-19 and the absence of legislation at the earlier stages to hear cases remotely. This was changed as the crisis progressed by the enactment of the **Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020** which have referred to under the Legislation section. However, at that stage there as already a substantial backlog in an area where we had already capacity issues for judges. There was a 19% reduction in the total number of lawsuits filed which is attributable to COVID-19.

The Injuries Board consent rates continue to be troubling and trending ever so slightly downwards or remaining static year on year. The acceptance rates follow a similar vein however more pronounced year on year. The overall average value of the awards has increased slightly on 2019 primarily down to a 2.3% increase in the average Employer's Liability award.

The Injuries Board report confirms that in relation to Employers' Liability accidents, 22% relate to slips and trips, 20% due to manual handling (overreaching / RSI), 15.5% by being struck by falling or thrown objects and 11.5% by crush or jamming incidents. In relation to location, 26% occurred within a factory or plant setting, 12.5% in construction, 11.5% in shop or retail area and 10% in the health service area.

As far a Public Liability is concerned the Injuries Board report confirms that 64% relate to slips and trips, 8% due to falling from a height, 7.5% by being struck by falling or thrown objects and 7% by assault. In relation to location, 18% occurred on the roadway, 15% in hotel/restaurant/public house setting, 19% in shop or retail area and 9.5% on a footpath.

It is interesting that 7% of the Injuries Board awards relate to assault which would have a defamatory aspect even though not assessed as such because of the psychiatric aspect. That will change going forward. The

courts saw a substantial reduction in defamation and assault resolutions, whilst the number of new cases increased substantially in relation to assault.

The report from the National Claims Information Database in relation to Employers' Liability and Public Liability is very revealing. It does not reveal anything new to those of us involved in this profession, however, it gives an independent factual report to the public which was required to instill further confidence back into our profession. The report tells us that the average cost of Employer's Liability claims increased by 56% and Public Liability claims by 48% between 2009 and 2015 with the cost reducing by 16% and 22% respectively between 2015 and 2019.

56%

average increase in Employers' Liability costs

The NCID confirmed that in relation to the total cost of each injury claim settled between 2015 and 2019, 67% of the cost was attributed to compensation with 30% being paid out for legal costs. Our rule of thumb would be to attribute two thirds of this cost to plaintiff fees and one third to defence fees. 57% of the total number of cases were litigated, 14% through PIAB and 29% settled directly which some might find surprising. 80% of the settlement costs relate to those litigated cases, with 12% to those settled directly and 8% to those settled through the Injuries Board.

Unsurprisingly, the more serious the case, the more likely it was to be become litigated. However, 'seriousness' has become confused with the level of potential damages. Following the publication and implementation of the Personal Injury Guidelines we anticipate that most of those cases falling within the €30,000 - €45,000 bracket previously will now come in at less than €30,000. Therefore, 36% – 40% of cases should be capable of direct settlement with a further 20% dealt with by the Injuries Board, leaving only 40% - 44% to be litigated. Much will depend on the application of the Personal Injury Guidelines.

1.7 years

average lifecycle for litigation settled through PIAB

In relation to lifecycle those within litigation had an average of 4.5 years, 1.8 years for those settled through PIAB, and 1.7 for those settled directly which some might also find surprising. Unsurprisingly Employers' Liability cases were more expensive than Public Liability which is interesting bearing in mind that 24% of these cases are settled directly by insurers/adjusters, twice the number settled by the Injuries Board. However, the vast majority 64% are still the subject of litigation.

This will change following the recent legislation bringing the Personal Injury Guidelines into place and it will be interesting to carry out this exercise again in 24 months' time. One fact identified by the report in relation to the level of legal costs has been met with quite an amount of negative commentary: the issue of legal cost levels.

Case Law

Professional Indemnity/Medical Malpractice

Sean Rae & Lauren Ray v HSE High Court 2019

The plaintiffs were the parents of a 24-year-old promising musician who, after spending some time in the US, had been identified by a record label and his future in music looked bright. This was in October 2015 however when he returned to Ireland, he returned to a deep depression losing all interest in music.

He had first presented with depression when he was 16 years of age in 2008. In December 2015 he was reviewed and put on medication and was reviewed again in January 2016 at which stage he underwent a full psychiatric assessment and treatment subsequently being referred to a social worker at the Mental Health Services team. On 22nd January 2016 his mother was concerned and informed the Mental Health Service. He was seen on 29th January however did not appear to get any better and his mother contacted the Buncranna Mental Health Service every day until she received an appointment for 2nd February, which was cancelled at short notice. The next day, February 3rd, 2016 he committed suicide. A new appointment for 9th February was issued to the family a few days later.

The allegation being made was that the phone calls made by the mother were not acted upon and as a result a reasonable mental health service was not provided. Both parents claimed that they were suffering from post-traumatic stress disorder and there was an out-of-court settlement agreed at €200,000, approved by Mr. Justice Kevin Cross.

Callum English v Cork University Maternity Hospital and the HSE High Court 2013

An eight-year-old boy suffered severe brain damage following a failure to diagnose meningitis at birth. The plaintiff was born in Cork University Maternity Hospital on 1st August 2012. Following his birth, he was quite unwell and there was a delay in diagnosing group B streptococcal meningitis and as a result he suffered severe brain damage.

He currently has cerebral palsy coupled with multiple mobility and neurological difficulties and will require extensive care for the remainder of his life. The case was initially defended in full, however the defendants subsequently apologised unreservedly for the standard of care. It identified the failure in communication and escalation and confirmed that these aspects will be improved. The case was settled at €22.5 million.

Rosie Slevin (A Minor) v The Coombe Hospital and the HSE High Court 2017

This case surrounds the birth of a child and failings in her care during that time. A failure to deliver the baby due to complications resulted in a lack of oxygen which has now caused cerebral palsy. The plaintiff cannot walk or speak and suffers from seizures and infections.

What is very interesting about this sad case is that it was settled through mediation and for the most part that mediation took place virtually as physical mediation was not possible due to COVID-19 restrictions. The hospital accepted liability of an early stage which helped all the parties to come to an amicable solution. The case was settled at €3.3 million which was subsequently ruled by Mr. Justice Kevin Cross in the High Court.

Amy Gannon (a Minor) v Our Lady's Children's Hospital & the HSE High Court 2015

This case involves a 12-year-old girl paralysed from the chest down following surgery to treat the curvature of her spine. Prior to the surgery the plaintiff had an independent life being able to walk and move around however the curvature of the spine was causing difficulty as it was impacting on her lungs and she was having difficulty breathing. The advice given to the plaintiff's mother was that the surgery would have to take place.

The surgery involved the insertion of an anchor system and implants along the spine using clinical pedicle screws. The allegations being made was that the screws were misplaced. Liability was denied with the defendant taking the view that the injury was as a result of a stroke which was a known complication for this type of surgery. The plaintiff alleged that no risks or alternative options to the proposed surgery were mentioned to the plaintiff's parents.

There was negligence in adopting a surgical strategy which had not indicated parallel nor allowed more conservative approaches to the plaintiff's condition. The case was settled for €9.4 million and approved by Mr. Justice Kevin Cross.

Defamation

Diop v Transdev Dublin Light Rail and STT Risk Management Ltd High Court 2019

The claimant boarded the Luas transport service with a valid ticket, with two security personnel approaching the plaintiff and his brother demanding to see their tickets. The plaintiff accused the security guards of racial profiling. The plaintiff subsequently brought defamation proceedings against the defendant on the basis of their demand to produce the tickets, hand gestures used by the security personnel and the fact that one of the security personnel asked the plaintiff to leave the carriage.

The allegation was that this was defamatory on the basis that other passengers would have taken the view that the plaintiff had not paid for his ticket which was incorrect. The High Court reviewed the details on the body camera and CCTV and identified a conflict of evidence between both versions of events. The court helpfully looked at the entirety of the transaction to ascertain whether the plaintiff was defamed or not and in this regard mention of the case of ***Griffin v Sunday Newspapers (2011) IEHC331*** was considered.

In this case it was held that ***"thus it follows that a Plaintiff cannot select an isolated passage or sentence in an article and complain of that alone if other parts of the article throw a different light on that passage. The real test is whether the result of the whole is calculated to injure the Plaintiff's character"***.

The court took the view that asking to produce the tickets was not itself defamatory. It also held that the plaintiff had not acted in a manner that was obstructive or abusive to anyone and for that reason alone there was no reason for one of the security guards to ask him to leave the Luas tram. Contractually he had a right to stay. The court therefore held that one of the security guards had by reason of his hand gestures and asking the plaintiff the step off the Luas defamed the plaintiff.

The defendant relied on the defence of qualified privilege which is detailed under the Defamation Act 2009. The court decided that the initial action of asking for the tickets to be produced was entitled to that defence. However once it was established that the plaintiff had a valid ticket the defence could no longer be relied upon.

The fact that the instruction by one security guard to the plaintiff to leave the train was immediately countermanded by the other security guard meant that there was only a momentary breach of contract and defamation and as a result the award of damages was only a nominal sum of €500.

Gerald O'Neill v The Irish Small and Medium Enterprises Association High Court 2020

A solicitor plaintiff issued defamation proceedings against The Irish Small and Medium Enterprises Association over the contents of press releases following a High Court judgement in a case the plaintiff was involved in last year. The case involved a personal injury action by one of the plaintiff's client's, which was dismissed as fraudulent and another as exaggerated. The nub of the issue was that the plaintiff, rather than a doctor, referred the claimants to a consultant practitioner to progress the claim rather than that referral being made

by a general practitioner. The case is still on-going and we will watch same with some interest.

Marie Keane v Tesco Ennis Circuit Court 2020

The claimant alleged defamation based on allegations being made by the defendant that she had not paid for goods at the Tesco retail store. The Tesco staff, the court was told, stated "***your messages have not been paid for***" and "***there is no such thing as taking these messages unless you pay for them***". The claimant had paid for the goods with her credit card however an issue with the IT system in the store suggested that the sale had not gone through.

The Court took the view that, given the plaintiff's character as being a respected businesswoman in West Clare, there is no way that she would have endeavoured to take the goods without paying for them. The judge was satisfied that the actions of the Tesco staff were injurious to the plaintiff's reputation as a businesswoman in a small town. It was interesting that Judge O'Callaghan took the view in relation to this credit card transaction that "***it is not for the customer to prove to anyone that the money paid for items has left his or her account"….If there is any problem with the system, the onus rests on the shop to deal with that situation"***.

The claimant advised that as Tesco were not able to confirm whether the sale had gone through, she was asked to reinsert her card. She had refused to do this as she advised the court that she had been asked to do this previously and it resulted in her paying for goods twice. She did not have online banking and as a result she had to go to her local bank to get a printout to prove that the goods have been purchased by her when she returned, the Tesco staff were able to confirm that the purchase had been made. The judge awarded €2,500 in damages.

Byrne v IKEA Dublin Circuit Court 2019

The claimant sued the defendant for defamation having been asked in public, within the store, to provide a receipt for the goods that were within her trolley. The question she was asked was ***"Did you pay for that. Where is your receipt***?" The judge dismissed the action advised that asking for a receipt was not defamation. He confirmed that the plaintiff was an upright and trustworthy lady and there was no reflection whatsoever in relation to her integrity.

Physical Injury

McDonagh (A Minor) v Clarecastle National School 2019

The claimant, a 14-year-old child, fractured his nose whilst playing an organised game of hurling where helmets were not provided. Liability was therefore not contested as the rules of the GAA quite clearly state that helmets were to be worn.

The fractured nose was one of two personal injury actions taken by the claimant through his father and in total the judge awarded a pay-out of €45,268 in damages. The Injuries Board had assessed the fractured nose at €25,150 and soft tissue injuries to the lower back and neck at €18,000. The judge took the view that the damages assessed to the nose were slightly high and to the back slightly low however on balance he confirmed the settlement.

Adam Fleming (A Minor) v Transdev Dublin Light Rail Dublin Circuit Court 2019

The claimant, a four-year-old child, was left stranded and screaming on the platform when the Luas Tram driver closed the doors before his mother could exit. The defendant had offered €40,000 in damages to settle. The incident occurred in December 2014 and the claimant's mother had to exit Luas at the next stop and get another Luas back, where she found the claimant shocked and traumatised. The child has been treated by several doctors however he remains fearful and anxious. Judge O'Connor approved the €40,000 settlement.

Bennett v Cod & Wallace Taverns Ltd High Court 2015

This case involves the plaintiff sustaining life changing injuries following an assault in the Tír Na nÓg public house, Wexford on 15th April 2009. The court was advised that the claimant suffered life-threatening head injuries and was left in a coma following the unprovoked assault.

The first named defendant approached the claimant becoming verbally abusive and threatening so much so that a member of the bar staff became concerned and went to get the bar licence holder who was in another part of the premises. Before they returned the plaintiff had been repeatedly punched and he fell to the ground suffering severe injuries to his head. He was subsequently taken to hospital and placed in intensive care. The first named defendant was subsequently jailed for 18 months in relation to the assault.

Liability was not contested Ms. Justice O'Hanlon took the view that the claimant who was a healthy fit and hard-working man involved in the building trade who had run his own company was now, because of the incident, only able to do very limited tasks and live-in sheltered accommodation. He had also suffered a stroke brought on from the injuries and therefore the effects of those injuries will continue. Following the incident, the claimant had to learn how to walk, use a knife and fork and how to drive again. His communication skills are now poor and he suffers from memory loss.

Having regard to the circumstances, its effect on the claimant and the economic climate (his inability to work) the judge awarded €231,000 and his costs against the defendants.

Doris Whelan v Dunne's Stores High Court 2019

The 58-year-old claimant sued Dunne's Stores for injuries suffered when she slipped on oil and fell at the Dunne's Stores shopping centre in Walkinstown in June 2013. The case went on for four days which is somewhat unusual bearing in mind that there appears to be clear CCTV evidence that the claimant had slipped on oil and fell to her knees injuring one to such an extent that she subsequently required a knee replacement.

The court accepted that the oil had come from a stock trolley used by somebody stocking shelves in the supermarket and the defence had not produced any evidence to counter that claim. The judge also stated his surprise that the person employed to clean the store and was present at the time of the accident did not give evidence in the case even though they were scheduled to give evidence.

In the circumstances the court awarded the claimant €83,250. There was a stay place on the award provided that an interim payment of €40,000 was made to the claimant in the event of an appeal.

Duffy And Duffy v Brendan Magee Trading as Magee Insulation Services and GMS Insulations High Court 2016

The plaintiffs contracted the defendant to insulate their attic using spray foam insulation. The plaintiffs were not advised by the defendants that they should leave their home and not return for at least two hours after the insulation was completed and they were present during the process. As a result, they have now become incredibly sensitised to certain products and advised the court that they and their daughter must "live in a bubble".

The judge found that on the balance of probabilities the nature and extent of the injuries was due to their exposure to the Isocyanate. It was found that the product itself is essentially safe if applied with proper safeguards however the view was that the installer was negligent in failing to advise the plaintiffs that they were required to be out of the house during the process and for at least two hours afterwards. The family now lives in a mobile home. The judge awarded €2 million to the plaintiffs.

Chekanova v Dunne's Stores High Court 2016

This case has previously been highlighted to the market, which involved the plaintiff being scalded when a €10 glass jug purchased by her from the defendant shattered when she poured hot water from a kettle into it. In the High Court Mr. Justice Kevin Cross had awarded the claimant €50,000 finding that the defendant was negligent in selling the jug and not having a label on same confirming that it was not suitable to hold hot liquid.

The judge took the view that the defendant should have known that people living in Ireland from foreign countries will use a glass jug to pour hot water into it and as a result he found against the defendant however he held the claimant 25% contributorily negligent.

Following an appeal to the Court of Appeal Mr. Justice Seamus Noonan said that it is "***universally known by reasonable adults of normal intelligence that boiling or very hot water has the potential to shatter an ordinary glass vessel***". He disagreed with Mr. Justice Cross's finding that the jug was meant to have a label warning against using it for hot liquids and took the view that it was surprising having sold more than 11,000 of these jugs no other complaints of a similar nature were received. On foot of these findings, he allowed Dunne's Stores appeal and dismissed the plaintiffs cross appeal against a finding of 25% contributory negligence.

McGeehan v Christopher Kelly Trading as McLoughlin's Bar Court of Appeal 2019

The claimant had the tip of her little finger amputated after the door of the public house slammed on it. In the High Court she was awarded €56,000 with the defendants being held liable subject to a finding of 25% contributory negligence against the plaintiff.

The Court had been advised that the main door of the pub had been shut because it was after hours and the plaintiff claimed that the corridor, she used to get to the exit was dark. She advised that she opened the door with her right hand and grabbed the edge with her left intending to pull it towards her but it slammed shut. As a result, her little finger was severely injured with the tip eventually having to be amputated. The High Court found that the defendant had failed to ensure a door closer fitted to the ball was functioning correctly to prevent it slamming.

Both sides appealed to the Court of Appeal. The Court of Appeal took the view that the case as pleaded which never changed was that there was no closer on the door and that there should have been. The High Court had taken the view that the accident was probably caused by the failure of the door closer to function properly therefore there was a disparity and the High Court judge was criticised for finding the defence liable on a case that was never actually pleaded or made by the plaintiff.

The Court of Appeal took the view that the accident was never established and there was no evidence before the High Court of any obligation on the defendants to have a door closer on any door in the premises. The Court of Appeal allowed the appeal by the defendants.

Collene Killian v Martin and Amy Kilduff High Court 2019

The plaintiff was attacked and seriously injured by a Pitbull terrier at the defendant's home. The incident occurred on 14th February 2016 when the plaintiff was 21 years of age. She was a visitor on the premises being friendly at that stage with the defendant's daughter.

The dog was owned by the defendant's daughter's boyfriend and whilst he was on the phone the dog entered the room in which the plaintiff and her friend were speaking. he dog "nipped" the plaintiff's back at which stage his owner came in to hold the dog back as the plaintiff tried to get out of the room. As she put her hand on the door to open it, the dog lunged at her, bit her arm, and took a considerable amount of flesh from her lower arm. The wound was too deep for closing and all that could be done at Tullamore Hospital was to wash

it and provide antibiotics. The plaintiff was subsequently transferred to St James Hospital where she spent six days undergoing procedures to close the wound. She has been advised by plastic surgeons that they will require several surgeries to heal this injury.

The court was advised how the plaintiff broke down when having her wedding dress fitted and how the incident affected her plans to attend agricultural courses etc. The judge awarded €65,000 to cover both the physical and psychological aspects of the event and a further €45,000 in relation to future reconstruction and surgeries that would be required. The total award being €121,917.

Megan Cara Austin (A Minor) v Hallmark Building Contractors Ltd High Court 2019
The plaintiff, who was 10 at the time, sustained injury on 5th January 2016 when her arm became impaled on a spike at the top of a series of railings. She had been climbing the wall and railings at the entrance to the Castleland site which is adjacent to her home.

The allegation was that there was a failure to anticipate that the fence and the spikes would cause the type of injury which the little girl suffered. It was also claimed that there was a failure to cordon off the area. The plaintiff was brought to Cork University Hospital where she was subsequently transferred to theatre and had the wound washed out and repaired. There was no underlying structural injury however she is left with a permanent scar.

The Personal Injuries Assessment Board had recommended an award of €91,500 however this had been rejected. Counsel for the defence said that liability was very much an issue and they alleged that there was also contributory negligence. The judge approved a settlement of €75,000 taking the view that there were difficulties in terms of liability in the case and that there was a risk that if it went to trial contributory negligence could be assessed 50% on the child's part.

Psychiatric Injury

Daithi and Cathal Owens (Minors) v Zoological Society of Ireland Dublin Circuit Court 2013
In 2013, when the incident occurred, there was a lot of media coverage. The claimant's sister Katie, who was two years of age, suffered serious arm and stomach injuries when attacked by a tapir at Dublin Zoo. The court was told that the family who were visiting the zoo from Shrule, County Mayo had been allowed into the enclosure for a close-up with the animal and her new-born calf Jenny by the keeper. Unfortunately, a shrill cry of excitement from the two-year-old resulted in the tapir believing her calf was in danger and she attacked the child. To save the child, the child's mother threw herself at the tapir. The tapir dropped the child and the child's father along with a zookeeper held the tapir back.

The child's siblings (the claimants in this case) witnessed the event and as a result suffered nervous shock which were subsequently exacerbated by the publication in the medical journal of the child's horrific injuries and the publication of pictures in the media generally. The claimants now aged 15 and 13 continue to suffer the psychiatric illness and the judge confirmed settlements in the amount of €33,000 each for nervous shock.

There are also cases taken by both the injured child and the parents in the High Court and a case taken by another sibling in the Circuit Court was approved a €25,000 two years ago.

Tracey Harris v Benchmark Property Consultants Ltd and Drimnagh Wood Management Company Ltd High Court 2016 and Yvonne McGrath v Benchmark Property Consultants Ltd, Drimnagh Wood Management Company Ltd and Harris Draintech Ltd High Court 2016
Both these cases had the partners of each of the plaintiffs suffering fatal injuries whilst carrying out work within a sewer in Dublin having been overcome by toxic gas in June 2015.

Justice Gareth Simons ruled a €75,000 settlement for Tracey Harris and €100,000 settlement for Yvonne McGrath. The €75,000 settlement was broken down as €40,000 for nervous shock and personal injury plus €35,000 solatium which is the maximum payment under Section 48 of the Civil Liability Act. The €100,000 settlement comprised of €65,000 for nervous shock and personal injury and €35,000 solatium. Ms. Harris had two children and Ms. McGrath one 11-year-old son.

The court heard that there had been ongoing blockages in the sewage system and the deceased parties had attended there on numerous occasions entering the chamber to carry out drainage works. On the day in question, they entered the chamber to clean it and were overcome by toxic gases unable to escape.

Employers' liability

Hegarty v Woods High Court 2015

The claimant and his employer attempted to fix a punctured tractor tyre when the fixing became overinflated and the steel rim blew off striking them causing fatal head injuries to both. The plaintiff's widow brought proceedings on behalf of herself and her four children. A full defence was filed with a plea of contributory negligence on the part of the plaintiff.

A negotiated settlement in the €282,500 was agreed and this represented just over 50% of the full value of the case. The judge agreed that the offer was indeed a good offer as there were issues concerning causation and contributory negligence and approved the settlement.

Farrell v The Minister for Agriculture and the Marine and Apolena HSG Ltd High Court 2016

The plaintiff was a public servant who sued her employer and the management company for injuries sustained when she fell in a car park whilst leaving her place of work. The plaintiff advised that there was no lighting outside and she had to fumble her way to her car on the basis that she knew where it was parked, however she could not see precisely where she was going. As a result, she slipped and fell on what was subsequently believed to have been leaves on the ground. Whilst there was evidence that the car park was physically in pristine condition, her evidence in relation to the lighting went unchallenged.

The claimant fractured her ankle which was initially treated with a below knee cast and crutches and subsequently with a walking boot. The judge was of the view that the claimant suffered a moderately severe fracture that has now resolved, and he awarded her €75,000 plus costs.

Morgan v ESB High Court 2017

This case is a Court of Appeal decision following an award made by the High Court to the plaintiff who sustained injuries when he fell on a staircase when collecting post at the ESB offices in Dundalk on 30th April 2013. The defendant had denied liability and contested the case.

In the High Court Ms. Justice Bronagh O'Hanlon awarded the claimant €110,000 saying that he did not get specific training in relation to the task of collecting post a duty which he had performed over a number of years. The claimant alleged that that whilst stepping from a landing to the first step on a lower flight of stairs that his feet went from him and he slipped and fell because the steps were wet. He injured his shoulder and he was out of work for months he is now left with ongoing pain.

Justice O' Hanlon found that there was a problem with the nosing on the steps combined with the fact that they were wet for some reason allowed her to find in favour of the plaintiff and the fact that he was carrying parcels in both hands did not amount to contributory negligence.

In the Court of Appeal Mr. Justice Seamus Noonan overturning the decision said that the claimant never mentioned that a leaking skylight over the stairs may have caused it to be wet either when he had a chance to comment on internal ESB investigation report or at an investigation meeting. The judge found that this was an extraordinary omission.

Similarly, the fact that he had mopped up the wetness following the accident and his failure to confirm same was also extraordinary. He found that there was no credible evidence before the High Court to justify a finding that the nosing on the steps was in any way responsible for the accident. He also took the view that training was never an issue. Overall, he found that there was no evidence to entitle the trial judge to take the view that there was a breach of the Health & Safety at Work legislation.

Farrell v HSS Management Ltd Trading as Harte Safety Solutions and Harte Sign Technologies Ltd High Court 2015

This case is unusual and involves both Employers' Liability and Products Liability potential. The husband of a 39-year-old woman who died from a heart attack whilst at work took the case on the basis that a defibrillator supplied by the defendant was not working and if it had been the evidence given by a cardiologist was that the deceased may have had a 38% greater chance of survival.

The deceased died from acute heart failure by reason of a condition known as a floppy mitral valve. The incident occurred at the deceased's workplace Takeda Ireland Ltd where she worked as a manager. The case was settled for €300,000. It is interesting that the defendant decided to try and settle this case. It was uncertain had the case proceeded to trial whether the plaintiff would have been in a position to establish that a functioning defibrillator would have saved the deceased's life.

We were advised that a cardiologist would give evidence to the fact that she had a 38% greater chance of survival if it had been working however when dealing with medical malpractice cases the burden is 50% in such scenarios and therefore it is unusual that the case did not proceed to trial.

Find out more

(pictured left to right)

David O'Neill ACII Tech IOSH
Technical & Client Lead - Ireland
david.oneill@mclarens.com

Alan Browne FCII
Head of Casualty (Ireland)
alan.browne@mclarens.com

Glenn Goggin FCII Dip.L BCL CIP CID
Managing Director - Ireland
glenn.goggin@mclarens.com

William Wilson ACII ACILA
Head of Major Loss Ireland
william.wilson@mclarens.com