

Personal Injury Accident Claims – Do you need a Solicitor anymore?

In the current climate, where the Personal Injuries Assessment Board advises that Claimants do not need a solicitor, Brian Morgan Litigation Partner in Morgan McManus Solicitors, Clones suggests that perhaps the Board should advise the Claimant that, now more than ever before, he does need a solicitor.

Nowadays, in the Republic of Ireland, victims are told that they do not need a Solicitor since the enactment of the Personal Injuries Assessment Board Act 2003 on the 22nd July 2004. All civil actions (except medical negligence claims and a further limited number of categories) intended to be pursued for the purpose of recovering compensation for a wrong in respect of personal injuries must now, by law, be referred for assessment by the Personal Injuries Assessment Board (PIAB) before the proceedings in Court may be initiated.

But what about the Legal cost?

Historically, in every jurisdiction, a victim who recovers compensation has always been entitled to have his solicitors' costs paid by the wrongdoer. This is in recognition of the fact that the victim will require independent advice, expertise and legal representation. However, if the victim settles his claim with PIAB, the Board will not pay his legal costs. Furthermore, PIAB does not even want to write to his solicitor and has made it very clear from its inception that the assessment of personal injury claims by PIAB should be a "Solicitor free zone".

Legal Minefield

A victim might be led to assume that he no longer needs a solicitor. The victim might assume that his claim will be simple and "hassle-free". What he won't be told is that, with the passing of new legislation in the past year, he is entering a minefield where his rights to privacy could be invaded and where he could end up in prison where it is deemed by a court that he has misrepresented or exaggerated his Claim.

Below is a summary of some of the dramatic changes which have been enacted by recent legislation which highlights the importance of getting legal advice from the commencement of the Claim :

(1) The Personal Injuries Assessment Board Act 2003

Medical Report – Privacy Issues

- Under the PIAB rules the victim is required to obtain a medical report from his GP and send it together with a completed application form to PIAB. PIAB sends a copy of the form and an unedited copy of the report to the third party (the person whom the victim holds responsible for the accident) and asks the third party if he intends to defend the claim or whether he wants PIAB to deal with it. No effort is made by PIAB to screen sensitive information on the

medical report before delivery to the respondent (the other party). What if that medical report contains very sensitive information about previous physical or mental illnesses from which the victim has suffered in the past? Is this information to become the subject of “bar-room banter” by a respondent who is not enthralled with the idea of being blamed by the victim for this accident?

Early Settlement – Indefinite Prognosis?

- We are told that PIAB will assist the early resolution of Claims. But what if the Claim is settled by PIAB before there is a final prognosis of the injuries? What if, having settled his Claim, the victim then suffers a further exacerbation of his injuries? What if, rather than getting a single initial Report from his GP, the victim had been advised by his solicitor to get a Specialist report or a follow-up Report from his GP (which is not allowed by PIAB) which might, with the benefit of further investigations and expert knowledge, have shown very serious underlying injury? Once the victim’s Claim is settled, there is no going back.

New Legislation – Serious Consequences

- More importantly, will the victim be properly advised by PIAB of the very serious consequences of his actions in the event that he offends the provisions of other new legislation which applies?

(2) The Motor Insurers Bureau of Ireland (MIBI) Agreement 2004

The MIBI exists to compensate victims of road traffic accidents where the third party was uninsured. However, strict procedures now exist under the new 2004 Agreement which, if the victim overlooks complying with them, could result in his Claim being dismissed. For instance:

Procedure

- Prior notice of the Claim must be notified by registered post or electronic mail as specified on the MIBI website. What if the victim notified by ordinary post only?

Strict Time Limits

- Strict time limits apply for notification of information. For instance, a claim for car damage must be notified within one year of the accident.

Notification

- The Claim can however only be notified within the first three month period of the accident provided the victim has demanded relevant insurance particulars from the third party “in accordance with the provisions of section 73” of the Road Traffic Act. Will the victim know the provisions of section 73?

Report to Gardai

- The accident must be reported to the Gardai within two days of the accident or as soon as the claimant reasonably could. What however if the victim relied on the assurances of the third party at the scene of the accident that he

would compensate him and then assumed that it was not necessary to report the matter to the Gardai?

Solicitor necessary?

- Ironically, as part of the co-operation provisions which now apply under the new Agreement, the MIBI recognises the entitlement of the victim to have his solicitor present if being interviewed by the Bureau. But have we not been told by PIAB that the victim doesn't need a solicitor? Bear in mind that these investigations by MIBI may take place at the same time as the PIAB Claim!

(3) The Civil Liability and Courts Act 2004

There are very serious consequences for victims if they fail to follow the procedures which now apply under this legislation. Some of the more serious provisions are summarised hereunder :

Reduction of Limitation Period

- The previous three-year period ("the limitation period") which the victim was allowed from the date of the accident to issue proceedings has now been reduced to two years. This may seem like a long period of time but what if the victim (as a lot of the victims do) decides that he will only issue proceedings if his injuries persist and only commences the Claim one and a half years after the accident?

Sufficient Time?

- While the balance six month period might appear sufficient time within which to issue Proceedings, remember that the victim must firstly put his Claim through PIAB before he issues proceedings. While the limitation period will be suspended while the Claim is being considered by PIAB, what if the victim cannot get all his medical reports in sufficient time to enable him to issue the new "*Personal Injury Summons*" which requires detailed particulars of the claimants injuries and other detailed particulars which may not be readily available prior to the expiry of the limitation period?

Verifying Affidavits

- Parties to court actions are now required to file "*Verifying Affidavits*" within 21 days of serving pleading. Where a victim makes a statement in an affidavit which is false or misleading and which that person knows to be false or misleading he shall be guilty of a criminal offence.

Criminal Victims?

- Where a victim gives or dishonestly causes to be given evidence in a personal injury action that "is false or misleading in *any* (my italics) respect and which that person knows to be false or misleading" he shall be guilty of a criminal offence.

Dismissal of Claim?

- The court is entitled to dismiss the plaintiff's (victim's) action also if it is satisfied that the plaintiff has given misleading evidence.

Consider the following scenario:

John, a 34 year old self-employed carpenter, is involved in a road traffic accident when his car is “rear-ended” by a third party and he has sustained a severe injury to his back. He is concerned that persistent backache will prevent him returning to work. He decides to make a civil Claim and contacts PIAB. He is told by PIAB that he does not need a Solicitor. He fills out the PIAB form and attends his G.P for a medical report.

Previous accidents and their relevance

John has recently moved to the locality and has only known his G.P. for a short time. John tells his G.P. that he has not suffered from any previous serious illness. He fails to mention that some years earlier he was involved in another road traffic accident. In that previous accident he sustained minor injuries, however a friend of John’s was killed in the accident and John subsequently attended a psychiatrist suffering from depression and post traumatic stress. John can see no relevance of this previous injury to his current injury. He knows that PIAB will send his medical report to the respondent involved in the accident and he certainly does not want the respondent to be become aware of his previous illness. John lives in a small community and is sure that the respondent would tell everyone in the locality.

Illegal Earnings?

John claims for loss of earnings. He omits to tell PIAB that half of the loss of earnings claim is illegal as it is based on a level of earnings where he has only previously declared about half of all his earnings to the Revenue Commissioners.

MIB Notification

When John filed his claim with PIAB he did not realise that the third party was uninsured. In any case, he did not know of the existence of the Motor Insurers Bureau. He did not know that if he didn’t notify the MIB of his claim for car damage within a year of the accident, then the claim would be statute-barred. PIAB fail to settle the Claim and a year later John obtains an Authorisation from PIAB enabling him to issue a civil Claim but an official in PIAB tells him that he must now go to a Solicitor.

And then he instructs a Solicitor.....

In instructing his solicitor he decides, when questioned about previous accidents and his earnings history, that he will continue the lie. After all, he doesn’t want to get off on the wrong step with his solicitor and isn’t he now stuck with the particulars as claimed which he gave to PIAB in writing? John’s Solicitor subsequently issues Proceedings on his behalf and, in his Verifying Affidavits, John compounds his lie by swearing that he had no previous accident and claiming for loss of earnings which were illegal in the first place. Up to this, the solicitor had only the benefit of the GP report and he then advises his client that he will now require to be examined by a medical consultant. The medical consultant will require the client’s previous medical notes and an authority is signed by the client to enable the notes to be taken up from the client’s previous GP.

And then the truth came out.....

It is then only ascertained on receipt of these notes that the client has been involved in a previous road traffic accident. Also, the solicitor on making further enquiries, then finds out that John's declared past earnings are much less than the figure which John had claimed in his PIAB form and subsequently notified to his solicitor. The solicitor then takes appropriate action to amend his client's proceedings but the damage has already been done : his client has now been discredited and is now in danger of having his Claim dismissed. Even worse, his client could be charged with a criminal offence. Having become aware of these problems, the third party insurance company call a pre-trial Settlement Meeting. The insurance company makes an offer which it knows is well below the proper value of the claim: indeed its only half of what PIAB offered two years earlier. The insurance company knows however that the victim has no alternative but to accept the offer as, if he doesn't, he will run the risk of losing all and also risk imprisonment.

What the Solicitor could have done – had he obtained early instructions

What if John had decided to instruct his solicitor prior to the PIAB claim? He would have been advised of the provisions of the new legislation. On making appropriate enquiries with the Garda Síochána John's Solicitor would have immediately ascertained that the third party was uninsured and John's solicitor would in the circumstances have notified the MIB of John's car damage claim well within the one year time limit. Perhaps, on finding out the details of the previous accident it might have been ascertained by the solicitor that the previous injuries had no bearing on the current injuries and revelation of the previous accident in court in due course would have had no consequence for John's current Claim.

Embarrassment could have been avoided

More importantly, to avoid embarrassment to John, John's Solicitors could have advised PIAB that the revelation of John's previous psychiatric injury to the respondent would be in breach of the onerous obligations on PIAB as a Data Processor under the Data Protection Act not to release sensitive information unless it is relevant and maybe in those circumstances he could have assured John that the revelation of the previous accident to PIAB had no embarrassing consequences for him. On ascertaining that some of his client's previous earnings were illegal, the solicitor could have arranged for his client to instruct an accountant with a view to making a voluntary disclosure to the Revenue Commissioners prior to the issue of proceedings, thus enabling his client to claim for future loss of earnings in his current Claim.

All could have been well

Perhaps John might have ultimately been entitled to the full value of his Award from the court rather than commencing a dishonest and misconceived Claim which should never have been made.

Is there a moral to this story?

Some might say that John should not be entitled to one euro if he makes a Claim which is in any way dishonest. That is correct. But is John not entitled to independent legal advice before he commences his claim – so that he can be advised of the consequences of every minutiae of his claim? PIAB will tell you that he doesn't need

a solicitor. I will leave the reader to decide. More importantly, does PIAB not have a *positive duty* to advise claimants of the necessity to instruct a solicitor at the commencement of every PIAB claim *bearing in mind that every Claim which commences before PIAB has the possibility of ultimately ending up in the Courts ?*

Brian Morgan is a partner in the firm Morgan McManus Solicitors who have offices at the Diamond, Clones, Co. Monaghan and 12 Paget Lane, Enniskillen, Co. Fermanagh – website : www.morganmcmanus.com.