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To what extent are the assessments by legal academics who critiqued the Irish personal injury reforms (PIAB & related measures) defensible in light of the outcomes? A case study

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Abstract

This dissertation supports the hypothesis that the current debate about 'a compensation culture' as against 'a negligence culture' is missing a third dimension of 'professional regulatory culture' that has not been accorded sufficient attention in the tort literature to date.

My original contribution to knowledge also demonstrates that many of the assertions by insurers that trends in premium rates for liability insurance are almost entirely driven by tort claims is largely a fallacy. The reason this is important is because there is often a 'taken for granted view' that the frequency of accidents causes claims which result in escalating insurance costs. That in turn can lead to calls for further tort reforms in many jurisdictions but the real mischief has not been properly identified, as revealed in this significant research.

Proposals in 2002 to reform the Irish compensation system for negligently inflicted personal injury provoked a flurry of concerns from academics. A number of reservations were raised about the potential for success and the risks to fairness for claimants. The majority professed a preference for the *status quo* but they were largely operating from an evidence free environment and many relied on little more than anecdotes from the legal professions. However, their analyses also provided a unique opportunity to identify what tort scholars considered to be the key markers of an optimal redress system.

To address those academic concerns the scope of this case study interrogated data for an entire nation, comprising of over 6.7 million claims with a value of €34bl and triangulated those trends with analyses of accident frequency as against insurance pricing and profitability over several decades. The role of the media in negative public perceptions of negligence law is also addressed.

These wide-ranging and robust statistical analyses make a substantial contribution to address a gap that it is acknowledged exists in the tort literature. While this thesis concludes that many of the academic concerns about the reforms were misplaced, it reveals that there are layers of interlocking relationships to which tort theory does not currently ascribe sufficient weight.

Contents

Acknowledgements

It is always difficult to write a fully adequate acknowledgment when a project has occupied one's mind for as long a time as this PhD research has mine.

Therefore, thanks are recorded to all those too numerous to mention who have supported and encouraged me during the course of this work – or even, when necessary, just left me alone to get on with it.

First and foremost, however, my deepest appreciation must go to my truly inspirational supervisor, Prof Lisa Webley, for her patience and confidence that my thesis would eventually be completed. I may not been the easiest pupil to supervise. I owe Lisa a great debt of personal and professional gratitude.

I would also like to thank the many academics and professionals, including judges, who challenged, commented, critiqued and engaged with me at various conferences across the globe over the years.

Unusually, it is also appropriate to acknowledge those whose reluctance to be wholeheartedly supportive of my efforts, such as in their reticence to grant access to data, actually motivated me to dig deeper.

Go raibh míle maith agaibh go léir.

Author's Declaration

I certify that this work is my own and that all material in this thesis which is not has been clearly identified. None of this research has been previously submitted for the award of a degree by this or any other University.

Signed: *Dorothea Dowling*

Dorothea Dowling

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Chapter 1 Introduction

1.1 Background to this research

Responding to public pressure about the unaffordability of liability and motor insurance, successive Irish Governments since 1986 had been concerned about the costs of the litigation system for personal injury claims.[1] Estimated tort outlay in Ireland was on a par with the USA at almost 2% of Gross Domestic Product and was considered a challenge to economic growth.

The reforms proposed in 2002 were to apply to all types of personal injury claims for which compensation was sought on the basis of alleged negligence. [2] In brief, issuing of legal proceedings were to be prohibited prior to a claimant invoking the procedures of a new statutory independent assessment body, the Personal Injuries Assessment Board [PIAB].[3] This redress model would resolve appropriate cases in a non-adversarial process without an award of legal costs.[4] This was a departure from the usual rule in adversarial litigation that 'costs follow the event'.[5] In parallel with establishment of PIAB for non-contested claims, there new litigation measures to discourage exaggerated claims while also requiring more open disclosure of information between the parties from the outset of litigation.

[1] Central Statistics Office data reflected an increase of 81% in the cost of motor insurance between 1989 and 2001 from 68.5 to 146.7 on the index. www.cso.ie
[2] With the sole exception of medical negligence actions.
[3] Established by the Personal Injuries Assessment Board Act 2003. I was non-executive Chair of PIAB from its inception until April 2014.
[4] Some exceptions were provided for at s.44 of the PIAB legislation, such as expenses incurred in the ruling of settlements for Minors.
[5] Ireland did not have a history of legal aid for such civil cases.

The reforms were based on the findings of a statutory investigation into a perceived crisis caused by escalating insurance costs and I had the honour of Chairing that Motor Insurance Advisory Board [MIAB] from 1998 to 2004. The interim report containing detailed and wide-ranging recommendations was published in April 2002.[6]

The proposals were met with staunch criticism from the Irish academic community, as well as from the legal professions. As the literature reviewed in Chapter 2 reflects, the implementation plans raised a flurry of concerns. It seemed that the very rule of law was under threat from a '*reign of terror*'.[7]

Commentary on the reforms also presented a rare opportunity to identify the views of some tort scholars on the 'key markers' of what an optimal negligence redress system should strive to achieve. The purpose of this case study is to interrogate the defensibility of those criticisms in light of the outcomes which are reviewed against those key markers.[8]

Given the academic criticisms of insurers, this case study also illuminates what has been termed the *"hidden and much under-estimated"* influence of that industry on perceptions of tort. [9] This raises the question of whether it is actually insurers who create the seemingly endlessly recurring 'claims cost crises'. [10]

The extensive longitudinal research submitted in this thesis could prove to be of significance to other jurisdictions contemplating tort reforms.

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[6] There were 67 MIAB recommendations, all of which were adopted by Government – see Appendices.

[7] To borrow a phrase from Rabin. Rabin, Robert L. "*Some Reflections on the Process of Tort Reform*", San Diego Law Review 13 of 1988 at page 43. And at page14: *"I was not even so bold as to carry the argument [on 'tension' in the system] to an outright assertion that legislative intervention was essential, or some similar heresy"*.

[8] There is also an issue about optimal compensation levels. In comparison to the other main common law jurisdiction in the EU, Ireland has a high level of Damages with the average settlement value being 12 times that of England as detailed in Appendix C1.2.

[9] Richard Lewis 'Insurers and Personal Injury Litigation: Acknowledging the Elephant in the Living Room' (2005) Journal of Personal Injury Law Issue 1/05 at p1.

[10] This is a different point from the role of insurers in the handling of claims as examined by others, such as Richard Lewis 'How Important are Insurers in Compensating Claims for Personal Injury in the U.K.? (2006) The Geneva Papers on Risk and Insurance - Issues and Practice, 2006, 31, 2, 323.

1.2 Methodology Summary.

The detailed operational methodology is set out at an Appendix after Chapter 8.

My perspective is that of an 'insider'.[11] This is a standpoint not often conveyed in the tort literature. A proper understanding of law requires appreciation of how legal norms apply in practice and that analysis has suffered from scholarly neglect. This research has the potential to make an original contribution to legal scholarship.

This may be the first tort literature to present analyses of an entire insurance market for a single nation over several decades to assess what academics consider to be the under-researched influence of that industry on the administration of civil justice. At a helicopter level, trend analyses are based on 6.7ml claims with a value of €34bl over the period 1992 to 2013 in the country with a population of just under 5ml people. Insurance is not merely ancillary but rather must be viewed as *"the primary medium for the payment of compensation, and tort law as a subsidiary part of the process"*.[12] Triangulation was undertaken of statistics on accidents, claims and insurance market performance which are distinct but related factors that are often examined separately in the literature.

Meta-analysis was undertaken of research previously conducted into injury claims and litigation costs in Ireland to assess the validity of the basis for criticisms of the reforms proposed in 2002. The substantive chapters analyse publicly available

[11] Engel. *The Oven Bird's Song – insiders, outsiders & personal injury in an American Community*. Eds. Law & Society review 1984, Vol. 18, No. 4. Although under the formula devised by Reza Banaker, I would be classified as merely 'an outside participant' on the basis of being a repeat defendant because he limits 'insiders' to 'judges and practising lawyers'- *Merging Law and Sociology: Beyond the Dichotomies of Socio-Legal Research* (Berlin/Wisconsin, Galda & Wilch, 2003).

[12] Cane, Peter & Goudkamp, James. *Atiyah's Accidents, Compensation and the Law* (9th Ed, Law in Context, Cambridge2018) at p 221 of Kindle version.

national statistics on a longitudinal basis, and also review court precedents for evidence, to test the robustness of academic concerns about the proposed reforms.

I maintain that I have a unique standpoint as a PhD candidate. To quote Twining, while one can debate questions of 'right' policies and effective rules in the abstract there is an additional requirement:

> *"In so far as participants in legal processes and other affected people complain that too many of their questions have been left unexplored, and that too many of their questions have been left unanswered by academic lawyers, their complaints are justified. The gist of their complaint is that for their purposes different criteria of relevance are required. A model of legal process developed around the concept of* ***standpoint****, it is suggested, is likely to provide a more satisfactory theoretical basis for such criteria than that provided by models of legal system as a system of rules (or rules and principles - Dworkin). This is not to reject such theories. It is only to put them in their place*". [13]

In addition to my elite experience of spearheading the reform programme, I have an extra-legal discipline as a Chartered Insurer. To that extent, this is inter-disciplinary research. Subsequent to working as a claims manager in the insurance industry in Dublin and London, two decades of my executive career were dedicated to managing personal injury litigation in the self-insured sector.[14]

To curtail the risk of rationalisation, to which I am alert, it is stressed that the various sets of statistics employed in this research were collected by many statutory regulators and State Agencies for a range of very different purposes through consistent methods, often set down in statute. [15] This assists in the objective of

[13] Twining, W. 'The Bad Man Revisited' (1973) Cornell L. Rev. Vol 58: 275 at p292.

[14] As Group Liability Manager of Ireland's national transport company, the CIE Group. This comprises Dublin Bus, Irish Bus and Irish Rail which are defendants in many of the seminal tort cases during my management of that risk profile of 290ml passenger journeys a year and 11,000 employees, which is exempted from EU Directives on compulsory motor insurance. Prior to that I was a Claims Manager in a major insurance company.

[15] I concede that the MIAB report was referred to as 'The Dowling Report' during Parliamentary debate in 2002. This was the report title applied in media coverage on one politician remarking that "*it was not an exaggeration to say the Dowling report should lead to a "radical reshaping of motor insurance in Ireland," as Ken Whittaker's Economic Development Document had done in the field of general Irish economic policy."*

demonstrating the robustness of trend identification as opposed to what might be secured through sampling or semi-structured interviews. [16]

The research data is public source information under EU Directive on the Re-Use of Public Sector Information 2003/98/EC and, therefore, copyright restrictions do not apply.[17] All tables and graphs are of my own creation except where indicated otherwise.

Because of my insurance knowledge I also have the expertise to highlight outliers which may be hidden in aggregated market data upon which other researchers might rely.[18] The significance of items such as re-insurance or changes to accounting policy can also have a marked effect on the interpretation of results and the perceptions about the cost of tort for society.

My triangulation demonstrates the dynamics between factors which tort developments may affect. These include accidents frequency, propensity to claim, claims costs, speed of finalisation, insurance inflation, underwriter profitability, underwriter efficiency and market dynamics including dysfunctionality.[19] Those relationships are examined relative to the assumptions on which public policy for injury compensation is often based.

This thesis may be the first time, at least since the Pearson Report in 1978 [20], that one piece of research brings together so many of the interlocking variables which

[16] These sources range from the police, the Road Safety Authority, the Courts Service, the Financial Regulator, the Department of Social Protection, the PIAB and publications of judicial decisions.

[17] The Regulations on the Re-Use of Public Sector Information 2005 S.I. No. 279 of 2005 implemented the EU Directive on the Re-Use of Public Sector Information 2003/98/EC. The Directive encourages all Member States to promote the re-use of public sector information and expects that, by exploiting its potential, European companies will contribute to economic growth and job creation.

[18] For example, in the decades under review there were at least three insurance companies with 'irregular' reserving practices which might skew the analysis as highlighted in chapter 6.

[19] Robert K Yin, *Case Study Research, Design and Methods* (5th Ed, Cosmos Corporation 2013).

[20] Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054 (1978) - better known as the Pearson Report.

are related to each other in tort. This work will prove important to the planning or assessment of reform programmes. I contend that my empirical research is of practical as well as theoretical significance.[21]

The planned methodology encountered a number of obstacles. The barriers faced in securing data warrant emphasis. While the multiple sources are from public documents that should not be taken to mean that they were readily accessible.[22] Some data is 'hidden', whether deliberately or not, and only an insider would know how to track it down – sometimes at considerable expense.[23]

This research benefited from the fact that I have a certain profile as a national expert in this field. One result of that privilege was that I was requested to provide assistance to a Joint Parliamentary Committee in 2016 about a newly emerging insurance cost crisis in Ireland. The fact that I was undertaking PhD research proved valuable on that occasion. In the course of those subsequent Committee hearings in September 2016, the Irish Competition Authority (Competition & Consumer Protection Commission) announced an investigation into price signalling by insurers.

Subsequently in March 2017, the anti-trust division of EU DG Comp contacted me with a request for a formal statement about competition issues in the Irish insurance market. Obviously I was only a very small part of their investigation evidence. As reported in the media, on 4th July 2017 EU DG Anti-trust investigators undertook dawn raids on a number of insurance offices in Ireland. The presumption of innocence is paramount in situations involving potential prosecutions so I will not elaborate further at this point.

[21] It may also prove of interest to competitors considering entering the Irish insurance market in post Brexit.

[22] A limited amount of data from the 2002 MIAB report is employed to set the benchmarks for the pre-reform period as many academics reviewed in Chapter 2 had a preference for the *status quo*. The post reform period is then analysed against those benchmarks to assess whether academic concerns in the context of their markers for an optimal tort redress system proved defensible.

[23] For example, the Motor Insurers Bureau in the UK publish their annual report online with analysis of outlay and activities. In contrast, to obtain even the minimum of information about trends in accrued costs for uninsured driving in Ireland one must apply to Companies Registration Office and pay a fee to obtain a copy of MIBI annual reports.

The legislation on Freedom of Information proved to be an invaluable tool and was explored to its limits. For example, having been refused a particular request in December 2016, I appealed to the Office of the Information Commissioner.[24] That determination held in my favour in September 2017. The parties concerned had a right to appeal to the High Court on a point of law and did so in an effort to prevent release of information on insurance costs in the public sector. As a result I have been served as a notice party with extensive High Court pleadings and that litigation is ongoing in 2019. The process of empirical legal research can be long and frustrating. My recurring question is '*what have they got to hide*?'

This research has already been impactful. This attests to the potential of this thesis to make a unique contribution to knowledge and understanding in the tort literature.

1.3 Reasons for the Irish case study

Among a number of factors identified by MIAB, there was a suspicion that many claims were questionable. Prior to the reform programme the academic literature in Ireland accorded limited attention to the system for delivery of compensation, in comparison to extensive commentary on tort law *per se*. Perhaps this is not surprising given that leading theorists, such as Rabin, seem somewhat dismissive of the role of administrative costs. This is reflected in his view that tackling this is '*not the stuff of breath-taking reform proposals*'.[25] This thesis presents a challenge to that conclusion.

[24] X v Local Government Management Agency – Case 170136. Available at-https://www.oic.ie/decisions/d170136-X-and-Local-Government-Mana/
[25] Rabin, Robert L (n7) at p42.

Various reforms had previously been considered and rejected until the cost of claims for both insured and self-insured parties became a major political issue.[26] The insolvency of the leading motor insurer in 1983 and of one of the largest liability underwriters in 1985 raised further concerns about the sustainability of the Irish system. Trade Unions, which provided some legal aid to their members, also complained about delays experienced by injured parties in securing compensation and expressed their members' dissatisfaction with the legal system. Employer groups pointed to mounting litigation costs as identified by a Joint Parliamentary investigation in 1986 and in a number of subsequent reports.

While some academics reviewed in chapter 2 asserted that '*blame for rising insurance cost [was laid] squarely on the shoulders of the legal profession'* that does not accord with the facts.[27] Indeed, it would be misleading to give the impression that the MIAB recommendations in 2002 related solely to the claims process. In total there were 67 recommendations. [28] These included measures for accident prevention and improvements in the operation of the insurance market. While some commentators argued that no reforms should have been commenced until the insurance industry provided a guarantee of premium reductions, the Irish Insurance Federation (IIF) did provide a detailed estimate of how rates could reduce by over 30%. That breakdown is provided in the MIAB 2002 report and is reproduced below:

IIF on Reductions in Total Claims Costs from Implementation of MIAB Recommendations		
Summary of Recommendation Category	% reduction	Cumulative
Road Safety Strategy	10%	
PIAB	7.6%	16.8%
Reduction in Uninsured Driving	5%	21%
Promotion of Rehabilitation	3%	23.4%

[26] In Ireland, small and medium size enterprises (SMEs) accounted for over 99% of businesses in the enterprise economy and almost 70% of people employed during 2014.
http://www.djei.ie/press/2014/20140411.htm

[27] Indeed, the Law Society recognised in their Gazette of May 2002 that the majority in number of the MIAB recommendations were directed at Regulators and at the insurance industry.

[28] The MIAB recommendations are set out in Appendices.

Abolition of 2% stamp duty	2%	24.9%
Reform of Courts & taxation of costs	2%	26.4%
Anti-fraud measures	1.75%	27.7%
Exclusion of earnings from "black economy"	1.5%	28.8%
Reduced plaintiff solicitors' fees	1.5%	29.8%
Book of Quantum	1%	30.5%
Repeal of Health (Amendment) Act 1986	1%	31.2%
	36.35%	

Table 1: Projected Premium Reductions from the Reform Programme 2002

Echoing the pessimism of many of the academics reviewed in Chapter 2, there were few grounds for optimism about the prospects for success of the reforms based on past experience. Previous initiatives, such as Jury abolition in 1988 and increases in the jurisdictions of the lower courts from 1991 in an effort to reduce legal costs, had resulted in insurance inflation increasing by 81% over 12 years between 1989 and 2001 instead of delivering the savings anticipated.

Establishment of PIAB, however, was not designed solely to tackle litigation costs which had been found to add 46% to personal injury compensation.[29] There had also been demands for a quicker system for delivering compensation entitlements in straightforward cases. Independent research showed, for example, that claimants in Ireland waited several years to secure compensation entitlements. This was ascribed to the fact that in England only 4% of claims involved barristers compared to 77% in Ireland at that time.[30]

[29] This had risen from 42% in 2001 per MIAB report 2004 – Dublin Stationery Office ISBN 0755713214.

[30] McAuley Report 1997 on a Personal Injuries Tribunal at Tables 5 & 6, pages 117& 118. See Chapter 5.

The existence of ongoing litigation, and the stress which is often attendant on that process, has been indicated in some studies to retard rehabilitation.[31] Unlike England where the rehabilitation industry was part of the litigation system, that option was not explored in Ireland. The tight timeframes in PIAB, coupled with the fact that claimants do not face potential liability for defendant costs, were designed to reduce stressors. Obviously, as recognised by the Supreme Court, mere money cannot possibly compensate for injuries of maximum severity where victims would prefer to turn the clock back and be restored to their pre-accident health. [32]

The first MIAB report, from which the PIAB ultimately resulted, was published in April 2002.[33] Two measures were immediately implemented.

First, Government introduced a ban on solicitors advertising 'no win, no fee' arrangements. Such inducements were considered misleading.[34] Long established precedent dictates that unsuccessful plaintiffs generally have an exposure for defendants' costs. The existence of before (or after) the event legal expenses insurance does not alter that rule.[35] There is no statutory guarantee of indemnity under such policies. If the credibility of a plaintiff is dented at trial that raises the risk that there may have been lack of full disclosure to expenses insurers and this can result in cover being subsequently denied.[36]

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[31] For example - Dr Clem Leech Dept of Social Welfare, Ireland; Nick Nevin, Dept of Work & Pensions, UK; Gordan Waddell, A Kim Burton *Concepts of Rehabilitation* www.gov.uk; B. M. Fullen, C. Doody, G. David Baxter,L. E. Daly, D. A. Hurley. *Chronic low back pain: non-clinical factors impacting on management by Irish doctors.* Ir J Med Sci (2008) 177:257–263

[32] *Sinnott v Quinnsworth* [1984] ILRN 523.

[33] Specific responsibility for implementation of each of the 67 recommendations was assigned to 7 Government Departments, 3 Regulators and 2 private sector bodies as detailed in the 2004 MIAB report.

[34] In research by the Jesuits published in Working Notes 1999 Issue 35 under the heading 'The Claims Industry and the Public Interest' the telephone directory for business firms had 44 pages of ads for solicitors compared to 24 for building services and 9 for estate agents. In that solicitors section there were 23 full-page ads costing between Irl£10,000 to Irl£16,000. The term 'no-win-no-fee' dominated.

[35] The repudiation clauses is such policies can be quite wide, as referred to by the High Court during an application for security for costs in *Greenclean Waste Management Ltd v Leahy (No. 1)* [2013] IEHC 74.

[36] In June 2014 the High Court held that, on the facts of the particular case, ATE insurance was not champerty nor trafficking in litigation which would be contrary to public policy. *Greenclean Waste Management Ltd v Leahy (No. 2)* IEHC 314.

Some academics had credited this advertising reform to the Law Society.[37] However, it was by reason of the self-regulatory status of the profession that the Statutory Instrument was introduced under their auspices but the measure arose from a MIAB recommendation which was adopted by Government.

The second most immediate step related to dynamics in the insurance market which, as identified by academics, was not considered competitive. A measure was introduced to tackle barriers to effective 'shopping around' which had been highlighted in the MIAB report. [38] This objective was advanced by empowering consumers to search for the best alternative motor insurance deal by providing them with a minimum of 14 days' notice of renewal terms, along with a statement of their accident free record. [39]

It may be obvious that unlike some tort reform programmes reviewed in much of the literature, the approach in Ireland was an example 'joined up thinking'. It focused in tandem on safety and insurance regulation within a suite of reforms that included the tort redress process. [40]

A third step, which the next section summarises, was establishment of the Personal Injuries Assessment Board and parallel litigation reforms which were the focus of academic commentary.

[37] Jonathan Ilan, 'Four years of the Personal Injuries Assessment Board: Assessing its impact' (2009) JSIL, 1, at p57. This paper was cited in the Law Reform Commission Report on ADR in 2010.

[38] MIAB recommendations 13 – 15.

[39] Interestingly, some seven years later the EU promulgated the 5th EU Motor Insurance Directive 2009/103 Directive to facilitate switching of service providers to encourage market competition.

[40] The outcomes from other significant measures on road safety are analysed in Chapter 4 on accidents.

1.4 The commencement of PIAB operations

To appreciate the academic commentary reviewed in Chapter 2, it is necessary to understand how radical the system proposed in 2002 was viewed. In the forward to a book on updated Irish personal injury law published in July 2016 Ms Justice Marie Baker of the High Court wrote:

> *"The law and practice in the area has changed almost beyond recognition in the years since the PIAB legislation of 2004…."*[41]

PIAB commenced operational activity on 22nd July 2004.[42] The legal community predicted that the new body would ultimately be a drain on the taxpayer.[43] It transpired, as originally planned, to be a self-funding agency and also repaid its initial set up costs to the Exchequer in December 2011. Fixed fees are levied on a per case basis, irrespective of complexity. [44]

Some commentators deemed the PIAB concept to be 'radical', 'innovative', 'unique' and the 'greatest experiment of all'. [45] It is different from any redress system operating in other common law jurisdictions. It was a significant departure from the pre-reform *status quo* which was favoured by many academics reviewed in chapter

[41] In the foreword to one of the latest practitioners guide to this area of Irish law. Colin Jennings, Barry Scannell, Dermot Francis. *The Law of Personal Injuries*. (2nd Ed, Round Hall 2016). Ms Justice Baker was subsequently appointed to the Court of Appeal in June 2018 and then to the Supreme Court in November 2019.

[42] The first full year of operations was 2006 as cases were rushed into litigation in early 2004 to avoid the reforms.

[43] Stuart Gilhooly, 'PI changes in Ireland - implications for England and Wales?' (2006) JIPL, 2, 104-111 at p110. That author was President of the Law Society in 2017.

[44] Regardless of the complexity of the case, the fee paid by respondents is €600 and €45 by claimants.

[45] Dorothea Dowling, 'PIAB: A decade of delivery?' in Eoin Quill & Raymond Friel (Eds). *Damages and Compensation Culture, Comparative Perspective*s. (Hart 2016) at Chapter 8.

2. It is also important to stress that it is not 'a scheme' because it applies the same principles of compensation assessment as employed by the judiciary.[46]

Tort literature often focuses on the most vulnerable injured parties who have sustained severe injuries and/or on those claimants whose cases are based on legal arguments at the penumbra of the law. However, such an approach ignores the reality that most claims are for minor to moderate injury. There is no financial limit on the amount of an award which can be made by PIAB. It deals with injuries across the severity range and the largest award to date was €1.6ml in 2013.

During 2017 there were 12,663 awards by PIAB valued at €315ml. That same year the Courts, at all levels of jurisdiction throughout the country, awarded €206ml in 1,849 cases including 400 in the High Court of which 50 valued collectively at €99ml related to medical negligence which are currently outside the remit of the PIAB.

The introduction of PIAB was not a move towards a 'no fault' system, which was what some commentators advocated should have been considered in preference to the reforms. However, it is designed to remove from a prospective plaintiff the burden of proof in relation to negligence in cases which are resolved through the non-adversarial process.

A number of academics reviewed in Chapter 2 focused on legal costs and some highlighted the issue of solicitor-and-own-client fees. One of the strategies of PIAB was to empower consumers to pursue their claims without incurring legal costs, if they so wished, by demystify the process of claiming so that people were clear on their rights to compensation. In this context, it is the stated policy of the Board to employ straightforward language wherever possible. Even prior to commencement of operations, PIAB published a laypersons' guide to explain the process as simply as possible. An extensive 'road show' from 2002 also addressed groups of consumers and other interested parties at various venues throughout the country to explain the

[46] PIAB is not 'a scheme' in the sense in which that term is used to denote one-off compensation schemes such as the 9/11 fund or workers compensation schemes in America, as examined by Robert Rabin in 'Reflections on Tort and the Administrative State' (2011) DePaul L. Rev. 61. 239.

new system. An outsourced service centre operates a Helpline to provide claimants with guidance from 8am to 8pm to assist parties in completing their initial claim submissions on a LoCall number. All the details with FAQ's are available on the website at www.injuriesboard.ie. Documentation from the Board is said to be designed to state their role clearly, as per the example below:

> *PIAB is for genuine claims where the person who is likely to be sued requires an independent assessment of the 100per cent value of compensation because they do not wish to dispute legal issues, for whatever reason.*

One of the issues raised by academics reviewed in Chapter 2 was concern about PIAB bias against claimants. The PIAB is staffed by independent public servants, drawn from varying professional backgrounds, and it is they who undertake the statutory assessment service not the members of the governing Board. In addition to internal expertise, PIAB established an Independent Panel of several hundred medical experts in different specialities throughout the country. In contrast to the usual litigation process, the claimant is not subjected to regular reviews by medical experts on behalf of the respondent or their insurance company. If, in the opinion of the PIAB, an examination is necessary then the outcome of an examination by a member of the Independent Medical Panel is the report which is relied upon in the assessment. Such independent examinations are undertaken in the vast majority of cases.

Commentators reviewed in chapter 2 did highlight the delays in the court system. However, the tighter timeframes in PIAB are not suitable for all injury claims. Where an assessment is sought too soon by a claimant they are required to wait until a stable medical prognosis is possible. Such a deferral is subject to the maximum timeframe for finalisation of an assessment which is 9 months and otherwise the case is released to the Courts. [47] Claims which on first notification involve injuries

[47] Although that 9 months can be extended to 15 months, or longer if the claimant agrees. However, there is a duty on assessors under s.49 PIAB Act 2003 to ensure that '*assessments to be made expeditiously*'.

that PIAB consider will obviously take a long time to stabilise are released to the court system on day one of the process without prior referral to the Respondent.

Establishment of the PIAB did not alter how the initial claim is made. The claimant can first seek compensation directly from the person whom they consider responsible for the accident. This stage could be called "naming, blaming and claiming".[48]

As reflected in Chapter 2, many who resisted the reforms argued that improved safety would be a preferable way of reducing insurance costs. PIAB has a clear but limited role in this context. It does not enquire into the circumstances of accidents as the Statutory Assessors are concerned solely with the extent of injury and/or loss. While PIAB have pointed to the potential advantages of exploiting its data to better inform public policy on safety measures, enforcement of the law on accident prevention is the responsibility of other State Agencies such as the police for motor accidents and the Health & Safety Authority for workplace occurrences.

Curtailing litigation costs was fundamental to the financial objectives of the reforms. Academics and others who resisted the reforms seemed, with a couple of exceptions, to regard lawyers as an essential part of the claiming process even in the most straightforward of cases. This issue was the source of frequent challenges to the Board. In October 2010 The Hon. Mr Justice Sean Ryan of the High Court commented as below when dismissing judicial reviews against PIAB for refusing to award legal costs: [49]

> *"There are many straightforward cases and the mere fact that a solicitor is retained does not necessarily mean that the solicitor's fees will have been reasonably and necessarily incurred for the purposes of s. 44 of the Act of 2003."*

[48] William LF Felstiner, Richard L. Abel and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) L. & Soc'y Rev.631-654. Herbert Kritzer, 'Propensity to Sue in England and USA: Blaming and Claiming in Tort cases'. (1991) J.L. & Soc. Vol 18, 400-27.

[49] There were 19 other cases joined in two lead actions in *Plewa & anor -v- PIAB* [2010] IEHC 516.

PIAB is largely a 'documents only' procedure and is non-adversarial. Once a Respondent consents to an assessment they have no further input. Damages are assessed in accordance with historic tort norms as applied by the courts.

The data indicates that the full architecture of the litigation system is not necessary in all negligence claims. A minority of personal injury cases involve legal issues and those are the sole preserve of the Courts. Such claims are released by PIAB at the outset because they involve such disputes. Such litigation involves lawyers, as well as two sets of experts on any potentially contested issue. However, statistical analysis of data from the Courts Services indicates that these litigation overheads are not necessary in the vast majority of claims. Most cases do not involve any real legal disputes but are more a matter of how much money is involved. This is evidenced by the fact that historically of all the injury litigation issued less than 10% proceeded to an oral hearing. As highlighted by Binchy, the only problem with that was that *"[t]oo many cases have been settled at too late (and too expensive) a stage."*

To put matters in context, it must be acknowledged that there were changes to the litigation system in parallel to the establishment of PIAB. Those measures were also criticised by some of the academics reviewed in chapter 2 who expressed a preference for pre-reform *status quo* and which is now briefly explained for comparison.

1.5 Parallel Reforms in the Courts System

As acknowledged by many academics reviewed in chapter 2, the need for reform of the litigation system had been long recognised. In 2001 the then Chief Justice the Hon. Mr Justice Ronan Keane identified some of the main challenges, and proposed possible strategies, pointing out that:

> *"The Irish courts system, since it was first established in 1924, has never been subjected to any critical analysis conducted with a view to ascertaining how far it falls short of achieving the presumed objectives of any such system*."[50]

In March 2015 the Hon. Mr Justice Frank Clarke of the Supreme Court also called for *"a root-and-branch"* review of procedural law.[51] He posed a number of questions:[52]

> *"We need to consider whether the somewhat cumbersome edifice that has grown up by additions and renovations is really fit for purpose….We need to consider whether we have not created unnecessary complication and whether procedures cannot be streamlined.....However, I question whether we really have procedures which are . . . fit for purpose in the context of modern litigation*". [53]

The unattractiveness of litigation can act as a deterrent to seeking rightful redress.

On the other hand, in 2002 there was a concern that introducing a simplified claims process through PIAB might encourage opportunistic claims, or encouraging '*weak claims*' as Binchy termed the risk. This was more than a merely perceived mischief. In the pre-reform period a 1995 study by international consultants Datamonitor on five factors in the business attractiveness of 16 EU locations rated Ireland least

[50] Lecture delivered to UCC Law Society 23rd March 2001. Reported in The Bar Review April 2001 p 321-28.

[51] In July 2017 Mr Justice Frank Clarke was appointed Chief Justice of Ireland.

[52] Inaugural lecture Kevin Feeney Memorial Lecture at University College Cork March 2015.

[53] 'Supreme Court judge calls for review of procedural law' *Irish Times* (Dublin 3rd March 2015) http://www.irishtimes.com/news/crime-and-law/courts/supreme-court/supreme-court-judge-calls-for-review-of-procedural-law-1.2124871

favourable in terms of legal environment. [54] The country had a negative reputation for 'fraud' and propensity to litigiousness which was echoed in the focus of the reforms.

In lobbying against PIAB the Incorporated Law Society of Ireland retained the services of a nationally renowned accountant who projected increased opportunistic claims.[55] That perceived risk was supported by some of the academics reviewed in chapter 2. The statistical analysis of the outcomes demonstrates there is no conclusive evidence of any disproportionate increase in claims frequency as a result of an easier compensation delivery system *per se*.

The reforms did include a focus on tackling exaggeration which most commentators reviewed in Chapter 2 conceded was rife in the pre-reform period. Where there are reservations about the genuineness of the claim, new litigation procedures were introduced to facilitate challenges by defendants other than having to prove fraud on a criminal standard of evidence. That was implemented under the Civil Liability & Courts Act 2004. That legislation requires plaintiffs to swear an affidavit as to the veracity of their allegations. If any part of their claim is materially overstated they may lose all entitlement to compensation, along with potential fines of up to €100,000 and imprisonment of up to 10 years. Defendants face similar sanctions for false averments. One of the significant aspects of this requirement was that it imposed a retrospective 'obligation to tell the truth'. This was not considered repugnant to the Constitution since it had always been a criminal offence to lie under oath. Honesty is essentially a binary concept.

Axiomatically, it became no longer possible for defendants to file a blanket defence and they were required to swear an affidavit stating the clear grounds on which the

[54] See C Parsons et al (2004), *Report on the Economics and Regulation of Insurance*, London: Cass Business School, City of London.). The Competition Authority Insurance Report Volume 1 and 11. https://www.ccpc.ie/business/research/market-studies/study-non-life-insurance-market/
[55] Mr Des Peelo of Peelo & Partners as covered in Parliamentary debates - http://debates.oireachtas.ie/seanad/2003/11/20/00006.asp

claim was being resisted. As was anticipated, many defendants disliked having to 'put their cards on the table' at such an early stage. It seems there is now an improved, albeit still imperfect, balance in pleadings between parties in litigation.

A preferred option for many who resisted PIAB was major improvements in the existing litigation system. Many such suggestions were included in the 2004 Denham report but have yet to be implemented as at July 2020.

Somewhat surprisingly, many other reforms introduced under the Civil Liability & Courts Act 2004 were not utilised. These included mediation, court appointed neutral experts, pre-trial conferences, case management, publication of actuarial tables and the requirement for plaintiffs to make an offer of their minimum terms. These were never adopted or were only partially enforced and there is limited evidence of improved efficiencies in litigation procedures and practices.

Efforts at improving the legal system were not aided by the financial crash from 2008 during which time the resources allocated to the Courts Service were significantly reduced. In 2017 the Government charged the President of the High Court, Mr Justice Peter Kelly, with undertaking a review of the efficiency of the administration of civil justice and developments are awaited as at July 2020.

1.6 Not Alternate Dispute Resolution *per se*

While Erskine (2007) refers to PIAB as 'alternate dispute resolution' (ADR) that is not the case in the sense that such a term might be strictly defined. [56] PIAB is not voluntary nor an alternative because it is a mandatory procedure which must be exhausted before any Court proceedings can be issued.[57] Another distinction from the conventional concept of ADR is that the PIAB process results in a formal award not just an offer of settlement. The concept of "twisting arms" as ascribed to mediation does not arise.[58] Proponents of 'Alternate Dispute Resolution' tend to stress its lower delivery overhead. While PIAB may not be ADR *per se,* the costs of running the new system will be assessed in the context of reservations of academics that savings would be delivered.

It had been the practice in Ireland to issue proceedings on almost every personal injury claim. This was confirmed by a member of the Litigation Committee of the Incorporated Law Society of Ireland in a 2006 article aimed at a largely UK readership:

> *"A feature of our litigation process, which was not one which you will be familiar with in the UK, is that barristers were used in almost all such cases.*
>
> *In order for proceedings to be issued a barrister was asked to draft them. If any settlements were taking place the majority of them would take place involving a barrister who would be paid a negotiation fee*."[59]

The author then declares that there was general satisfaction with that state of

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[56] Daniel H Erskine, 'Reforming Federal Personal Injury Litigation by Incorporation of the Procedural Innovations of Scotland and Ireland: An Analysis and Proposal' (2007) Cardozo J. Int'l & Comp. L. 1 at p36.

[57] PIAB does not involve mediating nor negotiating between the parties so it is not in that sense ADR, as it seems to be classified by Carol Daugherty Rasnic, 'Alternative Dispute Resolution Rather than Litigation? A Look at Current Irish and American Law' (2004) JSIJ 4[2] at p182-198.

[58] The term 'twisting arms' comes from the title of the Ministry of Justice Research Series 1/07 on court referred and court linked mediation, undertaken by Hazel Genn, Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray and Dev Vencappa.

[59] Stuart Gilhooly (n43) at p105.

affairs:

> *"This system operated for many years without much quibble or complaint from anyone other than insurance companies*."

The assertion above contrasts with consultant reports for Government which indicated that, quite apart from excessive costs, the inordinate delays in litigation were the source of widespread complaint by injured parties. In contrast, the insurance industry in a submission to MIAB in 2002 professed itself to be 'agnostic' about legal fees (and, indeed, levels of Damages) on the basis that these factors were merely part of the mechanism for distribution of the tort costs which society determined. Similarly, the Law Society considered that they had nothing useful to contribute to the insurance debate. This was stated in their President's message in the Gazette of May 2002 after publication of the 2002 MIAB report:

> "*We believed that insurance costs were an internal matter for the insurance industry, just as the costs of dentistry or brain surgery are a matter for the medical professions*."

Subsequently, as reflected by academics reviewed in chapter 2, lawyers considered they were unfairly blamed for the levels of insurance cost which were such a source of dissatisfaction. They also highlighted the fact that not all litigation overheads relate to solicitors' or barristers' fees. It is true that the professional fees earned by medical and other experts from litigation are not as frequently highlighted.

However, the term 'litigation costs' encompasses all such outlay and this was widely analysed in the MIAB report which raised competition law concerns in that context. [60] For example, as part of the focus on such experts' fees, PIAB at the outset of its operations determined to pay a fixed fee of €150 for medical reports with such payment being subject to appropriate detail and an acceptable standard of presentation. This met with considerable resistance from doctors' representative

[60] MIAB 2002 at C135-137 on medico-legal reports and court attendance fees.

bodies. [61] The Competition Authority also launched an investigation in July 2006 into the system of recommended fees operated by the Irish Medical Organisation during the period June 2004 and June 2005. That matter was subsequently resolved by way of an undertaking. As a more recent example of the trends in such costs, in medical negligence cases which are defended by the State Claims Agency [SCA] there was a 255% increase in their outlay on medical fees between 2008 and 2013. [62] This is a litigation cost which is largely avoided in the PIAB process.

Aside from empowering consumers to pursue their claims without incurring legal costs if they so wished, professional fees had been found to be protected from competition because of a number of barriers retained by the self-regulatory bodies. The market for legal services in personal injury claims seems to have been altered as a result of the reforms. Claimants who instruct solicitors could avail of lawyers who advertised online to undertake a PIAB case for a fixed fee of €399.[63] That contrasts with historical practice where many solicitors retained a percentage from claimants' compensation. That percentage was in addition to the party-and-party costs paid by the defendant. [64] Such a practice was regarded as misconduct since 1994 but there was little evidence of regulatory enforcement.[65]

In the next chapter the details of themes which emerged from academic commentary on the proposed reforms are reviewed.

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[61] In accordance with a PIAB template, not a 'medico-legal' report. Irish Medical News magazine of 30th August 2004 records the demand of PIAB by GPs for a fee of €300 per report and there was subsequent threatened non-cooperation with the new system.

[62] Analysis contained in Irish Law Society Gazette edition Jan/Feb 2015 on pages 32 to 35. The State Claims Agency (SCA) handles 'med neg', which are currently outside the remit of PIAB, on the basis of enterprise-wide liability indemnity in contrast to private hospital consultants who would carry their own insurance. Fees for medical reports rose from €753,000 in 2008 to €2.7ml in 2013 and legal fees rose over the same period from €8ml to €19ml.

[63] As recorded in Parliamentary debates. http://debates.oireachtas.ie/BUJ/2005/10/20/printall.asp

[64] Or in addition to costs paid by state compensation schemes such as the Residential Redress Board as reported in 2006: www.independent.ie/irish-news/solicitor-fined-over-double-bill-26363782.html.

[65] Solicitors (Amendment) Act 1994.

Chapter 2: Focused Literature Review

2.1 Scope of the Review

This review commences from the point where the need for reform in the redress system was almost a given. However, '*reform of what and how*' was hotly contested. The criteria for inclusion of literature in this focused review were references in academic publications to the PIAB and related reforms implemented in Ireland for the resolution of negligence based injury claims.

The authors who made a significant contribution to the issues are largely based in the Irish jurisdiction, with a few commentaries from abroad. The volume of academic analyses is relatively confined. However, some of the authors are eminent and influential members of the legal establishment in Ireland. [66] The reason why this is important is because the persuasive force of academic scholarship should not be underestimated. What may be described as 'privileged voices' have potential influence on judges and on other important bodies such as the Law Reform Commission. It was, after all, the teachings of an academic which provided Lord Atkin with the 'neighbour' principle at the core of the seminal negligence precedent in *Donoghue v Stevenson* in 1932.[67]

From this review it has been possible to identify what academics considered to be the 'key markers' of an optimal redress system for personal injury compensation based on tort, of which the financial implications are substantial. In Ireland over €2billion is paid annually in Motor and Liability premium by motorists, employers and businesses generally - in addition to which there is a substantial self-insured

[66] William Binchy produces the seminal book on tort law in Ireland and is often cited from by the bench. Gerard Hogan, who was an academic in Trinity College at the time of his article in 2004, was subsequently appointed to the High Court in 2010, to the Court of Appeal in 2014 and in September 2018 was appointed as an Advocate General at the European Court of Justice. Eoin Quill contributes the Irish section to the EU Law of Torts and publishes extensively on the subject.

[67] Identified as Prof Frederick Pollock in an article by Ferrari, Franco (1994) "Donoghue v. Stevenson's 60th Anniversary," *Annual Survey of International & Comparative Law*: Vol. 1: Iss. 1, Article 4.

sector. That would equate to approximately 1% of Gross National Income in 2018.[68]

2.2 Accident deterrence should be the priority instead of proposed reforms

While there is some scepticism in the theoretical literature about the success of the deterrence objective of tort, accident frequency was a focus in some commentaries on the reform proposals.

Hedley (2004) acknowledges that in an ideal world there would be no accidents but they are an inevitability of the real world.

> *"Everyone can agree that it would be much better if we arranged matters so that there were fewer accidents in the first place – any system for sweeping up after accidents have happened is bound to be gruesome and unsatisfactory to some degree."* [69]

Binchy (2004) highlighted what he considered *"egregious negligence"* and considered that the reforms were contrary to the best interests of "*genuine victims of carelessness*". [70] The inference is that reducing the claims cost deterrent would risk increasing the trends in negligent behaviour.

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[68] Gross Domestic Product in Ireland is highly influenced by foreign direct investment so a more reliable measure of the economy is now regarded as Gross National Income, as explained in the Irish Times 19th July 2018. *Value of Irish GDP hits record €294bn despite revision*. https://www.irishtimes.com/business/economy/value-of-irish-gdp-hits-record-294bn-despite-revision-1.3570121

[69] **Steve Hedley. 'The rise and rise of personal injury liability - A temporary difficulty or a permanent crisis?' Inaugural lecture of 22 January 2004 University College Cork.**

[70] William Binchy 'The implications of the Act for Tort Law and Practice' in Quigley & Binchy (eds) *The Personal Injuries Assessment Board: Implications for the Legal Practice* (Firstlaw 2004) at p118.

Kelleher (1995) urged a focus on improved safety instead of the reforms then proposed of caps and tariffs for compensation:

> *"The best way of reducing the cost of personal injury litigation is to reduce the number of accidents which cause injury in Ireland."* [71]

The extent to which the frequency of negligent occurrences is reflected in claims costs trends and insurance costs is subjected to statistical analysis to establish the extent, if any, of an identifiable inter-relationship.

2.3 Preferences for the pre-reform litigation system

There was a majority view in favour of the existing redress mechanism. However, there was simultaneously an acknowledgment of the need for improvements in litigation processes. One marker that emerges is that efficiency and economy of the redress process is considered essential for an effective tort system.

Ilan (2009) was in favour of the *status quo*:

> "*Legal academics have pointed to the suitability of the previous litigation regime, noting that it could be further reformed to achieve the aims of increased expedience and economy.*"[72]

The criteria for assessing 'suitability' is not expanded upon to test the justification for the conclusion above.

Patton (2012) also referred to litigation procedures:[73]

> *"The same influential 2002 report* [MIAB] *that led to the establishment of the Personal Injuries Assessment Board also paved the way for the Civil Liability and Courts Act 2004. Acting on the Report, the government-appointed Committee on Court Practice and Procedure identified sixteen shortcomings in the existing procedures governing personal injury actions*."[74]

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[71] Denis Kelleher, 'Cutting the Cost of Personal Injury Claims'. Irish Law Times (1995) 13 ILT 253.
[72] Jonathan Ilan (n37) at p58.
[73] Neil Patton (n37) at p72.

[74]This author seems to have the sequence and source of reforms slightly out of order. The Denham Report was published in June 2004. The Civil Liability & Courts Act 2004 had been in preparation

The main findings of the Committee on Court Practice and Procedure in June 2004 were of *'unduly long duration of litigation, excessive costs, and protracted settlements*'.[75] However, there was nothing new in those findings. For example, the advisability of introducing case management in Irish civil procedure had long been recognised. Patton may be correct that a fundamental review of civil procedure in Ireland could have been a preferable reform project but that option was not exploited then and remains to be explored in 2019. [76]

In a detailed analysis of the Irish and Scottish reforms of personal injury systems, Erskine (2007) proposed using elements of both to tackle the delays in the US federal system. He advocated an:

> *"optional procedure to expeditiously resolve federal personal injury cases. Personal injury actions represent the single greatest amount of cases filed in the U.S. federal courts. In 2004 alone, 57,357 new personal injury cases were filed. As many as 35,336 personal injury cases were pending three or more years in federal courts without resolution at the end of September 2005*." [77]

However, despite that backlog mentioned above Erskine was opposed to external neutral assessors being based outside of the court system as is the situation with the PIAB.

Rasnic (2004) highlights the significance of injury litigation for practitioners:

> *"In Ireland, personal injury cases alone comprise about one-half of the workload of solicitors and barristers".*[78]

since October 2002 after Government adopted the 67 recommendations of MIAB in April 2002. The General Scheme of the Civil Liability & Courts Bill was published in July 2003.

[75] That 2004 Committee on Court Practice and Procedure reported under the Chairmanship of Supreme Court Judge Mrs Justice Susan Denham who was appointed Chief Justice in 2011 until her retirement in July 2017.

[76] A Review of Civil Justice Administration commenced in February 2018 under the President of the High Court Mr Justice Peter Kelly but has not yet reported as July 2020.

[77] Daniel Erskine (n56) at p2.

[78] Carol Daugherty Rasnic (n57) at p187.

This author presents some cost comparators between Ireland and her home State of Virginia when comparing their reforms but reminds us of the different traditions in relation to awards which:

> *"do not follow the European rule of thumb that the losing party pays the winner's attorneys' fees. To be sure, the loser pays court costs in the U.S.A., but this amount can be a mere drop in the proverbial bucket compared with the fees of the respective lawyers. Consequently, civil litigation can be quite a financial burden, even for the defendant who prevails."* [79]

PIAB is obviously an exception to the European rule referred to above as the respondent does not pay the claimants' legal costs nor does claimant have potential liability for defendant costs as under the usual English rule.

Hedley (2004) records some of the dissatisfactions with the Irish court based system:

> "*So that is the modern system, which as I say today emphasises compensation above all else. And all the signs are that the system will continue to grow, if left to its own devices; that is certainly what it has done in the past. What, then can be done? It is not hard to criticise the system, on many grounds: waste, sloth, the prevalence of fraud, and that too much of the money circulating in the system ends up with the lawyers and insurers. The difficulty is not that the criticisms are wrong – on the contrary, they are usually fair points. But what is not clear is what would be a better system*."

The above passage focuses on total cost rather than just compensation given its reference to "*too much of the money circulating in the system ends up with the lawyers and insurers".*

One marker that emerges from the reviews above is that efficiency and economy of the redress process is considered an essential marker for an effective tort system. Whether the preferences of some academics for the *status quo,* even if in expectation of litigation reforms, were defensible is assessed in substantive chapters.

[79] Ibid at p196.

2.4 Constitutional concerns about the proposed reforms

A concern as to whether PIAB was unlawfully exercising judicial powers was raised by Hogan (2004). However, he found a saver in Article 37.1 of the Irish Constitution for the exercise of "limited" judicial powers in civil cases by non-judicial personages at Article 34.1."[80]

David Gwynn Morgan (2005) described the "novelty" of PIAB as an "oddity" in constitutional terms:

> *"The Personal Injuries Assessment Board (PIAB) and the structure into which it fits undoubtedly looks odd: and when any legal or other official arrangement looks odd, the question inevitably arises: is this novelty unconstitutional? But oddity is not automatically unconstitutional; nor is bad policy or policy which re-engineers the law more in favour of insurance companies, necessarily unconstitutional. There is unconstitutionality only if one can find some constitutional principle which has been broken."*

Later in that article this Constitutional law expert concluded*:*

> *"In conclusion, may I say that the claimant's legal advisers cannot be excluded from PIAB's procedures. However, in exceptional cases only, there would be a claim that these legal advisers should be paid for by the insurance company under section 44 of the 2003 Act. Generally, rumours of PIAB's unconstitutionality, like Mark Twain's death, appear to have been exaggerated."*[81]

It seemed that the constitutional question would be addressed in the first judicial review of PIAB which made reference to such potential arguments when initiated in July 2004 within weeks of commencement of operations. However, these points were not pursued in the High Court and, therefore, any such constitutional issues

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[80] Gerard Hogan, *'Public Law and Constitutional Aspects of the PIAB regime 2004'.* Paper delivered March 2004 at Law School, Trinity College, Dublin when lecturer and Senior Counsel. He was appointed to the High Court in 2010, to the Court of Appeal in 2014 and in September 2018 was appointed as an AG at CJEU.

[81] David Gwynn Morgan. 'The Constitutional and Administrative Law Framework of the Personal Injuries Assessment Board' (2006) JSIJ 6(1) p32-42 at p42. A summary of that article also appeared in the Sunday Business Post newspaper in November 2005 and in the April 2007 edition of the Bar Review.

about *quasi judicial* powers did not fall to be considered by the Supreme Court subsequently.[82]

2.5 Consideration of a 'no fault' system as a preferable reform

A more fundamental reform was proposed by some academics who called for consideration of the abolition of the tort system.

Quill (2005) concluded his paper as follows:

> *"A final comment is that it is unfortunate that the legislature in introducing such a radical overhaul of the tort process did not go a step further and undertake a fundamental review of tort damages (if not the entire system of eligibility for compensation)."* [83]

The above point was echoed by Ilan (2009) that there was "*no meaningful debate on the retention of a fault-based system of legal liability"*.

The abolition of tort in favour of 'no fault' would still require an effective compensation delivery system. To that extent, the outcomes from the non-adversarial PIAB procedures can be analysed to examine efficiency measures compared to the pre-reform period but beyond that it is not possible in this research to assess whether academics were justified in suggesting that a more fundamental reform of tort law would have been preferable.

2.6 Justice and fairness

Fairness of adjudication was a marker that was strongly stressed by academics.

Binchy (2004) viewed the reforms as part of a *"retrenchment"* against claimants:

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[82] *O'Brien (& the Incorporated Law Society of Ireland) v PIAB* [2008] IESC 71 - reviewed in Chapter 5.
[83] Eoin Quill (2005) The Personal Injuries Compensation Process in Ireland, School of Law, University of Limerick. This author publishes extensively on tort and Damages in the Irish jurisdiction.

> *"If these proposals had been seriously mooted a decade ago, one might have envisaged a serious confrontation between the Oireachtas* [Parliament] *and the courts. Today, I am not so sure. The Supreme Court today is willing to defer significantly to executive and legislative choices in relation to socio-economic policy. It is far from clear that the Court would strike down legislation restricting the rights of victims of torts, on the basis that the legislation violates the constitutional right of access to the courts, the right to litigate or the principle of equality."*[84]

The question of *"equality"* fell to be addressed by the Supreme Court in the first judicial review served against PIAB in July 2004.[85]

Additionally, in early 2004 the Incorporated Law Society of Ireland lodged a complaint with the Human Rights Commission about the PIAB proposal. Their decision found that the legislation did not constitute '*an unjustifiable interference with the essence of a claimant's right of access to court*' unless there was an '*unconscionable delay*'.[86] Speed of resolution emerges as a marker of an optimal redress system.

Rendolent of the 'expressway principle' which was feared by some, Binchy (2004) had concerns that 'weak claims' would be encouraged by the new and simpler system:

> *"An area at present causing much dissatisfaction is where insurance companies settle claims of modest amount when liability is highly questionable simply because it is economically more convenient in the short term to do so. This has the effect of misleading the public into believing that the tort system is based on arbitrary and unfair principles and of encouraging insured people and those who work for them to adopt a timorous or fatalistic attitude to the discharge of their duty of care. So far as I can see, nothing in the Personal Injuries Assessment Board Act 2003 mitigates this problem; indeed arguably the legislation has entrenched it. A small claim where liability is highly doubtful goes to the Board for assessment on the basis that the respondent is fully liable. The Board comes up with an award. Inevitably the insurance company is faced with the decision whether to go to court or cave in. The plaintiff now has a high assessment which may tend to make him or*

[84] William Binchy, 'Recent developments in the Law of Torts' (2004) JSIJ 4:1 at p8.

[85] *O'Brien* (n82) - reviewed in Chapter 5 on justice and fairness.

[86] Irish Human Rights Commission decision dated 5th April 2004.

> *her less willing to accept a lower figure. Of course the insurance company is free to stand firm and litigate, with all the wasted economic expenditure that even a successful defence will involve. Is there not a danger that it will continue its practice of settling, possibly at a somewhat higher figure?"*[87]

There appears to be a slight misunderstanding in the above passage as it was clear from the legislation that not all claims would result in a PIAB award. No assessment proceeds without the consent of the potential defendant. Data analyses will indicate the extent to which PIAB awards were accepted by respondents and claimants respectively. The commentary above also seems to ignore the historical reality that less than 10% of all litigation proceeded to trial but does seem to acknowledge that many settlements are made to save on "wasted economic expenditure" rather than on their merits. Binchy asserts above the harm that nuisance value settlements can do to public perceptions of the tort. However, disproportionate legal costs which motivate defendants to settle could equally lead to plaintiff lawyers mounting weak cases in the hope of securing the self-same nuisance value settlements.

To lay the blame on PIAB for this mischief of nuisance settlements becoming more "entrenched" seems to ignore the parallel legislation upon which the author otherwise comments favourably. That Civil Liability & Courts Act 2004 was introduced with the objective of strengthening challenges by defendants in appropriate cases. But at the same time in the interests of balance, unquestionably genuine innocent accident victims were provided with a new streamlined redress system. It seems quite a different point that litigation costs exposures may be so disproportionate that defendants feel, as this author implies, that they cannot afford to seek vindication. [88]

While this marker indicates that the tort system should weed out 'weak' claims, that issue was not a focus of the reforms other than by the introduction of measures to

[87] William Binchy (n70) at p121.

[88] Employees of such defendants can be more interested in such vindication than their employers. This has been my professional experience of instances where the falsely accused bus driver seeks peace of mind that he was not at fault or has concerns about his career prospects being prejudiced when a potentially successful defence is not pursued for reasons of costs and/or judicial unpredictability.

tackle exaggeration. This objective of weeding out claims which may be defendable in terms of liability is, therefore, beyond the capacity of this research to assess in either the pre or post reform era. There is no available data on the extent to which tort claims are dismissed by the courts.

The issues of 'equality' and procedural fairness are addressed in Chapter 5 to determine whether those criticisms of the reforms were soundly based.

2.7 Consistency and predictability of compensation

Consistency and predictability are considered essential elements of a system of justice. These concepts were not part of the old system according to the author of the leading guide for practitioners on damages. [89] Pierse (1999) stated:

> *"As there are no guidelines on damages as such in the Republic of Ireland (unlike the UK and Northern Ireland), this often presents a formidable task. My own view is that solicitors are often too quick to send their papers to counsel and rely too easily on counsel's views. Counsel may or may not be more experienced than the solicitor, but it behoves us to have a good working knowledge of the level of general damages that the courts are awarding, difficult and all as that may be. Special damages in an ordinary case, on the other hand, are fairly simple to calculate."* [90]

Pierse proceeds to make a point about the proportionality of damages with excessive compensation for minor injuries and he also highlights the variations between judges in the pre-reform era:

> *"As I mentioned above, I take the view that damages in catastrophic cases are not high enough, and that damages awarded for minor injuries are certainly not proportionate to those in catastrophic cases. From a plaintiff's point of view, this latter figure is probably welcome, but from an insurance company's perspective it most certainly is not, particularly because of the huge variations that seem to occur in the Circuit Court."*

Part of the motivation in charging PIAB with the responsibility of producing the first Book of Quantum as a guide to prevailing compensation levels was to support the principle of 'treating like cases alike'.

An effort to introduce "*an objective, scientific basis to the calculation process*"[91] seems preferable to a "*difficult guessing game"* as Pierse described it below:

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[89] Robert Pierse, Law Society Gazette May 1999 pages 20-22. Pierse was also the author of the leading practitioners' guide. Robert Pierse, *Quantum of Damages for Personal Injuries 1999*. (Dublin: Round Hall Sweet & Maxwell, 1999).

[90] This accords with Gilhooly *"that barristers were used in almost all such cases".* Stuart Gilhooly (n43) at p105.

[91] Quill cites Binchy that the detailed figures in the Book of Quantum *"may mislead claimants into a false belief that there is an objective, scientific basis to the calculation process*".

> *"The assessment of damages is a difficult guessing game, and it is important that solicitors be as well informed as they can. I believe that we should watch developments during this year with considerable interest. One cannot help but get the feeling, on reading recent judgments, that there may be substantial alterations this year or next year, if a sense of proportionality is to be brought into the thinking of the judges in the Supreme Court who lay down the markers or unofficial guidelines for damages."*

The proportionality which Pierse felt in 1999 would emerge *"this year or next year*" in the courts had not transpired prior to the introduction of the PIAB Book of Quantum in 2004.[92]

Patton (2012) highlights the advantages of a published guideline to damages ranges for various categories of injury:

> *"The fact that assessments are compulsorily linked to the Book of Quantum promotes a uniformity and predictability to the awarding of damages. As well as creating certainty for the parties involved, this also encourages early settlement of disputes. Both parties are in a position to realistically evaluate their respective positions by reference to concrete numeric evidence."*

Quill (2005) preferred the more *"comprehensive*" publication aimed at practitioners.[93] However, that would not have addressed the asymmetry of information between professionals and lay people which the Book of Quantum was designed to address.

Ilan (2009) raised concerns about early settlements facilitated by what he elsewhere describes as the *"provision of a rational book of quantum":*

> *"Whilst it is clear that rapidly-settled claims would generate significant savings in time and costs, there is an unaddressed issue of equity. PIAB promotes itself as an impartial adjudicator of claims, accessible to the public directly, without recourse to the legal profession. Whilst PIAB Annual Reports tend to comment favourably on the early resolution process, it is unclear what mechanisms are in place to monitor settlement offers, and by extension justice for claimants."*

[92] There is evidence of this proportionality emerging from the newly established Court of Appeal in a range of cases from November 2015 when it halved damages awarded by the High Court. This emerging jurisprudence is reviewed in Chapter 5 on justice and fairness.

[93] Robert Pierse (n89). This includes a review of special damages in addition to general damages and provides a more detailed indication of quantum for legal practitioners.

When this author was writing in 2009 he would not have been aware of the regulatory function of the Central Bank [CB] as insurance regulator to monitor settlements for compliance with the Code of Conduct under which the definition of a consumer includes a Third Party claimant. This role was first exercised in 2011 through examination of insurers' settled files.

Markers of consistency and predictability are highlighted by the reviews in this chapter. There were two relevant reforms introduced in that context, which were the PIAB Book of Quantum and the monitoring by CB of claim settlements which had not been a regulatory function in the pre-reform period when 90% of litigation cases were concluded without any neutral Third Party supervision. It is not possible to provide empirical findings on those markers of consistency and predictability in the pre-reform litigation to establish the *status quo* against which subsequent developments could be measured.

It is feasible, however, to present comparative analyses of the volumes of awards in value bands by PIAB as compared to the courts in the post reform period in an effort to establish the extent to which academic concerns about consistency and predictability were defensible.

2.8 The cost of compensation delivery overheads

The level of compensation delivery overheads was a recurrent theme in commentary.

Ilan (2009) acknowledged the importance of litigation costs to the objectives of the reforms:

> *"PIAB, it was argued, would greatly reduce these costs and resolve cases with greater expedience than the sluggish court system, reducing the need to tie up funds in "reserves" for long periods."*[94]

[94] Jonathan Ilan in his footnote 4 cites Dorothea Dowling at p34 of (n45).

Binchy (2004), acknowledged that historically most claims settled without an oral hearing but:

> *"As to the charge about greedy lawyers, I think two points may be made. First, aspects of the personal injury litigation system up to now are indeed worthy of criticism. Too many cases have been settled at too late (and too expensive) a stage*."[95]

Patton (2012) refers to "*inflated costs"*:

> *"At the dawn of the twenty-first century Ireland faced what was described as an out-of-control culture of personal injury claims. The court system had become inundated with litigation marked by systemic frivolity, exaggeration and fraud. Insurance premiums were escalating dramatically and there was significant political pressure to control the level of unmeritorious claims and inflated costs. Public attention was becoming increasingly focused on the issue. Furthermore, powerful insurance and employment groups were lobbying for reform to protect their dwindling profits. A three-year investigation resulted in a 2002 report that laid the blame for rising insurance cost squarely on the shoulders of the legal profession."[96]*

Two points arise from the commentary above. First, far from laying the blame 'squarely' on the legal profession, that 2002 MIAB report concluded with 67 recommendations directed at the entire spectrum of regulators and insurance market players.[97]

Secondly, in the context of Patton's reference to "*dwindling profits"*, the MIAB 2002 report actually demonstrated for the first time in public that motor insurers in Ireland had made ten times the profit of their UK counterparts over the preceding decade. This finding was widely highlighted in extensive media coverage upon publication of the report.[98]

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[95] William Binchy (n70) at p119.

[96] Jonathan Ilan at p65 (n37). However, as media coverage of the time attests, and in national publications cited by this author in other contexts, the 'blame' was spread fairly widely by the MIAB.

[97] The MIAB recommendations are in the Appendices.

[98] Particularly by a national newspaper from which Patton quotes in his article. Irish Times 17th April 2002– *Insurer profits ten times more than UK counterparts*.
https://www.irishtimes.com/news/irish-insurers-profit-ten-times-more-than-uk-counterparts-1.420313

Unlike many commentators, Patton does concede that the PIAB process is simple:

> *"The entire process is explicitly designed to facilitate the exclusion of legal representation. The application procedure is simplified to the extent that consultation with a legal professional would be superfluous."*

He also acknowledges, without criticism, that there is no scope for oral hearings in PIAB:

> *"Furthermore, the method of assessment excludes the possibility of oral hearings. Liability is not at issue and legal arguments cannot be made at any stage. The significant financial burden of expert medical witnesses is removed. In theory a claimant is left with the same compensation that a court would have awarded, minus the considerable legal costs and the lengthy delay in litigation. As is often the case, however, the practice may not accurately reflect the theory in this case."*

That the "*practice may not accurately reflect the theory*" is a comment that could be made about tort generally, pre and post or *sans* reform.

Patton concedes, in theory at least, that the claimant avoids "*considerable legal costs and the lengthy delay in litigation*" by the establishment of PIAB.

However, some predicted that the delay and costs situation would be aggravated by introduction of the PIAB. Quill, at footnotes 23 and 24, cited an Editorial in the Bar Review which referenced a report by the economist Dr Peter Bacon:

> *"Editorial in the Bar Review (2002) 7 Bar Rev, 302, prior to the implementation of the scheme described it as 'an extra layer of bureaucracy grafted on to the existing system, without any reasoned analysis as to how it will operate in practice.' For a more general critique of the system see A Review of the Costs to the Irish Economy and the Effectiveness of a Proposed Personal Injuries Compensation Scheme, 2002 (Report commissioned by the Bar Council)."* [99]

[99] The Bacon report for the Bar Council was also welcomed in the Gazette October 2002.

Credit must be granted for the fact that the footnote by Quill makes clear that the Bacon report was part of the lobbying by the Bar Council to resist change. [100] The assertion that PIAB would only be "*an extra layer of bureaucracy grafted on to the existing system"* implies that very few cases would be finalised through the new model and that those claims would subsequently result in litigation as usual. This projection is assessed through data analyses.

Fenn *et al* (2006) summarised responses to a research questionnaire on injury litigation funding across jurisdictions. The subsequent report seems to reflect a partisan view of the Irish reforms by conveying the impression that PIAB is merely a valuation procedure, which is required on all claims, before proceeding to Court:

> *"Once the claim has been valued clearance is given for the claim to proceed to court. It is also the policy of the PIAB not to deal with the lawyers although this has recently been challenged and the court has held that the PIAB cannot refuse to deal with lawyers. This decision is under appeal. The PIAB Act also does not provide for the payment of costs to lawyers for presenting cases to the Board so it is expected that claimants, if they hire lawyers, will have to pay their costs for presenting the cases to the PIAB. It is expected that this will be challenged. "*[101]

As detailed in Chapter 5, the PIAB did not "refuse to deal with lawyers" but rather sought to put the injured party at the heart of the process by involving the claimant in all communications.

The paragraph cited above from Fenn continues as follows:

> *"As a matter of interest the legal profession are against the formation of the PIAB and were not in the consultation process when it was originally put forward as a solution to the high cost of claims."*

In fact, lawyers were consulted in considerable depth. Extensive submissions to Government were made by both the Bar Council and the Incorporated Law Society

[100] Barristers and solicitors also availed of elite access to senior Government Ministers, as I myself experienced in person at some of those meetings in my capacity as Chair of MIAB.
[101] Fenn *et al.* 'The funding of personal injury litigation: comparisons over time and across jurisdictions'. DCA Research Series 2/06, at page 44.

of Ireland.[102] Both arms of the legal profession also had extensive elite access to Senior Minsters.

Quill (2005) also succinctly summarised some of the objections to the reforms:

> *"The process has been subject to a degree of criticism from members of the legal professions and from academic commentators. An editorial in the Bar Review is critical of the scheme in general as it forces the plaintiff to go through an additional administrative procedure, while leaving the defence a discretion as to whether it wishes to submit to the procedure. The editorial also emphasises the fact that the defence will usually be represented by a powerful insurance company, while the plaintiff will generally be a lone individual, with little or no representation or assistance. It further notes that, while both parties have discretion as to whether to accept the award or proceed to court, there will be greater pressure on plaintiffs than on defendants to accept, since plaintiffs will not usually want to start from scratch again. Doubts have also been expressed about the impact such a board will have on insurance costs, which is the principal objective of having such a board."*

There are a number of discrete areas addressed in the passage above.

Once a Respondent consents to an assessment proceeding then they have no further role in the process until the very end when they can either accept or reject the formal award. The Claimant is not, therefore, up against "*a powerful insurance company*" in the PIAB process.

The pressures to accept rather than reject can be quite the opposite from those portrayed above. The Respondent's insurer could be considered to have more to lose by rejection given their exposure to litigation costs. In contrast, the claimant will have amassed much of their documentation on Special Damages and secured medical evidence that could facilitate an early setting down of any subsequent litigation. It should also reduce costs generally. Removing a high volume of unnecessary litigation from the Court system should *ceteris paribus* facilitate shorter

[102] Trade journals of both the Bar Council and the Law Society reported on the extent of their representations to Government about the establishment of PIAB and related reforms prior to their implementation.

waiting times to trial for those claims which do require an oral hearing. The rates at which respondents consented to the process and then accepted awards which satisfied claimants is subjected to quantitative analyses in Chapter 5 on justice and fairness.

As advocated by academics, the use of a lawyer by [all] claimants might be facilitated by fee guidelines being published by an independent regulatory body.[103] However, reforms to that end have been resisted by the legal profession since at least 2005.

The doubts expressed by Quill above about the impact of the Board on insurance costs is assessed by quantitative analyses in Chapter 6 on premium trends and insurer profitability.

None of these commentators reflected on the reality of litigation settlements 'on the steps of the Court'. That is in contrast to the 28 days allowed to a claimant to consider the PIAB award. In the courthouse a plaintiff will often be required to make up their mind within a matters of hours, if not minutes, whether to accept an offer or proceed to hearing just as their case is called before a judge.[104] That is the reality of the listing system for personal injury in the Irish courts.

The projections of PIAB being merely an extra layer, with potential additional costs, is interrogated quantitatively for defensibility in Chapter 5.

2.9 Speed of claims resolution

Many of the commentaries reviewed mentioned the delays in the pre-reform era.

Patton (2012) undertook some statistical analysis for a comparator with PIAB data:

[103] Efforts by PIAB to pay a fixed fee for claimants' medical reports was challenged by a judicial review.

[104] The allocation of a 'particular' judge, noted for either pro-plaintiff or pro-defendant leanings, can alter the prospects of a claim within minutes of the commencement of a hearing as there is no pre-trial case management for these actions in the Irish litigation system.

> *"Preliminary year-end data for 2010 shows that compensation totalling €187 million was awarded in that year in respect of 8,381 personal injury claimants. The lowest and highest awards in 2010 were €500 and €387,286 respectively, while the average award was €22,271. The average time to process a claim was 6.9 months. Prior to the introduction of the Board, cases took on average thirty-six months to be resolved through the litigation system. Furthermore, in 2009 the Board's total delivery costs were €10.3million, with the comparable litigation costs at €54.4million. This meant actual savings of €44.1million."*

While this article was published in 2012, and is titled an eight year review, allowance must be made for the fact that Patton only had preliminary figures for 2010. In assessing his conclusions, therefore, allowance must be made for that limitation:

> *"Relying on the Board's published statistics alone it would appear that the system has successfully delivered on all fronts. Claims are resolved 80% faster with savings of 81%.*

The conclusion by Patton of claims being "*resolved 80% faster*" by employing the 6.9 months in PIAB is directly comparable to the average of 36 months processing time in litigation as both timeframes are not measured from the date of accident.

However, the inference from his next sentence is that there is emerging evidence of failure:

> *"In the first four years of its existence the Board saw substantial annual growth in the volume of cases it dealt with. Since 2008, however, the number of awards has been falling steadily, with an aggregate decrease of over 5% to date."*

The volume of cases which proceed to formal awards, and thereby earned fees for PIAB, is not a key performance indicator as the Board is not in business to make money. The stated objective of PIAB, to which the author himself refers, is to facilitate the resolution of claims without the necessity for litigation.

There appears to be a questionable statistical method employed below:

> *"More worrying for the Board is the associated figures from the Courts Service, which show that in 2009 there were 7,099 new personal injury cases filed in the High Court. This represents an 800% increase on the number filed*

> *the year after the Board came into operation. Similarly, the Circuit Court reported 6,999 new cases for 2009."*

A comparison to the volume of litigation issued in the year immediately after PIAB came into operation is not robust. As pointed out in the Courts Services annual report that year, which the author must have consulted to calculate his 800% figure, there were queues around the block of the Four Courts building just prior to July 2004 as part of the efforts by many lawyers to circumvent the new process. [105] Accordingly, the volume of cases that would normally have issued in 2005 and 2006 had largely already been filed in early 2004. In statistical terms, the Court data for 2005 would be regarded as an outlier against which safe comparisons cannot be made for calculating trends nor for drawing inferences. The relevant data is analysed in Chapter 5.

Patton (2012) appears misinformed as to the critical success factors for PIAB.

> *"[This issue is closely related to] what is undoubtedly the most damaging indication of the Board's failings - the degree of involvement that the legal profession retains in the process. The Board itself concedes that approximately 90% of claimants continue to retain legal counsel, despite the fact that costs are not awarded."*

Given the conventions on statutory interpretation that the content of Parliamentary debates cannot be relied upon as an aid to interpretation, whatever may have been said by Government or Opposition politicians during the passage of the PIAB legislation is irrelevant. [106] When an independent statutory body is established it must then operate in accordance with its Act. The fact that 90% of claimants may seek advice from a solicitor at their own expense is an option that was always enshrined from the outset of the drafting of the PIAB Bill, although there is a choice not to do so if desired, but the fact that they do is not failure of the reforms themselves. [107]

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[105] Longer opening hours were facilitated for this purpose by the Courts Service as announced in advance by the Law Society Gazette.

[106] There was reference to '*a lawyer free zone*' in heated political debates during the passage of the PIAB legislation through both Houses of Parliament.

[107] Just as there is provision for the increasingly frequent lay litigant and/or an unpaid McKenzie friend in the court system.

Patton was in a position to offer a perspective from both arms of the legal profession:

> *"Conversely, representatives of the legal profession will argue that it is their intervention in the Board process that facilitates early resolution of cases. Claimants are unlikely to accept a settlement offer from the respondent without first consulting with a solicitor. This cannot easily be disregarded in light of the fact that approximately one third of all applications to the Board are settled between the parties before an assessment is completed. Regardless of whether the presence of solicitors in the process is of overall benefit or detriment, the fact remains that one of the primary objectives of the Act was to make personal injury cases a 'lawyer-free zone.' On this point the legislative reform has incontrovertibly failed."*

Nowhere in the legislative framework is there reference to a '*lawyer-free zone'* nor does such an objective appear in the strategy statements of PIAB.

The author refers above to claimants receiving a settlement offer directly from a respondent. Those are negotiations in which PIAB has no role, nor was it ever intended that it would, except perhaps in supporting the equity of that process by levelling the information playing-field with publication of the Book of Quantum. There was no monitoring of direct settlements of litigation in the pre-reform era when less than 10% of claims proceeded to trial and independent adjudication.

Quill (2005) at the time of writing would only have had available the first annual report of PIAB. This provided data on the delivery overhead at 10% compared to 46% in litigation and a finalisation period at a maximum 9 months compared to 36 months on average under the litigation process. [108] Only a limited number of cases (at 555) had been dealt with between 22nd July and 31st December 2004. While those

[108] Greenford (2001). 'The Handling of Personal Injury Claims by Insurers in Ireland and England'. This research was conducted on behalf of the Special Working Group established to assess the viability of introducing a special compensation assessment board following the recommendation of the 1996 Deloitte report. Greenford's analysis is appended the Second Report of The Special Working Group on Personal Injury Compensation, Department of Enterprise, Trade & Employment 2001.

early results were considered impressive, he rightly urged caution and also forecasted some of the potential challenges ahead:

> *"Things could change significantly if aspects of the process are successfully challenged, such as the approach to legal expenses, or if significant numbers of awards are rejected and parties proceed to court. It could be argued that legal costs are justified in some cases and so should be allowed, since applicants unfamiliar with the compensation process may legitimately argue that they need independent assistance with the compiling of their claim and judging the suitability of an award."*

A longitudinal analysis can now be undertaken of the rate of award rejections and the proportion of those which proceeded to litigation, as projected above. Urging the payment of legal fees is a theme evident elsewhere in the academic commentary reviewed in this chapter.

In terms of the public unfamiliarity with the claiming process, there were efforts by PIAB to make legal 'jargon' intelligible in explanatory leaflets for the layperson which were devised in conjunction with the National Adult Literacy Agency. These were criticised by Binchy (2004). While the leaflets at the time of his writing were in draft format they had been widely circulated with testing among various stakeholder groups. Binchy makes some technical points about the detail of legal principles but is prepared to concede that total legal accuracy could make such guides less readily understood by the public. [109]

The academic projections on speed of resolution within the PIAB process, or that it would merely result in additional costly delays before proceeding to litigation, is tested through data analyses in Chapter 5.

[109] In 2000 there was a report from the Law Reform Commission on 'Plain Language and the Law' and those recommendations were reflected in the layperson's guide. Law Reform Commission.

2.10 Reforms were designed mainly to benefit insurer profitability

Aside from other references to insurance companies in the context of legal culture, it was projected that the reforms would boost profits for insurers rather than deliver any sustained savings for consumers.

Quill (2005) stated that "*doubts have also been expressed about the impact such a board will have on insurance costs, which is the principal objective of having such a board*". While it is true, as he asserted, that there was no written guarantee from insurers that premium rates would be reduced if the necessary reforms were implemented, the Irish Insurance Federation had submitted an itemised estimation of the 31% savings which could be delivered .That was published in the 2002 MIAB report.[110]

Ilan (2009) was also sceptical about the prospect of reduced insurance charges for consumers:

> *"It was proposed that savings would be passed to consumers in the form of reduced insurance premiums. Whilst these arguments hold logical appeal, it must be noted that they have been contested by representatives of the legal professions."*

In support of the assertion above, Ilan cites a February 2007 newspaper article questioning the level of insurer profits but the only independent monitor of insurance inflation for consumers is that undertaken by the Central Statistics Offices. The trends in premium charges relative to claims savings are analysed in Chapter 6.

Patton (2012) asserted that "*powerful insurance and employment groups were lobbying for reform to protect their dwindling profits".* He seemed even more pessimistic about the benefits to consumers:

[110] IIF savings estimate in Chapter 1 at 1.3.

> *"The impact of the Board on insurance premiums is also questionable. One of the fundamental objectives of the legislation was to tackle the spiralling cost of insurance for consumers….*
>
> *In fact, the cost of motor insurance fell consistently from the years 2004 to 2008.*
>
> *Following the pattern of Court Services figures, however, the numbers began to stabilise and quickly reverse. In 2009 alone, premiums increased by 15%. For 2011 the estimated average increase stands at 5%. Because of the lack of transparency in premium calculations it is impossible to separate the Board and non-Board influences in relation to these figures. Factors such as falls in profitability due to the global economic crisis, and the greater competitive presence of internet-based insurance providers distort any conclusions we can draw. Nevertheless, the establishment of the Board has not resulted in long-term savings for the insured."*

The various other data sets quoted above are interrogated in substantive chapters 3 and 6 to establish whether the criticisms were defensible.

Hedley (2004) expressed a dissatisfaction about the tort system *"that too much of the money circulating in the system ends up with the lawyers and insurers*."

Equally, Fenn *et al* (2006) were not optimistic either and projected it would be years before any benefits would be delivered:

> *"Ireland - 2003 and 2004 have seen some dramatic changes in Ireland with the formation of a Personal Injury Assessment Board, publication of a book of damages and amendments to civil procedure. The results of these changes will not be seen for a number of years."*[111]

Now that a number of years have passed, efforts can be made to identify the effect of the reforms on trends in premium charges and insurer profitability to address whether these criticisms were defensible.

[111] Paul Fenn *et al* (n101) at p44.

2.11 The 'Compo Culture' and exaggerated claims

There was general acknowledgement by academics of the existence of inflated injury claims that were not deterred nor detected by the pre-reform litigation system for tort redress. In addition to establishing the PIAB as a streamlined redress for straightforward genuine claims, measures were also introduced to curb exaggeration.

Erskine (2007) provided a summary of the categories of claims that he saw as the focus of statutory deterrent at section 26 of the Civil Liability and Courts Act 2004. This is addressed in Chapter 7.

Ryan (2004) in an analysis of the parallel litigation reforms stated that;

> "*Legislative impatience with Ireland's compo culture is of a relatively recent vintage. Some observers might say it inexorably followed from the Army deafness litigation. Hailed by politicians as 'immoral' and 'the result of a cancer which is eating at the heart of our society', that litigation is estimated to have cost the exchequer some €300ml. There appears to be widespread criticism of a tort law system that all too frequently allows opportunistic, unmeritorious plaintiffs to board the compensation gravy train*." [112]

This author is probably correct that public opinion about the tort system was negatively affected by "*army deafness*". That body of litigation continued for over 20 years. There were c.17,000 claims which were estimated to have cost the State €321ml by 2010. A third of that amount was said to have been paid to solicitors and barristers, with one plaintiff legal firm reportedly earning €16.2ml. [113] Binchy suggests that deference to the State *"explains the ease with which the Supreme Court accepted delivery of the legislative nudge in the ribs, in the context of the army deafness litigation, that it might find it helpful to adopt a mode of calculation of damages that would greatly reduce the amount that the courts had up to that point*

[112] Ray Ryan 'Practical Implications of the Civil Liability & Courts Act 2004' (Paper presented at Trinity College Dublin conference on 12th March 2005 at p5).

[113] '*Army Deafness Saga Finally Nears An End'* Irish Independent newspaper 24 January 2010. http://www.independent.ie/irish-news/army-deafness-saga-finally-nears-an-end-26625717.html

been awarding." However, that stance seems at variance with the view of Ryan (2004) that public opinion about the tort system was negatively affected by the "*army deafness*" litigation rather than mere deference to the interests of the State defendant by the judiciary. [114]

Holland (2006) acknowledges that prior to the reforms *"there was little or no disincentive to exaggerate*". He describes his own experience of the reality:

> "*My experience in personal injuries actions suggests that the real problem here is not so much the outright fraudulent claim as the fundamentally valid but exaggerated claim. It is the gilders of lilies who are most common. The problem historically was that there was little or no disincentive to exaggerate. If the plaintiff was found out he would nonetheless be awarded the true value of his case."*[115]

However, Holland considers the deterrents to exaggerated claims to *"be blunt to the point of injustice and for that reason may be little used in practice."*

Binchy states that the Civil Liability and Courts Act 2004 was anticipated by the Supreme Court in their "*hostile attitude to plaintiffs who are victims of negligence but who have aggravated* [exaggerated] *their injuries".* He does concede that "*undoubtedly there are some fraudulent plaintiffs who have taken advantage in some cases of a lax system of litigation strategy by certain defendants".* Evidence of lax strategy was defendants will be explored in chapter 7.

Quill (2005) seems dismissive of the ban on 'no win, no fee' advertising by solicitors:

> *"Solicitors' advertising in respect of personal injury claims has been banned in an attempt to halt the increases in the number of claims, as such advertisements were perceived to be contributing to a compensation culture. This is somewhat pointless, as such advertising still occurs on UK television, which is extensively available in Ireland."*[116]

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[114] A tariff of damages for army deafness claims, known as the Green Book, was introduced in 1998.

[115] David Holland, 'Civil Liability Act 2004: Some thoughts on Practicalities' Judicial Studies Institute Journal (2006) p43-59 at p52.

[116] Quill's footnote 6 states "*SI 518/202; advertising is permitted, but may not specifically make reference to personal injury claims; such advertising had only been permitted since 1996 (SI*

Whether this UK advertising affected legal culture in Ireland would prove difficult to determine and is beyond the scope of this research.

The concerns of these commentators about the statutory deterrents to exaggerated claims, and evidence of what Binchy terms *"a lax system of litigation strategy by certain defendants",* are assessed in Chapter 7 with a review of the jurisprudence emerging from the case law.

2.12 Summary of tort markers identified in these academic *critques*

A striking feature of the articles reviewed in this chapter is that none of these commentators denied the need for a range of reforms. However, there were different views on the 'mischief' which was to be addressed and varying opinions on what reforms should be implemented.

Binchy posed some very clear and relevant questions about the effect of PIAB:

- What is the likely effect of the legislation on tort litigation?
- Will it be to encourage resolution, by settlement or by acceptance of the Board's assessment, without going to court as much as at present?
- What will be the strategy of insurers on the question of accepting or rejecting assessments and on contesting liability?
- Will claimants seek legal advice before involving themselves in the assessment process and how active will the legal advisors be during the assessment process?
- Will a legal culture of generally accepting, or rejecting, assessments develop?
- And what will be the courts' attitude towards litigants in the new dispensation?

351/1996). It should be noted that it is the Law Society of Ireland that has responsibility for making such regulations.

At this remove, many of those questions posed in 2004 are addressed in this case study.

My unique contribution to empirical research in this area is largely quantitative with very long-term nationwide data some of which spans decades of development patterns. This is sufficiently robust to assess the merits of arguments about an optimal tort redress system in both the pre and post reform period.

In deconstructing the Research Question, the 'tort markers' required coded identification into themes of the academic concerns about the consequences of the reforms. These are addressed in substantive chapters of this thesis under the following headings:

Chapter 3 – Claims Cost Trends

Chapter 4 – Accident Frequency Trends

Chapter 5 – Justice and Fairness (including speed of resolution)

Chapter 6 –Premium Trends and Insurer Profitability

Chapter 7 – Exaggerated Claims

Chapter 3 – Claims Cost Trends

To what extent are academic projections about the limited positive, or potentially negative, effect of the reforms on claims costs defensible in light of the outcomes?

3.1 Introduction

The research indicates that the reforms reduced costs in a substantial body of claims and certainly did not causes increases as predicted. In the literature reviewed in Chapter 2 there was a general convergence of opinion that claims costs had been increasing in the pre-reform period but considerable doubt as to what results the PIAB and related reforms would achieve in that context.

Hedley (2004) encapsulated the historic growth and future projection as below:

> "*So that is the modern system, which as I say today emphasises compensation above all else. And all the signs are that the system will continue to grow, if left to its own devices; that is certainly what it has done in the past."*

Patton (2012) quoted from the sixteen shortcomings identified in the 2004 report of the Committee on Court Practice and Procedure and considered that *"[C]hief among these were the unduly long duration of litigation, excessive costs, and protracted settlements*." Those are factors which would result in increasing costs of claims and insurance.

Binchy (2004) emphasised the pre-reform right of access to the courts although he acknowledged that "*Too many cases have been settled at too late (and too expensive) a stage*".

Ilan (2009) related the importance of litigation costs to the objectives of reform:

> *"PIAB, it was argued, would greatly reduce these costs and resolve cases with greater expedience than the sluggish court system…"*

However, Ilan seemed to have had a preference for the *status quo*:

> "*Legal academics have pointed to the suitability of the previous litigation regime, noting that it could be further reformed to achieve the aims of increased expedience and economy."*

Quill (2005) cited the Bacon report, commissioned by the Bar Council, which projected negative claims cost consequences including a greater frequency of opportunistic claims resulting from the reforms.[117]

Patton (2012) indicated that productivity in PIAB had decreased:

> *"In the first four years of its existence the Board saw substantial annual growth in the volume of cases it dealt with. Since 2008, however, the number of awards has been falling steadily, with an aggregate decrease of over 5% to date."*

In a wider context, Fenn (2005) in a paper delivered to the Association of British Insurers on the subject of the perceived increase in Employer Liability claims volumes highlighted the difficulties caused by the lack of reliable data:

> *"Is there a "compensation culture" in the UK? The actuarial profession maintains that there is, but an influential report by the Better Regulation Task Force argues against this. What has been missing in this debate is an element of statistical rigour in weighing the evidence in support of one position or the other."* [118]

This case study will make a significant contribution to that debate in Ireland based on statistical rigour.

To examine the assessments reviewed in Chapter 2 it is necessary to identify the benchmarks for comparison, contextualised with explanations of the various elements involved. [119]

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[117] Editorial in the Bar Review (2002) 7 Bar Rev, 302*, A Review of the Costs to the Irish Economy and the Effectiveness of a Proposed Personal Injuries Compensation Scheme, 2002 (Report commissioned by the Bar Council).*

[118] Fenn *et al,* '*Is there a "compensation culture" in the UK? Trends in employer's liability claim frequency and severity*'. (2005) Centre for Risk and Insurance Studies Nottingham University Business School at p2. Cited from a presentation to ABI with the written permission of the author.

[119] This background of the pre-reform period draws heavily from a meta-analysis of the MIAB 2002 report.

3.2 The Elements of Total Claims Costs

To assess the extent to which academic concerns at Chapter 2 were defensible it is necessary to have clarity on what is being researched. There are two dimensions to trends in the cost of claims, the frequency of compensation seeking behaviour and value of the amounts ultimately paid.[120]

Outlay by motor and liability insurers predominantly relates to injury claims by persons other than the policyholder.[121] Such payments encompass the following items in an individual case:

a) General Damages which represent compensation for pain and suffering from the time of the accident and/or likely to be suffered in the future.
b) Special Damages relate to financial losses. An award under this heading represents repayment of expenses incurred or losses sustained, usually medical bills and deficits in earnings, from the time of the accident and/or likely to be incurred in the future.
c) Litigation or other costs payable by the insurer to the claimant for legal and expert fees incurred in pursuing the claim.
d) Claims handling costs incurred by the insurers instructing lawyers and other experts for investigating, and possibly defending, either liability or the level of quantum sought.

The last two items are referred to as "non-compensation" outlay. Their total represents an overhead on top of compensation outlay which is made up of General Damages and Special Damages under the definitions at (a) and (b) above. The

[120] Theoretically, payment is predicated on proof of fault in the law of negligence but many settlements are based on compromise and/or a short term cost-benefit-analysis by insurers of exposure to litigation costs.

[121] Insurers asserted to MIAB 2002 that 75% of annual claims outlay related to Third Party claims.

outcome of the reforms in terms of delivery overhead in contrast to the *status quo* favoured by some academics in Chapter 2 is analysed in detail in this chapter.

3.3 Evidence of frivolous claims

An additional feature was identified by Patton (2012) in that the "*court system had become inundated with litigation marked by systemic frivolity…"* The word 'frivolity' in this context could imply claims where there was little in terms of Special Damages to indicate a seriousness of injury that warranted pursuit of compensation. While it is not necessarily a fact, many from the claims management sector would consider that the absence of verifiable losses under the heading of Special Damages denotes a 'frivolous' action.

In the pre-reform era a 1996 Deloitte report contained an analysis of the relationship between Generals Damages and Specials Damages in court awards.[122] Those researchers commented:

> *"Examination of the data shows a clear inverse relationship between the size of Special Damages and the amount of General Damages. This relationship suggests that the judiciary may seek to compensate for low levels of Special Damages by awarding higher levels of General Damages".*

The McAuley Report subsequently undertook a similar analysis of overall settlements between 1994 and 1997. [123] Those later results on settlements reflected similar findings to those by Deloitte from sampling of court awards.

Dr Brian Greenford of the University of Limerick was the independent researcher for the McAuley report. He was in a position to conduct sampling of English cases but found that there was not a similar relationship there between Specials and Generals

[122] Deloitte & Touche 1996 Report on the Economic Evaluation of Insurance Costs in Ireland. Analysis was based on data from Doyle Court Reporters. See para C350 in MIAB 2002 and this data for a range of claim value bands is reproduced in Appendix at C3.3A

[123] Table reproduced at Appendix at C3.3B from the Second Report of the Special Working Group on Personal Injury Compensation 2001 – Department of Enterprise & Employment (as then was).

in that other common law jurisdiction.[124] The value bands employed in the analysis of English claims were at much lower levels because compensation in Ireland was considerably higher for equivalent injuries. [125] However, it seems that claims in England were more frequently mounted for injuries that did not involve any substantial financial losses. The more comprehensive NHS coverage of medical expenses than in Ireland could be a factor in the variances perceived.

The MIAB 2002 report commented that their examination of "*1999 raw data showed that, even under Third Party Only cover with no element of insured own damage, 62% of cases are under £5000 inclusive of litigation costs*."[126] The research quoted above seems to support the view expressed by Patton (2012) on the extent of 'frivolous' claims in the pre-reform era. [127]

An increase in ratio of General Damages to Special Damages in the post-reform period could confirm fears about increased 'frivolity' by virtue of a more straightforward redress system introduced with the establishment of PIAB as a manifestation of the 'expressway principle'.

The first aspect to be addressed in the frequency of injury claims overall.

3.4 Claims frequency

The first element of claims cost trends is the propensity of people to seek compensation after an accident. The Irish population are considered to be quite litigious although the injury claims frequency is half that of the UK.[128] The findings in

[124] The comparative data is presented in the table at Appendix at C3.3C

[125] The 1997 McAuley Report found that settlements in Ireland were on average twelve times the value of settlements in England for both motor and liability injury claims, as shown in Appendix 1.2.

[126] MIAB 2002 report at para C354.

[127] While it is not necessarily a fact, many in the claims management sector would consider that the absence of verifiable losses under the heading of Special Damages denotes a 'frivolous' action.

[128] On the Hofstede cultural value index Ireland is fairly high up the adversarial scale in an online exercise undertaken by the writer. Also of interest is the issue of national culture in the trends of social security, as in Geert Hofstede, *'Insurance as a product of national values'* (1995). The Geneva Papers on Risk and Insurance Practice 20.4: 423-429. UK claims frequency is based on CRU data.

this research indicate that any increases in claims frequency cannot be attributed to the reforms when viewed relative to economic activity and other influencing factors.

A concern raised by some academics in Chapter 2 about the reforms related to what may be termed 'the expressway principle' whereby, to use Binchy's term, more of the 'weak claims' would be encouraged.[129] That theory speculates that if the process of claiming is made too easy it can 'open the floodgates' to unmeritorious actions.[130] This was also a projection from the Bacon report commissioned by the Bar Council which was referred to by Quill (2005).

The extensive raw data which form the bases of the analyses which follow are included in Appendices for Chapter 3. [131] Summaries only are presented here in graphic or tabular format to aid readability.

The volume of claims cannot be reviewed in isolation from the frequency of allegedly negligent occurrences. Obviously, not all reported road accidents result in claims against motor insurance policyholders. For example, in a single vehicle accident involving only damage to the owner's vehicle there may not be comprehensive coverage for the repair costs and hence there would be no claim. In such circumstances the driver is unlikely to be able to sue another party, no matter how tragic the accident is in terms of consequential needs for medical attention or ongoing care.[132]

Equally, not all motor insurance claims will be reflected in accident statistics. Allowance must be made for insurance coverage on incidents such as fire, theft and

[129] The term using the Americanism of 'freeway principle' can be explained as '*adding more traffic lanes does not simply move the current flow of traffic faster because when the cost per trip falls more traffic enters the system*'. Ascribed to Patricia Munch Danzon and Lee A Lillard, 'Settlement out of Court: The disposition of medical malpractice claims' (1983). Journal of Legal Studies 12.2 p 345-77 at p374.

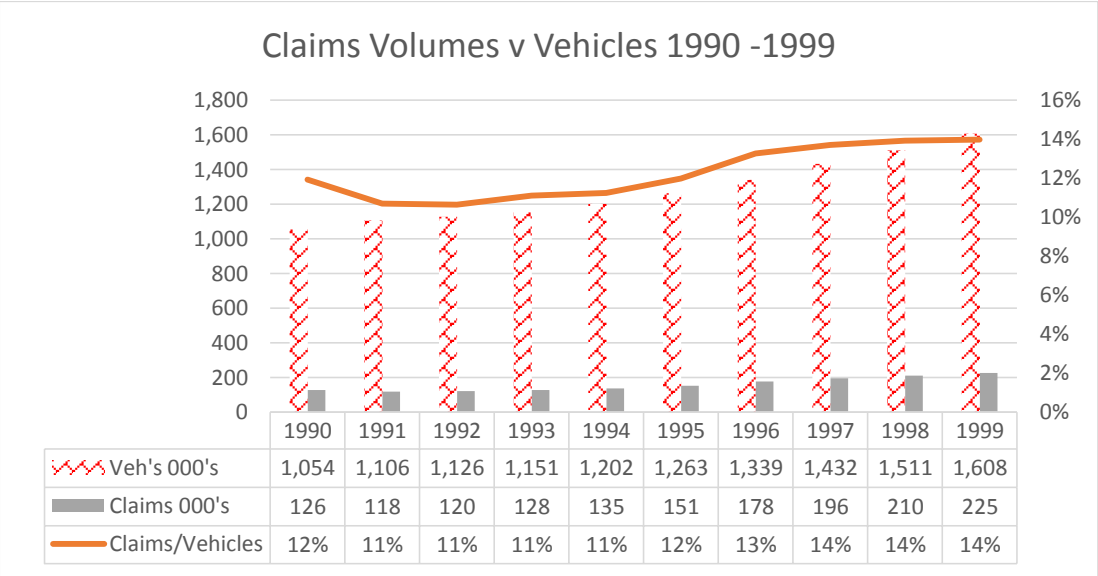
[130] Also expressed by the former Minister of State for Justice Willie O'Dea of the time – Sunday Business Post newspaper 31st August 2003.

[131] Tables at Appendices C3.12A to D.

[132] A public liability claim could be reflected in separate statutory data. Unlike England, local authorities still have statutory immunity for nonfeasance so a defective road surface blamed for an accident would leave the injured party without remedy unless malfeasance could be proved.

windscreen breakage. These would not involve reports to the police as traffic accidents but could result in a claim under a motor policy. Even allowing for these factors, there was a considerable disparity between the number of reported accidents and the volume of claims in the pre-reform period.

While it is demonstrated in Chapter 4 that only 2.4% of registered vehicles in 1990 reported being involved in an accident, the claims frequency relative to vehicles was 12% and this had increased to 14% by 1999. This claims volume data is from the annual statutory returns by motor insurers and is reflected in the graph below:



	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Veh's 000's	1,054	1,106	1,126	1,151	1,202	1,263	1,339	1,432	1,511	1,608
Claims 000's	126	118	120	128	135	151	178	196	210	225
Claims/Vehicles	12%	11%	11%	11%	11%	12%	13%	14%	14%	14%

Table 3.4 & Graph – Claims frequency by Registered Vehicles 1990-1999

Data source: MIAB 2002 Report at A94.

The trend in the graph above reflects the pre-reform period. That relatively low level of claiming, while increasing, is not indicative of a 'negligence culture' as argued for by some commentators in Chapter 2.

As demonstrated by the data analysis in the Appendices at C3.4, claims volumes relative to vehicles rose in 2000 to 16% and remained relatively stable after the reforms until the recession years around 2008 at 19% before falling back in subsequent years. The indicator for 2013 that claims volumes relative to vehicles have reduced to 10% must be read with caution because that is the data point at which analyses were undertaken for the developed pattern for all previous years and

could deteriorate somewhat over future years.[133] However, analysis of the trend in the post-reform period is important because there is no evidence of the feared 'expressway principle' inflating claim frequency as a result of the establishment of the more straightforward redress model in PIAB.

3.5 The Cost of Injury

To assess the claims cost trends projected by commentators reviewed in Chapter 2, the second influential factor after claims frequency volumes is the value of compensation for varying degrees of injury and the related overheads.

In the region of 75% of annual claims outlay under motor insurance relates to injury claims. Commentators often focus on the most serious injury in evocative assertions about vulnerable claimants with high care cost needs. However, in reality such claims are outliers in statistical terms as will be demonstrated.

Some data issues bear emphasis in the current context. It takes a number of years for the claims cost of a particular year's accidents to crystallise. The ultimate liability is not finally known until all the claims are finalised. The more mature data is for the third year of development after the occurrence of the accident. By that time most of the more serious and expensive claims should be obvious, although their financial exposure as estimated by insurers may increase or decrease repeatedly over the years between accident occurrence and finalisation.[134]

Some headline findings from the pre-reform era are insightful:

[133] The Civil Liability & Courts Act 2004 required claims to be notified within two months of occurrence of the allegedly negligent event, in the absence of which costs penalties can be sanctioned. However, the Statute of Limitations is two years for adult, running from age 18 for Minors and from date of knowledge in latent cases.

[134] This volatility can have a number of causes. The medical prognosis of the injured party may improve or deteriorate. The competence of the insurer in identifying defence evidence or assessing medical conditions may also be a factor. There were also examples of insurers in the Irish market depressing reserves for claims in pursuit of competitive pricing to increase market share. This is detailed in chapter 6.

Volumes of Claims in Value Bands 2002 and 2004 MIAB

1. *For all types of coverage in three years of cost development, 29% of cases were finalised at zero outlay in MIAB 2002, which had risen to 30% in MIAB 2004.*
2. *Of cases with some outlay by insurers, 80% of occurrences were valued at under Irl£5,000 in MIAB 2002 but in total financial terms the 'high volume-low severity' cases reflected only 15% of the overall cost of accidents.* [135] *In MIAB 2004, claims at this level of €6,349 accounted for 82% of volume and 14% of cost.*
3. *In MIAB 2002 the three year development at 1999 year end included 458 accidents valued at over £100,000 each and while these cases accounted for only 0.5% of volume they represented 26% of total cost. In MIAB 2004 analysis, the comparable range of over €126,974 were less than 1% of volume but 32% of cost.*
4. *In MIAB 2002 cases up to Irl£30,000 accounted for 95% of volume but 45% of estimated claim cost. In MIAB 2004 analysis the comparable range up to €38,092 accounted for 96% of volume and 50% of estimated claim cost.*

The high volume at 80%/82% of claims for the lowest value range at under €6,349 (previously Irl£5,000) would reflect a very minor injury in Ireland, but these only represented 15% of the overall cost. [136] This tends to support the point made by Patton about frivolity in the pre-reform period. [137] Thankfully, the frequency of major severity was low.

Quite rightly, fatal accidents receive priority in most discussions about road safety. Again however, it must be emphasised that in cold terms the financial consequences for the cost of motor insurance of a death is usually far lower than that of a long term disability. In the instance of a young person with no dependants the hard fact

[135] Ireland adopted the euro currency in January 2002 but the data which MIAB analysed in its 2002 report was for prior years so the values are expressed in Irish pounds.

[136] Some low value claims could, of course, involve serious injury but with a high level of contributory negligence so that a settlement or award would only represent reduced compensation commensurate with defendant negligence.

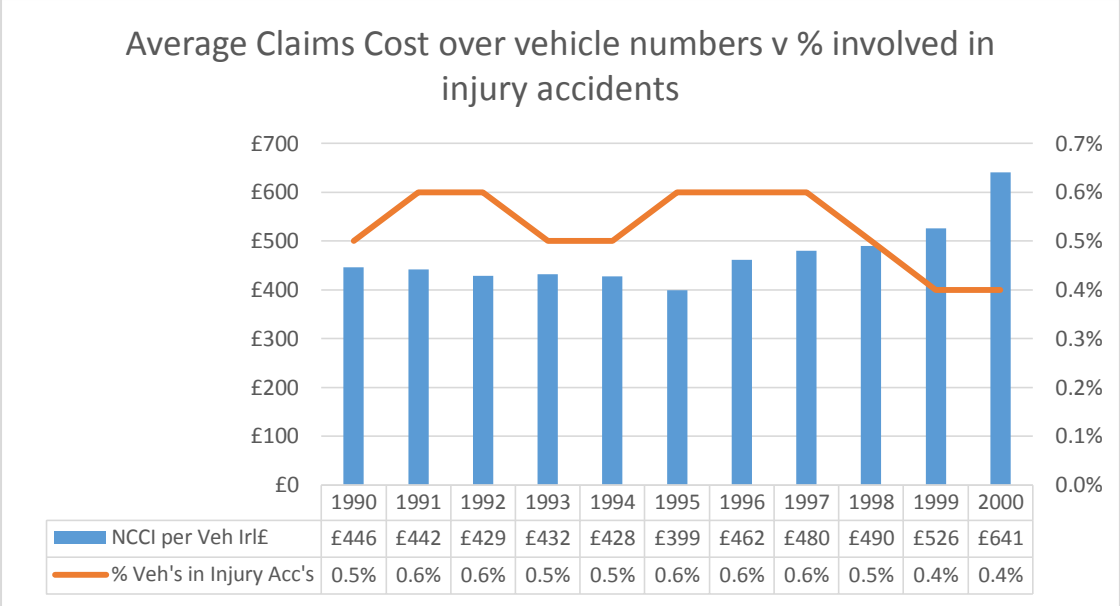
[137] This fact also further supported the MIAB recommendation in 2002 that the limit of the Circuit Court should not be increased to £100,000 [€126,974] because of the likely inflationary effect, as observed following the previous jurisdictional increases in 1991.

is that the compensation against a culpable driver was in the region then of Irl£25,000 plus litigation costs. [138] In contrast, a claim for serious injuries to a young person requiring 24/7 care for life with no future earnings prospects would be valued in millions.

The number of seriously injured young people reported as hospital admissions is considerably higher than the number of high value claims observed in insurers' raw data. Regrettably, many serious injuries to such drivers result from their own negligence. These injured parties are unlikely to succeed in any claim against anyone so these accidents do not influence the cost of insurance. Such injured parties must provide for their own livelihood and fund medical expenses from their own resources. In that sense, victims of negligence could be regarded as privileged over others with disabilities. [139]

Prior to the reforms, the overall cost incurred for all types of claims relative to injury accidents for the period 1990 to 2000 was increasingly steadily. This is reflected in the graph below. The 'net cost of claims incurred', which is the estimated value after reinsurance, is abbreviated to NCCI. This figure encompasses claims paid plus reserves for claims yet to be finalised. Over this period the per vehicle average claims cost increased by 44% from £446 to £641:

[138] That sum reflected the maximum mental distress limit at that time of £20,000 under the Civil Liability Act 1961 along with reimbursement of funeral and other expenses.
[139] In contrast to England where there is a duty for road maintenance, in Ireland local authorities have immunity for nonfeasance and if an accident is alleged to have been caused by a road defect the injured party must prove malfeasance.



Graph 3.5.1 – NCCI per vehicle & % vehicles in injury accidents 1990- 2000

Data source: MIAB 2002 Report at A19.

It will be noted that, proportionately, the volume of vehicles involved in injury accidents over that eleven year period was relatively stable at 0.5% to 0.4%. The reasons for the significantly higher claims cost per vehicle over this period warrants another dimension of interrogation which is presented in Chapter 6 on insurer profitability given the high level of estimated liabilities reported in statutory returns. The amount of Irl£641 for 2000 above equates to €814.

As can be seen from data at Appendix 4.9, the relative volume of vehicles involved in reported occurrences reduced steadily from 4.4 in 2000 to 2.2 in 2014 per ten thousand vehicles. This improvement in safety arose from EU in addition to national measures as explored in in Chapter 4 on accidents. As reflected in the table below, the Net Cost of Claims Incurred (NCCI) reduced steadily in the post reform period from €815 in 2001 to €397 in 2013. Note that the values in the table below are expressed in euros in contrast to the previous graph when the currency was Irish pounds:

Table 3.5.2 – Net Cost of Claims Incurred v Vehicles 2001 – 2013

Motor YEAR	Veh's 000's	NCCI ***Euros***
2001	1,770	€815
2002	1,850	€748
2003	1,937	€659
2004	2,036	€540
2005	2,138	€427
2006	2,296	€449
2007	2,442	€363
2008	2,498	€435
2009	2,468	€476
2010	2,416	€436
2011	2,425	€347
2012	2,403	€338
2013	2,483	€397

The reason this is important is because it points to the lack of any evidence that claims cost would be increased by virtue of the establishment of PIAB as had been projected by some commentators reviewed in Chapter 2. There are, however, some nuances in that data because of the changing dynamics within the insurance market. These include companies operating on a Freedom of Services basis remitting more money to their EU/UK Head Offices in reinsurance and other expenses as demonstrated in Chapter 6.

3.6 Litigation overheads within claims cost accruals

As recognised by the commentators reviewed in Chapter 2, a feature of the Irish claims system had been that all injury cases involved litigation and the instruction of counsel. Far from lawyers' fees alone being targeted, as asserted by Patton (2012), the MIAB undertook a detailed analysis of the amounts earned by a range of experts. Contrary to some commentary by the Law Society that lobbyists for insurers merely produced figures to focus on solicitors, the statutory investigation was undertaken over a prolonged period from 1998 to 2004. It had been suggested that, on average, only 50% of outlay on claims was recovered by the injured party. The balance related

to the litigation process. This would mean that for every 100 paid in total on claims the claimant received only 50.

Ilan (2009) raised the issue of solicitor-and-own-client costs and was critical of the fact that it was not included in the cost-benefit analysis of PIAB. However, such fee payments by claimants to their own solicitors do not affect outlay be insurers, either pre or post reform, so that cannot be a defensible criticism of PIAB unless that outlay is quantified in the litigation system. There was also anecdotal evidence that some plaintiff Solicitors, in addition to recovering party-and-party fees from defendants' insurers, deducted an additional 10% of client compensation in 'no win, no fee' arrangements'. In such situations, from a total outlay of 100 the claimant would receive a net 45 (i.e. 50 less 10%) from which medical expenses and any other bills would be payable. A system requiring an extra 55 to deliver 45 compensation - a 122% add on cost – did not appear efficient although that was the *status quo* for which many academics in Chapter 2 expressed a preference.

Because claims costs are said to be the driver of premium charges, it was important to secure reliable figures to establish the extent of non-compensation outlay. MIAB were surprised to discover that insurers did not undertake such analyses of outlay by expenditure type in the ordinary course of managing their own business operations.

The initial survey results indicated that non-compensation as a percentage of total injury outlay on motor was 26% in 1996, 27% in 1997 and 28% in 1998. A further survey on litigation costs was undertaken in October 2001. The non-compensation payments as a percentage of total injury outlay were also 28% in 1999 and in 2000 which was stable from 1998. [140]

As a robustness test, MIAB considered it advisable to establish the breakdown of outlay in classes of liability business which are not compulsory but where indemnity

[140] MIAB 2002 Report paras C106 to C110. MIAB 2004 Report – pages 55 to 59.

was provided for personal injury claims. The relative percentages for those additional classes of business, Employer Liability and Public Liability, are summarised in one table below:[141]

Table 3.6 – Litigation overheads by all classes of business 1996-2003

Motor Third Party Injury			**Delivery Overhead %**					
Year of settlement	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**
Non-Comp as % Total	26%	27%	28%	28%	28%	28%	29%	29%
Non-Comp as % Comp	34%	37%	38%	39%	40%	38%	40%	41%
Employer Liability								
Non-Comp as % Total	29%	29%	29%	32%	31%	31%	33%	34%
Non-Comp as % Comp	41%	41%	41%	46%	46%	45%	49%	52%
Public Liability								
Non-Comp as % Total	34%	36%	33%	37%	36%	34%	36%	40%
Non-Comp as % Comp	52%	55%	50%	60%	56%	51%	57%	65%
All classes involving TP injury								
Non-Comp as % Total	26%	28%	28%	29%	30%	29%	30%	31%
Non-Comp as % Comp	35%	38%	39%	42%	42%	40%	44%	46%

Employer Liability claims reflect a higher level of litigation costs at 52% of the compensation amount compared to motor at 41% in 2003. That was somewhat surprising given the rarity of an employer successfully defending a negligence action by an employee. However, these cases regularly involve technical or mechanical issues requiring expert witnesses which would increase the relative non-compensation outlay.

Public liability claims reflected the highest proportion of litigation overhead, expressed as 65% on top of the compensation in 2003. It seems these cases were more likely to be defended than motor accidents. Many Public Liability actions also involve co-defendants which would inflate the legal costs for the losing party. In

[141] Note: 1996-1998 is 33% of EL & PL market but 64% in 1999 & 2000. Again these were partial returns based on 67% of the 1998 gross written motor premium and 33% of that year's liability market which underwrites Employers Liability and Public Liability. The survey undertaken in October 2001 captured results for 64% of the 1999 motor market written premium income.

motor accidents, the genuinely injured passengers are usually entitled to compensation and the dispute is limited to respective insurers involved in multi-vehicle collisions. Overall, the delivery overhead was increasing rapidly over the period 1996 to 2003.

While some academics in Chapter 2 contended for the 'suitability' of the litigation system, this model of redress risked becoming financially unsustainable. Given that a number of those commentators expressly recognised the extent of 'wasted resources' which can motivate nuisance value settlements, it is difficult to justify their stated preference for the *status quo* over the proposed low cost reform proposals for straightforward claims based on the readily available data for the pre-reform period in the MIAB reports to which some of them refer.

3.7 The connection between litigation costs and claims frequency

As reviewed in Chapter 2, Binchy expressed the view that unnecessary settlements can damage public perceptions of tort. However, the issue of litigation costs cannot realistically be separated from that of claims costs overall. On grounds of short-term economics, many cases are settled for a "nuisance value" because exposure to costs is a deterrent to defending the defendant's right to justice. Compensation may be paid even where there are grave reservations about the extent of injuries or losses alleged. Logically, such unmeritorious cases may feed the trend of other parties being inclined to "*have a go*" at securing money after minimal involvement in an accident.[142] In the UK the 1978 Pearson Report estimated administration costs to be 45%. That was at a time when only 25% of those involved in road accidents made successful claims.[143]

[142] The damage this does to public confidence in the integrity of tort law is specifically acknowledged by Binchy (2004) but is also identified by other academics as a reform requirement.

[143] In terms of road collisions in the UK at that time, the Pearson Commission reported there were 7,000 people killed and 400,000 injured annually.

The MIAB findings were also tested against other sources of data with which they were found to be consistent. The 1996 Deloitte Report examined a sample of court awards over a 5 year period to 1994. Those cases reflected legal fees at 43% of compensation in claims up to £15,000 and 26% in awards between £50,000 and £100,000. Research undertaken on settlements for the 2001 McAuley Report was also largely consistent at 38% for the litigation overhead. [144]

Propensity to claim can be influenced by arrangements for litigation funding but this was not a factor in Ireland during the period covered by this case study. The legal position was clarified in May 2017 by a majority decision of the Supreme Court that private litigation funding is unlawful in Ireland. [145] The reaction of the legal profession to this continuing enforcement of 14th century legislation can be represented by the extract from one commentary below: [146]

> *"Maintenance and champerty remain unlawful in this jurisdiction, and the statutes dating back to the 14th century prohibiting such behaviour remain in force.*
> *It is a matter for the legislature to change the law as it stands and it is unknown at this time whether the Oireachtas will engage in any reform of this area. The Supreme Court in its decision also left open the possibility that a constitutional challenge may be brought against the current laws against maintenance and champerty. While the Persona decision is unequivocal in stating that third party litigation funding remains illegal in Ireland (with some limited exceptions), it remains to be seen whether any legislative changes will ultimately change this position."*[147]

The issue of sourcing litigation funding was the subject of a consultation paper from the Law Reform Commission in Ireland during 2003 and a report was published in 2005. Their focus was largely on multi-party actions. Chief among their recommendations was "*a requirement for judicial certification as a necessary*

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[144] Second Report of the Special Working Group on Personal Injury Compensation 2001 – Table 30, p132.

[145] *Persona Digital Telephony Limited and Another v The Minister for Public Enterprise, Ireland and Others* [2017] IESC27 ("*Persona*").

[146] *Supreme Court not Seduced by Third Party Litigation Funding Arguments.* https://www.williamfry.com/newsandinsights/news-article/2017/05/31/supreme-court-not-seduced-by-third-party-litigation-funding-arguments.

[147] *The Persona case reaffirms the status of maintenance and champerty in Ireland.* http://www.rdj.ie/insights/persona-case-and-the-law-of-maintenance-and-champerty-in-ireland

preliminary step". The reason this is relevant is that in the other main common law jurisdiction in the EU, the funding of litigation through legal expenses insurance was one of the counter-productive reforms introduced by the UK in 1999. This has not been part of the reforms in Ireland to date. Several of the commentators reviewed in Chapter 2 urged payment by PIAB of claimant legal fees but they did not express any opinions on other options such as first party insurance or civil legal aid.

3.8 Compensation delivery overhead in the post-reform period

Some academics reviewed in Chapter 2 criticised the failure to consider a 'no fault' scheme in preference to the proposed reforms. One of the arguments proffered in support of a 'no fault' systems, aside from wider coverage, is the potential to reduce administration costs. It is said that a higher percentage of the outlay goes to the injured parties so the question arises whether that would have been a preferable reform.

In the table at Appendix C3.8 detailed raw data is set out on the annual operating costs of PIAB relative to the amounts awarded each year. The trend in unit cost is downwards. There were a number of factors at play. PIAB invested in technology to enhance efficiency.[148] Additionally, the more frequently respondents consent for claims to proceed for assessments, and the higher the proportion of formal awards that are accepted, then the more economies of scale operate.

There is substantial work undertaken by PIAB that is not reflected in the unit costings because time and effort is dedicated to assisting claimants to perfect their application. This often results in a direct settlement when the papers are served on the Respondent. However, no fee is payable to PIAB unless an assessment proceeds. If overheads were expressed relative to the full volume of claims registered, the unit cost would be less than €300 per case. At a summary level, the table below expresses

[148] I also make no attempt to conceal my bias by stating that PIAB has a very dedicated team of senior personnel. See hard data in PIAB annual reports for details of investments in the technology enhancements.

the unit cost relative to the value of awards made and relative to the value of awards accepted:

	2009	2010	2011	2012	2013	2014	2015	2016	2017
As % of value of awards made	5%	5%	5%	5%	4%	4%	4%	3%	3%
As % value of accepted	9%	9%	9%	9%	8%	7%	7%	6%	6%

Table 3.8 – PIAB unit cost relative to the value of awards 2009-2017

Taking the least favourable comparison from a PIAB perspective, the cost of running the assessment service equates to 6% of the value of accepted awards in 2017 and that had reduced from 9% in 2009. This compares favourably to studies of 'no fault' systems with a delivery overhead of 30% compared to a litigation overhead of 55% on average in those jurisdictions. [149]

That 6% also compares very favourably to the Irish litigation overhead. For the purposes of comparison with the court system, PIAB initially used the percentage of litigation overheads recorded in the 2004 MIAB report at 46% of the value of compensation. However, after investigation by the National Competitiveness Council of increases in legal fees since 2006 the comparative percentage employed by PIAB from 2014 was 58%.

Contrary to what was predicted by lawyers and their consultants, PIAB operates on a self-funding basis.[150] The largest single category of expenditure in the early years was on judicial reviews and reserves also had to be set aside for further threatened judicial reviews. However, once the High Court had clarified in 2010 that no awards of costs were required within the statutory framework those challenges decreased.[151] Those financial reserves were then released by reductions in fees over the succeeding years. In 2019 the fixed fee payable by a Respondent for an assessment is €600.[152]

[149] Studdert, D.M., Thomas, E.J., Zbar, B.I.W., Newhouse, J.P., Weiler, P.C., Bayuk, J., and Brennan, T.A. (1997). 'Can the United States afford a 'no-fault' system of compensation for medical injury?' *Law and Contemporary Problems* 60(2): 1–34.

[150] In 2011 PIAB also repaid its initial set-up costs of €4.5ml to the Government.

[151] *Plewa & Anr v PIAB* [2010] IEHC 516 in October 2010.

[152] The Claimant pays a fixed fee of €45 which is repaid if the assessment proceeds to acceptance.

One of the great unknowns is the level of solicitor-and-own-client fees which was raised by Ilan (2009). It was not possible to obtain data on this element of claimant outlay in the pre-reform period. However, reaction to the 2002 MIAB report prompted public commentary that such fees represented at least 10% of compensation on top of recovery of party-and-party costs. In contrast, in the immediate post-reform period there were advertisements by solicitors offering to undertake PIAB applications for a fixed fee of €399 plus Vat and outlays.[153]

As the client now has a more direct interest about the level of costs, it is likely that fixed fee arrangements have continued for cases finalised through PIAB. In the 21 unsuccessful judicial reviews launched for payment of costs, the solicitors sought from €2,000 to €1,000 (plus Vat at 21%) for Employer Liability and motor claims respectively.[154] The claimants were satisfied to accept their awards and the sole issue was costs.

There was some media coverage of the test case decisions in 2010. [155] Although the PIAB was awarded costs they did not pursue a recovery because, aside from the fact that the plaintiffs were not a mark, the clarity achieved was welcomed as confirmation of the position as determined by the Supreme Court in *O'Brien* in December 2008 on non-recovery of legal costs in the new system. [156] Some of the commentators reviewed in Chapter 2 were writing after those Superior Court decisions but made no reference to those precedents when urging that fees be awarded to lawyers which is at variance with the settled law against recovery of costs.

[153] As revealed at the Joint Parliamentary Committee meeting on 25th October 2006.
[154] *Plewa & Anr v PIAB* [2010] IEHC 516 at paras 10 and 20.
[155] Challenge to injury board over legal fees dismissed. Irish Times 21st October 2010. http://www.irishtimes.com/news/challenge-to-injury-board-over-legal-fees-dismissed-1.666386.
[156] Polish duo face €100,000 fee over costs case. The Sunday Times 24th October 2010. http://www.thesundaytimes.co.uk/sto/news/ireland/News/Irish_News/article427423.ece.

3.9 Litigation Overheads in the post-reform period

Commentators in Chapter 2 who predicted that PIAB would just be another layer of bureaucracy projected that the reforms would add to costs overall. A private researcher would not have the power to require the insurance industry to undertake a survey on current litigation overheads. In that context the most recent insurance cost crisis has been of assistance to this case study which has been necessarily been iterative.

A Working Group established by the Minister for Finance to investigate the cost of insurance published its first report in January 2017. Part of its focus was on recent trends in non-compensation outlay and the table below was compiled from their findings. Data was supplied for insurers' own legal and other investigation costs, and for Third Party (TP) claimant costs. The compensation amount is shown separately (abbreviated to 'Comp' in this table). The non-compensation outlay is then expressed as a percentage of the compensation as a delivery overhead (abbreviated to 'O/H %').[157]

Working Group- Motor Settlements 2013-2015 €ml's Delivery overhead as % of Compensation						
€ml's	TP Costs	Own Legal	Own other	Comp	Total	O/H %
2013	€66	€38	€21	€255	€379	49%
2014	€70	€26	€23	€274	€392	43%
2015	€74	€28	€28	€293	€422	44%
Trend	+12%	-26%	+34%	+15%	+11%	-10%

Table 3.9.1 – WG Litigation Overheads in Motor Settlements 2013-2015

The trend over these three years indicates that, while the amount paid in compensation had risen by 15%, the overall total outlay increased by a lower percentage of 11% because of reductions in insurers' own outlay. This could indicate greater use of PIAB to conclude assessments rather than insurers engaging experts. There is another way of interpreting the trend. It could be suggested that insurers were being less 'forensic' in examining claims and merely wanted to get them off

[157] These figures are from 78% of the motor insurance market.

their books, perhaps because of concerns about enhanced prudential requirements under Solvency 11 which was scheduled to commence from 2016.

The main finding from the data is that the delivery overhead reduced from 49% on top of compensation in 2013 to 44% in 2015, which is a 10% decrease. This does not seem to accord with lobbying by insurers in 2019 that legal costs are one of the causes of recent drastically increased premium charges from 2013.

Further data assists in addressing some of the questions which arise from the data above. The table below has been compiled from the Working Group Report.[158] It shows the trend in the average cost over the three years of settlements between 2013 and 2015. In the first column is the average compensation for claims finalised through formal PIAB awards, where there had been a 2.4% increase from €20,979 to €21,487. The other two columns show averages for claims finalised outside of the PIAB process including by court awards. This is broken down into two sub-categories, the compensation alone is shown in column headed 2 below, which had increased by 4.6%, and the total outlay to include delivery overheads in column 2A which increased by a lower percentage of 1.4%.

	Within PIAB	2. Comp outside of PIAB	2A. Total Outlay outside of PIAB
2013	€20,979	€22,383	€33,290
2014	€20,897	€21,355	€30,552
2015	€21,487	€23,412	€33,764
Increase	2.4%	4.6%	1.4%

Table 3.9.2 - Average Motor Claim Cost by Settlement Channel 2013-2015

The trends above raise a number of issues to which only speculative answers could be offered and which are outside the current research question but it could be inferred that litigation costs are reducing proportionately.

However, more relevant to the academic *critques* in Chapter 2, a fascinating insight was provided on how those delivery overheads compare by different finalisation

[158] Department of Finance, Cost of Insurance Working Group Report 2017 at page 93.

channels. For claims finalised by insurers through PIAB, the delivery overhead was less than 1% relative to compensation as set out in the table below:

In PIAB	2013	2014	2015
TP Costs	0.58%	0.67%	0.57%
Own Legal	0.03%	0.04%	0.03%
Other Own	0.19%	0.23%	0.27%
Total	0.8%	0.94%	0.87%

Table 3.9.4 – Delivery Overhead as % of Compensation in PIAB 2013-2015

Third Party fees are a feature of some PIAB awards but only amount to c.0.6% relative to compensation. There was very little outlay on insurers' own legal costs in such cases at 0.03%, although their other outlay represents c.0.2% relative to compensation.

Claims which were finalised prior to the PIAB process reflect a much higher delivery overhead of between 1.99% and 2.73% over this period as reflected in the table below. Whilst that might be considered a minimal delivery overhead, it is notable that it is many multiple of the 0.8% to 0.9% when finalised through formal PIAB awards:

Pre-PIAB	2013	2014	2015
TP Costs	0.83%	0.93%	1%
Own Legal	0.24%	0.26%	0.31%
Other Own	0.92%	1%	1.42%
Total	1.99%	2.25%	2.73%

Table 3.9.5 – Delivery Overhead as % Compensation Pre-PIAB settlement

The data above indicates there was an increase in own 'other' outlay by insurers over this period. In contrast, Third Party costs remained largely static at c.1% relative to compensation. Again this is at variance with the lobbying by insurers that increased legal costs were a significant factor in premium charges which increased by 70% between 2013 and 2016 as reflected in the CSO index.

One obvious question that might be raised is why insurers would indulge in such early direct settlements when a more cost effective finalisation route in terms of

delivery overheads is available through PIAB. The answer is probably unknowable within the limits of this research. However, it is important to highlight that the research belies the assertion by commentators that PIAB would just be used by insurers to 'flush out' claim details but that they would then proceed to defend in litigation so that the reforms would just be a new layer of bureaucracy.

The sharpest contrast to the level of delivery overhead available through the PIAB process is provided by data on post-PIAB settlements which includes court awards and this is the *status quo* for which many commentators in Chapter 2 expressed a preference. That litigation overhead ranged from 46% to 41% on that body of cases alone, as set out in the table below:

Post-PIAB including Court Awards	2013	2014	2015
TP Costs	25%	24%	24%
Own Legal	15%	9%	9%
Other Own	7%	7%	8%
Total	46%	40%	41%

Table 3.9.6 –Overhead as % Compensation settled post PIAB

It may be recalled that the range of 46% to 41% mirrors the percentage levels found by MIAB on the entire portfolio of injury claims reflected in their 2004 report.

Over the period above there was a relatively significant reduction in insurers' outlay on their own legal costs in these litigated cases, from 15% to 9% on top of compensation which is a 40% decrease. Claimant costs were static around 24%. Again this is at variance with lobbying by insurers in 2019 about an increasing trend in legal fees.

While there are undoubtedly other ways of interpreting this data, the overall trend indicates a reduction in delivery costs post-reform because of the volume of claims being finalised outside of the litigation system at a low overhead. This is contrary to what was projected by some commentators reviewed in Chapter 2.

3.10 Relativity of General v Special Damages – the issue of frivolity

The relativity of General Damages as against Special Damages in the post reform period may provide insights on the issue of 'frivolous claims' identified by academics, some of whom considered this 'expressway' risk would increase after establishment of PIAB. In the overall context of claims costs a new dimension was added from August 2014. That was the starting date for recoverability from potential defendants of social insurance payments caused by negligent accidents.

The system is in its early days but it does provide an indication of the numbers of claimants who were absent from work as a result of accidents for which they have lodged a negligence claim. There was a retrospective element to this legislation in that it applies to all settlements from August 2014 rather than just to accidents from that date. The table below details the number of claims on which benefit certificates had been sought.

Year	2014	2015	2016	2017 to Sept.
Number	7,508	7,287	6,835	5,082

Table 3.10.1 – Social Insurance Benefit Certs 2014 to Sept. 2017

Obviously there are claimants who would have no social insurance entitlements, such as the self-employed, who were injured to the extent that they were unable to pursue their trade or profession for a period post-accident. However, even allowing for that factor it seems that only a small proportion of claimants who registered with PIAB were disabled from work as a result of accidents for which they claimed compensation in tort. In 75% of claims where potential compensators apply to the Department of Social Protection for details of benefits paid a 'Nil Cert' was issued.

Over the four years to 2017 a total of 132,307 injury claims were registered with PIAB. This compares to the 26,600 in the table above where social insurance

certificates were issued to claims settlers between August 2014 up to end of September 2017.[159]

Prior to this reform there was an element of unjust enrichment for some plaintiff as receipt of social insurance was not netted off against financial earnings loss. The amounts involved for the Exchequer are substantial. There was €69ml recovered to September 2017 and further recoveries expected at that point of €206ml (O/S) as set out in the table below:

Social Insurance Recoveries €ml's			
	Recovered	O/S	Total
2014	€36	€61	€97
2015	€21	€63	€84
2016	€10	€50	€60
2017 to Sept	€2	€32	€34
AYTD	€69	€206	€275

Table 3.10.2 - Social Insurance Recoveries from Claims.

The raw data secured from the Department of Social Protection provides a breakdown by accident type – motor, EL and PL. However, while a deeper analysis has been insightful from a number of perspectives it is not necessary for the current research question. In time, these social insurance recovery records will provide a useful perspective on work absences caused by accidents for which compensation is being pursued in Ireland.[160]

Unfortunately, the raw data received from the Courts Service does not provide a breakdown of High Court awards between Special Damages and General Damages to assist further assessment on the issue of 'frivolous' claims.[161]

[159] The retrospective element must also be borne in mind as certificates must be sought from 2014 on the entire caseload of claims outstanding at that point in time.

[160] Such data has been available in the UK for many years and is often relied on by academics for trend analysis of claims frequency.

[161] Raw data secured from the lower courts provides such an intermittent breakdown between General Damages and Special Damages, which seems to vary by district, that it is considered unreliable to model for this purpose.

There is an alternate explanation for the lower levels of recovery certificates than the volume of claims registered with PIAB annually. There is a possibility that the claims settlers are not applying to the Department of Social Protection as required. This could be an attempt to avoid liability for repayment to the Exchequer. [162] Alternatively, many claims may be settling at such low values that it is considered not worth the effort of applying. This is an area for further research. It is not possible to further address this issue of 'frivolous' claims by reviewing the ratio of Special Damages to General Damages. However, interrogation of trends in claims values may provide an insight.

3.11 Review of negative projections

As mentioned in Chapter 2, Quill (2005) cited a report commissioned by the Bar Council in 2002 from Dr Peter Bacon & Associates, by a person who was very influential in political circles at that time. [163] There was wide media coverage on the projections by those economic consultants that the PIAB proposal could cost €150ml per annum so that in 10 years it would have cost the Irish economy an estimated additional €1.5bl.[164] The report highlighted a number of negatives forecasted from the reforms as set out in the table below: [165]

[162] Irish Independent 18/10/18 *State accuses insurers of dodging €20m*. https://www.independent.ie/business/irish/state-accuses-insurers-of-dodging-20m-37405914.html
[163] Editorial in the *Bar Review* (2002) 7 Bar Rev, 302, see *A Review of the Costs to the Irish Economy and the Effectiveness of a Proposed Personal Injuries Compensation Scheme*, 2002 (Report commissioned by the Bar Council)." See also Gazette October 2002 p3.

[164] Dr Peter Bacon who was the author of this report was one of those credited with the economic miracle in Ireland known as 'the Celtic Tiger'. *Banking Inquiry: Housing boom driven by tax breaks - economist Peter Bacon*. Independent 4th March 2015. http://www.independent.ie/business/irish/banking-inquiry/banking-inquiry-housing-boom-driven-by-tax-breaks-economist-peter-bacon-31039887.html
[165] Bacon report p28.

Costs arising from System Operation and Outcomes Compared to Ideal

ISSUE	ESTIMATE OF COST (per annum)
Higher insurance premiums	Very high: 1.25% excess on insurance costs economy Euro 125 million through lost competitiveness.
Non-payment of insurance	No evidence that this is happening in a detrimental manner.
Incentive to make small claims and pursue them further in the system.	Leads to losses of Euro 10.6 million under assumptions detailed in the text. The impact of this on insurance costs may be a multiple of this.
Increased fraudulent claims.	Wasted resources valued at Euro 14 million. The impact on insurance costs may be a multiple of this.
Moral hazard.	Some costs but compensating gains – mostly a health and safety issue.
Distribution of income.	Potential small benefit to society but negligible in practice.
Loss of confidence in legal system.	Potentially important but minor so far.

Table 3.11 – The Bacon Report summary

Contrary to the projections above, premium charges reduced over the decade from the announcement of the reforms as detailed in Chapter 6. In simple terms there was a 40% reduction compared to the annual increase of 1.25% projected above, which would have been a cumulative increase of 13% in premium charges. That is a favourable variance of 53%.

Analysis of claims frequency is presented later in this chapter. There is very little evidence of the existence of any greater incentive "*to make small claims and pursue them further in the system*" than in the pre-reform period.

The issue of exaggerated claims is addressed in Chapter 7.

Some items in the table above, such as *"loss of confidence in the Court system",* cannot be addressed within the confines of the research for this case study.

The actual estimated saving in litigation costs alone for the first decade of PIAB operations was €1.5bl. That would equate to a €3bl improvement on projections in the Bacon report. [166]

In lobbying against PIAB the Incorporated Law Society undertook a similar exercise. They retained the services of a nationally renowned accountancy firm, Des Peelo & Partners.[167] That 2002 report forecasted an annual running cost for PIAB of €30ml compared to an operational reality at one third of that figure. This was demonstrated within the first year of operations.[168] Negative cost estimations by Peelo also included loss of productivity in the Courts by virtue of reduced litigation volumes which can be refuted by data.

It is reasonable to speculate that some of the academics reviewed in Chapter 2 were negatively influenced about PIAB because of these reports from eminent individuals instructed by the Law Society and by the Bar Council. It seems forecasting is a challenge, even for the experts, but the savings secured from the reform exceeded the reform target of 31% in sharp contrast to the projections of many detractors.

3.12 Data on claims costs overall

Some commentators reviewed in Chapter 2 doubted that the reforms would have a lasting deflationary effect on the cost of claims and on the trends in insurance inflation but the data indicates otherwise.

With my insider perspective I can highlight that, because of the approach to insurance accounting, it is not advisable to examine individual years on a standalone basis. Deteriorations in the condition of injured parties, and/or insurers'

[166] Board to shake up insurance industry could cost €30m – Independent. 17 July 2003. https://www.independent.ie/irish-news/board-to-shake-up-insurance-industry-could-cost-30m-25939276.html. Also Mr Des Peelo of Peelo & Partners as covered in Parliamentary debates - http://debates.oireachtas.ie/seanad/2003/11/20/00006.asp

[167] PIAB must make 'economic sense'. Times 19 Oct 2002 Peelo. http://www.irishtimes.com/news/piab-must-make-economic-sense-1.1100517.

[168] Injuries board proves Law Society wrong. Times 19 Sept 2005. http://www.irishtimes.com/business/injuries-board-proves-law-society-wrong-1.494270

appreciation of those exposures, occur over succeeding periods given the long tailed nature of some injury claims. Essentially this means that only older years of account relative to the year of accident occurrence, where the vast majority of claims have been finalised, will provide a robust basis to calculate trends in average cost. This *caveat* bears emphasis in interpreting the graphs below.

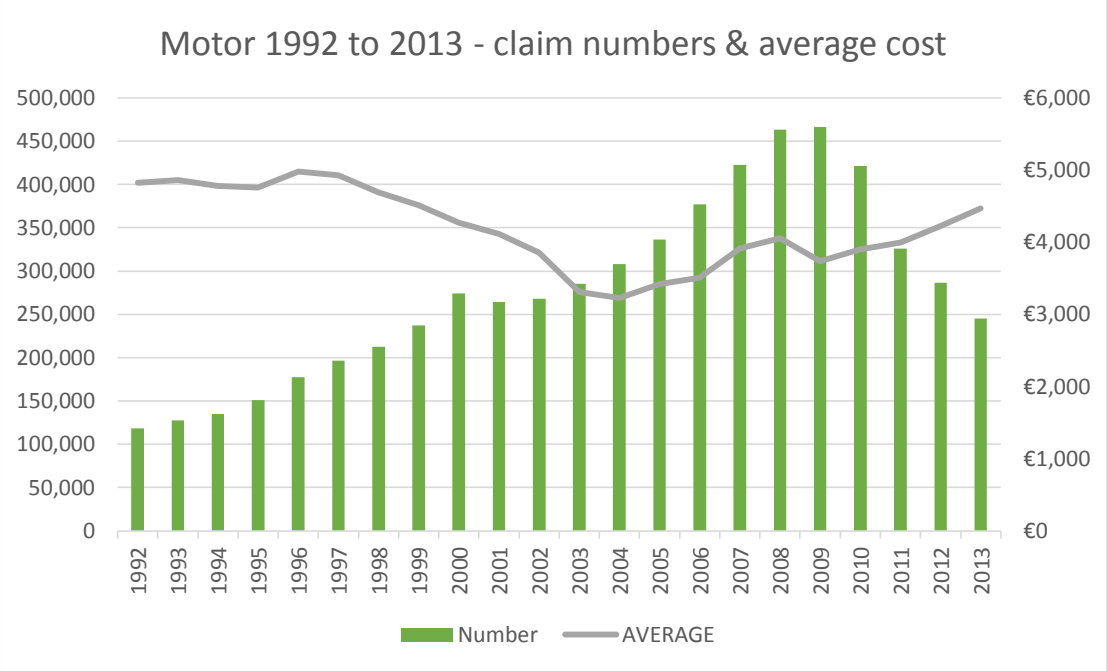
Statements on insurers' potential liability are heavily reliant on estimated figures. The variance in trends between different classes of insurance business also reflects the reality that there are many variables involved. These will be explained after a review of the headline data for the entirety of the Irish insurance market for Motor, Public Liability and Employer Liability.

As argued in Chapter 6 on profitability, there are reasons to have reservations about valuation estimates produced by insurers from 2014 onwards. Accordingly, this analysis relates to the period from 1992 to 2013. Claim numbers and average incurred cost are set out in the graphs below.

It must be stressed that the volume data for motor claims includes 'own damage' claims by policyholders so it is important to bear in mind that these are not the annual levels of motor injury claims solely. [169] The existence of this high volume of usually low value 'own damage' claims obviously supresses the average value compared to what would be observed if it were possible to review data on injury claims alone.[170]

[169] These include losses such as windscreen breakage, fire, theft and accidental damage.

[170] Such an exercise is possible on mainland Europe as compulsory and elective cover are unbundled so the data is available separately. Motor insurance is a loss leader in the vast majority of EU Member States. Neither the UK nor Ireland contribute data to that European Federation of national federations of insurers. www.insuranceeurope.eu



Graph 3.12.1 – motor claim numbers and average cost 1992-2013

Contrary to what many had predicted, average claims cost for 2013 at €4,472 reflected in the line above is below the value in the mid-1990s where it was €4,756 in 1995 and €4,977 in 1996.

The average cost reached its lowest level in 2004 at €3,226. However, there was considerably less Comprehensive cover in the 1990's than in more recent years where a volume of low value 'own damage' claims would suppress the average.[171] That inference seems to be supported by the increase in numbers reflected in the bars above because the volume of motor injury claims registered with PIAB did not mirror that frequency pattern.

Subsequent to PIAB commencing operational activity in July 2004 the average value increased from €3,226 to a high of €4,058 in 2008, when the largest volume of claims is recorded at over 460,000 which, it must be stressed, included 'own damage' claims. More recent years reflected a reduction in volumes but an increase in average value, which stood at €4,472 in 2013 but that would be a heavily estimated

[171] Some insurers refuse to quote for 'Third Party Only' cover which is compulsory under EU law.

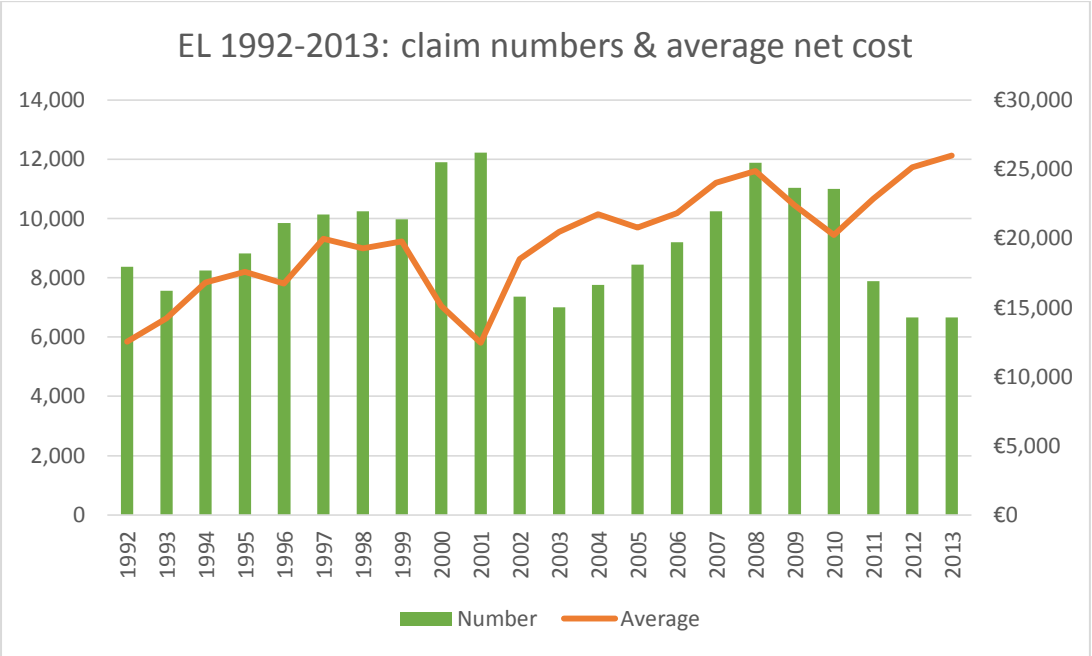
liability. This could indicate a reduction in 'frivolous claims' in the early days of the reforms but further evidence on that issue is necessary.

In the next chapter on accidents this trend in average cost will be analysed relative to the frequency and severity of collisions to establish whether and/or to what extent there is an interrelationship with tort claims. This is important to test some academic assertions in Chapter 2 that the main driver of increased claims and insurance costs is a negligence culture.

In Chapter 2 Binchy ascribed rising insurance costs to "egregious negligence" by employers and considered the country's accidents statistics to be 'appalling' while Kelleher and others counselled the 'safety first' approach before embarking on any of the proposed reforms. Because motor insurance is compulsory it is necessary in testing academic criticisms to establish if different dynamics were operating in other insurances which provide indemnity in the event of Third Party injury claims.

Insurance cover for Employer Liability (EL) is not compulsory in Ireland. In reality, it is purchased by most organisations except in the State and Semi-State sectors where there is a high level of self-insurance.

The graph below reflects the trends for both the pre and post-reform periods in claim numbers and average cost from 1992 to 2013:



Graph 3.12.2 – Employer Liability numbers and average cost 1992-2013

The volume of claims was at its highest during 2000 and 2001 when cases involving insurers totalled 11,908 and 12,226 respectively. However, these years reflected the lowest average value at €15,122 and €12,466 respectively, the latter for 2001 being the lowest on record. Those were years of an economic boom in Ireland.

In the context of commentary at Chapter 2, it is insightful to review research published in 2015 by the Economic and Social Research Institute [ESRI] which indicated that the 'Celtic Tiger' era had been bad for worker safety in terms of reported accidents. [172] On the basis of the insurer data above, this seems to have been the case in 2000 and 2001 if viewed on the basis of the volumes of claims but not on severity measured by average value trends.

Interestingly, the tentative economic recovery to 2013 seems to have resulted in more serious claims. The average estimated value rose to its highest ever level in 2013 at €25,999 but this is a heavily estimated figure. However, the volume of claims at 6,658 is one of the lowest on record second only to 6,671 in 2012. This could indicate less frequency of "egregious negligence" as referred to by Binchy (2004).

[172] ESRI report. https://www.esri.ie/news/was-the-economic-boom-bad-for-workers/

The next chapter, on accidents, will analyse whether these claim patterns are reflective of workplace accidents which were reported to the Health & Safety Authority. Analyses of the frequency of both accident and claims trends must factor in the fluctuating numbers employed over this research period.

Caution needs to be exercised with data on insurance which is not compulsory. During the height of the recession there may have been a concealed pattern of economically pressed companies not effecting cover while trying to stay financially afloat. Other employers may have agreed to higher levels of retained liability and dealt with lower value cases themselves rather than report them to their insurer. Investigation of these possibilities is beyond the research required for this case study.

Most difficult to measure against any single economic indicator is the trend in Public Liability (PL) claims. Those volumes and average values are reflected in the graph below. Again a spike in volumes can be observed subsequent to the economic crash with 24,362 claims in 2009. The frequency spikes in 2000/2001 related to the boom years of heightened economic activity.

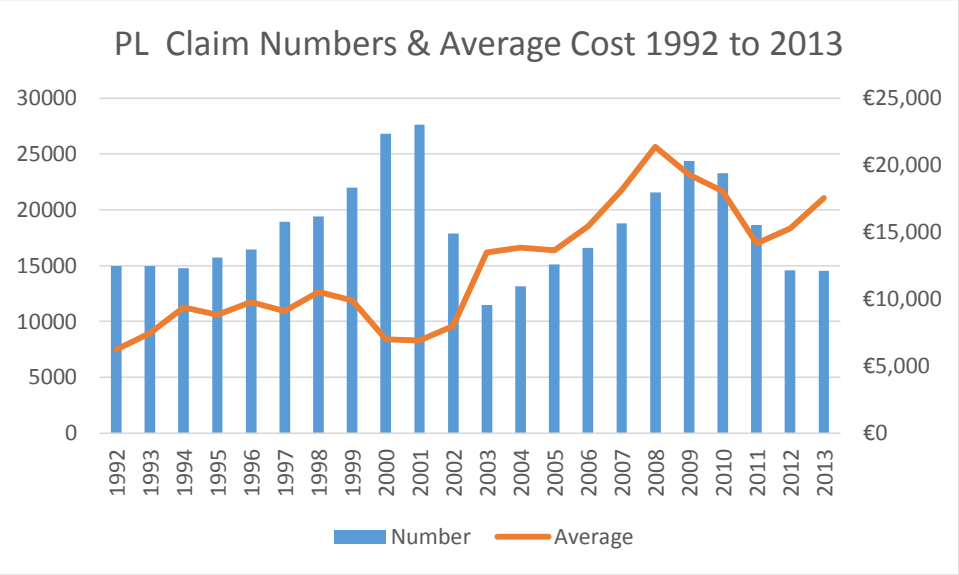
Subsequent to PIAB commencing operational activity in July 2004 the average value of PL claims was €13,841 and this continued an upward trend until 2013 at an estimated €17,534. The rise in average value from 2003 could indicate that only more serious rather than 'frivolous' claims were being pursued.

There were substantial reductions by 2013 from the claims volume in 2001 of 27,628 during the 'Celtic Tiger' years of economic boom.

In contrast, during the recession period 2008 to 2010 the data reflects a higher volume and also a higher average value with the highest being €21,364 in 2008. This may indicate more claims were being lodged as a potential source of ready money for people who were under a range of financial pressures and this is an area for further research in the future. [173]

[173] It would be an interesting enquiry, but beyond the scope of this research, to seek to establish whether there is a specific socio-economic profile among those who are involved in more accidents

The volume and average value trends are reflected in the graph below:



Graph 3.12.3 – Public Liability numbers and average cost 1992-2013

Counterintuitively, the volume at 24,362 in 2009 had fallen to 14,547 by 2013 when there was economic recovery which would mean more footfall in public places. As will be explored in Chapter 6 it seems that market dynamics rather than underling claims costs drove the trend in PL insurance charges.

3.13 Conclusions on academic assertions about claims cost trends

It is undeniable that the overall trend in the incurred cost of claims as estimated by insurers increased after 2003 but there are a myriad of market dynamics which could account for that observation. However, the arguments by academics in Chapter 2 that claims costs would increase because the establishment of PIAB would only introduce an additional layer of bureaucracy do not withstand scrutiny. This is further demonstrated in Chapter 5 on justice and fairness with data on the extent to which claims were finalised within the new low-cost model.

and/or pursue claims for minor injury. Some geographical clusters of claims frequency might already point in that direction.

Chapter 6 examines the extent to which sustained savings in premium reductions were delivered over the longer term until 2013 and highlights many non-claim issues underlying the most recent insurance cost crisis.

A further difficulty with this data, in addressing academic concerns about frivolity and/or the expressway principle, is that the trends in claims reported by insurers are inconsistent with the patterns of claims registered with PIAB by class of insurance. Aside from that finding, the identified 'recession effect' in all three classes might be termed opportunistic rather than frivolous. As demonstrated, the overwhelming volume at c.85% of claims is for low value which reflects minor injury and represents only c.15% of the overall cost.

What it has been possible to conclude from this chapter is that analyses of claims cost trends, relative to increasing numbers of registered vehicles which are decreasingly involved in accidents in proportionate terms, do not explain the pattern in average value as estimated by insurers. It would then be open to academics to assert that their projections of increased costs as a result of PIAB are defensible. However, claims finalisation by settlement channel confirms that the cases through PIAB reflect a much lower delivery cost but lawyers seem to require a fairly stable level of income from personal injury even when fewer cases are being litigated. That adverse trend in litigation overhead costs would be accelerated if PIAB were to award fees as sought by many commentators reviewed in Chapter 2.

Chapter 4 - Accident Frequency Trends

To what extent are assessment by legal academics that a 'negligence culture' is the key to claims costs defensible in that light of what the data reveals about accident frequency?

4.1 Introduction

Three issues arising from the commentary reviewed in Chapter 2 about safety are addressed in this chapter.

The first challenge is the assertion that Ireland suffered from a 'negligence culture' in the pre-reform period and that that should have been tackled in preference to the proposed reforms. [174] The data indicates otherwise but the basis of the assertion is also tested.

Kelleher (1995) focused on negligence culture and invoked the financial figures employed to justify investment in road safety. He concluded that the "*best way of reducing the cost of personal injury litigation is to reduce the number of accidents which cause injury in Ireland".* [175] A similar assertion was made by an economist in 2017 in response to the most recent insurance cost crisis. [176] However, when subjected to scrutiny such a stance is not robust in the context of tort objectives and related insurance costs.

As Hedley (2004) summarised it "*any system for sweeping up after accidents have happened is bound to be gruesome and unsatisfactory to some degree"* and the analyses in this chapter should not be interpreted as condoning a certain level of accidents as 'acceptable'.

[174] As in Kelleher (1995), Binchy (2004) and Ilan (2009).
[175] Denis Kelleher (n71) at p1.

[176] Short, Jack. Trinity College Dublin *"Traffic Injuries in Ireland – a Neglected Problem"* Journal of the Statistical and Social Inquiry Society of Ireland. Oct 2017 Available at http://www.ssisi.ie/JackShort_Oct12th.pdf

Secondly, and in a wider context, one of the aims of tort is to discourage negligent behaviour. [177] By extension, at a simplistic theoretical level it should be possible to observe that higher insurance costs would be a factor in reducing accidents and *vica versa*, all other things being equal. This research indicates that safety standards did not disimprove during the period of sustained decreases in premium charges from 2002 to 2013. However, it must be acknowledged that a number of safety initiatives were imposed by both national law, in accordance with MIAB recommendations, and by EU projects during this period.

Lastly, some academics reviewed in chapter 2 called for consideration of a 'no fault' system. There is inconclusive research on whether the introduction of such schemes adversely affects accident frequency.[178] In dealing with this aspect, the focus presented here can only be how tort reforms affected insurance costs for consumers relative to accident rates or whether there is any evidence of a causative relationship as contended for by academics.[179]

4.2 Accidents cause claims which cause costs which hike insurance

The notion that accidents are the main cost driver of insurance costs, as often asserted by insurers, has a superficial attraction in logic. Such an approach is also consistent with theory from the 'cathedral' of law and economics. Both sides of the

[177] Guido Calabresi, *The Cost of accidents: a legal and economic analysis* (Yale UP 2008): 'Some thoughts on risk distribution and the law of torts'. (1961) Yale Law Journal 1:70(4) 499-533: 'Transaction costs, resource allocation and liability rules – a comment' (1968) The Journal of Law & Economics, 11(1), p67-73.

[178] Mark A. Geistfeld 'The Coherence of Compensation-Deterrence Theory in Tort Law' (2011) DePaul L. Rev 61: 383 at p385. Peter Bartrip 'No-fault compensation on the roads in twentieth century Britain' (2010) Cambridge Law Journal, 69:2: pp 263-286. Nora Freeman Engstrom, 'An alternative explanation for no-fault's "demise"' (2011) DePaul Law Review 61: 303. However, different considerations are reflected in the policy of no-fault compensation for industrial diseases as per Jane Stapleton 'Compensating the Victims of Diseases' (1985) Oxford J. Legal Stud:5:248.

[179] Paul Heaton presents what he asserts to be the first empirical research on how tort reforms in various American States affected the cost and take up of auto insurance but he does not factor in trends in accident frequency. 'How Does Tort Law Affect Consumer Auto Insurance Costs?' (2015) Journal of Risk and Insurance 84(2):691.

debate about 'the blame culture' *versus* the 'claim culture' may concede that accident prevention should be a societal goal that is of importance far beyond its purely financial perspectives. However, the MIAB statutory investigation into insurance costs which commenced in 1998 did highlight safety issues. That fact is not acknowledged by detractors of the reforms nor in the literature reviewed in Chapter 2.

In an effort to determine, if possible, the extent to which trends in 'negligence' support the views of academics, it is necessary to determine whether data demonstrates any co-relativity between accident frequency and claims costs.

Because motor accounts for c.60% of injury claims, statistics on different categories of road accidents are analysed in some detail before addressing trends in the other types of claims within the remit of PIAB such as workplace accidents.

4.3 Trends in reported motor accidents

Aside from Kelleher (1995), the commentators reviewed in Chapter 2 who considered accident frequency to be the main cause of an upward trend in insurance costs did not quote any statistics in support of such assertions. Binchy (2004), without citing any empirical data or sources, stated "*Our statistics on deaths and injuries on the roads are appalling"* and that is an assertion that is not supported by those statistics.

Most of those commentators whose views are being tested in this thesis were writing subsequent to the publication of the MIAB report in April 2002.[180] The findings from that statutory investigation received wide media coverage both in the general press and in local legal publications. Copies of the report were available for free online from the Department of Enterprise, Trade & Employment at that time.

[180] Binchy 2004, Quill 2005, Ilan 2009, Patton 2012.

Hard copies are available from the national Stationery Office and are held in the National Library of Ireland.[181]

Care must be exercised in interpreting flat numbers on accidents given the increase in the volume of registered vehicles over the relevant period. The overall relative level of reported accidents reflected a decreasing frequency to the year 2000 at 1.9% of registered vehicles reporting accidents, down from 2.4% in 1990. Some of this accident data has already been examined relative to claims costs in Chapter 3 so the statistics will not be repeated here but those analyses are presented in Appendix C4.3.

There was also a welcome reduction in fatalities between 1990 and 2000. The trend reduced in both absolute terms from 432 to 362 and also in proportion to the increasing number of registered vehicles, where the rate almost halved from 4.1 to 2.2 per ten thousand vehicles.

While the crude numbers on the total of accidents reported as involving personal injury reflected a significant decrease from 2,818 in 1990 to 1,640 in 2000, the relative incidence of injury accidents per 1,000 registered vehicles reflected a more significant downward trend. In the years 1996 to 2000 the serious injury rate reduced from 27 to 10 per 10,000 registered vehicles. Such changes in exposure units must be factored into robust analysis.

It is widely recognised that motor injury non-fatal accidents are under-reported. However, there is no reason to believe that the extent of under-reporting by motorists has altered over the period covered by this data.[182] Assuming a consistent reporting pattern, the benign trend in relative injury accident frequency does not support the argument by Kelleher that accident reductions would prevent an

[181] Both the 2002 and 2004 reports are in the NLI catalogue.
http://catalogue.nli.ie/Record/vtls000233173

[182] In 1995 the method of recording accidents changed and it was estimated by National Roads Authority that this resulted in 25% more injury occurrences being captured in the statistics but it did not affect fatal collisions. To allow a comparative assessment of the trend, the number of accidents prior to the introduction of the new recording system was increased by 25% for 1990 to 1994 in my analyses.

insurance cost crisis nor do these trends reflect the "appalling statistics" contended for by Binchy (2004).

Academic commentary often focuses on the outliers of serious injury to press a case for the most vulnerable claimants. However, as demonstrated in Chapter 3, such claims are a small proportion of the volume.

Injured parties are differentiated in the accident data between minor and serious injury.

- The definition of a minor injury is "an injury of a minor character such as a sprain or a bruise".
- Serious injury is defined as "where a person is detained in hospital as an in-patient or any of the following injuries whether or not detained in hospital – fractures, concussion, internal injuries, crushings, severe cuts and lacerations, severe general shock requiring medical treatment"

For the sake of hypothesis, if one could assume constant claims costs then these favourable trends between 1990 and 2000 in reduced serious injuries should have resulted in savings on insurance rates being charged to a growing pool of vehicles. It is necessary to examine the academic argument that a focus on securing favourable trends in injuries would result in savings on insurance without any of the other proposed reforms. This appears not to have been the case as demonstrated in the next section.

4.4 Motor accidents and insurance cost trends

Similar to the approach that might be ascribed to some academics, but for different reasons, insurers promulgate the message that premium charges are a direct reflection of accident frequency.[183] There seems to be no cogent justification on that

[183] The IIF estimated savings from implementation of the MIAB reforms at 31% ascribed the highest proportion at 10% [only] to accident prevention.

basis for the level of price increases which had been imposed on policyholders in the pre-reform era. [184]

It is preferable to examine what might be considered a more relevant comparison of average premium per vehicle rather than total market premium as against the accident trends. When that is done a stronger relationship can be observed between premium income and the volume of registered vehicles. Although there was a larger pool over which to spread the risk, insurers do not appear to have reduced average premium charges despite the improved trend of relative accident frequency.

In any population set of policyholders with a greater volume of newer and 'better' cars there is likely to be a shift from more limited compulsory coverage to wider comprehensive policies that include repair to the insured's own vehicle. Wider coverage warrants higher premium for the greater risk of property damage claims by policyholders. From analysis of insurers' data it appeared that the volume of comprehensive cover increased from 40% in 1993 to 54% in 1997 and to 60% by 1999. [185] This wider coverage was identified in Chapter 3 as a possible explanation for the increase in claims volumes since the early 1990's.

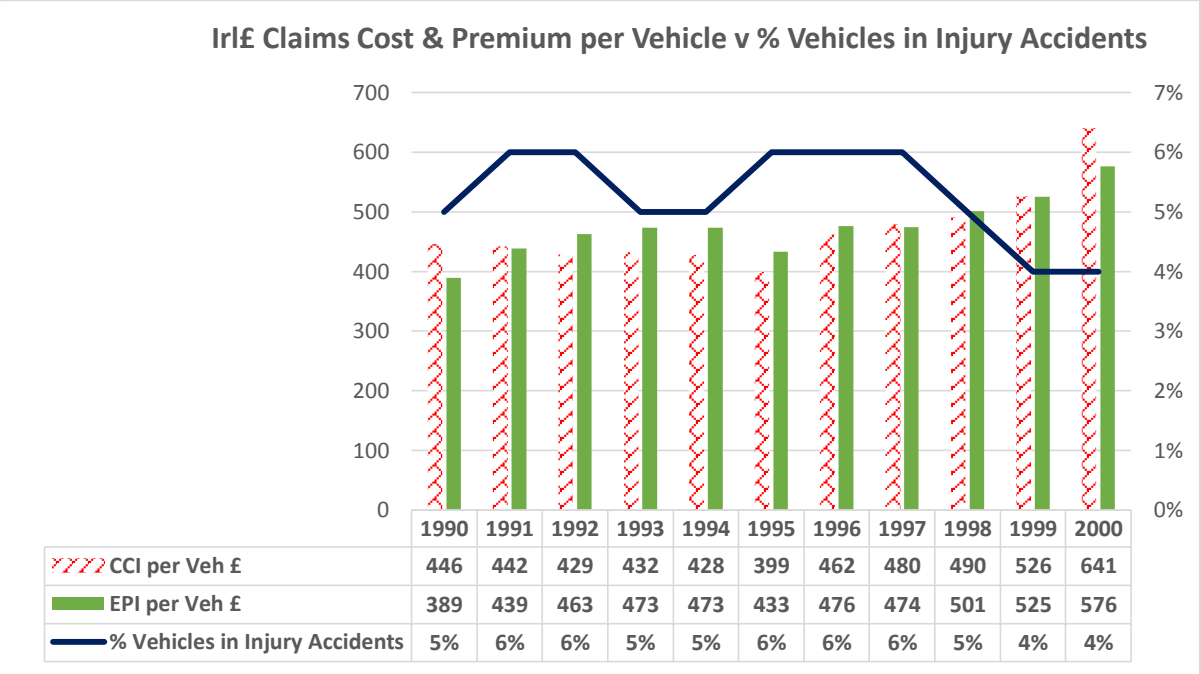
Examining the trend in average premium per vehicle, there does not appear to have been a direct relationship with accident frequency. That is particularly noticeable in the years from 1996 to 2000 where the average premium charges increased while the relative accident frequency was reducing. Insurers generally assert that premium rates are a reflection of trends in claims costs but that was not the finding with the data analyses presented in Chapter 3.

An inverse relationship with the Cost of Claims Incurred (CCI) emerged from the accident statistics in the pre-reform period. The data indicated that relative accident

[184] There is a long series of explanations supported by graphic presentation of data in this section of the MIAB report but only the concluding graph is reproduced here which reflects the more robust reporting system introduced in 1995 for injury accidents.
[185] As detailed in the MIAB report 2002.

frequency per vehicle was decreasing, by a cumulative 14%. However, average estimated claims cost per vehicle was persistently increasing over those 6 years, rising from Irl£399 in 1995 to Irl£641 in 2000, which is an increase of 61%.

Since the occurrence of injury claims is said by insurers to have a more significant effect on insurance rates than the cost of vehicle damage, it is necessary to examine separately the frequency of injury accidents. Comparisons between the injury accident rate and average estimated claims cost incurred (CCI) per vehicle and average earned premium income (EPI) per vehicle can be insightful as there was no clear relationships. This seems to run counter to the logic argument that trends in accidents are the main driver of claims costs. This is reflected in the lack of relationship in the graph below:



	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000
CCI per Veh £	446	442	429	432	428	399	462	480	490	526	641
EPI per Veh £	389	439	463	473	473	433	476	474	501	525	576
% Vehicles in Injury Accidents	5%	6%	6%	5%	5%	6%	6%	6%	5%	4%	4%

Graph 4.4 – Claims Cost & Premium per Vehicle v Injury Accidents 1995-2000
Data source: MIAB at A21.

Only 6% to 4% of 10,000 registered vehicles were involved in a reported injury accident between 1990 and 2000. Over that period there was a 48% increase in the net earned premium (EPI) per vehicle from £389 to £576. This compares to a 44%

increase in the estimated claims cost incurred (CCI) by vehicle which went from £446 to £641. [186] Those variances between EPI and CCI require further exploration as it might imply 'below cost' selling in 2000 relative to estimated claims risk.

In the overall financial context, fatalities represent a small number of the total claims volume. Furthermore, the claim value for fatalities is significantly lower than that for injury cases involving long-term disability. Accordingly, the trend in fatalities relative to CCI and EPI will not be analysed in detail but the academic argument that accidents cause claims costs which cause hikes in insurance charges is not supported by analyses of this data.

4.5 Motor Insurance Inflation

Both insurers and some commentators reviewed in Chapter 2 feed into a public perception that it is primarily accidents which account for increases in the cost of insurance.[187] The rate of motor insurance inflation which is recorded by the Central Statistics Office does not support that contention either.

Taking 1995 as the base of 100 for premium charges used by Central Statistics Office (CSO), in 1996 there was a reduction in the index to 99.3. However, premium charges increased in 2000 by 23.5% to an index of 123.6. This was in inverse relationship to the 12% reduction in the relative accident trend over that same period.

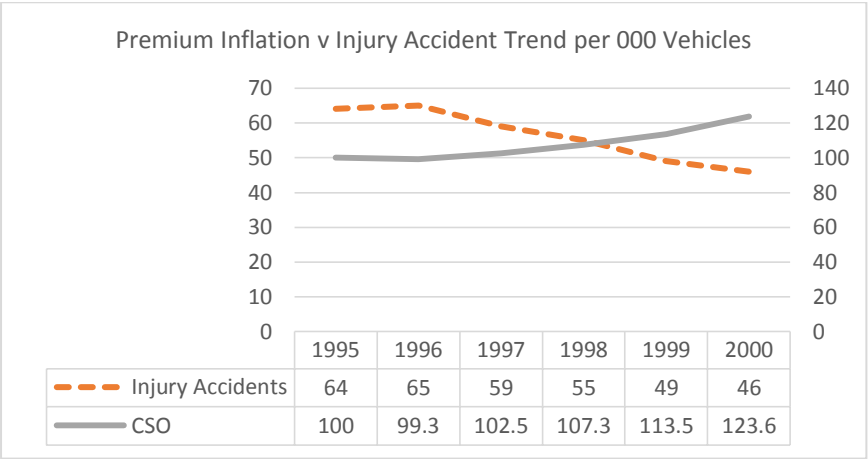
Premium predominantly covers personal injury so a positive correlation might be expected between trends in reported injury accidents and the cost of motor

[186] In the interests of balance, it should be emphasised that any attempt to calculate insurers' profits or losses from the figures above would be misguided. This section focuses solely on examining incurred claims costs and earned premium income relative to trends in accident frequency. No account is taken here of management expenses or investment income which are analysed in Chapter 6 on insurer profitability. Additionally, as mentioned in the Chapter 3 on claims costs, financial reserves for claims in any particular year can include adjustments to the provisions outstanding for a number of previous years' accidents.

[187] In the estimates of potential savings to be delivered as a result of MIAB recommendations, insurers ascribed 10% to road safety measures while all other proposals were in single digits.

insurance. The frequency of injury claims and their average cost may have a greater influence on inflation in motor insurance charges than the trend in reported accidents *per se*.

However, the trend in the Central Statistics Office inflation index in comparison to relative injury accidents again reflects an inverse relationship to that observed from total accident rates in the pre-reform period. This is reflected in the graph below:



Graph 4.5 – Relative Injury accident rates v premium inflation

Data source: MIAB Chart A26- CSO for index & National Roads Authority for accident reports.

The cost of insurance increased by 23.6% over a period during which injury accidents relative to 10,000 registered vehicles reduced by 28% from 64 in 1995 to 46 in 2000. On the basis of these comparisons, there is little evidence that there is a direct reflection of accident trends in motor insurance premium increases. It must also be borne in mind that the vast majority of premium paying policyholders are never involved in an accident, reported or otherwise.[188]

Data for the post-reform period will now be examined.

Based on a simplistic application of theory, the 40% reduction in motor insurance costs in the decade after implementation of the reforms should have resulted in

[188] MIAB analysis of insurers' raw data shows that less than 10% of private motor policyholders were involved in any accidents or claims annually.

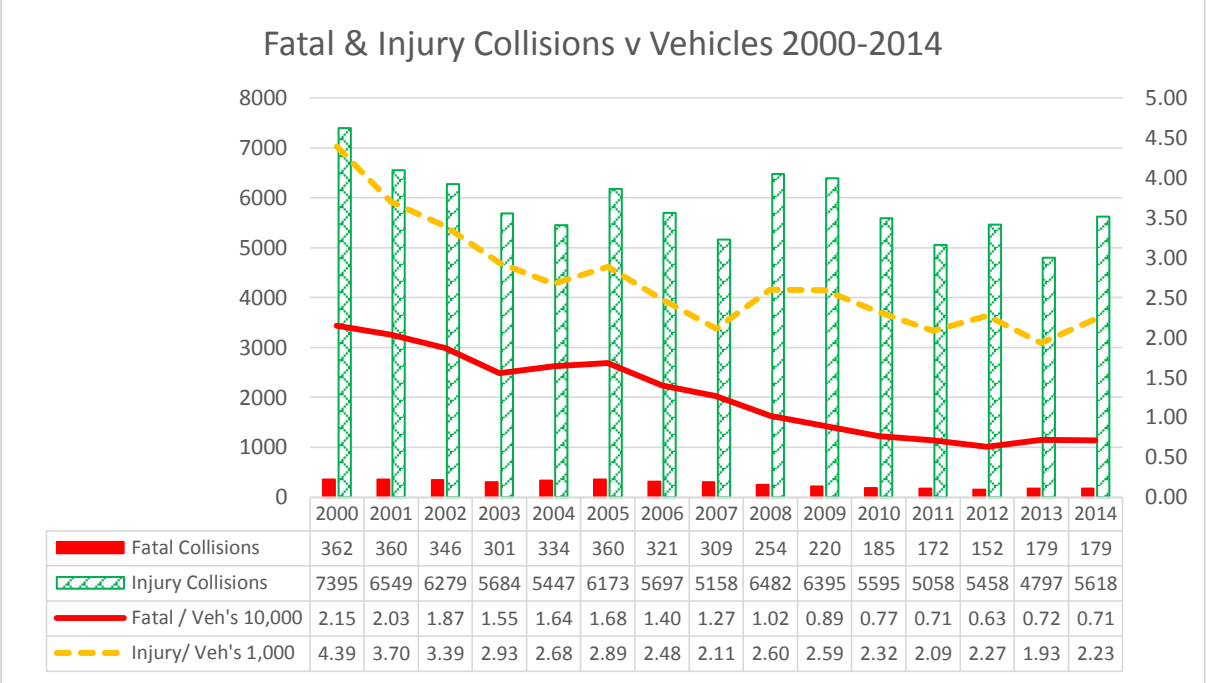
increased accidents. That would seem the logical consequence of an argument that high costs discourage negligent behaviour. Those analyses form the second part of this chapter. A brief trend analysis of workplace accidents is also presented for comparative purposes lest there are different dynamics at play than with compulsory motor insurance.

4.6 Accident trends in the post reform period

To follow the logic that a 'negligence culture' rather than a 'compensation culture' accounts for insurance costs, one might expect that significant reductions in premium charges could lead to a dampening of the deterrent effect resulting in increased accident frequency. That expectation is not supported by data from the post reform period.

However, this analysis is complicated by the fact that MIAB recommendations on safety were implemented from 2002 so it is difficult to prove cause-and-effect in relation to any single factor. For the sake of hypothesis, it is assumed that insurers' estimated savings from road safety measures at 10% were attributable to accident reductions and reflected in premium reductions. Since the pre-reform data did not reflect any constant correlativity between the trends in premium charges and injury accidents, the analysis of post-reform data will be less detailed.

Briefly, the most effective deterrent to negligent driving in Ireland seems to have been the 'penalty points' regime which was introduced on an incremental basis from October 2002. The trend in fatal and injury collisions relative to the volume of registered vehicles is presented in the graph below:



	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Fatal Collisions	362	360	346	301	334	360	321	309	254	220	185	172	152	179	179
Injury Collisions	7395	6549	6279	5684	5447	6173	5697	5158	6482	6395	5595	5058	5458	4797	5618
Fatal / Veh's 10,000	2.15	2.03	1.87	1.55	1.64	1.68	1.40	1.27	1.02	0.89	0.77	0.71	0.63	0.72	0.71
Injury/ Veh's 1,000	4.39	3.70	3.39	2.93	2.68	2.89	2.48	2.11	2.60	2.59	2.32	2.09	2.27	1.93	2.23

Graph 4.6 – Fatal & Injury Accidents v Vehicles 2000-2014

In simple numbers there was a 51% reduction in fatal collisions from 362 in 2000 to 179 in 2014. There was also a 24% reduction in other reported collisions involving injury from 7,395 to 5,618 over that period. The reductions were even more dramatic when reviewed relative to the increasing volume of registered vehicles. There were, however, some exceptions to that underlying trend.

For fatal collisions there was an increase in 2004 on the previous year of 11% and again in 2005 by 8%. As it transpires these did not all relate to cases involving motor insurers. Sadly, ten fatalities resulted from two catastrophe accidents involving the self-insured national transport services.[189]

In 2008, which was the year of the financial crash, there was an exceptional increase in the number of injury collisions which increased by 26% on the previous year. Again in 2012 there was a contra-trend increase of 8% in injury accidents.

[189] Feb 2004 Wellington Quay - *Five dead in worst tragedy in the history of Dublin Bus*. http://www.independent.ie/irish-news/five-dead-in-worst-tragedy-in-the-history-of-dublin-bus-26218114.html. May 2005 Kentstown - *Five teenage girls killed in Meath school bus crash*. https://www.irishtimes.com/news/five-teenage-girls-killed-in-meath-school-bus-crash-1.1177723.

From an insurer perspective, more vehicles on the road present more sources of premium income. There was a significant growth in the volume of registered vehicles over this period, from 1.7ml in 2000 to 2.5ml in 2014. When collisions are analysed relative to numbers of registered vehicles, the annual trend in accident frequency appears more benign. On that basis, relative fatal collisions reduced by 67% and other injury collisions by 49%.

In the recession year of 2008, there was a 23% increase in reported injury accidents relative to the volume of registered vehicles. That trend remained benign subsequently until 2012 when there was a 9% increase on the previous year in injury reports. Relative fatal collisions increased by 14% in 2013 but reduced again in 2014, although reported injury that year increased by 16%. The reduced rate of road deaths at 42 per million of population puts Ireland among the better performers in the world.

Chapter 3 on claims costs demonstrated a significant reduction in motor claims volumes in 2013 from the spike in the recession years around 2008. The trend in average claims cost, however, was on an upward spiral since 2010 but those values are based on heavily estimated figures by insurers. The run-off of those reserves over the subsequent five years will provide the ultimate profile and will be an interesting subject for future research.

4.7 Challenges with accident data

National newspapers highlighted that fatalities in 2015 were the second lowest since records began.[190] Unfortunately, fatal collisions in 2016 at 174 represented a 12% increase on the previous year. This trend reversed by 2018 which recorded the lowest ever level of fatalities recorded since records began in 1959.[191]

While deaths on the roads are, rightly, a priority for public policy they are viewed differently in financial terms from a safety perspective than their valuation in tort damages.

Kelleher (1995) was essentially correct in his calculations of the cost benefit analysis for avoiding accidents. However, he employed risk management figures which were used at that time to economically justify a range of safety investments. These are very different valuations from compensation criteria which was the focus of that debate at that time on capping damages.

In 2002 Goodbody Consultants recommended the following 'menu of prices' to the Road Safety Authority.[192]

The following values for cost per accident (at market prices) are recommended:	
Fatal	€2,280,000
Serious injury	€304,600
Slight injury	€30,000
Damage only	€2,400

Table 4.8 - Goodbody C.19: Road Accident Costs by Type of Accident 2002

The basis of these calculations do not reflect the measure of compensation awarded in tort. In terms of total costs, serious injury claims would be many multiples of the figure recommended above. In contrast, fatalities are often the least expensive claims. There is a Statutory maximum for a fatality in the absence of a dependency

[190] Road deaths for 2015 are the second lowest since records began. http://www.thejournal.ie/road-deaths-2015-2526510-Jan2016/

[191] https://www.irishexaminer.com/ireland/last-year-saw-fewest-fatalities-on-irish-roads-since-records-began-465174.html

[192] To employ a term used by Jules L. Coleman in 'Doing away with tort law' (2007) Loy. L.A.L.Rev. 1149 at p.1163

claim. The risk management approach also factors in the cost of policing and lost output for the economy which do not feature in tort costs nor, therefore, in insurance rating. It is not defensible to use these values as a measure of avoidable tort claims costs in the insurance context.

4.8 Non-motor Workplace Accidents

Binchy (2004) highlighted what he considered the *"egregious negligence"* of employers. There are undoubtedly examples of such behaviour and criminal sanctions have been pursued with heavy fines imposed in many instances, particularly for fatalities. However, the quotidian picture is not as bleak as might be inferred from his article. Indeed, claims involving the most *"egregious negligence"* are often settled quietly without any oral hearing or those involving groups of claims are assigned to special tribunals rather than being left to the vagaries of tort litigation.[193]

Chapter 3 on claims costs emphasised that Employer Liability insurance is not compulsory in Ireland. However, reporting of accidents to the Health & Safety Authority is a requirement by law. For statistical robustness, the frequency of workplace accidents is best viewed in the context of numbers of people employed at any one time.[194]

Unemployment rose sharply during the economic downturn after the financial crash in 2008 but started to improve in 2014. At a time when premium charges were falling up to 2013, the numbers of reported workplace accidents since 2008 had generally reduced in number but were relatively stable compared to the number of people employed. That data on fatalities and injuries is set out in the table below for the years 2008 to 2015 relative to the workforce:

[193] The most recent example is the cervical smear test scandal in 2018.
[194] Health & Safety Authority Annual Reports at www.hsa.ie

	2008	2009	2010	2011	2012	2013	2014	2015
Fatals	57	43	48	54	48	47	55	56
Injury	8069	7002	7583	7094	6804	6598	7431	7775
Total	8126	7045	7631	7148	6852	6645	7486	7831
000's employed	1966	1961	1882	1850	1851	1881	1913	1964
As % of Workforce	0.41%	0.36%	0.41%	0.39%	0.37%	0.35%	0.39%	0.40%

Table 4.9.1 – Numbers of reported fatal and injury workplace accidents

While it is not acceptable to be complacent about accidents, there is no evidence of a major deterioration in the trend of negligence. Less than half a percent of the workforce are reported as being involved in accidents.

Obviously, it must not be assumed that all accidents are caused by someone else's negligence. It seems that many employees share that view as EL claims registrations with PIAB have been rather static relative to the size of the workforce.[195]

	2008	2009	2010	2011	2012	2013	2014	2015
Workforce 000's	1966	1961	1882	1850	1851	1881	1913	1964
PIAB EL claim no's	4,390	4,119	3,742	3,866	3,828	4,040	4,368	4,843
Ratio	0.22%	0.21%	0.20%	0.21%	0.21%	0.21%	0.23%	0.25%
PIAB EL claims v H&SA accidents								
Claims/Accidents	54%	58%	49%	54%	56%	61%	58%	62%

Table 4.9.2 –EL claims lodged with PIAB v workforce & accidents

To judge from the volume of Employers' Liability claims lodged with PIAB relative to reported workplace accidents, it seems just over half result in personal injury claims.

Chapter 3 on claims costs demonstrated a significant reduction in EL claims volumes in the statutory returns of insurers from the spike in the recession years around 2008. There had been a similar spike in volumes during the 'Celtic Tiger' years of peak economic activity around 2000 and 2001. The trend in average claims cost, however, was on an upward spiral since 2010 but those values are based on heavily

[195] Alternatively, the injuries sustained may have been considered too minor to warrant pursuit of compensation.

estimated figures by insurers. The run-off of those reserves over the subsequent five years will provide the ultimate profile.

In terms of the trends in workplace accidents, there is no compelling evidence of increasing "*egregious behaviour"* by employers. The purpose of PIAB was not to tackle those outliers which are the responsibility of the Health & Safety Authority to police.

For Public Liability claims there is no central monitoring of accidents unlike the comparators available in motor and workplace occurrences. Analyses of claims costs presented in Chapter 3 reflected a spike in volumes during the recession years around 2008.

4.9 Conclusions on academic assertions about accident frequency

The assertions by commentators reviewed in Chapter 2 who canvassed for accident prevention as a preferable focus of reform are not supported by the data. The increases in insurance costs pre-reform were not caused by deteriorating accident frequency and the safety profile improved further when premium rates decreased.

However, for the post reform period it must be acknowledged that parallel measures on road safety were introduced, as recommended by MIAB. Accordingly, it is not possible to conclusively identify whether reducing premium charges experienced between 2002 and 2013 would have led to more negligence in the absence of that closer monitoring of driver behaviour through criminal law mechanisms. For liability insurance, it is not possible to arrive at conclusions because of alterations in the market which are addressed in Chapter 6 on insurer profitability.

When a new insurance cost crisis emerged recently, there was a renewed focus by lawyers in 2017 on accident frequency although road fatalities had reduced to the lowest level on record. The prevention of accidents should be a societal priority for reasons far greater than the cost of insurance. However, reform of the injury redress process, to reduce the cost of claims and improve the speed of resolution, need not

be mutually exclusive objectives as contended for by some commentators reviewed in Chapter 2.

Chapter 5 – Justice and Fairness

To what extent are the legal academic criticisms of the reforms on the basis of justice and fairness, including speed of resolution, defensible in light of the outcomes?

5.1 The academic concerns about PIAB in the context of justice & fairness

As reflected in Chapter 2, most commentators considered that the tort system was perceived to be riddled with exaggerated and fraudulent (loosely so called) claims. That standalone aspect might be labelled justice for defendants in a '*fight against freeloaders*'. That issue in addressed separately in Chapter 7 on exaggerated claims.

As Hedley (2004) stated it was not difficult to criticise the pre-reform system in which "*much of the money circulating in the system ends up with the lawyers and insurers".* Data on litigation costs were analysed in Chapter 3 and the insurer issues are addressed in Chapter 6.

Overall, academics expressed a preference for the *status quo* so it is necessary to interrogate data on the pre-reform system to address their concerns about what they saw as the negative potential of the reforms.

Binchy (2004) had a fundamental objection to the establishment of PIAB. He considered that "*the legislation violates the constitutional right of access to the courts, the right to litigate or the principle of equality."*[196] The extent to which "*access to the courts*" was a reality, and whether that has changed, is subjected to statistical scrutiny. The principle of '*equality of arms*' was addressed in the first of the judicial reviews against PIAB by a decision of the Supreme Court.[197]. That reasoning in that decision is reviewed later in this chapter.

[196] William Binchy (n70) at p8.
[197] *O'Brien (& the Incorporated Law Society of Ireland) v PIAB* [2008] IESC 71.

Ilan (2009), while acknowledging the "sluggish" court system, expressed the preference of academics for the *status quo*.[198] However, in the context of welcoming the provision of a *"rational book of quantum",* he also expressed a concern about the equity of early settlements and questioned *"what mechanisms are in place to monitor settlement offers, and by extension justice for claimants*."[199] There were no such mechanisms in place before the reforms but after the reforms the adequacy of settlements was reviewed so those findings will be explored to assess the validity of that concern. The comparability of awards values as between PIAB and the courts will also be analysed to assess equity between those two settlement channels.

Speed of resolution was a concern raised in many commentaries reviewed in Chapter 2. Indeed, in early 2004 the Incorporated Law Society of Ireland complained about the proposed reforms to the Human Rights Commission.[200] That did not secure condemnation of the PIAB Act 2003 subject to one proviso - unless there was an '*unconscionable delay*' in proceedings.[201] Finalisation periods, which some predicted would deteriorate because of PIAB, are a key marker that can be subjected to quantitative assessment as presented later in this chapter. The results seem to indicate a radical change in the legal culture.

Quill (2005) seemed to rely on the assertions by barristers that PIAB would be "*an additional administrative procedure"* for plaintiffs.*[202]* The inference is that PIAB would achieve very little by the speed and economy of its assessments because it would only be a preliminary step before proceeding to traditional litigation. That view was later supported by Patton (2012) in a four year review of PIAB which stated that award numbers were falling steadily and that "*it remains the reality that as the new system matures beyond infancy it has seen a steady decline in the number of claims successfully reaching completion. Parties are turning to the courts once more*

[198] Jonathan Ilan (n37) at p56 -58
[199] Ibid at p62.
[200] Gazette January 2004 page 9. "*We are at present assisting the Human Rights Commission, which is investigating very seriously our complaint that the rights of accident victims are likely to be violated by PIAB".*
[201] Human Rights Commission decision 5th April 2004 re PIAB Act 2003.
[202] Eoin Quill (n83).

to resolve their claims, hoping for a larger pay-out." Fenn (2006) also conveyed the impression that PIAB was merely a first step before proceeding to court. These concerns can be addressed by longitudinal analyses of acceptance rates and relative values of the awards.[203]

5.2 PIAB procedure in detail

Because the PIAB process is criticised by commentators in Chapter 2 in terms of justice and fairness, it is necessary to explain the framework in some detail to assess the robustness of their concerns.

Additionally, because much tort literature tends to focus on the most vulnerable of claimants and/or on the most seriously injured, it is also necessary to be clear about the types of injury claims annually in Ireland so as to put the PIAB role in context. As Rasnic (2004) identified:

> *"In Ireland, personal injury cases alone comprise about one-half of the workload of solicitors and barristers."*

The value bands into which these cases fall will be presented later in this chapter but for overview purposes below is the categorisation of claim by type of accident as between Motor, Employer Liability and Public Liability notified to PIAB:

Year Notified	2009	2010	2011	2012	2013	2014	2015	2016	2017
Motor	58%	59%	59%	59%	60%	60%	59%	55%	56%
Employer Liability	16%	14%	14%	13%	13%	14%	14%	14%	17%
Public Liability	26%	27%	27%	28%	27%	26%	27%	26%	27%

Table 5.2 - Annual Claim Notification proportions by accident type

Motor accidents are the predominant cause of injury claims.

[203] In cannot be assumed that all court awards are accepted as justice in action given that many are appealed and research on the Court of Appeal indicates than over half of High Court decision are overturned.

The proportionality of claims as between each category above has remained relatively stable over the years. With the exception of medical negligence, every personal injury claim must be registered with PIAB whether it is to proceed to assessment within that non-adversarial model or is being released to litigation from the outset. This research, therefore, is based on the complete national data set rather than sampling which was the method employed by Deloitte and by researchers for McAuley.

On its website, and in a number of publications, the PIAB sets out the assessment process for those straightforward cases in 6 steps:

1. If the parties cannot agree a direct settlement, referral of all such injury claims to PIAB is mandatory. The claimant submits a simple form with a medical report from their treating doctor along with details of any financial losses or outlays to date and anticipated in the future.[204]

2. PIAB sends a copy of the application to the Respondent. That potential defendant has 90 days to conclude their investigations and indicate whether they consent to an assessment proceeding or whether they intend to proceed to Court.[205]

3. If the case involves legal arguments the PIAB issues a Release Certificate which authorises proceedings to be commenced if the claimant chooses to pursue the matter further. [206]

4. PIAB operates a 'documents only' procedure. Once the Respondent has consented to an assessment proceeding they are essentially excluded from

[204] Application form available on http://www.injuriesboard.ie/eng/Forms-Guidelines/. The claimant pays a fee of €45 which is refunded as part of the award. This amount compares to the Court fee for issuing a personal injury summons which ranges from €90 to €400 depending on the amount of compensation sought.

[205] Failure by the Respondent to reply within 90 days results in the case proceeding by default.

[206] Those proceedings must be initiated within the period permitted by the Statute of Limitations, which is two years from date of accident (or from knowledge of accrual of action) plus up to a further 6 months from date of authorisation by PIAB.

the process until the award is determined. There is no role for advocacy and therefore no provision for payment of legal fees, except in vulnerable cases.[207] The question of whether and to what extent an injury has been sustained is a medical one. At initial application stage, the treating doctor summarises the injuries and the treatment already recorded on the patient's file, and for which the doctor's treatment fees will be awarded as part of the claim. In contrast, the member of the independent medical panel undertakes a *de novo* examination of the claimant and establishes from the medical records what injuries and treatment were involved. Once there is a stable prognosis it is the report(s) from members of the Independent Medical Panel that form the basis of the compensation award.

5. The ethos of the PIAB could be described as inquisitorial rather than adversarial. The role of the assessors is to get to the heart of the damages claim and ensure that the claimant secures that to which they would be entitled on the basis of 100% liability. This is done by employing PIAB's own expertise rather than two sets of professional witnesses on actuarial, accounting, taxation and other such calculations upon which fees would be incurred in litigation. Special Damages for wage losses are awarded at levels consistent with declared earnings history. [208] That was a change introduced by the Civil Liability & Courts Act 2004 so that undeclared earnings from the black economy can no longer be recovered. [209] In this context, PIAB have relevant information directly from both the Revenue Commissioners[210] and Department of Social Protection.[211]

[207] For example, infants and fatalities where Court rulings are required.
[208] This point was highlighted by Binchy who placed responsibility for such recovery on defendants but previous Court precedents held that plaintiffs could recover proven losses regardless of tax compliance.
[209] Civil Liability & Courts Act 2004 Section 28. Income undeclared for tax purposes shall be disregarded, unless the court considers that in all the circumstances it would be unjust to disregard such income, profit or gain.
[210] PIAB Act 2003 at Section 28.
[211] PIAB Act 2003 at Section 26.

6. At the end of the process, the parties are free to reject the PIAB award and the required Release Certificate will be issued for litigation. There are, however, downsides for unreasonable refusals of awards.[212] For example, if a claimant rejects a PIAB award of €30,000 then when proceedings are served that amount automatically stands as the defendant's tender. Alternatively, a lower figure can be lodged to reflect defence costs and/or allegations of contributory negligence. In keeping with the long standing lodgement practices in the Courts, if that figure of €30,000 is not subsequently exceeded, the plaintiff will not receive any award of costs and may also be responsible for the defendant's costs. A PIAB award is not 'an offer of settlement', as some describe it, but is an independent statutory award which is enforceable by the same mechanism as a judicial decree.

To an extent, the difficultly many lawyers seemed to experience with understanding the PIAB process may arise from their training and education.[213] As a result they are likely to have an innate preference for an adversarial system. It seems nobody likes change.[214]

The default position of lawyers (and some academics) seemed to be that all claimants are vulnerable and that every case involves '*essentially contested concepts'*. [215] In contrast, the potential plaintiff and potential defendant may not necessarily view matters in that light. This is now evidenced by the extent to which early settlements are concluded directly without litigation and even without

[212] An amendment was introduced in 2007 to curtail abuse of the process where a PIAB award would be rejected but the same amount accepted upon issuing of proceedings which then carried an entitlement to legal costs. This lacuna was widely covered in lawyers' professional publications until it was resolved.

[213] The extent of PIAB seminars held countrywide by the Law Society for their Members was unprecedented. Gazette July 2004 p6. In total 1,000 solicitors attended law Society seminars. That held on 31st May 2004 was '*the biggest educational seminar ever organised by the Law Society*'.

[214] Evidence to the Joint Parliamentary Committee by PIAB on 25th October 2006 outlined the extent to which their service centre had to spend time dealing with queries from solicitors on interpretation of the new legislation.

[215] Gallie, W.B.(1956a), "*Essentially Contested Concepts*", Proceedings of the Aristotelian Society, New Series, Vol. 56 (1955 - 1956), pp. 167-198 Published by: Blackwell Publishing on behalf of The Aristotelian Society.

proceeding through the full formal PIAB process. It is possible that '*just settlement*' can be '*a just settlement*' provided there is a truly independent expert and a neutral assessor of entitlements. That is quite different from enforced compromise, by mediation or otherwise, about which there are many reservations in the literature.[216]

As recognised by Patton (2012), there is really no role within PIAB for representation in the traditional sense where two identical cases could secure different outcomes because of the skill or otherwise of their advocates and because of the identity of the judge drawn on the day. That does not serve the justice concept of 'equality of arms'. As there are no issues on liability in the PIAB process, there is no opportunity to, nor necessity for, influencing the assessors.

In terms of the extent of injuries sustained, the Medical Panel undertake their role independently and are neutral. Financial losses are the subject of documentary proofs, as is explained to claimants by the Service Centre at the outset and by the assessors in the course of the process. That is also clear from the PIAB website.

Most of the representational activity by solicitors is expended on trying to secure legal costs, as is reflected by the theme of judicial reviews. This may have influenced some of the academics reviewed in Chapter 2 to argue for the payment of legal fees in the PIAB process. However, as Patton (2012) commented in the context of the simplicity of the PIAB process:

> *"The entire process is explicitly designed to facilitate the exclusion of legal representation. The application procedure is simplified to the extent that consultation with a legal professional would be superfluous."* [217]

[216] Such as Dame Hazel Genn,'Judging Civil Justice' Hamlyn lectures 2008. But for low value non-injury civil cases, Birmingham was found to be an exemplary scheme - Webley, Lisa and Abrams, Pamela and Bacquet, Sylvie, Evaluation of the Birmingham Court-Based Civil (Non-Family) Mediation Scheme (September 1, 2006). Available at SSRN: http://ssrn.com/abstract=1349874 or http://dx.doi.org/10.2139/ssrn.1349874.

[217] Patton's views reflect the decision on costs in *Plewa v PIAB* [2010] IEHC 516.

The academic assessment above accords with the decisions of the High Court and Supreme Court which are reviewed later in this chapter.

5.3 Denial of Right of Access to the Courts

Most legal academics expressed a preference for the *status quo,* according to Ilan (2009):

> "*Legal academics have pointed to the suitability of the previous litigation regime"*

Binchy (2004) expressed it most strongly, that establishment of PIAB violates the "*right of access to the courts*".

To assess the validity of those concerns it is necessary to examine the pre-existing reality, and the extent to which is was disturbed by the reforms, as well as assessing at what level the less serious claims actually required access to the courts in the pre-reform period. There was also some statistical analysis undertaken by Patton (2012) on trends in litigation volumes which he indicated as evidence of the 'failure' of PIAB and those calculations must be tested for validity.

Historically, in overall terms there are c.30,000 personal injury claims in Ireland annually. That figure remained relatively stable for a decade in the pre-reform period. Annual data is published by the Courts Service on the volume of claims commenced on the litigation route and the proportion that proceeded to trial. Traditionally, accountability for productivity was not a priority in the courts so reporting on the number of injury awards did not exist before October 2002. Until 2006 the Courts Service had to undertake some sampling and provide estimates of the number of injury cases initiated in the Circuit Court since 2000.

During early 2004 there was a rush by lawyers to initiate proceedings in every case on their books to avoid the commencement date of PIAB operations on 22nd July

2004.[218] On Friday 23rd July 2004 it was reported that 5,000 claims were lodged with the High Court's Central Office in the previous five days, 20 times the usual volume for a week. [219] Accordingly, data on proceedings from 2004 to 2006 must be regarded as statistical outliers.

The year 2006 was the first full operational year of PIAB so the court data before that time is reflected in the table below:

Number of Injury Claims initiated in litigation			
Year	High Court	Circuit Court	Overall
2000*	10,480	20,000	30,480
2001*	12,335	22,000	34,335
2002*	10,641	21,000	31,641
2003	11,245	20,000	31,245
2004	15,293	20,000	35,293
2005	746	3,000	3,746
2006	2,673	5,000	7,673

Table 5.3.1 - Number of Injury Claims initiated in litigation 2000-2006

To use the 2005 figure above for trend analysis, as done by Patton (2012) to assert that there was an "*800% increase on the number filed the year after the Board came into operation"*, would obviously not be robust because it is a statistical outlier resulting from a rush of summons being issued in 2004.

A measure of the relative seriousness of injury claims during this period can be identified by comparing the volume of High Court summons to those issued in the Circuit Court where the financial limit was €38,000 until 2014.[220] The figures for the years 2000 to 2006 are set out in the table below and the column on the right expresses the less serious Circuit Court cases as multiples of High Court, although it

[218] Notices in the Law Society Gazette of June 2004 had announced extended opening hours of the Central Office to facilitate this strategy.

[219] Rush in compensation claims before PIAB takes effect. Irish Examiner 23rd July 2004. http://www.irishexaminer.com/breakingnews/ireland/rush-in-compensation-claims-before-piab-takes-effect-158340.html?utm_source=link&utm_medium=click&utm_campaign=nextandprev#

[220] The District Court did not adjudicate on personal injury actions at that time.

must also be mentioned that there was no sanction during that period for initiating a claim in a higher jurisdiction than necessary:

Number of Injury Claims at Circuit v High Court			
Year	High Court	Circuit Court	Circuit/High
2000*	10,480	20,000	1.9t
2001*	12,335	22,000	1.8t
2002*	10,641	21,000	2.0t
2003	11,245	20,000	1.8t
2004	15,293	20,000	1.3t
2005	746	3,000	4.0t
2006	2,673	5,000	1.9t

Table 5.3.2 - Number of Injury at Circuit v High Court level 2000-2006

In broad terms, twice as many claims were initiated at the lowest jurisdictional level than were commenced in the High Court. Again, the relativity measure on seriousness for 2005 at a multiple of four is obviously a statistical outlier - as is 2004 in the High Court with a multiple of 1.3 of Circuit Court volume and this was the year PIAB commenced operations in July.[221]

While resource planning in the courts would not be based on the assumption that all proceedings issued would proceed to trial, a measure of court productivity can be devised by comparing awards made to the volume of litigation initiated annually. The limitations of the available data mean it is only possible to reliably review the extent of "access to the Courts" for the period 2002 to 2006 in respect of the pre-reform period. That data on awards by the courts is presented in the table below:

Number of Awards in personal injury			
Year	High	Circuit	Overall
2002*	612	1,736	2,348
2003	433	1,722	2,155
2004	492	1,182	1,674
2005	301	1,054	1,355
2006	173	1,102	1,275

[221] At that time, a High Court Writ could be issued stating little more than the identities of the parties.

Table 5.3.3 - Number of Court Awards in injury cases 2002-2006

A significant reduction in the number of High Court awards by 2006 will be noticed, down to 173 from 612 in 2002. Judicial resources were diverted to areas where their expertise was more essentially required.[222]

What might not be appreciated by another researcher reviewing these crude numbers is that there was a timing lag in cases emerging from the PIAB process which subsequently may have proceeded to trial. The extent to which the reforms merely presented "an additional" layer before proceeding to litigation, as apprehended by Quill (2005), must be assessed. Additionally, my insider perspective can identify that from 2011 there was a new feature of a surge in medical negligence claims, which are outside the remit of PIAB, and this created additional workload for the High Court.[223]

The Vanishing trial

It is somewhat of a false analogy to compare PIAB to the *status quo* of the adversarial court system.[224] The Law Society had called for oral hearings in the PIAB model. [225] Even before the reforms, only a small volume of litigation was proceeding to trial to secure determinations on personal injury claims. In terms of delay and cost, it seems illogical to approach every case as if it will result in a hearing when historically so few ever proceeded to that point in the civil justice system.

[222] Such as to Chair Tribunals of Enquiry on various public scandals.

[223] It was only from 2011 that Medical Negligence became a feature of reported High Court summons and data in that category were published by the Courts Service.

[224] This false analogy was also adopted by the Law Society as *amicus curia* in the first judicial review *O'Brien*.

[225] The Law Society had rejected a Government proposal in 2001 based on the McAuley reports which would have involved oral hearings by a three-person panel and would have granted awards of costs.

As demonstrated in the next section, 17% of litigation was proceeding to trial in 2006 which was an outlier but this subsequently fell steadily to 8% by 2017. Research of the literature indicates that this may be a fairly international feature of tort.

In a series of articles published in November 2004 the concept of the 'vanishing trial' is credited to Galanter (2004). [226] His article on the American jurisdiction reviews the considerable research undertaken by others on this subject in federal and state courts in America.[227] Most of the main causes identified, such as early case management by the judiciary and strike outs, do not apply in the Irish system.[228] The referral of cases to other fora, such as arbitration or mediation, similarly do not apply.[229] In 2015 there was one defendant in the High Court in Ireland who proposed ADR for multiple claims but such an approach does not reflect the norm. [230]

Galanter is of the view that the courts rely on costs barriers and delays to induce settlements or to force abandonment of claims.[231] These are obviously not features of the PIAB system. There is a minimal application fee of €45 for the claimant and no exposure to defendant costs. There is a statutory maximum period for assessors to conclude assessments which is 9 months.

There is one suggestion by Galanter as to why 'big cases' go to trial which is of particular interest in the Irish context.

[226] Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) Journal of Empirical Legal Studies. 1.3: 459–570.

[227] Again, in contrast to America, juries were abolished for personal injuries trials from 1988. That measure did not result from the levels of damages awarded by juries *per se* but because of the inconsistency of awards which was a failure to treat 'like cases alike' contrary to a principle of justice. It was also hoped that trials would be shorter so that legal costs would be reduced. None of those objectives were achieved.

[228] Galanter (n226) at p515.

[229] Ibid at p514.

[230] These were products liability claims in relation to defective parts for hip replacement operations. "Judge orders 'innovative' solutions in DePuy hip implant cases". Irish Times 29th October 2015. http://www.irishtimes.com/news/crime-and-law/courts/high-court/judge-orders-innovative-solutions-in-depuy-hip-implant-cases-1.2410744

[231] Galanter (n226) at p516.

"Willingness to invest may reflect anticipated precedential effects, both doctrinal and projecting readiness to fight, as well as commitment to principles."[232]

In fact, data from Ireland indicates that claims in the lowest jurisdiction at the District Court are twice as likely to proceed to trial. This is so even despite the increase in 'medical negligence' cases at High Court level which are the most trial prone. [233] Below is a table of the summons issued at each of the three financial jurisdictions:

Court Summons	***2006***	***2007***	***2008***	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
High Court	*2,673*	*5,951*	*6,466*	7,099	7,068	8,179	8,791	9,561	7047	7,219	8,510	8,909
Circuit Court	*5,000*	*7,154*	*6,931*	6,999	7,567	7,821	8,073	8,505	9852	10,631	12,230	12,497
District from 2014									864	1142	1,158	1,011
PI Summons	*7,673*	*13,105*	*13,397*	14,098	14,635	16,000	16,864	18,066	17,763	18,992	21,898	22,417

Table 5.3.4 – Litigation Summons Issued 2006-2017

Armed with that data above on the volume of summons issued at each level, it is necessary to compare the proportion of litigation that proceeded to trial in the different jurisdictions over the same period as below:

Court Awards	***2006****	***2007****	***2008****	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
High	*173*	*133*	*124*	408	392	343	375	590	1018	469	390	400
Circuit	*1,102*	*968*	*966*	931	980	1,213	1,485	1,109	509	1,012	977	1,075
District from 2014									433	501	535	374
Total	*1,275*	*1,101*	*1,090*	1,339	1,372	1,556	1,860	1,699	1,960	1,982	1,902	1,849

Table 5.3.5 - Court Awards 2006-2017

[232] Ibid, footnote 104 at p17.

[233] There have been repeated criticisms by the High Court of the State Claims Agency for their approach in fighting these cases. See for example Irish Times 22nd March 2014. '*Judge urges overhaul of clinical negligence cases*'. http://www.irishtimes.com/news/crime-and-law/courts/judge-urges-radical-overhaul-of-clinical-negligence-cases-1.1734166.

The asterisks in the tables above for years 2006-2008 are to emphasise that they are outliers, as previously identified.

The highest proportion of claims that proceeded to full trial over this was in the District Court. From February 2014 the financial jurisdiction of the lowest jurisdictional level, being the District Court, was trebled to €15,000 and it commenced determining injury claims for the first time. In the initial result, 50% of cases issued proceeded to trial but this had reduced to 37% by 2017 as reflected in the table below:

Awards v Summons	***2006****	***2007***	***2008***	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
High	*6%*	*2%*	*2%*	6%	6%	4%	4%	6%	14%	6%	5%	4%
Circuit	*22%*	*14%*	*14%*	13%	13%	16%	18%	13%	5%	10%	8%	9%
District									50%	44%	46%	37%
Awards % Summons	*17%*	*8%*	*8%*	9%	9%	10%	11%	9%	11%	10%	9%	8%

Table 5.3.6 – Court Awards v Summons Issued 2006-2017

Cumulatively over this period, only 10% of litigation issued proceeded to secure an award and that relativity had reduced to 8% based on the 2017 data. Undertaking an aged analysis by comparing summons to trials one or two years later does not provide a significantly different insight into the low levels of litigation which proceed to a hearing. Only 1% of claims annually are heard in the High Court.

Before delving deeper into that data, there are further insights from the literature which seem to identify the extent to which Ireland provides a unique opportunity for this case study.

Rasnic (2004) proposes an alternate conclusion from the American data on vanishing trials:

> *"Conversely, a second analysis of the data focuses instead on the rarity of trials in courts and the negative rhetoric and rules stemming from courts about trials. The data could mark the* privatization *of disputing processes, whether located in or out of courts."* [234]

[234] Carol Daugherty Rasnic (n78) at p783.

It seems clear from that article that this writer's main concern is about the restraints on public funding which she fears will result in devaluation of trials. My contrary hypothesis is that if the 'unnecessary' trials were removed from the court system, more resources could be freed up for the trials that would prove to be of value in the wider context.[235]

At that 2004 conference Friedman, a legal historian, stated that the *"mythic portrayal of the trial"* is not the norm, and "[*has] not been the norm for quite some time*." [236] From the perspective of this case study his next point is of even more interest:

> *"insofar as the* "trial" *did exist, it served a function that the legal system no longer cares to fulfill, at least not in the traditional way. This function was a didactic or theatrical or educational function."*[237]

Dealing with the "e*ducational function"* in the context of tort encompasses the deterrence effect by decisions providing a guide to behaviour. However, only a small proportion of the c.2,000 negligence trials *per annum* provide anything transferrable beyond the fact matrix of the individual cases.

Friedman, citing Molot, observes that the "*judicial role today is not what it used to be*" in America:

> "*Judges used to rely on the parties* "to frame disputes," *at which point the judges would resolve issues on the basis of* "legal standards." *But today "*overcrowded dockets and overzealous litigants have led judges to stray from this passive role*." Now judges take an* "active, largely discretionary approach to pretrial case management." *Molot's description would strike most social scientists who study law as naïve."* [238]

[235] While I advocate efficiency measures in the Courts, such as case management, I do not support the concept of a 'managerial judiciary'.

[236] Lawrence Friedman, 'The Day Before Trials Vanished' (2004) J. Empirical Legal Stud. 1: 689.

[237] Ibid at p689.

[238] Ibid 690 cites from - Jonathan T. Molot, 'An Old Judicial Role for a New Litigation Era' 103 Yale L.J. 27, 29 (2003).

It seems some commentators pine after 'the good old days of yore'. This yearning is not only for trials but trials as they ought to be, the 'classic trial' as Friedman dubs their view. Unlike in America, judges in Ireland have not been diverted to case management so that does not explain the diminishing trial trends observed in this jurisdiction.

5.4 PIAB is a misleading myth about dispute resolution

The critics of the PIAB seem to be indulging in myth with a preference for the *status quo* involving 'testing' of cases in Court. This harks back to an era that has changed internationally. [239]

In an article published in 2005 Lande describes the 'vanishing trial' concept as a misleading myth:

> *"a myth defined as a* "popular belief or story that has become associated with a person, institution, or occurrence, especially one considered to illustrate a cultural ideal." *Human societies need myths to help provide meaning for life. Social scientists find that myths are powerful in modern societies as popular stories are integrated into individuals' and organizations' core values and beliefs."* [240]

In that article he goes on to address myths in the civil law context.

> *"There are other trial myths as well. An inspiring myth of trials is as vehicles for justice in which the little guy overcomes odds and prevails in the end. This myth sometimes extends to the legal system generally, with courageous appellate judges issuing controversial rulings that establish precedents to help people get justice in the future. Presumably these myths are appealing to many people who are concerned that trials are vanishing."*[241]

[239] Marc Galanter had also tackled myths or what he called quarter-truths in 'News from Nowhere: The debased Debate on Civil Justice' (1993) Denv. U.L. Rev., 71, 77.

[240] John Lande, 'Replace *'The Vanishing Trial'* With More Helpful Myths' (2005) Alternatives to the high cost of litigation, 2(10) pp161-170 at p168.

[241] John Lande, 'Shifting the focus from the myth of *'The Vanishing Trial'* to complex conflict management, or I learned almost everything I need to know about conflict resolution from Marc Galanter' (2004). Cardozo J Conflict Resol., 6, 191 at p195.

While not denying the robustness of the research by Galanter and others, Lande counsels a different approach:

> *"Rather than anthropomorphizing the procedures into being the protagonists in these stories, we should celebrate humans and their wise and caring actions when working with conflict. This includes judges and lawyers who choose between the various procedural options—including, but not limited to, trials—to promote appropriate goals for litigants and societies."* [242]

In that parallel article in 2005, Lande extols the virtues of complex conflict management systems. While of overall interest in terms of seeking fair outcomes in the civil justice administration of tort claims, none of those avenues were available in Ireland during the pre-reform period. They equally do not provide explanations for the apparent change in legal culture since the introduction of the reforms, which some commentators reviewed in Chapter 2 had predicted.

5.4 Delays in Speed of Resolution

The data certainly supports the assertions by the commentators reviewed in Chapter 2 about excessive delays in the pre-reform system.[243]

Patton (2012) challenged the comparisons made by PIAB to their finalisation periods as against the pre-reform period so that must be tested with previously published research.

A report published in 1996 by Deloitte indicated it was taking five years on average for cases to reach trial before victims were compensated through court awards. [244] That report was based on sampling because comprehensive records were not kept of personal injury summons and awards.

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[242] John Lande (n241) at p170.
[243] In the taxation of costs, time is a measure in assessing allowable fees.
[244] Deloitte & Touche 1996 report to the then Minister of State for Industry & Commerce. *The Economic Evaluation of Insurance Costs in Ireland*' Department of Enterprise, Trade & Employment, Dublin, Ireland.

In 2001 further research found that the average waiting time from date of claim to trial had improved to 36 months on average.[245] That study was again based on sampling but it extended beyond court awards as it was on data in files from insurance companies in Ireland and England.

The data expresses the delay period in terms of days from the date of the accident before the claim was intimated. It then records the days from the date of claim to finalisation at trial. It also provides a comparison of claim turnover in Ireland to findings on files from insurers in England which is the other main common law jurisdiction in the EU. Those findings are reproduced in the table below:

Days Delay – Motor Claims	**Ireland**	**England**	**Ireland/England**
Date of accident to claim	113	71	1.59
Claim to settlement	796	261	3.05
Claim to initiation of settlement	666	175	3.81
Claim until proceedings	371	190	1.95
Date of claim until trial	1007	241	4.18

Table 5.4.1 - Days of Delay – Motor Claims Ireland v England 1997

Source: McAuley Report Table 11, page 121

On the last line in the table above, the 1007 days from date of claim to trial equates to 36 months. That was four times longer than in England. As claims in Ireland on average were not lodged until 113 days post-accident, that adds another 4 months. Therefore, in those cases the average wait was 40 months from accident to resolution at trial. Taking the 796 days from claim to settlement without trial which averages 28 months and given that claims were not lodged 4 months post-accident that equates to 32 months. Under the terms of the Civil Liability & Courts Act 2004 claimants are required to notify their intention to claim within two months of an accident although there is no known case of where a sanction was imposed for non-compliance.

[245] Second Report of the Special Working Group on Personal Injury Compensation 2001 – known as 'The McAuley Report'. Reproduced at paragraphs c.158-160 in MIAB Report 2002.

Focusing solely on cases in that previous sampling which were the subject of litigation, the comparison of delays in Ireland deteriorated further in the comparison to England. Once proceedings were issued, it took Irish lawyers six times longer than their English counterparts to initiate a settlement. Those findings are reflected in the table below:

Litigation Cases – Days from commencement	**Ireland**	**England**	**Ireland/England**
To settlement	614	130	4.72
To defence	265	32	8.28
To trial	721	178	4.05
To initiation of settlement	486	81	6.00

Table 5.4.2 -Litigation Cases - Days from commencement of proceedings

Source: McAuley Report Table 12, page 121

It can be seen above that in litigation cases it took 721 days, or twenty-five-and-three-quarter months, from instigation of litigation to trial. In litigation it took 486 days, nearly seventeen-and-a-half months, on average from instigation of litigation for a settlement at a pre-trial stage.

The difference from previous research is that this current case study is based on the entirety of national data over a number of years whereas the McAuley and Deloitte reports relied on sampling.

Returning now from the previous reports to the current research, it is necessary to examine the volume of litigation which actually proceeded to trial pre-reform.

Some commentators reviewed in Chapter 2 indicated this would not alter radically because PIAB would merely be another layer in the system before litigation. Data for the period 2002 to 2006 is reflected in the table below showing awards as a percentage of summons issued annually:

No of Awards as % of initiated injury claims			
Year	High Court	Circuit	Overall
2002	6%	9%	8%
2003	4%	8%	6%
2004	5%	6%	5%
2005	3%	5%	4%
2006	1%	6%	4%

Table 5.4.3 - Awards as proportion of initiated claims 2002-2006

Overall, in 2002 some 92% of litigation did not proceed to trial and this had risen to 96% by 2006. In the latter year, it is noticeable in the High Court that 99% of summons were not reflected in trials compared to 94% in 2002. This is the system for which many academics expressed a preference, although it is not but that the deficiencies in the litigation system were acknowledged. As identified by Patton (2012), these were highlighted in a review chaired by Mrs Justice Susan Denham published in June 2004.[246]

"Personal injuries procedures in the High Court need a comprehensive overhaul, according to a new report. The system currently in use is 'not appropriate to modern personal injuries litigation'.
The report, published by the Committee on Court Practice and Procedure in late June [2004], says that there should be a reduction, to two years, in the time allowed to lodge a personal injuries claim, greater enforcement of deadlines for advancing cases, and penalties introduced in relation to costs for causing delays or introducing unnecessary expert witnesses. It also recommends that people who bring false or exaggerated claims should be penalised, and advises that both the plaintiff and defendant should verify on oath the contents of the pleadings.
Among 23 recommendations for changes in court practices, the report says that case management of personal injuries actions should be introduced 'in appropriate cases', that court rules should have a more realistic, but more strictly enforced, timetable for the different steps in pre-trial procedures, and that the parties should lose control of the pace of the action and the courts should be more proactive in moving the case on."

[246] The main items were covered in an article in the Law Society Gazette of July 2004 at page 6.

The similarity of the proposals above in June 2004 to the recommendations made by MIAB in April 2002 may be noted. That overhaul of the litigation system advocated in June 2004 has not been realised to date.[247]

Based on the productivity reflected above in the number of court awards, it is possible to project how many years of trials *mutatis mutandis* it would have taken to clear each year's new litigation cases if oral hearings were required. Again, the reliable comparative data is only available from 2002. The number of new summons each year is divided by the number of awards in the table below:

Number of Awards annually/Number initiated annually			
Year	High Court	Circuit	Overall in Years
2002*	17.4	12	13.5
2003	26	11.6	14.5
2004	31	17	21.1
2005	2.5	2.9	2.8
2006	15.5	4.5	6

Table 5.4.4 - Number of Awards v. Summons initiated 2002-2006

On the basis of the data above, the 2002 productivity would have taken thirteen-and-a-half years to clear the new claims initiated that year, being over 17 years in the High Court and 12 years in the Circuit Court. This is the "sluggish" court system to which Ilan (2009) and other academics referred as highlighted in Chapter 2 but for which many expressed a preference for that *status quo* over the reforms proposed.

Productivity in the litigation system had the appearance of doubling by 2006. At that year's rate it would have taken six years to clear all the cases initiated that year, being fifteen-and-a-half-years in the High Court and four-and-a-half years in the

[247] Plans for a review of the civil justice system were announced by the Deputy Prime Minister in March 2017 but no report has been issued as at July 2020.

Circuit Court.[248] However, that measure must be read with caution given the outlier of the low levels of summons issued in 2005 and 2006.[249]

This is the *status quo* of the system for which many commentators expressed a preference over the reforms proposed in 2002 and which cannot be demonstrated to be defensible.

In contrast, the PIAB is permitted a maximum period of 9 months from the date of consent by the respondent to conclude an assessment, and cases are actually reaching the award stage in an average of 7 months, compared to the alternate formal process in the courts with delays running to years. The judgments reviewed in Chapter 7 in the context of exaggerated claims also highlight the years which elapse before trial.

5.6 PIAB is just another layer in the litigation process

Fenn (2006) seemed to regard PIAB as merely a hurdle that had to be overcome before proceeding to court. Quill (2005) cited the Bar Review which predicted that PIAB *"forces the plaintiff to go through an additional administrative procedure"* rather than being a route to finalisation of redress rights.

What is now known from the post-reform period provides insight into how the *status quo* was operating. Prior to this research, facilitated by establishment of PIAB, nobody knew what became of claims other than those that proceeded to full trial.

For the sake of clarity, it is emphasised that all personal injury claims must be registered with PIAB, except medical negligence which currently remains outside its remit. It was never the intention that 'all' claims would be finalised by PIAB. Claims

[248] The appearance of doubling, from 2.8 years to 6 years, would ignore the fact that actual awards in the High Court in 2006 were only 173 compared to 301 in the previous year. Data for 2005 must be classified as an outlier because of the volume of cases rushed into the system in 2004 to avoid PIAB.

[249] The MIAB Report 2002 at para C.358 found that delays to trial had deteriorated since the time of the Deloitte report in 1996 as proceedings were being issued at a later stage than previously.

involving legal disputes of any nature are the sole preserve of the courts. Cases released to litigation by PIAB have been a fairly consistent percentage of overall claims at c.60% over the period 2006 to 2017. As will be demonstrated, only a proportion of those claims actually proceeded to commence in the litigation system and only a very small percentage of those which issued proceedings actually progressed as far as trial.

Binchy (2004) seemed to misunderstand the legislation by implying that every claim would proceed to assessment:

> *"A small claim where liability is highly doubtful goes to the Board for assessment on the basis that the respondent is fully liable. The Board comes up with an award. Inevitably the insurance company is faced with the decision whether to go to court or cave in. The plaintiff now has a high assessment which may tend to make him or her less willing to accept a lower figure."*

Aside from PIAB determining on 'day 1' that a claim should be released to the courts, the trigger for an assessment to proceed rests with the respondent consenting to an award being made, as reflected by the legislation.

The rates of consent by respondents to compensation assessments proceeding are set out below by class of insurance business and they vary as between Motor, Public Liability (PL) and Employer Liability (EL):

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Motor	46%	41%	39%	46%	44%	43%	49%	44%	48%	49%
EL	22%	23%	24%	21%	21%	20%	22%	19%	23%	22%
PL	24%	21%	18%	20%	20%	21%	26%	22%	23%	26%
Overall	36%	33%	31%	36%	34%	34%	39%	35%	35%	38%

Table 5.6.1 – PIAB consents to assessment by class of business 2008-2017

It can be assumed that these are 'quality' claims in the sense that a respondent/their insurer is unlikely to consent and pay a fee for an assessment if they consider the liability defendable or if there were suspicions about its genuineness. All three classes above individually have increased or stable rates of consent over this timeframe, with some intermittent exceptions which warrant examination with the benefit of my insider perspective.

The first noticeable differentiation is that consents to an assessment proceeding have always been highest in motor. These are the simplest accidents in which to determine liability. It is also relevant that this is the only class of insurance which is compulsory in Ireland. Injured passenger have an almost automatic right to compensation, bar issues of contributory negligence, and liability inter drivers is usually resolved by one test case.

Public Liability are the more likely to be defended than motor. Such claims often involve a number of potentially culpable parties. However, consents to assessments proceeding have still risen marginally from 24% in 2008 to 26% in 2017 with a low of 18% in 2101. Employer Liability claims are most difficult to successfully defend. These consents been fairly static at the c.22% rate reflected in the 2017 data.

The respondent is allowed 90 days from claim notification by PIAB to complete their investigations and respond with consent to an assessment proceeding. A failure to respond within the time limit is deemed a consent. However, after the exchange of claims papers the parties often remain in negotiations and many claims are settled direct after the formal assessment process has commenced so these would fall into the categorisation of rejection whereas they have actually been resolved.

Ultimately, c.38% of all registered claims proceeded to a full formal award. An issue raised by commentators in Chapter 2 was whether the PIAB assessment process would be (ab)used to 'flush out' the details of the claim but that the ultimate award would be rejected because there was no genuine intent to meet the claim. In that context, the level of award rejection by respondents must be interrogated.

The acceptance rate of PIAB formal awards was fairly constant at c.60% cumulatively over the period 2008 to 2017. This is contrary to the impression created in a newspaper article of July 2010 upon which Ilan relied. An award is not classified as accepted unless it is acceptable to the claimant, even if the respondent had accepted. A rejected award results in an authorisation for the claimant to proceed

to litigation if they so choose.[250] The award acceptance rates by class of insurance business are set out in the table below:

YEAR	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
Motor	63%	62%	59%	59%	60%	60%	60%	57%	54%	53%
EL	63%	58%	57%	61%	56%	63%	61%	56%	56%	56%
PL	70%	65%	66%	64%	64%	63%	65%	59%	58%	57%
	64%	62%	60%	60%	60%	61%	61%	57%	55%	54%

Table 5.6.2 – Acceptance of PIAB awards by class of insurance 2008-2017

Acceptance rates reduced slightly in motor and Public Liability after 2014 because of rumours of a new Book of Quantum being prepared.

It is clear that the type of insurance business reflects varying patterns of consents to assessments proceeding and to ultimate acceptance of those awards. For example, while the overall finalisation rate through PIAB in 2017 was 21% (consents at 38% culminating in acceptance of 54% of those awards) the level of resolution for Motor was higher at 26% (consents at 49% culminating in acceptance of 53% of those awards). This is in sharp contrast to EL where only 12% of claims were finalised through PIAB (consents at 22% culminating in acceptance of 56% of those awards). PL finalised through PIAB were 15% (consents at 26% culminating in acceptance of 57% of those awards). This indicates that 'tort in action' varies by the class of insurance business and this is a feature which was not identified in any of the commentaries reviewed in Chapter 2.

Of the potential litigation, from the combination of Day 1 releases along with refusals by respondents to consent to an assessment proceeding and the rejected PIAB awards, 22% of registered claims 'disappeared' in the sense that their volume is not reflected in summons issued over the period 2006 to 2017. The importance of this evidence is that it points against the prediction of PIAB being just a step prior to litigation. [251] It is an assumption that these claims were either settled direct or were

[250] As revealed by the CEO of PIAB at the Joint Parliamentary Committee meeting on 25th October 2006, just four firms of solicitors accounted for 14% of rejections as they refused to accept any PIAB awards. If they had operated otherwise the acceptance rate would have been 75%.

[251] In the pre-reform period it was stated that all claims involved litigation. See Gilhooly (n70) p121.

withdrawn. This feature was most noticeable in 2006 when 41% of claims 'disappeared'. From my insider perspective I can say that this is a reflection of the quality of some 'low quality' claims which were rushed into the new easier system in the early days.[252]

A cumulative summary is set out in the table below:

From 2006 to 2017	Volume
Claim Volumes to PIAB	337,382
PIAB AWARDS	120,057
Awards as % of claims	36%
Accepted PIAB awards	71,067
Accepted as % of awards	59%
Accepted as % total claims volume	21%
Potential Litigation being non-consents & rejected PIAB awards	266,229
Summons Issued (incl. Med Neg)	194.908
The 'disappeared' potential litigation	71,321
Disappeared as % of claims	22%

Table 5.6.3 - Overview of PIAB Acceptances & Potential Litigation 2006-2017

<u>The disappeared litigation</u>

The issue of litigation 'productivity' assumed a new importance following the economic crash which crystallised in 2008. All public services were reduced over the following years. By 2014 it was said that the Courts Service was *'in a crisis'* because of constraints on resources. Whether that assertion was justified or not, the reality was longer wait for trial and limited resources to modernise litigation practices.[253]

[252] This may be evidence of a temporary operation of the 'expressway principle' whereby the offer of a straightforward redress system increased propensity to claim but these cases were not of a quality that warranted pursuit to the very first step of initiation of litigation.

[253] Court services at 'tipping point' following cutbacks. 21st November 2014. Irish Examiner. http://www.irishexaminer.com/ireland/court-services-at-tipping-point-following-cutbacks-298929.html

This is the *status quo* for which many academics in Chapter 2 expressed a preference to the reforms proposed in 2002.

In terms of fairness, Binchy emphasised the right of access to the Courts. However, in the pre-reform era over 90% of litigation was disposed of without any monitoring of equality of arms in terms of an evaluation by a neutral Third Party. The situation now is that 38% of claims have been independently assessed and 21% of claims are finalised on the basis of formal PIAB awards.

Even though an acceptance rate of PIAB awards at c.60% would indicate that c.40% may be destined for litigation, there has been a valuation placed on those injuries and losses by an expert neutral body. Those rejected awards may form the basis for negotiations, at either higher or lower figures. This is reflected in the fact that c.22% of potential litigation did not proceed to the stage of issuing a court summons. Whether settled or withdrawn, these cases would have been finalised between the parties within 6 months of the PIAB release, on top of the statutory period of two years which is the time bar for proceedings since the 2004 reforms.

The data also shows that of the cases released to litigation initially, some 22% (being 71,321 claims) disappeared over the period 2006 to 2017. That percentage is derived from the difference between the 79% of claims that had potential for litigation post-PIAB and the 57% that actually proceeded to issue a summons. These finalisations would be a combination of direct settlements facilitated through information sharing in the PIAB process, or claims withdrawn after respondents declined to have the claim assessed because of strong defence prospects.

What cannot be conclusively demonstrated from available data is the extent to which claims were settled direct between parties before the formal claim registration was completed with PIAB. Those upfront settlements may have been accommodated by the sharing of information on injuries and losses at the first stage of the process. Such settlements obviously result in the respondent not consenting to the assessment proceeding. These finalisations directly between the parties may be a substantial proportion of the 65% that appear as releases for litigation after initial registration and exchange of papers.

At an overall level the position has changed from the pre-reform era where almost 100% of claims involved litigation to the post reform period where only 57% of claims proceed to the summons stage.[254] This analysis refutes the assertion by Patton (2012) that the PIAB should be worried that about Court statistics for 2009 of an "*800% increase on the number filed the year after the Board came into operation"* because the 2005 litigation data is an outlier so that is not a robust statistical finding.

In terms of overall claims volumes, 21% were finalised through the full formal PIAB process during the period 2006 to 2017. With outlier exceptions, there are no awards of costs in such cases.[255] In addition, a further 22% disappeared without commencing litigation. The academic preference for the *status quo* of all such claims entering the litigation system is not defensible in light of these findings that 43% did not require access to that system to be finalised, and only 6% proceeded to court.

In terms of productivity over the period 2006 to 2017, there were 120,057 awards by PIAB compared to 18,985 awards by the courts over that twelve years. This data does not support the projections of some commentators that PIAB would simply be an additional layer prior to litigation.

Of those claims which were released to litigation where summons were issued, only 8% of those proceeded to trial. Court awards represented 6% of overall PIAB registered claims volumes.[256] This research finding does not support an assertion by Ilan about "*Legal academics have pointed to the suitability of the previous litigation regime".*

[254] Obviously in both the pre and post reform eras there were very minor claims that were resolved direct at early stages. However, the advent of 'Med Neg' in recent years is reflected in the summons issued but as these are outside the remit of PIAB the volume of 'ordinary' injury claims being resolved without litigation is greater than 43%.

[255] Under S44 of PIAB Act 2003 some allowance can be made in exceptional cases. See guidelines on website.

[256] Court awards are actually lower than 6% relative to claims registered with PIAB as medical negligence is outside their remit but it is not known how many of those oral hearings related to that excluded class although the number of summons issued on such claims has been increasing in recent years to around 1,000.

One might have expected that with purportedly 'easy claims' being taken out of the litigation system by PIAB, more of those litigated would actually proceed to trial. Factors behind this simplistic observation are explored further.

5.7 PIAB will be used to 'flush out' claims to the disadvantage of claimants

Quill (2005) summarises an article in the Bar Review with the assertion that *"while both parties have discretion as to whether to accept the award or proceed to court, there will be greater pressure on plaintiffs than on defendants to accept..."*

Binchy (2004) points to the discretion open to defendants after an award is made by PIAB:

> "*The Board comes up with an award. Inevitably the insurance company is faced with the decision whether to go to court or cave in. The plaintiff now has a high assessment which may tend to make him or her less willing to accept a lower figure. Of course the insurance company is free to stand firm and litigate, with all the wasted economic expenditure that even a successful defence will involve. Is there not a danger that it will continue its practice of settling, possibly at a somewhat higher figure?"*[257]

The finding of c.95% acceptance rates of awards by respondents, on the c.36% of claims on which they consented to assessments, contradicts any assertion that insurers would merely use PIAB to 'flush out' the details of claims and then proceed to a defence.

There was an argument by lawyers that PIAB was only suitable for 'easy claims' and this was particularly strong when resisting extension of its remit to medical

[257] William Binchy (n70) at p121.

negligence.[258] It is possible to secure some insights from the data. [259] On a cumulative basis to 2017 the average award made by PIAB had a value of €20,292 and the average value of the accepted award was €22,162. Accordingly, it is not just cases at the lower end which are being finalised through the new non-adversarial model as predicted by some commentators because the variance between these two averages would be greater if only the low value claims were being finalised.

The data in the table below seems to belie the criticism by some academics that respondents would merely use the PIAB process to 'flush out' the details of a claim but would then proceed to reject the award and force the claimant into litigation. The overall c.60% acceptance rate disguises the fact that respondents accept the awards 94% of the time. For claimants the cumulative acceptance rate is 67% and the claimant is allowed a longer period to decide on acceptance than is afforded to the respondent. It is necessary for both parties to have accepted the award before PIAB will issue an 'Order to Pay' which has the same enforcement status as a court award.

Acceptance Rate as between Claimant & Respondent – all classes					
Year	By Claimant	As % of total	By Respondent	As % of total	Overall acceptance
2005	697	75%	887	95%	69%
2006	3,808	68%	5,263	94%	61%
2007	5,470	67%	7,880	96%	61%
2008	6,210	70%	8,457	96%	64%
2009	5,997	69%	8,218	95%	62%
2010	5,640	67%	7,963	95%	60%
2011	6,563	67%	9,376	95%	60%
2012	6,959	69%	9,564	94%	60%
2013	7,425	70%	9,993	94%	61%
2014	8,533	69%	11,726	94%	61%
2015	7,737	66%	11,077	94%	57%

[258] I was so perplexed at 'med neg' that in the midst of my PhD research I studied for a Masters in medical law and ethics at London University which I completed with merit in 2012 but I regard these tort actions as being in a class of their own.

[259] The 1996 Deloitte report found that 90% of claims by volume were within the Circuit Court jurisdiction of €38,000, as also recorded in Law Society Gazette May 1997 at page 5. In evidence to the Joint Parliamentary Committee on 25th October 2006 the CEO of PIAB confirmed research with the Courts Service that 89% of awards were still within that Circuit Court jurisdiction.

2016	8,307	64%	12,166	94%	55%
2017	7,615	60%	11,380	90%	54%
Overall	80,961	67%	113,949	94%	59%

Table 5.7 - Acceptance Rates by Claimants v Respondents 2005-2017

Some of my insider knowledge aids interpretation of the data above. As recorded in the transcript of evidence by PIAB to a Joint Parliament Committee in April 2014, there was a small number of high volume plaintiff legal firms who had a policy of rejecting all PIAB awards.[260]

Other tactics by a small group of solicitors include refusing to allow their clients to attend examinations by the independent medical panel and/or deliberately under-stating the level of Special Damages which are then introduced in subsequent litigation. This concealment of the true extent of the claim was then used as justification by these claimant solicitors to reject the award. Legislation was published in 2017 to curtail these continuing abuses and was passed in 2019.[261]

Given that the average finalisation period in PIAB is 7 months it is clear than the speed of resolution has improved considerably as against the pre-reform era based on sampling by Deloitte and research for McAuley. Productivity in the courts for litigation case since 2004 has not improved, however, and that is the *status quo* for which academics expressed a preference.

There is no evidence that PIAB is '*just another layer*' before proceeding to Court. The research all points in the opposite direction to the predictions by some commentators reviewed in Chapter 2.

5.8 User (dis)satisfaction with fairness of redress processes

[260] PIAB CEO in evidence to the Joint Parliamentary Committee 1st April 2014.
[261] PIAB (Amendment) Act 2019.

Academics widely accepted dissatisfaction with the pre-reform litigation system as summarised by Hedley (2004):

> *"It is not hard to criticise the system, on many grounds: waste, sloth, the prevalence of fraud, and that too much of the money circulating in the system ends up with the lawyers and insurers."*

In the context of 'fraud', loosely so called, all claims which are consented to by respondents for assessment by PIAB may be regarded as 'quality claims' for research purposes. That classification is argued for on the basis that the respondent/their insurer would not have paid the assessment fee if it was their intention to fully defend liability. [262] Acceptance rates of awards by respondents are persistently high at c.95%.

PIAB structures and resources enable individualised attention to claimants. This is so where an assessment is consented to, and even prior to that in a case by case approach to registration of claims through the outsourced service centre. Additionally, there is 24/7 online guidance with an interactive damages estimator.[263]

User satisfaction surveys by PIAB, exploring various criteria, are published in their annual reports with high rates of positive feedback. No such quality testing is undertaken amongst users of the courts system.[264]

In the UK research was published in 2008 on user satisfaction with Courts and Tribunals. That extensive and very interesting analyses highlights in its conclusions the lack of robust data:

> *"Robust, well analysed data on what the general public thinks about civil and family courts and tribunals and what underlies those perceptions is almost*

[262] There are, of course, exceptions. For example, in September 2014 when a tram and bus collided each potential defendant agreed they would have their respective passenger claims assessed by PIAB although each at the time intended to ultimately defend liability fully for the accident. Subsequently CCTV from nearby premises confirmed that liability rested totally on the tram operator. Hundreds of multi-party litigation cases had been avoided through this new approach.

[263] An interactive mobile phone app was also introduced by PIAB in 2013.

[264] In an adversarial process with a winner and a loser in every defence case, the concept of 'satisfaction' would require some sophisticated definition. Essentially, PIAB is a 'win-win' model in that the respondent wants the claim concluded without litigation (for whatever reason) and the claimant wants their compensation, subject to adequacy of the award.

non-existent. A similar gap is robust data on what businesses think about courts and tribunals." [265]

For the purposes of this case study, all that can be said is that there is no robust evidence of user satisfaction with the pre-reform litigation system in Ireland which most academics favoured as the *status quo* in preference to establishment of PIAB.

5.9 Expressway principle & encouragement of weak claims

As reviewed in Chapter 2, Binchy was concerned about the adverse effects on public perception of tort caused by nuisance value settlements of claims that might otherwise be successfully defended on their merits but for the disproportionate cost risks. His view was that such behaviour would be encouraged by the establishment of PIAB. However, the research indicates that the more simple PIAB system, relative to the litigation system, did not result in the apprehended explosion in claims volumes.

There can be a delicate balance between addressing an unmet legal need and the risk of encouraging frivolous claims.[266] Striking that balance needs to be informed by the fact that defendants have rights too.[267]

The overall number of claims registered annually is set out in the table below:

Claim Volumes to PIAB 2006-2017											
2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
18,750	20,137	24,722	25,919	26,964	27,669	29,603	31,311	31,576	33,561	36,656	33,114

Table 5.9 Claim Volumes to PIAB 2006-2017 by year of registration

[265] Ministry of Justice Research Series 5/08 March 2008. '*Just satisfaction? What drives public and participant satisfaction with courts and tribunals'* at p72. Research by Richard Moorhead, Mark Sefton and Lesley Scanlan.

[266] In an American context that "*the proportion of frivolous lawsuits was directly related to both sides' trial costs*" although the 'strike out' option, which was also considered a factor, does not apply in Ireland. See Avery Katz, 'The effect of frivolous lawsuits on the settlement of litigation' (1990) International Review of Law and Economics 10(3-27).

[267] Re *Gaspari, Irish Rail & Dowling v Ireland & The Attorney General* – corporate bodies are entitled to constitutional protection of their property rights.

The difficulty with this data, of course, is that it relates solely to the claims registered with PIAB. It should not be read simplistically as an overall increase in national injury claims volumes from 18,750 in 2006 to 36,656 in 2016 (or 33,114 in 2017). As demonstrated in Chapter 3, there was increased 'buy in' to the new process over this period.

5.10 PIAB refuses to deal with solicitors?

A number of commentators reviewed in Chapter 2 recounted that PIAB had 'refused' to communicate with claimant solicitors. For example, Fenn (2006) stated "*It is also the policy of the PIAB not to deal with the lawyers although this has recently been challenged and the court has held that the PIAB cannot refuse to deal with lawyers".* That is not an accurate reflection of events. The untrammelled right of a claimant to seek legal advice was enshrined from the very first draft of the PIAB legislation and is stated clearly in the Act at section 7. [268]

It had been the plan of PIAB to put the claimant at the heart of the process to facilitate their input, which some research noted as a priority. This would also have ensured that they were regularly updated on the progress of their claim.[269] That strategy was derailed by the first judicial review launched within weeks of PIAB opening its doors. It seems that many lawyers tend to insulate and isolate their clients from the redress process. That litigation culminated in court determinations which examined issues of fairness.

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[268] PIAB Act 2003 at s.7:

> *1) Nothing in this act is to be read as affecting the right of any person to seek legal advice in respect of his or her relevant claim and no rule shall be made under section 46 that affects that right.*
>
> *2) Sub-section (1) shall not be read as requiring any procedure to be followed by the board or hearing to be conducted by it that would be required to be followed or conducted by a court were the relevant claim concerned to be the subject of proceedings.*

[269] A frequent case of complaint against solicitors, as reflected in the annual reports of the Law Society Disciplinary Committee. Complaints of overcharging, forgery and delay upheld against solicitors. Times 7th October 2008. http://www.irishtimes.com/news/complaints-of-overcharging-forgery-and-delay-upheld-against-solicitors-1.892132.

As recorded in the High Court judgment, PIAB had not refused to communicate with the claimant's solicitor. The matter was not determined on the basis of section 7 which had been in the Bill from the outset to ensure clarity for claimants that they were entitled to seek legal advice if they so wished. That valued added service, however, would be at the claimant's own expense and the High Court in *O'Brien* upheld the policy that no costs would be awarded. That outcome accorded with the accurate prediction of Professor David Gwynn Morgan (2005) that legal advisors could not be excluded from the process and that payment of fees would only arise in exceptional circumstances.

Some considerable time could be spent analysing how difficult and complicated the Law Society, as *amicus*, tried to make the PIAB process appear, especially for the often trotted out small minority of vulnerable claimants. However, since that January 2005 judgment by the High Court was appealed by PIAB to the Supreme Court it is preferable to focus on their reasoning which was delivered in December 2008 following a hearing in April 2008.

The concept of 'equality of arms' was raised by some commentators reviewed in Chapter 2. This was addressed in the decision of The Hon Mrs Justice Macken of the Supreme Court: [270]

> *"Having regard to its origin and to the manner in which it has been developed in the case law, the respondent and the amicus curiae have not established that "equality of arms" in its classic sense, is applicable to the scheme provided for under the Act of 2003."*

Since PIAB is not an adversarial process, the practice of fair procedures was held to be satisfied.

[270] *O'Brien (& the Incorporated Law Society of Ireland) v PIAB* [2008] IESC 71.

The fact that this Supreme Court decision made clear below that there was no entitlement to costs did not prevent further judicial reviews on that precise issue.

> *"The provisions of s.7(1) are neither intended nor permitted to interfere with the entitlement of a claimant to obtain legal advice, the only caveat being that under the legislation a claimant does not have a right to be indemnified in respect of the costs of such advice. This clearly includes such advice as may be sought in relation to the completion of an application or in relation to correspondence between a claimant and the Board."*

The second Supreme Court judgment was delivered by Denham J., with whom Chief Justice Murray expressly agreed, and from which the most relevant is paragraph 69 as in an extract reproduced below:

> *…Thus while PIAB is required to accept the authorisation, and write to the applicant's solicitor, this does not exclude PIAB from informing the applicant also. This could be done by copying the correspondence issued to the legal representative to the claimant. There is nothing in the Act of 2003 which prohibits such a policy. This would advance the policy of PIAB as an alternative forum, less formal than a court. It would also keep a claimant informed of the process.*

From a PIAB perspective this outcome effectively meant that rather than corresponding with the claimant and copying their solicitor, correspondence was addressed to the solicitor and copied to the claimant. Much of the subsequent coverage by the legal profession tended to give the impression that solicitors were now essential when dealing with an application to PIAB.[271] Such essentiality of lawyers, and payment of their fees, were contended for by many of the commentators reviewed in Chapter 2 but was not supported by the Supreme Court decision delivered in December 2008. As the Law Society commented after this judgment "*be under no illusion, PIAB is here to stay. Nothing we say or do is going to*

[271] Supreme Court rules PIAB not entitled to refuse to deal with clients' solicitors. Times 20th December 2008. http://www.irishtimes.com/news/court-rules-piab-not-entitled-to-refuse-to-deal-with-clients-solicitors-1.1275185. Lawyers win challenge to injury board 'exclusion' – Independent 26th January 2005. http://www.independent.ie/irish-news/lawyers-win-challenge-to-injury-board-exclusion-26005875.html. High Court rules against PIAB on solicitors' representation rights. Gazette November 2005.
https://www.lawsociety.ie/Documents/Gazette/Gazette%202005/November2005.pdf

change that."[272] Obviously, doubts were harboured up to that point but PIAB secured a constitutional 'clean bill of health' in all practical senses.

After the Supreme Court decision of December 2008 in *O'Brien*, the PIAB was presented with a bill by the plaintiff's solicitor at €2.1ml. That was challenged through taxation and was adjudicated on 10th June 2010. The legal fees were reduced to €393,472, being deductions of €1.8ml or 82%.

5.11 Bias against claimant rights?

Many commentators reviewed in Chapter 2, explicitly or impliedly, supported the views of lawyers that PIAB would be biased against the interests of claimants. For example, Binchy considered that the reforms were contrary to the best interests of "*genuine victims of carelessness*" which does not, in any event, accurately reflect tort law of negligence and foreseeability must be proven as distinct from mere "carelessness". He also saw the reforms as "*anticipated by the Supreme Court in their hostile attitude to plaintiffs who are victims of negligence".* While that latter comment was made in the context of exaggeration, there is an underlying narrative that all claimants are innocent "victims" of someone else's negligence and axiomatically anyone associated with the defendant camp is not to be trusted.

As then Chair of the Board, my professionalism was attacked on grounds of bias in a High Court judicial review relating to costs. This challenge was based on partial and out of context quotations from my replies while appearing before a Joint Parliamentary Committee in October 2008 where questions were asked about solicitors trying to derail PIAB.[273]

The judicial reasoning by Ryan J, in rejection of those assertions of bias, is set out in the extract from paragraph 69 below:

[272] Gazette 2009 January, p18-19 re *O'Brien* Supreme Court.
[273] *Plewa & anor -v- Personal Injuries Assessment Board*. [2010] IEHC 516.

> *69. Even if they are considered independently, without reference to the affidavits, the statements made by the officers of the Board do not in my view bear the meanings the applicants attribute to them. It is true that a small part of the transcripts if taken alone and read literally gives some comfort to the applicants' argument but a fair and reasonable reading of the exchanges as a whole does not support a case of bias ….*
>
> *70. The suggested reading of the Oireachtas proceedings would be contrary to the terms of the Acts, as an informed reasonable person would be aware.*

The 'informed reasonable' person has resonance with 'the man on the Clapham omnibus' whose standards are central to tort in determining duty of care in negligence.[274]

The determination in *Plewa* did not prevent continuation of the campaign against PIAB. [275] This may have been an effort to undermine trust in the neutral Third Party which is so essential according to some research.[276] It seems that some commentators reviewed in Chapter 2 may also have been influenced by anti-PIAB lobbying.

5.12 PIAB will attempt to reduce compensation levels?

There was a general endorsement by academics reviewed in Chapter 2 of the publication by PIAB on guidelines reflecting prevailing levels of compensation in the Book of Quantum.[277] That leaves unanswered, however, enquiry as to how the

[274] The origins of 'the man on the Clapham omnibus' are not clear but it first appears in a 1903 decision on a libel case for a measure of public opinion in *McQuire v Western Morning News* [1903] 2 KB 100.

[275] The fact that I made very pointed criticisms of the insurance industry at that forum, and many others, is never alluded to by the legal profession.

[276] Tom R. Tyler, 'What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) LAW & SOC'Y REV., 22, 103. E. Allan Lind et al., 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System' (1990) Law & Soc'y REV. 953.

[277] Again, I cannot pretend to be agnostic on this subject. Irish Times 27 November 2002 'The prophet of the book of quantum'.

https://www.irishtimes.com/life-and-style/motors/the-prophet-of-the-book-of-quantum-1.1128000

appropriate level of compensation might be determined and there were academics concerns, particularly by Binchy, that the PIAB was a mechanism for reducing compensation. Patton (2012) implied similarly:

> *"In theory a claimant is left with the same compensation that a court would have awarded, minus the considerable legal costs and the lengthy delay in litigation. As is often the case, however, the practice may not accurately reflect the theory in this case."*

This research on the reality does not support that criticism above about the practice.

This issue of adequacy of General damages is one with which many jurisdictions struggle. How levels of damages should be reviewed over time remains an open question in Ireland in 2019. This contrasts with the declared approach enunciated in the UK with updated versions of the Judicial Studies Institute Guidelines linked to the retail price index.

The financial crisis added another dimension. In June 2017 the Supreme Court confirmed that economic trends should be factored into the assessment of legal costs.[278] No such adjustment had been factored into trends in General Damages.[279]

These larger questions essentially fall outside this case study except to assess whether there is evidence of the concerns reviewed in Chapter 2 about the delivery of equitable levels of compensation through the PIAB process. Since the governing principles on the quantum of compensation lie outside the scope of this research, the issue of equity is addressed relative to rates which were prevailing both pre-reform and post reform in the litigation system.

[278] *Sheehan v Carr* [2017] IESC 44.

[279] This is the subject of contentious debate between some of the judiciary and their superior judges. Interview of Judge Kevin Cross, Sunday Times 29th October 2017. *Judge hits out at campaign to cut insurance claims.*

https://www.thetimes.co.uk/article/judge-hits-out-at-campaign-to-cut-insurance-claims-n57wxmmfx

There are presentational and robustness issues with this data.

The first obvious reality is that in any individual year the portfolios of type of injuries are unlikely to be identical, in either the courts or PIAB, so only indicative trends can be analysed. Secondly, the Courts Service altered the value bands under which statistics on awards are reported from 2014 onwards so it is necessary to split this analysis over two timeframes. Taken at an overview level, the relativity of awards by the courts in value bands between 2008 and 2013 is set out in the table below. The analyses reflect the fact that most claims by volume are at the lowest level of below €20,000 which reflects a relatively minor injury in Ireland. This data is set out in the table below:

Court Awards 2008 to 2013 in Value Bands						
Year	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**
Under 20k	740	767	820	1,027	1,315	967
Under 100k	300	456	419	429	421	572
100k plus	50	116	133	100	124	160
Totals	1,090	1,339	1,372	1,556	1,860	1,699
Bands Proportionate to Overall Volumes						
	2008	**2009**	**2010**	**2011**	**2012**	**2013**
Under 20k	68%	57%	60%	66%	71%	57%
Under 100k	28%	34%	31%	28%	23%	34%
100k plus	5%	9%	10%	6%	7%	9%

Table 5.12.1 - Court Awards in value bands 2008-2013

The variation in seriousness from year to year can be identified by awards over €100,000. These higher value cases increased from 50 in 2008 to 160 in 2013, and in relative terms from 5% to 9% of High Court awards by volume. While the type of

claim is not identifiable from the raw data secured from the Courts Service, there is evidence that this reflects an increase in medical negligence actions.

The majority of court awards in the table above were for under €20,000. That profile accords with the distribution of PIAB award values. Only the years 2014 and 2013 are shown in the tables below by class of business but individual years are provided in their annual reports and the distribution in varying value bands has remained relatively stable.

Table 1.2 PIAB Annual Report 2013					
Value Range	Motor	EL	PL	TOTAL	As % Total
>20k	5,278	356	862	6,496	61%
to 38k	2,113	311	639	3,063	90%
38k+ to 100k	601	143	249	993	
>100k	70	16	18	104	
ALL	8,062	826	1,768	10,656	

Table 1.2 PIAB Annual Report 2014					
Value Range	Motor	EL	PL	TOTAL	As % Total
>20k	5,930	351	1,073	7,354	59%
To 38k	2,679	363	730	3,772	90%
38k+ to 100k	664	208	338	1,210	
>100k	55	19	10	84	
ALL	9,328	941	2,151	12,420	

Table 5.12.2 – PIAB Awards by Value by Class of Claim 2013 & 2014

Fairly consistently, c.60% of PIAB awards are for below €20,000 and 90% were below €38,000 which was the limit of the Circuit Court up to 2013.

A new dynamic was introduced in February 2014 when the District Court jurisdiction was extended to injury claims by virtue of an increase in its financial limit from €5,000 to €15,000. Unfortunately, no breakdown by value bands is provided in relation to awards at that level and the statistics from the Courts Service also changed the value bands in which data is published for the higher courts.

However, by interrogation of the tables presented in the Annual Reports from the Courts Service it is possible to extract the relative volume of awards in certain value bands. The highest proportion of the volume of awards between both the High Court and Circuit Court was below €15,000 as set out below:

Court Awards €0 > €15k by volume				
	2014	2015	2016	2017
District Court	433	497	530	363
Circuit Court	654	460	398	405
	1087	957	928	768
Of overall awards	55%	48%	49%	42%

Table 5.12.3 - Court Awards in value bands 2014-2017

Between 55% and 42% of awards were for below €15,000. Many of the cases commenced in the Circuit Court should have been initiated in the District Court.

An alternate approach is to focus on the volume below €60,000 which is the new limit of the Circuit Court for proceedings issued after February 2014, as below:

Court Awards €0 > €60k by volume				
	2014	2015	2016	2017
District Court	433	286	282	374
Circuit Court	1010	1006	972	1071
	1443	1292	1254	1445
Of overall awards	74%	65%	66%	78%

Table 5.12.4 – Court Awards by volume up to €60,000

Cumulatively over the period above 71% of court awards were for amounts below €60,000. For comparison, the PIAB awards in value bands for the three classes of business in 2016 are reflected in the table below:

PIAB 2016 Awards in Value Ranges					
€000's	Motor	EL	PL	TOTAL	Vol as % total
>20k	5,502	419	965	6,886	53%

20k to 38k	3,197	449	868	4,514	35%
38k to 100k	801	262	389	1,452	11%
>100k	64	28	22	114	1%
ALL	9,564	1,158	2,244	12,966	

Table 5.12.5 - PIAB Awards in value bands 2016

The value profile in that table above reflects 88% of awards at below €38,000. However, those statistics only deal with the volumes of PIAB awards in different value bands. More challenging is to address the academic criticisms about parity in compensation levels and to review the values of awards by PIAB relative to the Courts. As the latter are also dealing with claims outside the remit of PIAB this cannot be a definitive exercise. For example in 2017, the value of awards in the High Court which related to medical negligence accounted for 54% of the overall value that year. Bearing in mind the limitations of the data, however, it may provide an insight to tabulate the overall amounts awarded by the courts compared to the PIAB as set out in the table below:

	2008	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
PIAB Awards										
Volume	8,845	8,643	8,380	9,833	10,136	10,656	12,420	11,734	12,966	12,664
Values €ml's										
Awards made	€217	€200	€184	€211	€218	€245	€282	€269	€315	€314
Accepted awards	€131	€118	€108	€123	€128	€144	€166	€151	€169	€168
Court Awards (including medical negligence)										
Volume	1,090	1,339	1,372	1,556	1,860	1,699	1,960	1,982	1,902	1,849
Values €ml's	€64	€86	€98	€89	€112	€147	€173	€188	€163	€206

Table 5.12.6 - PIAB & Court Awards Values 2008-2017

The obvious conclusion from the data in the table above is that more of the compensation value annually is being subjected to independent neutral assessment by PIAB than in the pre-reform era. Over the period 2008 to 2017 the courts made 16,609 awards at a value of €1.3bl, which included medical negligence, which would have been the extent of neutral evaluation without the reforms. Over the same

period, PIAB made six times more awards at 106,276 totalling €2.5bl of which 59% were accepted at €1.4bl being 57% by value. Post reform €2.7bl of awards have been independently assessed for finalisation. This should assist in allying concerns expressed by Ilan (2009) about the monitoring of compensation for equity. There are, however, challenges in drawing any wider inferences.

It is not possible to calculate averages from the above tabulations in the sense that, while it would be mathematically possible, it would be meaningless. A simple average calculation on court awards would not be statistically robust if there is a cluster of maximum severity cases in any particular year.

In September 2015 insurers based their lobbying for further reforms on the contention that the average High Court award in 2014 had increased by 34% on the previous year.[280] However, media coverage during that year had highlighted a number of very serious medical negligence actions. For this case study the anonymised raw data on awards was sought and secured from the Courts Service. It transpired that the situation was very different from that asserted by insurers when a few multi-million '*med neg*' cases were extracted. These cases did not relate to insurers.[281]

It was more statistically robust to compare the median value and exclude the top four claims by value where the awards were over €5ml. Measured on this basis the median value of High Court awards in 2014 was €63,400. This was relatively unchanged from 2013 at a median of €65,000. Lobbying by insurers for reforms based on incorrect data seems doomed to failure from the perspective of legitimate interests. There is a balance of competing rights to be maintained. Diminishing one does not justly enhance the other.[282]

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[280] Insurance Ireland statement on 15th September 2015. 'Insurance Ireland Proposes Range of Measures to Address Increases in the Cost of Claims'.

[281] Medical negligence is dealt with on an 'enterprise-wide liability basis' and is handled by the State Claims Agency which is publicly funding. Comparative litigation overheads incurred in that framework are analysed in chapter 3 on trends in claims costs.

[282] To paraphrase Lord Steyn in *Attorney General's Reference (No 3 of 1999)* [2001] 1 All ER 577 at p.584 - although the comment was made in the context of criminal law evidence and the

It so far as it can be proven, there is no indication that PIAB is awarding lower levels of compensation as predicted by some commentators reviewed in Chapter 2.

5.13 Minor and moderate injuries are disproportionately compensated

A number of commentators reviewed in Chapter 2 were of the view that damages for serious injury were inadequate. It was not the function of PIAB, however, to alter the levels of compensation but merely to assess claims at prevailing rates. Pierse (1999) expressed concerns for the most seriously injured:

> *"I take the view that damages in catastrophic cases are not high enough, and that damages awarded for minor injuries are certainly not proportionate to those in catastrophic cases."*

At that stage he expected fairly immediate changes:

> *"One cannot help but get the feeling, on reading recent judgments, that there may be substantial alterations this year or next year, if a sense of proportionality is to be brought into the thinking of the judges in the Supreme Court who lay down the markers or unofficial guidelines for damages."*

No such guidelines were issued prior to the 2004 publication by PIAB of a Book of Quantum reflecting prevailing compensation levels. The proportionality issue does, however, warrant some attention in light of more recent developments.

It is my view that the law in Ireland changed from November 2015 because of jurisprudence emerging from the newly established Court of Appeal. In a range of cases from that date a number of awards by the High Court for minor and moderate injuries were halved on appeal. It is worth citing what may be the most important passages from the first of those decisions:

> *"18. For my part I fear there is a real danger of injustice and unfairness being visited upon many of those who come to litigation seeking compensation if those who suffer modest injuries of the nature described in these proceedings*

"triangulation of interests" taking into account the interests of the accused, the victim and of society at large.

> *are to receive damages of the nature awarded by the trial judge in this case. If modest injuries of this type are to attract damages of €65,000 the effect of such an approach must be to drive up the awards payable to those who suffer more significant or what I would describe as middle ranking personal injuries such that a concertina type effect is created at the upper end of the compensation scale. So for example the award of general damages to the person who loses a limb becomes only modestly different to the the [sic] award made to the quadriplegic or the individual who suffers significant brain damage and in my view that simply cannot be just or fair."* [283]

As stated by Irvine J at paragraph 17 that is *"not to say that this is a formula that must be applied by every judge"* so it may not be a binding precedent 'for all cases' but it does provide guidance on a more proportionate approach relative to the 'cap' on General Damages of €400,000 when assessing compensation for minor and moderate injuries which is, as demonstrated, the level at which the overwhelming volume of claims are pursued.

My personal views about levels of damages are irrelevant and the theoretical principles surrounding quantum are beyond the scope of the research question. However, I felt so strongly that *Payne v Nugent* was an invitation to stand back and undertake a reappraisal of excessive damages at the lower level that I publically decried a revised Book of Quantum which was issued by PIAB in October 2016. [284] My arguments were based on both principle and pragmatism.

Firstly, the updated version was largely based on data from 51,000 claims settled by insurers during 2013 and 2014. The 'going rate' of damages during that period was effectively halved in many cases by the Court of Appeal subsequently yet those excessive settlements, guided by the higher High Court awards, are now embedded in the new Book of Quantum in 2016.

Secondly, based on experience I am wary of relying on data from insurers.

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[283] *Payne v Nugent* [2015] IECA 268

[284] 13th Oct 2016. *Adding insult over injuries: the Book of Quantum should be binned* – Irish Independent. http://www.independent.ie/business/irish/adding-insult-over-injuries-the-book-of-quantum-should-be-binned-35125658.html

Thirdly, the public perception of that move was not helpful at a time when there was said to be a further insurance cost crisis emerging. The new Book of Quantum was widely described in the media as increasing compensation for 'whiplash' because it did increase levels for the less severe injuries.[285] This risks further damaging the negative public view of tort.

Fourthly, somewhat controversially, I question whether judges are well equipped to undertake assessments of quantum in a rational manner divorced from influences by the parties in the individual case. Certainly that role should not be assigned to insurers by permitting their data to influence the guidelines on compensation. Given the new guidance from the Court of Appeal this was an ideal, and missed, opportunity to devise a more rational scale.

Pragmatically, I am also of the view that only guidelines published by the judiciary, aided by appropriate medical and economics experts, are likely to be followed by members of the bench so as to deliver consistency and predictability in the interests of all parties including wider society as a whole. The academic concerns about principles surrounding the appropriate levels of damages remain unresolved in Ireland.[286]

In Chapter 6, my hypothesis is argued that high award levels may actually suit insurers and that is somewhat supported by data analyses. That suggestion runs contrary to the views of commentators reviewed in Chapter 2.

[285] 5th October 2016 a new PIAB Book of Quantum was published - Today FM. https://www.todayfm.com/Compensation-guidelines-increase-for-whiplash.

[286] The 2018 report from the Personal Injuries Commission proposes percentage disability ratings as a basis of compensation, with an initial focus on soft tissue 'whiplash' injuries.

5.14 What does the data reveal on whether the criticisms by legal academics of the reforms on the basis of justice and fairness were defensible?

In so far as robust evidence can be procured, this chapter has presented data which supports answers to Binchy's list of questions as below:

Q1 -Effect of the legislation on tort litigation?

A1 - Reduced volumes compared to 100% of claims involving litigation, allowance must also be made for the new trend of medical negligence actions in court data.

Q2 - Encourage resolution, by settlement or by acceptance of the Board's assessment, without going to court as much as at present [2004]?

A2- Low levels of Court hearings as in the pre-reform period but a greater proportion of supervised settlements by formal PIAB awards. Direct settlements are now monitored by the Regulator through sampling for compliance with the Consumer Protection Code.

Q3 - Strategy of insurers on accepting or rejecting assessments and on contesting liability?

A3 - High levels of consent by respondents to assessments of compensation proceeding and high levels of acceptance of awards by both claimants and respondents at c.60% over the period 2006 to 2017

Q4- Will claimants seek legal advice?

A4 - From the outset 90% of claimants chose legal advisor, as was always provided for under section 7 of the legislation from its first draft, but at their own expense as confirmed by the Superior Courts.

Q5 - Will a legal culture of generally accepting, or rejecting, assessments develop?

A5 – Stable high levels of acceptance by both claimant and respondent but the latter is higher.

Q6 -Courts' attitude towards litigants in the new dispensation?

> A6 - This seems largely unaltered, although there is a new jurisprudence on proportionate damages emerging from the Court of Appeal since November 2015 which has halved the value of a number of awards made by the High Court which were deemed excessive.

The constitutional scholar David Gwynn Morgan (2005) considered that establishment of PIAB "*re-engineers the law more in favour of insurance companies."* [287] It may be simplicity on the part of commentators, and perhaps also by the judiciary, to consider that claims are paid by the insurance industry. It is the body of policyholders and society at large which pays ultimately. Wilful blindness to that reality only adds to the "*denigrated average perceptions of the tort system"* to use a phrase from Ilan (2011).[288]

An inference permeating academic commentary in Chapter 2 is that it was insurers who dictated the reforms announced in 2002. In fact, the implementation of the programme which established PIAB was considerably more balanced than what insurers had sought then, and indeed than the further reforms which they are seeking now in 2019.

If they were aware of the detail of the reality of how the majority of personal injury claims were concluded in the pre-reform era, it does not seem to have been valid for academics to make the comparison below as expressed by Ilan (2009)

> "*Legal academics have pointed to the suitability of the previous litigation regime, noting that it could be further reformed to achieve the aims of increased expedience and economy.*"[289]

No criteria of 'suitability' are set out in the above cited article and it is not a 'like for like' comparison.

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[287] David Gwynn Morgan (n81) at p31.

[288] Jonathan Ilan, 'The Commodification of Compensation? Personal Injuries Claims In an Age of Consumption' (2011). Social & Legal Studies 20(1) 39 at p40.

[289] Jonathan Ilan (n37) at p58.

Where the tort cases really go in Ireland

An academic article published online in May 2012 is of particular interest in the current context because the researchers included Jonathan Ilan.[290] Their work reviewed the approach to claims handling by local authorities in both Ireland and Scotland. This provides an insight into the reality of what happens with the c.94% of tort claims that never reach trial, and indeed would be unlikely to even commence in the litigation system.

The purpose of analysing this body of work is to identify what 'fairness factors' may be at play in settlements reached outside the supervision of neutral expert assessors such as in PIAB. As the article comments, these claims *"differ significantly from the* 'gladiatorial contests' *which populate the law reports and most textbooks*". This is what the writers call '*the lower tier of justice'* as opposed to the judicial or upper tier. Because of the level of retained liability and delegated authority resting with these (potential) defendants these cases differ from insurer claims handling which has been reported on in other research.[291]

In an interesting observation, the writers state that comparison of these claims handling processes to the judicial process is *"too heavy handed"*. It will be recalled that in the context of the proposed reforms one of these authors reported in a 2009 article on the preference of academics for the *status quo.*

Ilan also expressed concerns about PIAB in the context of monitoring for fairness in the increasing volume of direct settlements. Since no such monitoring had ever taken place in the pre-reform litigation system perhaps that concern was also a little '*too heavy handed'*. Trust in neutral Third Party experts is important and Ilan was

[290] Simon Halliday, Jonathan Ilan and Colin Scott, 'Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) MLR 75, no. 3, 347.

[291] Such as Brian Greenford. The Handling of Personal Injury Claims by Insurers in Ireland and England. This research was conducted on behalf of the Special Working Group established to assess the viability of introducing a special compensation assessment board following the recommendation of the 1996 Deloitte & Touche report. The report is appended the Second Report of The Special Working Group on Personal Injury Compensation, Department of Enterprise, Trade & Employment 2001.

writing in the highly influential publication of the Judicial Studies Institute (as then was).

As that 2012 article comments, claims processing is the site of almost all tort activity and:

> *"If insurance is the '*lifeblood of the tort law system'*, then the bureaucratic administration of claims is its pulse. It seems clear that our system of tort law could not function without it*."[292]

Drawing on research by Mashaw in the context of implementation of US social security law, the authors state that:

> "*speed comes at the cost of the involvement of the subjects in the process and the benefits that this can bring in terms of the acceptance of decisions by subjects and the value they attach to having been involved*". [293]

In PIAB, however, there is a consistent c.60% acceptance rate of assessment decisions and the speed of resolution has reduced to 7 months from what was an average of 36 months in litigation but this did not come at the cost of individualised attention. In contrast, a claimant's involvement in the litigation process is severely restricted. There must be compliance with court rules and procedures. This applies particularly in the c.6% which proceed to an oral hearing where parties might have the opportunity to 'tell their story'.[294]

In a harsh reality from a defendant perspective, these authors record one of their interviewees as reporting that;[295]

> "*the attitude of the legal system is that our public liability insurance is in fact* 'accident insurance' *and that the court's main concern was to ensure that claimants received pay-outs for accidents*." [296]

In counterpoint to the concerns from academics reviewed in Chapter 2 that claimants are up against lawyers for powerful insurance companies, the findings by

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[292] Halliday *et al* (n290) at p350.
[293] Ibid at p352 citing J. Mashaw, *Due Process in the Administrative State* (New Haven, Yale UP, 1985).
[294] Nor can it be presumed that all claimants want to 'tell their story' given privacy considerations that may arise from a trial in open court.
[295] This is despite immunity of local authorities in Ireland for nonfeasance.
[296] Halliday *et al* (n290) at p364.

these researchers more accord with the reality that decisions by such prospective defendants "*were being made largely in isolation from the input of lawyers*".[297]

There is a telling passage from their conclusions:

> *"Our argument is ultimately premised on a sceptical view of the nature of law in society – that the law which we study in the law reports and see discussed in the textbooks is something of a* boutique *offering within the legal system. The law on the books is both a rare and rarefied thing. As Ross has observed: Adjustment of insurance claims compromises the legal mandate for individualised treatment with the need of a bureaucratic system for efficient processing of cases . . .This is the law, as it is experienced by its clients rather than by its philosophers. Perhaps in the light of some kinds of legal philosophy it is bad law. In my opinion, such legal philosophy has lost contact with the reality of modern society*."[298]

While leaving as open for debate the matter of preference for the rigid application of formal rules, these researchers concluded that in Ireland:

> *"expert judgment and the flexible application of legal rule and principle with attention to the particularities of individual cases were privileged in Ireland at the cost of consistency of decision-making at a jurisdictional level".*

The reason this is important is because for detractors of PIAB, a more relevant comparison might have been, not Binchy's "*constitutional right of access to the courts"* but with the reality of what was happening in the 90% of litigation which never reached trial, or the claims which never even started into litigation in the pre-reform period.[299] In those pre-reform settlements there was an asymmetry of information. This was particularly so in relation to levels of damages prior to publication of the PIAB Book of Quantum in 2004. However, nobody knew in the pre-reform period what happened to those claims. This case study shines light on that subject in the post reform period and refutes the assertion that the litigation *status quo* was preferable to the PIAB process.

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[297] Ibid at p365.
[298] Ibid at p367 citing. H.L. Ross, *Settled Out of Court* (Hawthorne Aldine 1980); p 134–5
[299] The rise of lay litigants in areas other than tort is such a trend in Ireland of late that it is specifically commented upon in the Annual Report of the Courts Service.

In fairness to the academics reviewed in Chapter 2, there was a background discourse in the legal community that was unremittingly hostile to PIAB.[300] Accordingly, their views may well have been influenced by that atmosphere.

Obviously, a finding that insurance and tort are inextricably linked is not new and has been the subject of considerable literature. However, the longitudinal analysis in this case study brings more clarity to the lack of a rational relationship between trends in accidents and claims costs which allegedly drive premium rates. That leads on to scrutiny of insurer profitability and the rate of insurance inflation for consumers, on which academics in Chapter 2 had mixed views about the consequences of the proposed reforms. That is the focus of the next chapter.

[300] Law Society Gazette October 2002 at page 3 the Director General stated: "*that the Law Society had for years recognised that the system was in need of reform and had no objection in principle to the introduction of the PIAB, provided that its means of operation is fair, it makes economic sense and actually does result in cost reduction".*

Chapter 6 – Premiums Trends and Insurer Profitability

To what extent were concerns that the reforms were solely designed to increase insurer profits, and would not deliver sustained cost benefits to policyholders, shown to be defensible in light of the outcomes?

6.1 Academic concerns relative to premium trends and insurer profitability

Research does not support the doubts expressed by commentators reviewed in Chapter 2 that the reforms, including the establishment of PIAB, would fail to deliver sustained premium reductions to policyholders.

Patton (2012) echoed the general narrative:

> *"Insurance premiums were escalating dramatically and there was significant political pressure …. Public attention was becoming increasingly focused on the issue. Furthermore, powerful insurance and employment groups were lobbying for reform to protect their dwindling profits."*

Each of these assertions warrants scrutiny for defensibility.

Some academics astutely identified non-claim issues that affect premium rates and their relevance is interrogated to assess the validity of those views. There were also some aspects they failed to identify which are relevant to the defensibility of their other assessments.

The effect of the reforms on insurer profitability must be identified to address the concerns of commentators that (only) insurers would be the main beneficiaries of any reduction in claims costs. The data underlying the research reported on in this chapter is very extensive and some of it is quite complex. Accordingly, overviews are presented in tables and graphs but some of the relevant raw data are included in Appendices.

6.2 Reforms were a response to the dwindling profits of insurers?

Hedley (2004), in summarising dissatisfaction with the pre-reform system, cited various grounds including "*that too much of the money circulating in the system ends up with the [lawyers] and insurers."*

Patton (2012) asserted that MIAB 2002 findings resulted in the *'blame for rising insurance cost squarely on the shoulders of the legal profession*'. That is inaccurate. Aside from the fact that the 67 recommendations were directed at a wide range of factors other than lawyers, it was the first research which highlighted that the profits of motor insurers in Ireland were many multiples of their UK counterparts.

The trends in premium, underwriting and technical results between 1983 and 1999 are set out in Appendix C6.2 showing the pre-reform post-tax profit. [301] This comparative profit finding by MIAB in 2002 was extensively covered in the media at the time. The Law Society Gazette accurately quoted the figures in question, that Irish motor insurer profits at €343ml were ten times that of the UK motor market at £30ml over the same period.[302] It must also be understood that motor is often underwritten as a loss leader and that is confirmed by data from all the EU Member States. [303]

The statutory investigation into insurance costs by MIAB commenced in 1998. The quest for an alternative system for personal injury claims dates back even further, to at least 1986 as reflected in the chronology of previous research tabulated in the methodology appendix to this thesis.

[301] From paragraph M20 from MIAB report 2002.

[302] This finding by MIAB in the 2002 report of profits in Ireland being ten times those of comparable insurers in the UK was detailed in Law Society Gazette May 2002 at page 8 and extensively covered in the national media at the time. https://www.irishtimes.com/news/irish-insurers-profit-ten-times-more-than-uk-counterparts-1.420313.

[303] A body known as Insurance Europe is the EU federation of insurer federations across Europe and produces interesting statistical analysis of motor insurance results in the Member States although Ireland and the UK only make selective data submissions which omit profitability reports. https://www.insuranceeurope.eu/insurancedata

Appendix C6.2A sets out the figures for the motor Underwriting Result compared to Net Earned Premium Income for the years 1992 to 2013. The reported results turned positive for insurers in 2002 when details of the planned reforms became known to the industry at large upon the publication of the MIAB report in April 2002. This reflects the practice by insurers of anticipating future trends, positive or negative, when determining pricing.

There was a profitability spike in 2005 when the underwriting result is expressed as a percentage of premium being 26%. This reflected optimism about the operations of PIAB, which had commenced registering claims in July 2004, and also the passage of the Civil Liability & Courts Act 2004 which became effective in September 2005.

It can be demonstrated that profitability improved for motor insurers, as some commentators had predicted, over the decade between the publication of the MIAB recommendations in 2002 up to the 2012 reported results. The inflation hike in 2012 to 80.4 reflected in CSO data is most likely explained by the introduction of the EU Gender Directive under which male and female drivers could not be rated

differently. It has been reported that both genders are paying more as a result, particularly in the younger age categories.[304]

However, commentaries reviewed in Chapter 2 were not limited to motor. Indeed, Binchy focused particularly on Employer Liability. As demonstrated in Chapter 5, the consent and acceptances rates in the PIAB model were very different as between classes of business. Most tort literature tends not to make those distinctions between compulsory and non-compulsory insurance. The profitability for the other types of liability business reflect a different trend than in compulsory motor.

Appendix C6.2B presents year by year data on underwriting and technical results for liability insurance between 2003 and 2013 which reflects volatility over this review period. There were what could be called 'super profits' in the years immediately after implementation of PIAB in 2004 and it could be said that this had been predicted by some commentators. Hedley (2004) is supported in his contention that

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[304] **I was a member of the Irish Government's McDowell Committee in 2006 which researched the actuarial validity of gender rating as a proxy for risk factors in a number of classes of insurance. Despite opposition by both the Irish and UK Governments the measure was introduced from January 2012. Taking that ECJ case at its height, rating by age may also be questionable. These issues are of greater significance in common law countries than on the mainland as Europe tends toward the alpine rather than the maritime model of risk pooling. Additionally, a more significant proportion of their accident costs are absorbed by the social insurance systems. Sample media reports on consumer adverse experiences of the Gender Directive include -*How an EU gender equality ruling widened inequality*. Guardian 14th January 2017 at- https://www.theguardian.com/money/blog/2017/jan/14/eu-gender-ruling-car-insurance-inequality-worse**

“too much money” ends up with insurers. In 2012 and 2013 there were three outlier companies which mask the underlying positive results for the remainder of the market in those years. When their data is excluded the market loss for 2012 and 2013 at €58ml turns into to a positive Technical Result of €123ml and that is 29% relative to Net Earned Premium Income over that period from 2003 to 2013 excluding the outliers.

The economic crisis from 2008, which involved high unemployment, means there are too many factors extraneous to the reforms to identify provable causations for Employer Liability and Public Liability profit trends. Statistical analyses of volumes of liability claims and related accident frequency were, however, examined in relevant substantive chapters.

For current purposes, liability business will not be interrogated further. There is no independent monitoring of premium trends to address the question which academics reviewed in Chapter 2 raised as to whether claims savings would be credited back to policyholders by reductions in liability premium charges. It can be stated that business complaints about such costs did not re-emerge until 2015. That resulted in enquiries by Joint Parliamentary Committees from 2016 after which competition law investigations commenced which are still ongoing in July 2020 at national and EU Commission level.

However, the question can be addressed further in the context of compulsory motor insurance for which there are stable datasets.

6.3 Reforms will not deliver sustained benefits to consumers?

Quill (2005) stated that "*Doubts have also been expressed about the impact such a board will have on insurance costs, which is the principal objective of having such a board."* While establishing PIAB was also about improving the redress process for claimants, that pessimism about the influence on insurance inflation can now be assessed.

Ilan (2009) was also sceptical of insurance charges being reduced for consumers:

> *"It was proposed that savings would be passed to consumers in the form of reduced insurance premiums. Whilst these arguments hold logical appeal, it must be noted that they have been contested by representatives of the legal professions."*

Even allowing for the fact that this author concedes that lawyers were the main source of planting the doubt above, which was contrary to the CSO index at that time, on further interrogating the basis of the assertion it was identified that Ilan cited a February 2007 newspaper article in a footnote. [305] The journalist in question focused on the need for Government to "tackle" excessive insurer profits but did state that premium charges were at their lowest level since 1999, and had dropped by 18% in 2004 alone after PIAB commenced operations in the July. That article also recounted that the doubts of consumers had been "planted by the legal profession" who the journalist stated '"detest PIAB".[306] The source relied upon by Ilan does not, therefore, seem robust.

Patton (2012) had identified that "*the cost of motor insurance fell consistently from the years 2004 to 2008…"* but he contended that *"the establishment of the Board has not resulted in long-term savings for the insured…"* He considered that the "*impact of the Board on insurance premiums is also questionable. One of the*

[305] Jonathan Ilan (n37) at footnote 52 on p68.
[306] "Happy insurance firms and irritated lawyers – but what about consumers?" *Irish Times*, 28 February 2007
https://www.irishtimes.com/opinion/happy-insurance-firms-and-irritated-lawyers-but-what-about-consumers-1.1197517

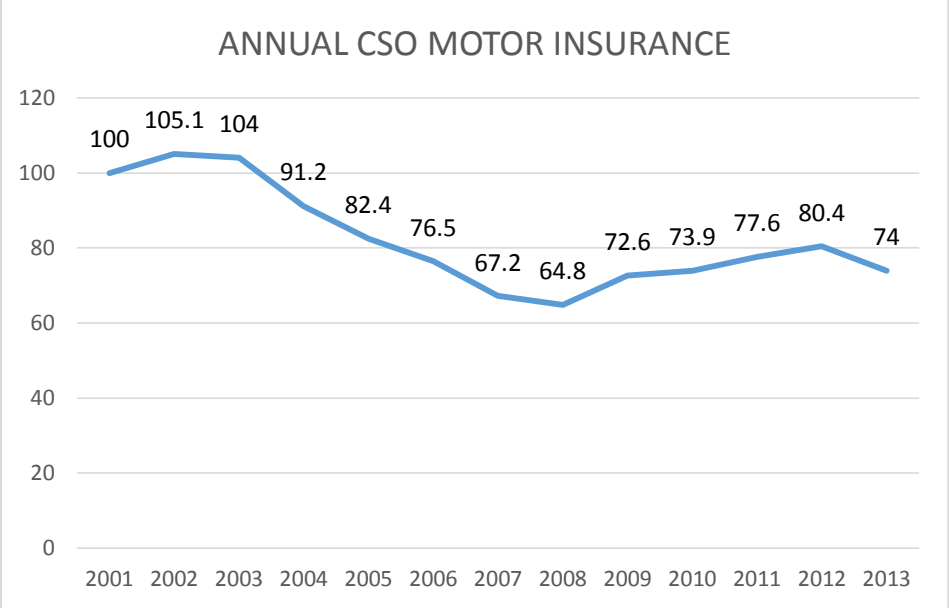
fundamental objectives of the legislation was to tackle the spiralling cost of insurance for consumers…"

Upon interrogation of that article it was identified from a footnote that Patton seems to have relied on the Deloitte Motor Insurance Report 2010 as the source for a projection that "[*F]or 2011 the estimated average increase stands at 5%".* On following the link in his footnote, it was established that the statistic of 5% is from an annual industry breakfast briefing where insurers share their projections about how much they plan to increase premium over the following year.[307] I know that because I have been attending those events since their inception 25 years ago. That is not a reliable source to reach the conclusion that savings being delivered to consumers as a result of the reforms are in question. The only consistent measure of actual premium inflation is the index compiled by the Central Statistics Office which is publicly available online.

Despite that fact that Patton could see the CSO index reducing since 2004, Fenn (2006) projected that the "*results of these changes will not be seen for a number of years."*[308] The interviewees in that published research may have been from the legal community rather than based on published hard data.

The evidence demonstrates that there were substantial and sustained reductions in premium charges between 2002 and 2013. The trend in motor insurance inflation is reflected in the graph below which represents the CSO index. At the time of publication of the MIAB recommendations in April 2002 the index stood at 108.7. The lowest Year End index since then was 2008 at 64.8. There was a decrease of 40% to Year End 2013 in flat terms without allowing for general inflation.

[307] Patton (n37) at footnote 42 on p71.
[308] Paul Fenn *et al* (n101) at p44.



Graph 6.3.1 – Motor Insurance Inflation CSO 2001-2013

The movements above in the CSO index can be contrasted with the trends in motor claims cost, analysed in Chapter 3, as against the level of premium income to examine whether causal links can be identified. For each of the data sets below a sub-column reflects the movement from the prior year. Net Premium Income is abbreviated to NEPI and the Net Cost of Claims Incurred (which consists of claims incurred after allowing for reinsurance) is abbreviated to NCCI:

Year	**CSO Index**	*v. prior*	**NEPI €**	v. prior	**NCCI €**	v. prior	*NEPI/NCCI*
2001	100		1,468		1,442		*102%*
2002	105.1	*5%*	1,594	*9%*	1,384	*-4%*	*115%*
2003	104	*-1%*	1,702	*7%*	1,276	*-8%*	*133%*
2004	91.2	*-12%*	1,685	*-1%*	1,100	*-14%*	*153%*
2005	82.4	*-10%*	1,606	*-5%*	912	*-17%*	*176%*
2006	76.5	*-7%*	1,562	*-3%*	1,031	*13%*	*152%*
2007	67.2	*-12%*	1,529	*-2%*	886	*-14%*	*173%*
2008	64.8	*-4%*	1,438	*-6%*	1,086	*23%*	*132%*
2009	72.6	*12%*	1,349	*-6%*	1,176	*8%*	*115%*
2010	73.9	*2%*	1,242	*-8%*	1,054	*-10%*	*118%*
2011	77.6	*5%*	1,202	*-3%*	841	*-20%*	*143%*
2012	80.4	*4%*	1,114	*-7%*	813	*-3%*	*137%*
2013	74	*-8%*	1,054	*-5%*	986	*21%*	*107%*
CUMMULATIVE		-26%	18,545	-31%	13,987	-25%	*133%*

Table 6.3.2– Motor Inflation v Premium v Claims Costs 2001-2013

In all of the individual years above the premium income exceeded estimated claims costs, sometimes by substantial margins, with a cumulative income of €18.5bl compared to costs of €13.9bl. That margin decreased dramatically in 2013 to 7% when claims costs were estimated to have increased by 21% on the previous year despite a steady trend of reducing costs reported over the previous three years.

Major market events during the period under review included the Regulator's declaration of the 'insolvency' of Quinn which had held a significant market share. That insurer was placed into Administration in March 2010 although rumours of its difficulties were long standing.[309]

At another major market player, Royal Sun Alliance Ireland (RSAI), significant deficits in estimates for prior years' liabilities came to light in 2012.[310] This required substantial revision of reserves in 2013 by €72ml in motor and was so significant it masked the overall market profit result that year.[311] These events dampened competition in the market and would have been of more relevance to pricing than the underlying trends in claims cost as presented in Chapter 3 or the underlying accident frequency as analysed in Chapter 4.

While there are some timing differences, in the period reflected in the table above the 25% reduction in net claims costs may account for the 31% reduction in net premium income for motor insurers. The trend in premium inflation indicates a reduction of 26% which more closely reflects the trend in net incurred claims costs as analysed in Chapter 3.

[309] I happened to be at the insurance conference in the RDS on the day that the news of Quinn being put into Administration was announced. Competitors in the audience cheered.
[310] This controversy resulted in the CEO succeeding in an unfair dismissal claim before the Employment Appeals Tribunal because of the public nature of the announcement of his immediate departure from the company. The reports of that evidence provide some interesting insights, such as that reserves were regarded as "treasure in the Irish caves" to be used as the insurance group saw fit. RTE report by the national broadcaster on 9th March 2015. *Former RSA executive in unfair dismissal claim*. https://www.rte.ie/news/2015/0309/685684-philip-smith-rsa/
[311] Additionally, in 2012 AVIVA altered its status from being an Irish regulated insurer to being a branch of the UK parent. As part of that process 46% of the premium earned in Ireland that year was remitted to the UK as 'management expenses'. Insurers' management expenses are subjected to scrutiny in this chapter.

Contrary to some of the commentary reviewed in Chapter 2 that no reforms should have commenced until insurers gave a 'guarantee' of premium reductions, there is a resonance in the downward pricing trends above to the projections by insurers that implementation of all the MIAB recommendations could secure claims cost savings in excess of 30%.

This evidence of a benign trend in insurance inflation is at variance with the negative projections by consultants retained by the legal professions to which some academics referred when criticising the reforms. The data demonstrates that the savings to consumers were substantial and sustained from April 2002 to the end of 2013.

6.4 Non-claim factors identified as affecting premium rates and profits

Patton (2012) astutely commented on some non-claim factors:

> *"Because of the lack of transparency in premium calculations it is impossible to separate the Board and non-Board influences in relation to these figures. Factors such as falls in profitability due to the global economic crisis, and the greater competitive presence of internet-based insurance providers distort any conclusions we can draw."*

In addition to the global factors identified above, which warrant testing, there were also some local events not related to tort claims costs *per se* that had a significant influence.

There have been a number of insurer insolvencies in the Irish jurisdiction.[312] Such failures can depress competition in a market that is highly concentrated. As a result of these exits, other players may be relieved of the pressure to credit claims savings back to consumers through premium reductions.[313] The extent of these factors,

[312] Setanta in 2014: PMPA in 1983: ICI in 1985. There have also been some 'passporting' insurers who have come in and out of Ireland under the EU single market rules.

[313] Although my methodology is entirely different from theirs, Fenn *et al* arrived at a similar finding. "*Changes in the number of companies operating in the market each year had a significant*

which are extraneous to the reform programme in influencing pricing, are essentially unknowable. However, interestingly in terms of timing these events seem to appear as spikes in the data trends. While raising a *caveat*, some efforts can be made to strip out the influence of these exceptional factors.

A feature of the insurance market is pricing in anticipation of forthcoming trends.[314] While only Board members of MIAB might have known in 2001 the extent to which insurers estimated potential premium reductions if the reforms were implemented, the details of those projected savings became public knowledge with the release of the MIAB report in April 2002. Those details were extensively covered in the media at that time.[315] A reductions in the net cost of claims incurred (NCCI) were reported from that year and the CSO index reflected price deflation from 2003 until 2009.

Trends in Investments Returns

Some commentators reviewed in Chapter 2, such as Patton, seem to have accepted arguments by insurers in purported justification of premium increases that one of the causes had been reductions in their investment income. Analyses indicate the extent to which this may or may not be of relevance in either the pre and post reform period.[316]

Over the ten years from 2005 to 2014 when motor net earned premium income (NEPI) totalled €11bl the statutory returns record an investment income of €1.2bl or

effect…entry of firms reduced profits, exit of firm increased profits". CRIS Discussion paper 2005.1. '*Cycles in insurance underwriting profits: dynamic panel data results'.*

[314] In 2015 insurers told the National Competitiveness Council that one of the reasons for premium increase was Payment Protection Orders but, although that alternative to once-off lump sum settlements had been discussed for many years, the necessary legislation was not actually introduced until October 2018 with commencement of the Civil Liability (Amendment) Act 2017.

[315] They were also readily ascertainable by an internet search for academic work being researched in 2008 which seemed to ignore those dynamics. So this is not information personal to me when I criticise the robustness of that commentary by Ilan (2009).

[316] It might be considered an irony that insurers complain about reducing investment returns given their resistance to improvements in the discount factor applied for plaintiffs in maximum severity cases, and also given that many insurers sell investment products that promise to deliver a better rate of return than the average person could achieve by investing for themselves.

10% over that period. However, as premium income reduced annually so did the relativity of investment returns, decreasing from 12% in 2005 to 4% in 2013 although rising again to 7% in 2014. Proportionalities for individual years are presented on a per company basis in Appendix C6.4. There are some odd assignments to the motor account of such investment returns in particular years at a market level. Upon interrogation it can be identified that particular companies seem to perform considerably worse than others in their investment strategies but there is no consistency with global financial events.

Indeed, it is questionable whether what might have been the old business strategy of relying on holding premium for a long period until claims fell due to be settled remained tenable once PIAB was established in 2004 with an average finalisation period of 7 months. The change in legal culture after the reform also accelerated the payment pattern with a substantial volume of direct settlements pre-PIAB in contrast to the historical approach of 'all' claims involving the issuing of proceedings. This raises an issue about the competence of insurers if they were continuing to rely on investments for profit given the shortening run off period between receipt of premium and finalisation of claims.

6.5 The law was re-engineered to suit insurers?

David Gwynn Morgan (2005) considered that the reforms represented a "*policy which re-engineers the law more in favour of insurance companies…"* This implies that this author doubted there would be balancing benefits for consumers but the data above demonstrates the savings in premium charges from 2002 to 2013.

There is an assumption in academic commentary reviewed in Chapter 2 that insurers would see it as in their interests to 'reengineer' lower claims cost to boost profitability but that is not necessarily what the data analyses indicates. High claims costs can suit insurers because of the level of fixed overheads in the sector which cannot be reduced in proportion to any reduction in claims costs as will be demonstrated.

Insurer Management Expenses and Broker Commissions

The counter institutive hypothesis that high claims costs may suit insurers is a suggestion I have expressed publically many times.[317] The only plausible counter argument I encountered was that coverage would become too expensive and people would stop buying the product. [318] However, that saver does not apply when insurance is compulsory as in motor.[319] Analyses of statutory returns do seem to support my stance to a certain extent.

Raw data is presented on a per company basis in Appendix 6.5 on the trend in management expenses, which it must be stressed are a separate item from claims management expenses.[320]

Because there are too many extraneous issues in the data for liability market, the focus for more recent years is on compulsory motor. [321] The table below shows Net Earned Premium Income (NEPI) and Management Expenses (MGT XPS) with the latter expressed as a percentage of the former:

€ml's	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	*Total*
NEPI	1,329	1,245	1,190	1,120	1,050	944	983	1,076	1,029	1,030	*10,996*
MGT XP'S	186	192	204	249	189	179	198	284	215	220	*2,116*
XPS/NEPI	14%	15%	17%	22%	18%	19%	20%	26%	21%	21%	*19%*

6.5.1 – Motor Premium Income v Management Expenses 2005-2014

[317] There is a field of non-rational economic theory, as discussed by Richard Posner in 'The Law and Economics Movement' (1987) The American Economic Review 77, no. 2:1.

[318] Q&A at University of Limerick international conference in May 2015 organised by Eoin Quill.

[319] Aside from those who decide to break the law and risk criminal sanctions by driving uninsured.

[320] Defined in the Central Bank guidelines for insurers as: Management expenses should include all general and administrative expenditure except Directors fees, which should be included in the Profit and Loss Account (Form 11).

[321] Irish market aggregate figures published in the annual Blue Book do not capture risks underwritten elsewhere in the EU which became an increasing proportion of liability business whereas motor remained predominantly insured within the state.

While Management Expenses at market aggregate level over the period 2005 to 2014 increased by 18% from €186ml to €200ml, the relativity to Net Earned Premium Income deteriorated still further from 14% to 21% which is an increase of 50%. [322] When net premium income reduced substantially post-reform by 22%, the impression of relative efficiency disappeared.

Similar to observations above on insurers' management expenses, the relativity of broker commissions increased as premium rates decreased - going from 5% to 8% over the period 2005 to 2014 and increased in real terms from €65ml to €87ml. Raw data is presented in Appendix 6.5 on a per company basis but is summarised at aggregate market level in the table below:

€ml's	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	*Total*
NEPI	1,329	1,245	1,190	1,120	1,050	944	983	1,076	1,029	1,030	*10,996*
COMM	65	66	70	63	71	75	80	82	86	87	*745*
COMMS/EPI	5%	5%	6%	6%	7%	8%	8%	8%	8%	8%	*7%*

Table 6.5.2 – Broker Commissions v. motor premium 2005-2014.

It could be suggested that brokers also would have limited interest in claims costs reducing if that results in lower premium rates which in turn reduce commission amounts calculated on percentages. If brokers had secured the 8% rate applicable in 2014 on the level of net premium which applied in 2005 they would have been better off collectively by €41ml in that year alone. [323]

These largely fixed expenses must be recovered from policyholders. Such outlays appear as a greater proportionate overhead the more the premium charges reduce. In reviewing tort reforms, scant attention is paid in the tort literature to the efficiency of the insurance market model.

[322] The data above for 2012 contains an outlier where one insurer AVIVA remitted 46% of their Irish Net Earned Premium Income to their EU head office as part of the process of downgrading its Irish operations to a mere branch.

[323] Individual insurance companies vary in their strategy on broker commissions as can be demonstrated on an individual basis as demonstrated in the raw data at Appendix 6.5

To put those amounts in context, it may be noted from the compensation detailed in Chapter 5 that in 2017 the accepted PIAB awards amounted to €168ml and court awards were €206ml, of which half related to 'med neg', but a gross total of €374ml. Insurer management expenses and broker commissions accounted for an almost comparable level at €307ml in 2014 alone. While some commentators reviewed in Chapter 2 raised concerns about profitability, there was no call for a review of insurer efficiency overall which would seem a preferable agenda to the lobbying for lawyer fees.

It is of interest that more profits were earned by insurers in Ireland where injury compensation levels and the frequency of litigation costs are higher than in the UK which tends to support the suggestion that high claims costs can suit insurers.

The EU Solvency 11 effect

Ilan (2009) reported the proposition that early settlements would reduce "*the need to tie up funds in* "reserves" *for long periods."*[324]

The importance of this issue of adequacy of reserves should not be underestimated. This is evident in a new insurance cost crisis emerging in Ireland from 2016, despite no deteriorations in accident frequency nor in claims costs as demonstrated in the substantive chapters of this thesis. Other factors are at play to determine premium charges.

The most significant recent 'shock theory' of the underwriting cycle is likely to have been the new prudential regime known as Solvency 11. This took effect from January 2016, although it had been in development since at least 2001. Despite the long forewarning, the level of preparedness varied considerably between companies.[325]

[324] Ilan cites Dorothea Dowling in 'The PIAB: A Win, Win Solution', at chapter 8 in Quigley and Binchy (eds.), *The Personal Injuries Assessment Board: Implications for Legal Practice* (Dublin: Firstlaw, 2004), p34.

[325] At an insurance conference I attended in November 2013 only 13.3% of companies surveyed considered they had "*moved to a pricing approach incorporating Solvency 11 capital issues*". A

It is difficult to assess how much additional resources these measures required insurers to allocate to their solvency margin. A number of insurers found themselves in the position of needing to raise additional capital as a matter of relative urgency. The extent of those perceived deficits would not generally be in the public domain as nearly all companies operating in Ireland are members of UK or European insurance groups and results are presented on an aggregated rather than a geographical basis.[326]

The only wholly owned Irish quoted insurer at that time was FBD. The public record reflects the extent to which that company required substantial additional capital in 2015. That may be a proxy for what other insurers faced in terms of challenges.[327] This is likely to have been of greater importance in dictating pricing in recent years than the debate about 'a compo culture' or a 'negligence culture' so frequently addressed in the tort literature as reflected in Chapter 2.

6.6 Other factors not identified

The purportedly inevitable insurance cycle

What at first may seem tangential to this research may prove more relevant to factors driving premium rates than the debate about 'compo culture' or 'negligence culture' as reflected in the commentaries reviewed in Chapter 2.

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further 40% said they had partially moved towards compliance "*using internal capital model*" and basically 22% responded that they had done nothing at all.

[326] The one exception being Liberty which is American owned. It was reported in January 2017 by the Sunday Times UK that Liberty had sought funding from its parent company in Boston. *The former Quinn insurance business Liberty Insurance has been given a €40m cash injection from its parent group to boost its solvency.* https://www.thetimes.co.uk/article/liberty-insurance-gets-40m-boost-from-us-parent-p0tt5gjxg

[327] Most other motor insurers operating in Ireland returned profit in 2018. *Liberty Insurance predicts return to 'good' profit in 2017*.https://www.irishtimes.com/business/financial-services/liberty-insurance-predicts-return-to-good-profit-in-2017-1.2494320. FBD reported a 70% increase in profits for the first half of 2018. https://www.rte.ie/news/business/2018/0801/982352-fbd-reports-higher-profits-for-first-half-of-2018/

For the purposes of this case study, brief mention must be made of the 'underwriting cycle'. That inter-relational perspective has more relevance to profitability and pricing than trends in claims cost or accident frequency reviewed in Chapters 3 and 4 respectively. It was also demonstrated in Chapter 5 that there was some evidence of insurers becoming less forensic in their investigation of claims. In the business it is said that "the only good claim is a settled claim". Large outstanding volumes have implications for the Solvency margin and long tailed liabilities have a tendency to deteriorate.

Supported by some empirical data, I also have an additional contribution to make to this consideration of the concept of the 'insurance cycle'. My contention is that 'hard' and 'soft' price phases can arise from deliberate manipulation of the domestic market by dominant insurers. This is a different point from insurer incompetence or inefficiency covered elsewhere in the literature, although that can lead to insolvencies too.[328]

This hypothesis is based on data in the MIAB 2002 report and on some consultancy work I undertook for The Competition Authority (TCA) on their 2005 investigation into the non-life insurance industry, plus experience of recent events from an insider perspective. Obviously, it is necessary to provide some evidence in support of this tentative hypothesis.

It has been demonstrated that policyholders did experience reduced premium rates from 2002 up to 2013 which many commentators reviewed in Chapter doubted would be delivered by the reforms. However, the question remains whether the profits of insurers were subsequently inflated as a result of the reforms *per se*. Obviously, the concept of profit is not in itself 'bad' but profiteering is, from a moral and ethical perspective. It may also be contrary to competition law but that requires a high burden of proof and is not what I am suggesting here.

To the extent that premium charges are based on claims trends, the latter are heavily estimated figures. Those liabilities relate not just to claims which have been reported but also potential liability for claims which have yet to be lodged at the end of the

[328] Paul Fenn *et al*. (n313).

financial year. Such claims are referred to as IBNR (Incurred But Not Reported). [329] The extent to which different insurers add to their base financial provisions for these 'unknown' claims varies but there is a questionable pattern over time given the impact of the reforms from 2002 which considerably shortened the run-off tail.

Because of my insider knowledge (and the fact that I am old) there is additional evidence upon which I can draw to support my tentative hypothesis that high claims costs can suit insurers. The power of that sector, as recognised by some academics, is also the power to do nothing. In 2012 when substantial increases in the financial limits of the lower courts was mooted, it surprised me that there were no strong objections by the insurance industry. At the time I was Group Liability Manager of the national transport company, CIE. My 'what if' projections indicated the negative financial consequences of the Circuit Court limit being increased from €38,000 to €60,000 and the District Court being trebled to €15,000 so that it could deal with injury claims for the first time. [330] Without divulging any confidences, it was only by exertion of pressure from me that the industry made any effort to have this measure abandoned but their efforts were half hearted. When one reviews the evidence from the period after the previous jurisdictional increase it supports the suggestion that higher claims costs, which was the anticipated consequence of the financial increases in the court limits, can suit insurers.

Back in 1990 it was announced that the Circuit Court limit was to be increased the following year from Irl£15,000 to Irl£30,000. In very brief terms, the consequence of that were:

- Insurers doubled Written Premium Income from €452ml to €904ml by 1999
- while claims payments increased, from €368ml to €698ml, underwriters were able to levy a higher rate of increase in the premium charges

[329] A measure of such provision is understandable provided the potential liabilities are not Statute barred.

[330] "*It may be in the public interest for Alan Shatter* [Minister for Justice] *to listen to vested interests*. Times 15th July 2013.
https://www.google.ie/amp/s/www.irishtimes.com/business/it-may-be-in-the-public-interest-for-alan-shatter-to-listen-to-vested-interests-1.1463477%3fmode=amp

- reserves for the estimated cost of motor claims incurred more than doubled from €470ml to €846ml.
- there was an alarming rate of price increases, being in 1991 the highest inflation ever on record at a cumulative 81% to 2001, as reflected in the CSO index in the table below:

Year	**Motor Insurance YE Index**	Increase pa	Cumulative Increase
1989	68.5		
1990	78.5	15%	
1991	93.9	20%	34%
1992	96.3	3%	37%
1993	99.1	3%	40%
1994	101	2%	42%
1995	100	-1%	41%
1996	99.3	-1%	40%
1997	102.5	3%	43%
1998	107.3	5%	48%
1999	113.5	6%	54%
2000	123.6	9%	62%
2001	146.7	19%	81%

However, the benefit for insurers was that the margin between premium income and claims expenditure grew over this period by 45% from €84ml to €206ml.

There were various outlier events over the period in question. For example, jury abolition for personal injury cases in 1988 produced none of the anticipated savings which had probably been factored into a levelling off of premium inflation in 1988 and 1989. Those unrealised savings, coupled with increases in lower court jurisdictions in 1991 which had the objective of reducing litigation costs and was also a failure, created deficits in the reserves estimated for prior years' outstanding claims. Premium charges increased significantly from 1991 to 1994. After a slight reductions in 1995 and 1996 there were further increases in premium charges over

the remainder of that decade with a particularly substantial increase in insurance inflation during 2001.

Time will tell whether the premium increases experienced by consumers since September 2013 upon announcement of the jurisdictional increases, which did not actually increase the median value of court awards as demonstrated in Chapter 3, will increase profits for insurers and build 'war chests' of excessive reserves to fund the next insurance cycle. A provision differential analysis of the amounts set aside for claims in individual years of accident compared to the ultimate cost of those claims will reveal the true picture over the coming years.

While it might be argued that this is outside the bounds of this case study, it is explained in order to highlight that there are multi-dimensional factors affecting the cost of insurance other than those identified by most commentators reviewed in Chapter 2. Insurers are indeed powerful, as asserted by many tort academics, but they are largely unregulated except from the perspective of solvency supervision as there is no equivalent of the Financial Conduct Authority in Ireland. Motor insurers collectively have been deemed '*an emanation of the State'* by CJEU in the context of their MIB responsibilities and were held liable for *Francovich* damages to injured parties for failure to comply with EU Motor Insurance Directives. However, there is no mechanism to hold insurers to account for their treatment of policyholders in terms of unjustified charges. [331] The reason this is important to tort because calls for reforms which reduce compensation rights may be caused by consumer complaints about insurance charges that bear little or no relationship to trends in claims costs.

As Lewis (1995) indicates, Governments may have a vested interest in maintaining the *status quo* with insurers.[332] This is not so much 'tort in action' as tort exploited as an excuse to secure dividends for shareholders. The commentators reviewed in

[331] In a range of cases both the UK and Ireland have been found not to have respected the EU law rights of injured parties under various Directives as interpreted by CJEU. Some of these now defunct national precedents are examined in my article published in the December 2016 edition of the Gazette of the Incorporated Law Society of Ireland.
https://www.lawsociety.ie/News/News/Stories/Defective-motor-insurance-EU-law-and-victims-rights/#.Xsa130RKjIV

[332] Robert Lewis, 'Insurers' Agreements Not to Enforce Strict Legal Rights: Bargaining in the Shadow of the Law' (1985) MLR 48(3) 275.

Chapter 2 may have been justified in their cynicism about insurers but for a host of additional reasons that they did not articulate.

6.7 Conclusions on premium trends & insurer profitability

As Richard Lewis (2005) highlights *"insurance is largely ignored by the great majority of tort texts*".[333] This case study assists with bridging that gap in the literature.[334]

Commentators reviewed in Chapter 2 were of the view that the reforms were motivated by insurers 'dwindling profits' *per se*. However, analysis of the evidence shows that profits were relatively healthy but it was the public resistance to continuing to pay increasing premium charges that underpinned the MIAB investigation and subsequent recommendations.

None of the academics denied that premium charges were escalating in the pre reform period at an unacceptable rate. Their reservations about the potential success of PIAB had some resonance with public attitudes in a 2002 survey.[335] Replies are recorded below in response to the question '*Do you agree or disagree that the Government's Personal Injuries Assessment Board, which was recently established, will lead to reductions in*…..?'

Table 6.7 – 2002 survey of public attitudes to establishment of PIAB

Do you agree or disagree that the Government's Personal Injuries Assessment Board, which was recently established, will lead to reductions in:			
	Agree	Disagree	Don't know
Insurance claims costs	40%	10%	51%
Insurance Premiums	36%	13%	52%

There is an interesting variance above of 4% between expectations of cost reductions at 40% compared to only 36% that the savings would be reflected in premium reductions. Both such responses were still at below the balance of

[333] Richard Lewis. '*Insurance and the tort system'*. Legal Studies 25 (2005): 85-116 at p85

[334] This research should also provide a more current insight into the inter-relationship between tort and insurance as compared to findings in 1978 as reflected in the Pearson report which is still widely cited for data.

[335] Survey undertaken between 20th and 30th November 2002 of 1,200 people aged 18+ interviewed at home on a face-to-face basis by Lansdowne Market Research for the Irish Insurance Federation as published in the MIAB 2002 report pages numbered 13 to 18.

probabilities if one ignores the 'don't know' which were the preponderance. Members of the legal professions would undoubtedly have been in the 'disagree' category. It could be said that some academics were marginally less well informed than the public.

In the commentaries reviewed in Chapter 2 there was very little discussion of how the fundamental functions of the law of negligence could be improved. Law and economics theory contends that insurance is the most efficient system of pooling the risks of negligent accidents. [336] In the words of Calabresi (1970), general deterrence involves deciding [*emphasis added*]: "*what the accident costs of activities are and* ***letting the market determine*** *the degree to which, and the ways in which, activities are desired given such costs*". [337] That theory is not reflected in the reality.

In free market economics there is no regulator assigned with the role of ensuring that insurers are actually efficient in the common interest. The imperfect market, with the imbalance of power between providers and purchasers, seems not to be fulfilling that function. The fact that motor is compulsory entails a risk that tort claims start to be regarded as insurance claims. [338] MIAB called for a better balance by the Financial Regulator between solvency supervision, which is their priority, and the other legitimate interests of consumers. [339] There is no evidence of that as yet and consumer protection continues to be weak in 2020.

The 'light-handed' regulation pursued by the EU Commission is also failing in its objective of creating a single market for financial services from the perspective of consumers. The fact that one of the objectives of the EU Directives harmonising motor insurance provisions is the creation of a single market cannot be in any doubt since at least the latest 5th such Directive which states at the first preamble that:

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[336] William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* (Harvard UP 1987).
[337] Guido Calabresi (n177).
[338] Under the Central Bank code 'consumers' are defined to include Third Parties.

[339] MIAB recommendation number 4:- *"That the unique position of compulsory motor insurance should be adequately reflected in the responsibilities of the new Irish Financial Services Regulatory Authority (IFSRA) as the Board are of the view that there is currently no effective regulatory mechanism to balance the legitimate concerns of consumers with requirements for effective solvency supervision."*

> *"It should therefore be a key objective of Community action in the field of financial services to reinforce and consolidate the single insurance market in motor insurance."* [340]

The single market is not a reality for motor policyholders. The insurance lobby is influential at EU level in affecting the content of Directives, just as they are at national legislative level.[341] Insurers can make more difference to the law of tort than judges can do by extending or establishing precedents. Many academics reviewed in Chapter 2 recognised this reality in their reference to "powerful insurance" groups.

Lord Denning might be pleased to observe that there is no longer a fiction of ignoring the insurance status of the defendant.[342] The 5th Directive provides a directly effective right for the claimant to sue the vehicle insurer direct. This objective is set out at preamble 21 as below:

> *"In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, this right* [of direct action] *should be extended to victims of any motor vehicle accident."*

If provisions were implemented to make such direct claiming rights an everyday reality, which seems not to have been done in either Ireland or England, then it would be observable from court lists exactly how many actions are against insurers rather than other corporate bodies or individuals.[343] This would assist in answering the question whether it is nine out of ten or some other proportion of actions that are essentially against insurers.[344] The academic fiction that there is a relational

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[340] DIRECTIVE 2005/14/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC.

[341] As concluded by Lewis (n332) at p116 on the influence of insurers on legislation and everyday practical operation of the tort system. Oppositional to that perspective, Lewis notes that there is little proof of plaintiffs moulding the facts of their cases to fit into an insured scenario but some evidence of that is provided in this case study at Chapter 7 on exaggerated claims.

[342] Dissent by Lord Denning in *Lister v Romford Ice & Cold Storage* [1956] 2 Q.B. 180, 187 (C.A.) - extending vicarious liability.

[343] Lewis (n333) at p86 in footnote 2 describes as exceptional a tort action which proceeded against an uninsured pedestrian. Ironically that seems to have been a subrogation claim pursued by a legal expenses insurer so it was not 'cleansed' of the insurance affect. *DAS v Manley* [2002] EWCA 1638.

[344] Ibid, cites data from Pearson in 1978 that indicates "*insurers pay out 94% of tort compensation*" at footnote 6 on page 86. Given the existence of compulsory motor insurance it can now be safely assumed that all such motor injury cases involve insurers or, in the event of an uninsured vehicle, the MIB. The PIAB data does provide insight by classification of claims between motor, Public

aspect to tort recovery in which the 'wrongdoer pays' would be exploded. The question then arises as to what implications that has for tort theory. That will be addressed in my overall conclusions in Chapter 8.

The fact that this case study has of necessity being iterative over a long period of time adds to its robustness. In 2019 the latest insurance crisis seems to have resulted largely from the strain caused by unpreparedness for a new EU Solvency regime and/or issues that are not related to trends in claims costs as analysed in this thesis. Indeed, when the Government's Working Group published its Second Motor Insurance Key Information Report in May 2018 it found that total projected claims costs per policy, for all claims types, had increased by only 14% over the period from 2011 to 2016 whereas premium inflation reflected on the CSO index was 70% over the three year period to September 2016.[345] The fact that insurance rates reduced subsequently by 23% up to December 2018 when no actual new reforms had been implemented raises further questions about the justification for previous increases.

Insurers publicly maintain that premiums are a function of liabilities and claims arising within the particular risk profile. [346] However, this case study raises a challenge to that purported formula. Indeed, even at a national level private motor statistics by policyholder profile published by the Central Bank reflect rising premium in the face of reducing claims costs.[347]

Imposing excessive premium charges causes public outcry. That outcry turns into political pressure. The result is often to adopt reforms lobbied for by insurers to the detriment of genuine injured parties rather than reviewing the efficiency of

Liability and Employer Liability. No such categorisation is available in the raw data secured from the Courts Service.

[345] From CSO index 62.6 in Sept 2013 to 106 in September 2016.

[346] Measures highlighted in helping reduce mart insurance costs. 4 February 2019.

https://www.agriland.ie/farming-news/measures-highlighted-in-helping-reduce-mart-insurance-costs/

[347] The latest data was published in 2017 for the 2015 year of account. In February 2019 there is a suggestion that no further such analyses will be released which, if true, represents a further loss of transparency.

https://www.centralbank.ie/statistics/statistical-publications/private-motor-insurance-statistics

insurance operations.[348] If tort academics, like some of the commentators reviewed in Chapter 2, do not arm themselves with robust data they are at risk of not being in a strong position to resist what they may consider unwelcome reform proposals.

Victims of negligent accidents are, compared to others with disabilities, privileged because of the 'law and economics' theory that underlies the option/enforcement of insurance provisions of which they may avail, subject to discharging the burden of proof. It would be inconsistent with that reality to object to the tort system being assessed in the context of socio-economic policy for efficiency and proportionality.

[348] The priority, and perhaps only, concern of the regulator in Ireland is to avoid insolvencies and to ensure the stability of the financial market. No arm of Government has responsibility for the cost competiveness of insurance, as noted by the National Competitiveness Council in January 2016.

Chapter 7 – Exaggerated Claims

To what extent are concerns raised about exaggerated injury claims defensible upon analysis of case law on the statutory deterrents introduced?

7.1 Introduction to academic concerns

At the outset it may need to be stressed that PIAB has no role in detecting or filtering out exaggerated claims as that is the responsibility of defendants and solely the preserve of the courts to impose sanctions. Changes to the litigation system to assist in tackling questionable injury claims were introduced in parallel to establishing PIAB.[349] Defendants also faced the same sanctions as plaintiffs for false averments under the provisions of the Civil Liability & Courts Act 2004.

There was almost universal concern among the commentators reviewed in Chapter 2 about exaggerated claims, albeit employing a range of terminology from fraud to frivolity, and some acknowledgment of the damage caused by these cases to perceptions of tort. However, some academics seemed rather dismissive of the significance of fraud (*loosely so called*). There was no sense of outrage and they did not seem to feel compelled to explore how this might be addressed within the essential elements of tort theory at common law.

The reality of the pre-reform period is reflected by Ryan (2004) in that there "*appears to be widespread criticism of a tort law system that all too frequently allows opportunistic, unmeritorious plaintiffs to board the compensation gravy train*." [350]

[349] This can be thought of as a triage approach. Straightforward 'assessment only' cases would be adjudicated by PIAB at low overheads with no defendant cost exposures for plaintiffs and the disputed liability cases would enter the Courts whose workload would be unburdened of the 'assessment only' cases but there would also be meaningful deterrents to exaggerated claims within the litigation system.

[350] Ray Ryan (n112) at p22.

Hedley (2005) summarised the objectives of the reform programme as compared to other alternatives such as a 'no fault' regime:

> "*The current choice in Ireland is to stick with a common law system, but with rather vigorous attempts to cut out wastage and fraud*."

These 'vigorous attempts' included deterrents to misleading claims in the Civil Liability & Courts Act 2004 at section 26 (hereinafter s.26). The proposed reforms in relation to 'fraud' were met with a mixed reaction that does not seem to be defensible in light of most of the jurisprudence which emerged subsequently at Superior Court level.

Binchy stated that the Civil Liability and Courts Act 2004 was anticipated by the Supreme Court in their '*hostile attitude to plaintiffs who are victims of negligence but who have aggravated* [exaggerated] *their injuries'*. However, as a review of the case law demonstrates, it was actually the refusal of the courts to impose any worthwhile sanction upon proof of exaggeration that necessitated the statutory intervention. [351]

Ilan (2009) seemed to make light of the reality of the concerns in this context: [352]

> *"It has been pointed out that the law of tort is designed to award compensation only in relation to legitimate claims, and that the Irish courts have taken an increasingly restrictive approach to public liability even without legislative intervention*." [353]

The purported '*increasingly restrictive approach'* to liability seems to relate to a rather different issue of what might be called '*weak claims'*. However, Ilan does raise an interesting point. Defendants may have been entering full denials in the old

[351] In a range of cases pursued by CIE to the Supreme Court, being the only defendant who had fought the issue to that high a level at that time, or indeed since up to July 2020.

[352] Jonathan Ilan (n37) at footnote 15 on p58.

[353] Ilan cites a paper on the UK situation by Annette Morris 'Spiralling or Stabilising? The 'Compensation Culture' and our Propensity to Claim Damages for Personal Injury' (2007) 70 M.L.R. 349, 355.

system when in reality their reservations related solely to quantum in situations where they might otherwise have conceded negligence. In essence, such an approach would encourage or, indeed, oblige a defendant to be less than honest in concessions of fault in cases involving exaggeration. Their only defence prospect would rest on a failure by the plaintiff to discharge the burden of proof on other essential elements of negligence. That would be an economically inefficient approach to litigation and a waste of court resources. However, this research does indicate that some judges took that 'soft route' to dismissal rather than grant applications to invoke s.26.

Holland (2006) accepted that prior to the reforms *"there was little or no disincentive to exaggerate*".[354] However, he considered the statutory deterrent to *"be blunt to the point of injustice and for that reason may be little used in practice."* He proved to be relatively correct in terms of volume, albeit for a very different reason.

The perspective of the legal profession can be gleaned from Gilhooly (2006) in a factual account of the statutory deterrents:

> *"The most radical and celebrated changes have been the measures which have been brought in to combat fraudulent claims. There is now a requirement to swear a verifying affidavit when pleadings are provided in any case. This requirement applies to both plaintiff and defendant. This affidavit will swear that all information in the pleadings are true and accurate, and if it subsequently transpires that they are not, then the party which has been found guilty of making the false declaration will be guilty of an offence."* [355]

It is important repeat, as stated above, that the new requirements also applied to defendants.

Back in 1999 the judiciary seemed to recognise that relatively high levels of damages in Ireland were more likely to encourage opportunistic claims:

> *"There is the more serious issue of fraudulent claims. There would appear to be an increase in smallish bogus accident claims particularly against local authorities arising out of alleged defects in pathways or manhole covers etc.*

[354] Holland (n115) at p52 and at p59.
[355] Stuart Gilhooly (n43) at p106.

> *The only answer is for the Courts and Judges to be vigilant in weeding out the spurious claims and in not imposing an excessive duty of care on occupiers, employers etc."* [356]

The above passage seems to conflagrate the issue of '*duty of care'*, which is as one of the essential elements of liability, with the entirely different issue of '*spuriousness*' based on allegations of exaggerated consequences. The authors of that report were of the view that:

> "*judges can however be helped in this task, through appropriate legislation, and through greater use of information technology*."

The '*appropriate legislation'* was ultimately introduced under the 2004 Act. This followed the statutory investigation into insurance costs when the Government accepted the proposals of MIAB published in April 2002 and, of those 67 recommendations, number 47 was worded as below;

> "That stringent measures be introduced to tackle fraudulent and exaggerated claims with loss of all compensation entitlements and appropriate criminal sanctions."

Binchy (2004) expressed a rather one dimensional view of the proposals. He made no comment on fairness for defendants, nor pronounced any apparent condemnation of exaggerating claimants:

> "The introduction of s.26 represents a clear attempt by the Oireachtas [*Parliament*] to weaken the position of plaintiffs whose claim is tainted by untruthfulness in some respect."[357]

The legislation makes clear that it is not untruthfulness 'in some respect' that is relevant but rather "*in any material respect*" per s26(1)(a). The concept of 'truth and honesty' had also been invoked in the 2004 Denham Report to which Patton (2012) referred on the dysfunctionality of the personal injuries system.[358]

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[356] In research by the Jesuits published in Working Notes 1999 Issue 35 under the heading "The Claims Industry and the Public Interest", which included elite access to members of the judiciary.
[357] Annual Review of Irish Law 2004 – Tort – Damages – Procedure. P527.

[358] 2004 Committee Report on Court Practice and Procedure, Chaired by Judge Mrs Justice Susan Denham who subsequently became Chief Justice in 2011 until her retirement in July 2017.

Details of the plan by the Minister for Justice to tackle '*dubious personal injury claims'* were announced in July 2003 and were was covered widely in the media at the time.[359] Binchy commented that the "*Minister was apparently content with the principle that untruthfulness should be met by an outright dismissal*" and he quoted relevant comments by the Minister:

> *"People must understand that if they take personal injuries actions, they will lose out if they come other than with clean hands as genuine claimants. If they come with dishonest intent either to exaggerate or tell lies about their case, they will get nothing*." [360]

The concept of coming with 'clean hands' seems to invoke equitable principles which are not an anathema to the concept of an 'even playing field' for defendants.

Many important justice dimensions arose in subsequent Parliamentary debates. The ultimate objectives were clear and relatively simple, as reflected in the wording of the legislation at section 26 of the Civil Liability and Courts Act 2004 as below:

> **26.**—(1) If, after the commencement of this section, a plaintiff in a personal injuries action gives or adduces, or dishonestly causes to be given or adduced, evidence that—
> (*a*) is false or misleading, in any material respect, and
> (*b*) he or she knows to be false or misleading, the court shall dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
> (2) The court in a personal injuries action shall, if satisfied that a person has sworn an affidavit under *section 14* that—
> (*a*) is false or misleading in any material respect, and
> (*b*) that he or she knew to be false or misleading when swearing the affidavit, dismiss the plaintiff's action unless, for reasons that the court shall state in its decision, the dismissal of the action would result in injustice being done.
> (3) For the purposes of this section, an act is done dishonestly by a person if he or she does the act with the intention of misleading the court.
> (4) This section applies to personal injuries actions—
> (*a*) brought on or after the commencement of this section, and
> (*b*) pending on the date of such commencement.

[359]Irish Independent 3rd July 2003 *McDowell hopes his 10-year threat will cut false claims*. http://www.independent.ie/business/irish/mcdowell-hopes-his-10year-threat-will-cut-false-claims-25937381.html

[360] Annual Review of Irish Law 2004 – Tort – Damages – Procedure. P530.

However Binchy (2004), somewhat contrary to the precise wording above and oppositional to the clear intent of the legislature, seemed to leave the matter of statutory interpretation wide open:

> *"It remains to be seen whether the courts will take a more nuanced view. What is not clear is whether the court is free to take, and articulate, a position,* a priori*, that a general rule denying compensation to a plaintiff who is untruthful in any material respect is one that would result in injustice being done. In other words, does the* "out clause" *given by the section on the issue of justice permit the court to articulate a value that is inconsistent with the value adopted by section [26]? Of course the issue is unlikely to surface because the court is always free to conclude, in* the particular circumstances*, that to deny compensation to the particular plaintiff would result in injustice being done."*

If the judiciary had adopted the *a priori* position in every case as suggested by Binchy above then this reform would not have addressed the concerns of many academics reviewed in Chapter 2 about the extent of 'fraud' (loosely so called) in the tort system. Following what appears to be advice from Binchy to the bench to circumvent the legislation might also raise constitutional issues about the separation of powers. The extent to which "the out clause" was invoked, so as not to dismiss exaggerated claims in the interests of justice, can now be assessed.

Erskine (2007) provided a summary of the categories of claims that were to come under renewed focus:

> "The verifying affidavit protects against the three types of exaggeration:
> (i) where the whole claim is concocted,
> (ii) where there is a genuine claim but the effect of the injuries is exaggerated by the claimant because of a subjective belief that the injuries have had a worse effect [than] they have...
> and
> (iii) **...**where there is a genuine case of negligence established but the plaintiff deliberately exaggerates the injuries, knowing that he or she is exaggerating the injuries and their effects." [361]

[361] Daniel Erskine (n56) at p49.

Erskine also highlighted the sanctions that were being introduced in America against lawyers involved in questionable claims.[362] Rather than the 'greedy lawyers' referred to by Binchy (2004) it may be the 'misleading lawyers' which need to be tackled.

After the issue of fairness, the second aspect from academic commentary reviewed in Chapter 2 is the actions of defendants in the context of exaggerated claims. Binchy regarded this issue as "*dictating the process of legislative change*" and contended that:

> '*undoubtedly there are some fraudulent plaintiffs who have taken advantage in some cases of a lax system of litigation strategy by certain defendants*.' [363]

There seems to be an inference above that defendant lawyers may not have been discharging their responsibilities to clients.[364] A review of the cases fought prior to the statutory intervention challenges that contention. [365] Binchy's suggested remedy for '*some fraudulent plaintiffs*' was to propose another form of litigation, that is the rather obscure tort of malicious institution of civil proceedings.[366]

To address the apparent attribution of blame to defendants, it was necessary to search for evidence of such 'lax' strategies. Indeed, tackling exaggeration assumed an additional importance after the introduction of the reforms because it was suggested by some that an increase in the frequency of questionable claims could be caused by the establishment of a more straightforward redress process through PIAB.[367]

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[362] Ibid at footnote 350 on p56.

[363] William Binchy (n70) at p118.

[364] Or the laxity of defendant lawyers not being persuasive enough to secure instructions from clients to defend fully.

[365] For transparency, I again emphasise that I was Group Liability Manager of the national transport company in Ireland from 1990 to 2013 in which capacity I was responsible for mounting many of the legal challenges in the pre-reform period.

[366] The tort of malicious institution of civil proceedings in *Dorene v Suedes (Ireland) Ltd [1981] IR312*. Binchy conceded it had only ever succeeded once in Irish law, in a case which did not involve a fraudulent litigant, and which related to an entirely different issue in an action for specific performance rather than tort.

[367] Binchy expressed this view in the context of 'doubtful claims' being encouraged. Similar concerns about the 'expressway principle' leading to higher claims frequency were raised by the Junior

Insight from my own personal professional experience, as demonstrated by the number of leading cases fought by CIE companies, is that efforts by defendants to tackle this mischief were far from "lax" but frequently resulted in frustration and wasted resources that were unrecoverable. Now that I am retired from that occupation since 2013, reflexivity requires that I acknowledge my own role in this research process. However, I unashamedly adopt the defendant perspective which is so rarely covered in the literature.[368] That is one of my claims to significance.[369]

Binchy acknowledged that even securing such a remotely likely decree as under the tort of malicious institution of civil proceedings, and even if it included an award of exemplary damages, that would be worthless against most plaintiffs. However, he asserted that it would "*send out a message to others contemplating this type of fraud"*. This view demands an assessment of what messages were actually being sent out, in the pre and post-reform eras, as these affect legal culture. Only the High Court and upwards issue written decisions. Injury claims are predominantly adjudicated at Circuit Court level and are frequently reported on in the media so a review of those headlines also provides a picture on the 'message' which was being conveyed. [370]

As addressed in Chapter 5, Patton (2012) was concerned about the monitoring of settlement offers "*and by extension justice*" for claimants but made no reference to fairness for defendants. He only briefly referred to exaggeration:

> "*The court system had become inundated with litigation marked by systemic frivolity, exaggeration and fraud*."[371]

Minister for Justice as reported in the media. The Sunday Business Post newspaper, 31st August 2003. The point was also made in the Bacon report commissioned by the Bar Council.

[368] Such research as does exist tends to reflect the views of defendant lawyers which is quite a different perspective from defendants themselves. See Ken Oliphant et al '*Comparing Legal Cultures'*, BIICL. March 2016 [slides kindly provided to me by Ken summarising research on legal culture with views of lawyers in different jurisdictions on levels of adversarial strategies.]

[369] I make a distinction between the defendant perspective (as in Twining on standpoint), particularly where self-insured, and that of defendant lawyers as in Twining, W. *The Bad Man Revisited* (1973) 58 Cornell L. Rev. 275, 281-82.

[370] Appendix 7 provides listings of media coverage on dismissed claims and related matters.

[371] Patton (n37) at p65.

There is an issue with the word *'fraud'* which reflects a surprising looseness of language employed by some academics. A review of the case law demonstrates that invocation of the 'fraud' concept also caused confusion and inconsistencies among judges as the jurisprudence developed in the post-reform period.

The type of claim involved in exaggeration must be distinguished from actions based on slim grounds of negligence and from others which may be deemed frivolous.[372] Those issues go to the essential elements of tort and corrective justice. Exaggeration is not accommodated specifically within negligence theory.

In addition to the exaggeration element, some cases reviewed for this chapter present challenges to fundamental aspects of the rule of law. These include equality before the law and the normative structure of our relationships with each other.

7.2 Jurisprudence on exaggerated claims relative to academic concerns

Appendix 7 provides a listing of the 50 relevant judgments which were reviewed to test the views of commentators in Chapter 2 on the subject of claims exaggeration and the statutory deterrent. Many of these claims were 'assessment only' where negligence was not disputed. Accordingly, these provide a microscope on redress (only) in tort.

Academics had a preference for the *status quo* of the old litigation system. However, it can be demonstrated that the need for a statutory intervention arose because in that pre-reform system there was an imbalance towards plaintiffs under the common law on exaggeration. From a defendant perspective, unsatisfactory results had been secured by CIE all the way up to Supreme Court level.[373] Briefly, the themes

[372] Avery Katz (n266).
[373] For the sake of clarity, these cases were not the only actions fought on the basis of exaggeration up to that time but they are the only ones which proceeded to Supreme Court level.

which emerged from those common law precedents through a systematic review are summarised below under relevant headings.

Jurisdictional questions

There 'may' be an inherent jurisdiction for courts to dismiss but it was not invoked. *"It appears to be a notion applied where the whole of an action ought to come to an end and is preventive of an abuse of process rather than punitive. That is the present state of the law*" *– O'Connor 2003* citing *Vesey* 2001 and *Shelly-Morris* 2002.[374]

That it is not the job of the judge to '*disentangle*' the false and genuine aspects of a plaintiff's claim as that would risk the loss of the appearance of impartiality - *Vesey 2001* and cited in *Shelly-Morris* 2002.

It is not proper to engage in benevolent speculation, nor is it fair to the Defendant to so do - *Shelly-Morris 2002* citing *Vesey* 2001.

Definitions and procedures

Exaggeration: "*Three such ways are: (i) where the whole claim is concocted, (ii) where there is a genuine claim but the effect of the injuries is exaggerated by the claimant because of a subjective belief that the injuries have had a worse effect that they have. This type of approach involves no conscious lying by a plaintiff. (iii) Thirdly, there may be a situation where there is a genuine case of negligence established but the plaintiff deliberately exaggerates the injuries, knowing that he or she is exaggerating the injuries and their effects. This may take on the appearance of a fraud claim*". - *Shelly-Morris 2002* and citing *Vesey* 2001.

The onus of proof rests with the Plaintiff who is obliged to discharge it in a truthful and straightforward manner. - *Shelly-Morris 2002* citing *Vesey* 2001

[374] *O'Connor v Dublin Bus* [2003] IESC 66: *Vesey v Bus Eireann* [2001] IESC 93: *Shelly-Morris v Dublin Bus* [2002] IESC 74**.**

> That the factual content of pleadings, and the facts upon which experts rely in their reports, are the responsibility of the plaintiff and not of his/her advisors. It is the responsibility of a solicitor to ensure that a plaintiff is fully aware of the significance and, indeed, solemnity of advancing a claim for hundreds of thousands of pounds, or a lesser sum, before the claim is presented to the Defendant, not to speak of the Court - *Shelly-Morris 2002*.
>
> Loss of earnings, on which there is 'fragile evidence' should not be included in awards for general damages. Special damages have a designated meaning per *Ratcliffe v. Evans* [1892] 2QB 424. - *O'Connor 2003.*

This review of case law so far is certainty not indicative of "*a lax system of litigation strategy by certain defendants*" to whom Binchy (2004) seems to assign blame for exaggeration slipping through the tort system. As to his invocation that defences "*would send out a message*" it seems that the common law precedents were more likely to have encouraged the 'carry on as usual' approach to overstated claims. The long hard, and expensive, battle at common law, from the 1996 accident up as far as the Supreme Court in 2003, had achieved some clarity. However, relatively little of practical use had been secured from a defendant standpoint nor was there any strong clear message to plaintiffs about consequences for pursuing exaggerated claims.

There are two other CIE cases at Supreme Court level (*Ahern* and *Goodwin*) that continue to be cited in determinations under s.26. [375] However, it can be contended that these are in the grey area between the old legal culture and the post reform period. Retrospective legislation is usually repugnant to the Irish Constitution but it was possible to persuade the Office of the Attorney General that s.26 should apply to existing litigation on the basis that the onus to tell the truth in personal injury actions had always applied. [376] In reality, proceedings issued prior to the emergence

[375] *Ahern v Bus Eireann* [2011] IESC 44. *Goodwin v Bus Eireann* [2012] IESC 9.

[376] There are no absolute rights. They may be regulated by Parliament when, in the words of Kenny J. "the common good requires this". *Ryan v. AG* [1965] IR 294.

of precedents on interpretation of the legislative intervention were at a mid-point between the old and new regimes. [377] Those pleadings may not have been drafted with the new '*truth and honesty*' measures in mind.[378] Indeed, it was acknowledged in a later High Court judgment that the *Ahern* case *"from what I can ascertain, it clearly turned on its own particular facts". [379]*

Additionally, there is an error in the *Ahern* reasoning to the extent that it was held that s.26 did not apply because the disputed experts and their reports were not put into evidence as a result of the future care claim being withdrawn in the course of the trial.[380] However, as subsequently determined in a 2010 High Court decision, that abandoning of an overstated loss does not save a plaintiff from an application under s.26.[381] Accordingly, further analysis of those Supreme Court decisions in 2011 and 2012 does not assist in addressing academic concerns reviewed in Chapter 2.

In the summary of judicial reasoning which follows, it is sometimes necessary to outline the fact matrix to gain an appreciation of the 'tort in action' that is faced by defendants. It is also observable that in many of these claims there was a long lead time between accident and final determination which supports the findings on delay and lack of case management in the Denham Report 2004.

Findings from this review are presented in the chronological order of the decisions to demonstrate the iterative manner in which mixed messages were being conveyed.

The first reported successful application under s.26 was in October 2007. That decision turned on its facts because the defendant could prove that the injuries had

[377] Prior to the legislative and, indeed, prior to judicial interpretation of the 2004 Act.

[378] 2004 Committee Report on Court Practice and Procedure, Chaired by Judge Mrs Justice Susan Denham.

[379] Para 146 in *Nolan v O'Neill & Mitchell* [2012] IEHC 151

[380] Para 147 in *Nolan v O'Neill & Mitchell* [2012] IEHC 151

[381] *Farrell v Dublin Bus* [2010] IEHC 327.

been sustained in a different accident. [382] Given that the plaintiff had attempted to secure compensation from a defendant who had no involvement, it is somewhat surprising that the judge took the opportunity to ascribe the adjective 'draconian' to s26. That decision has been repeatedly cited when refusing s.26 applications. However, the selective narrative drowns out that part of the decision which classes such claims as 'an abuse of process':

> *"I would be doing a grave injustice to the defendants if I were to make an award of damages to the plaintiff in respect of the left facial injury, since, apart altogether from the s. 26 implications, I could not as a matter of probability be satisfied that those symptoms were caused by this particular accident."*

The judge made a helpful advance by applying s.26 and at least there is a rare reference to justice for defendants. What tends not to be cited is the remainder of the sentence after the word 'draconian' which is *"certainly of a draconian nature, but it is deliberately so in the public interest"*.

A Supreme Court decision in January 2009 is sometimes referred in articles about s.26 and it might be cited as an example of the 'soft option' by imposing a higher degree of contributory negligence along with a considerable reduction in the level of damages. However, the judgment itself makes no reference to any application under s.26.[383] That inaccurate classification as s.26 also applies to three other cases which were dismissed on grounds of credibility which probably represented the 'soft option'.[384] It is possible that a change in legal culture led to dismissal of these actions based on more strict application of classical principles rather than invoke the 'nuclear' solution of s.26. This would support the inference from Ilan (2009) that it had been the practice of defendants to lodge full defences even where reservations were more nuanced.

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[382] *Carmello v Casey & Anor* [2007] IEHC 362.

[383] *Hussey v Twomey & MIBI* [2009] IESC 1.

[384] Articles often include cases as examples of unsuccessful s.26 where there was no such application mentioned on the face of the judgments- *Hegarty v CIE* [2009] IEHC 495; *Forde v Central Parking* [2011] IEHC 407; *De Cataldo v Petro Gas* [2012] IEHC 495- and of successful s.26 where no such application was made in *Boland v Dublin CC & Ors* [2011] IEHC 176. These cases revolved around credibility or other grounds.

The next decision which brought some clarity to s.26 was in July 2009. [385] This involved an assault which, on its facts, would normally result in an automatic entitlement to compensation. The importance of this dismiss is that the extent of injury was held irrelevant to consideration of the 'injustice' discretion. That approach was subsequently followed in 2010 in a contested Employer Liability action where the plaintiff sustained a thumb amputation and negligence was found 25/75 in his favour but:

> *"The fact that the dismissal of an action will deprive a plaintiff of damages to which he or she would otherwise be entitled cannot, by itself, be considered unjust. Section 26 of the Act contemplates and requires such a consequence."* [386]

While Holland (2006) might consider that dismissal on the basis of one exaggeration to be "blunt to the point of injustice". However, that approach was subsequently endorsed by the Court of Appeal in 2017 upholding a dismiss in 2015 under s.26 of a plaintiff who had been seriously injured but alleged he was wheelchair bound since the accident but which surveillance had shown to be far from the reality. [387]

In a November 2009 decision, where the defence might have resulted in s.26 application but none was made, it was held that the exaggeration by the plaintiff resulted from her medical condition and fear of litigation.[388]

In a December 2009 decision, the evidence of exaggeration was side-stepped by a finding that there was no proof of liability on the employer. This seems to have been 'the soft option' again.[389]

In March 2010, where again there no liability on the defendant, the court did take the opportunity to address the question of exaggeration as compared to CCTV footage of the event. The lack of proof of negligence was in itself sufficient to dismiss

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[385] *Gammell v Doyle & White* [2009] IEHC 416

[386] *Higgins v Caldark and Quigley* [2010] IEHC 527 at para 87.

[387] *Platt -v- OBH* [2017] IECA 221.

[388] *Hegarty v CIE* [2009] IEHC 495.

[389] *Behan v AIB* [2007] IEHC 554.

but the judge did not limit herself to the 'soft option' and also granted an application under s.26.[390]

Probably the most significant of the early decisions for litigation practice was in July 2010. This clarified, as should have been apparent from the wording of the legislation, that the sanction of dismiss did not only apply to sworn evidence but also to pleadings which were intended to mislead the defendant. [391] This was a motor accident where the bus company conceded responsibility for the collision with a taxi. The plaintiff had attempted to withdraw a substantial actuarial future loss claim just before the hearing commenced, probably upon becoming aware that the defendant had evidence which contradicted the alleged loss of earnings.

A March 2011 decision involved a man who claimed nine and a half years of lost earnings in an Employer Liability claim. [392] Consistent with the finding at common law in *Vesey* in 2001 that it was not the role of a judge to disentangle the valid losses from the other parts of the claim the case was dismissed under s26. The plaintiff had actually been paid by his brother/employer throughout. The plaintiff offered to pay both side's costs if allowed to withdraw his claim but the judge refused and sent the papers to the Director of Public Prosecutions. Cases such as these probably did assist in dissuading the *"the prevalence of fraud"* as identified by Hedley (2005) among other commenters reviewed in Chapter 2.

In May 2011 a refusal to dismiss arose from an admitted disastrous 'cut and colour' in March 2007.[393] The plaintiff had not revealed a pre-existing back complaint, nor a subsequent motor accident, which she denied was what affected her golf outings. Despite the unusual fact matrix, this decision is widely quoted in s.26 applications for one particular passage:

> *"Finally, I wish to observe that s. 26 of the Civil Liability and Courts Act 2004, is there to deter and disallow fraudulent claims. It is not and should not be seen as an opportunity to seize upon anomalies, inconsistencies and*

[390] *Danagher v Glantine Inns Limited* [2010] IEHC 214.

[391] *Farrell v Dublin Bus* [2010] IEHC 327.

[392] *McKenna v Dormer Services* [2011] unreported.

[393] *Dunleavy v Swan Park Ltd t/a Hair Republic* [2011] IEHC 232.

unexplained circumstances to avoid a just liability. Great care should be taken to ensure, in a discriminating way, that clear evidence of fraudulent conduct in a case, exists before a form of defence is launched which could unjustly do grave damage to the good name and reputation of a worthy plaintiff."

The passage above has been inaccurately quoted by some as requiring satisfaction of a criminal standard of proof before evidence is presented to justify an application for dismiss. However, the correct test was cited in *Farrell v Dublin Bus* as below:

The standard of proof required to discharge the onus of proving that a plaintiff has knowingly given or adduced false or misleading evidence, is not the criminal standard of proof "beyond a reasonable doubt" applicable to criminal offences such as fraud, perjury or offences contrary to the provisions of section 25 of the 2004 Act.

The application of such a standard would, for practical purposes, render s. 26 of the Act ineffective and unworkable.

The appropriate standard of proof has been identified by Hamilton C.J. in Georgopoulos v. Beaumont Hospital Board *[1998] 3 I.R. 132 (at pp. 149-15) in the following terms:*

> *". . . The standard of proving a case beyond reasonable doubt is confined to criminal trials and has no application in proceedings of a civil nature. It is true that the complaints against the plaintiff involved charges of great seriousness and with serious implications for the plaintiff's reputation. This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities', bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."*

In Banco Ambrosiano SPA and Others v. Ansbacher & Company Ltd. and Others *[1987] I.L.R.M. 669, the Supreme Court (Henchy J.) discussed the standard of proof in cases involving fraud in the following terms:*

> *"Proof of fraud is frequently not so much a matter of establishing primary facts as of raising an inference from the facts admitted or proved. The required inference must, of course, not be drawn lightly or without due regard to all the relevant circumstances including the consequences of a finding of fraud. But that finding should not be shirked because it is not a conclusion of absolute certainty. If the court is satisfied on balancing the possible inferences open on the facts, that fraud is the rational and cogent conclusion to be drawn, it should so find."*

In the judgments reviewed, there is no reference to the "*grave damage to the good name and reputation of a worthy"* defendant that can be caused by an unwarranted claim.

In November 2011 a dismiss involved an apprentice roofer who had fallen from scaffolding.[394] The injuries were not consistent with accident as alleged. Doctors gave evidence that they would have altered their opinions had they known of his scuba diving/sailing/roofing activities while he was allegedly unable to work.

A March 2012 decision related to motor accident in 2006 where negligence conceded. [395] The judicial reasoning on refusing the s.26 application deemed the plaintiff's evidence "*somewhat fragile particularly in relation to the onset of his symptoms"* but relied on evidence from an osteopath who prepared a report for the court c.5 years after the accident and had no clinical notes to assist him in refreshing his memory. The judge found, on the balance of probabilities, that his evidence was reliable and remarked that people who "*milk the system"* are not prone to admitting improvement in their condition.

An October 2012 dismiss related to a plaintiff who slipped at work in November 2006 and negligence was conceded. [396] He was on certified sick leave until June 2007 and then continued working until April 2008 when he gave up work again on the basis of his injuries. The judge recounted the pitiful plight of the plaintiff as alleged:

> *"lost his accommodation and ended up dependent upon the charity of the Islamic community, as a result of which he was living in the Cultural Centre, sleeping on the floor there, indeed, a very pitiable plight, as depicted in his evidence*."

[394] *Folan v O'Corraoin and Ors* [2011] IEHC 487

[395] *Nolan v Kerry Foods Ltd* [2012] IEHC 208. Award by Irvine J.

[396] *Rahman v Craigfort Taverns Limited* [2012] IEHC 478.

However, surveillance videos cast matters in a different light by capturing him providing a delivery service for takeaway restaurants and he could afford to purchase a new jeep in 2010. The judge found that "*the plaintiff had absolutely no disability whatsoever....*" The reasoning in the following passage had some profound precedent value:

> *"It seems to me that all of this is entirely inconsistent with some kind of innocent state of mind. I am satisfied that his gross exaggeration of his injuries has to do with a conscious desire to enhance the value of his claim. What we have here is an attempt to transform what should be very small damages for very minor injuries resulting from a minor incident into what I am sure the plaintiff hoped would be very large damages for serious and ongoing* sequelae *which now, he claims, have lasted for nearly six years and which are continuing."*

This issue of the '*state of mind*' of a plaintiff is argued in a number of cases. In some judgments it was held that the subjective nature of the exaggeration must be proved by the defendant. Here the judge allowed the clear facts of systematic "*mis-description*" (including to 5 doctors) to answer that onus. Given the concession on negligence, it is reasonable to infer that the defendant would have readily paid "*very small damages for very minor injuries"* but was forced to shoulder the considerable 'financial burden' of fighting a highly inflated claim.

Also in October 2012 another dismiss under s.26 arose from a minor motor accident in August 2007. The plaintiff alleged she could not pursue a plan to move from hairdressing to a career as a dance teacher.[397] The alleged loss was quantified in an actuarial report and the judge commented that the large capital sum in excess of €800,000 "*undoubtedly outraged the defendants"*. The judicial reasoning was that the plaintiff had placed "*almost insurmountable obstacles in the path of this court in getting a reliable picture and that this alone would have warranted dismissal*." This was an important precedent in that the judge held that one example alone of the material misleading factors warranted dismissal. Holland (2006) might consider that '*blunt to the point of injustice*'.

[397] *Montgomery v The Minister for Justice & Anr* [2012] IEHC 443.

Again in October 2012, a further dismiss under s.26 related to a plaintiff *Meehan* who alleged his accident was caused by defective scaffolding in September 2008.[398] This was refuted by CCTV from the building site. The judge held that in light of the real time footage of the event it was not necessary to rely on the plaintiff's evidence for liability. The issue arose of whether anyone had actually been misled. The judge held that the defendant's knowledge of the accident circumstances was not material to whether the plaintiff intentionally gave false or misleading evidence because:

> "*It is the plaintiffs* [sic] *conduct of the litigation that is in issue, not whether he actually succeeded in misleading or deceiving another party or the court."*

This was important because the issue of defendant reliance, which would be relevant to deceit or fraud (*properly so called*), was held not to be relevant. This was a welcomed clarification from a defendant perspective.

As reflected in a number of decisions, surveillance evidence secured by defendants means they are not actually reliant on exaggerated pleadings, nor medical reports, as they already know such allegations to be overstated. Importantly, the reasoning confirmed that the misleading of another party was as relevant as misleading the Court under oath.[399]

Having assessed this October 2012 *Meehan* evidence on General Damages, relying on objective findings in medical evidence, quantum was determined at €135,000 and there were Special Damages for loss of earnings at €95,000 for past and €385,470 into the future. It then transpired at the hearing that the plaintiff had a substantial business as a ticket tout, which he tried to deny when caught out. The judge held that the, by then abandoned, earnings claim was "*obviously material*" and that the "*inference is that it was knowingly false/ misleading*". The finding that reasonable inferences could satisfy the onus of proof was welcome news from a defendant standpoint.

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[398] *Meehan v BKNS & anor* [2012] IEHC 441.

[399] This affirmed and strengthened the principle established by the precedents in *Farrell* 2010 and in *Higgins* 2010.

Interestingly, in this case the judge held that it was "*clear on the authorities that is not open to this court to separate out the good from the bad*" but that that is exactly what the court might "*have done before section 26*".[400]

That *Meehan* case also addressed the question of what constitutes injustice, which was a concern of academics reviewed in Chapter 2. The judge observed:

> *"One of the examples given in the cases is if a plaintiff who told a relatively trivial lie had catastrophic injuries then it would be wholly disproportionate in that situation and accordingly unjust to dismiss the whole action because of a relatively unimportant or peripheral or trivial untruth".*[401]

No reasonable defendant would argue with the approach enunciated above for invoking the injustice exemption. This is more balanced than the *a priori* approach Binchy (2004) seemed to advocate for judges to avail of the 'out clause' across the board. It also makes clear that it is not necessary for s.26 to be an instrument that is '*blunt to the point of injustice'* as feared by Holland (2006).

January 2013 looked positive for the prospects of defendants facing exaggerated claims. This action arose from a very minor motor accident in October 2008 where negligence was conceded.[402] Being from Togo, the plaintiff's first language was not English and the hearing lasted ten days. The linguistic challenges faced by the plaintiff was an aspect for which the judge made very specific allowances. There was a myriad of complaints, added to over time. The plaintiff underwent extensive medical tests and said she needed to use a stick. The defence doctor found her "*unbelievable"*. Surveillance videos were produced.

This is an important and widely cited precedent:

> "*Of particular relevance in the present case will be whether this plaintiff on one or even more occasions deliberately gave a false and/or exaggerated account of and presentation of her symptoms and complaints when she*

[400] However, the 'disentangling' of the plaintiff's case had been frowned upon by the Supreme Court in *Vesey*.

[401] The CIE cases of *Ahern 2011, Farrell 2010 and Higgins 2010 w*ere cited with approval.

[402] *Salako v O'Carroll* [2013] IEHC 17.

attended certain medical consultants so that those consultants would then give evidence which she knew was false and/or exaggerated. While the defendant has pointed to a great number of occasions on which it is alleged that a false or exaggerated account and presentation of symptoms and complaints was given to consultants, it suffices in my view for her to be shown to have done so even once, since even that one occasion is sufficient to trigger the section and mandate a dismissal of the entire case."

In terms of proportionality some, such as Holland (2006), might consider that just one example of misleading should not be sufficient to ground a dismissal. However, the judicial reasoning above is consistent with careful reading of the wording of the legislation.

While this detailed and robustly reasoned precedent in *Salako* is widely cited, the legal trade journals did not focus on many of the crucial principles established, such as that a single proven exaggeration of a material matter is sufficient for a dismissal. Lawyers, and indeed some other judges subsequently, are more likely to emphasise the anti-defendant comments, such as that the measure is '*draconian*'.

By April 2013 the position seemed positive for those fighting exaggerated claims. This *Ludlow* case might have been a high point of principle on the rule of law.[403] The claim related to a motor accident in 2009 and the plaintiff said she was a passenger in her own car which crashed into a wall late at night. She alleged that the driver was Unsworth, a slight acquaintance of herself and of her boyfriend TT. The car was insured with Zurich but Unsworth was not a named driver.[404] All vehicle occupants had left the scene by the time the police arrived. Those same officers responded to a call at 01.40 am the following morning about a domestic violence incident at the home of TT when the injured party was the plaintiff. On arrival at the address, the police spoke to the plaintiff but she was not willing to make a statement. When subsequently interviewed about the accident, the plaintiff gave the police a slip of paper with what appeared to be a note of an English mobile phone number and the name of Darren Unsworth whom she maintained had been driving. The second

[403] *Ludlow v Unsworth & Zurich* [2013] IEHC 153.

[404] The EU law issues involved in the untenable defence launched by Zurich is relation to policy indemnity, which were rejected by the judge, are addressed in Chapter 8 on conclusions to this thesis.

defendant, the insurers of the vehicle, argued that the case rested on credibility. They submitted that the plaintiff's account of the whole episode was riddled with inconsistency and assertions that were so incredible as to make it impossible to rely on any of her evidence. In what might otherwise have been a lacuna, because under EU law an injured passenger is entitled to compensation regardless of the insurance status of the vehicle, the judge turned his attention to s.26. In a summation on the plaintiff's burden of proof, the judge held:

> *"The plaintiff has to prove her case. It is true that it is sufficient for her to establish that she was injured when travelling as a passenger and the identity of the driver does not determine liability. But a plaintiff cannot play fast and loose with the truth, cannot tell some truth but not the whole of it, cannot tell a mixture of lies and truth and leave it to the court to try to winkle out the good from the bad. The circumstances of the case are material. They include the events before the critical incident in which the injuries were sustained as well as what happened after."*

The notion that a plaintiff might be required to tell '*the whole truth and nothing but the truth*' seems consistent with assumptions in theory and accords with the view expressed by Ilan (2009) that tort is for legitimate claims. This was refreshing from a defendant standpoint. Moreover, this judgment seemed to indicate some equitable principles. Tort was to serve those who '*come with clean hands*'.[405] If that principle were to be followed, it could substantially reduce the 'fraud' about which commentators are concerned and it would remove a lot of the aggravation experienced by defendants in cases where plaintiffs play "*fast and loose*" with the concept of honesty.[406]

Unfortunately from a defendant perspective, over the following 18 months the jurisprudence veered off in an entirely different direction, starting with a decision of July 2013.[407] This plaintiff *Lackey* had been upstairs on a stationary bus that was rear-

[405] Whether s.26 introduces an equitable principle to tort law is worthy of consideration.
[406] Whether s.26 is a public policy defence within the law of tort is examined in the conclusions to this chapter.
[407] This is a case of which I have personal knowledge having viewed the onboard CCTV footage from the bus shortly after the occurrence on 16th April 2008.

ended by the defendant's car in 2008.[408] Whilst the car was an economic write-off, the bus sustained minimal damage and is a much heavier vehicle. No other passengers alleged injury. Negligence was conceded but the defence by the insurers of the car asserted that the impact was so minor that no injury could have resulted. In addition to this causation defence, an application was made under s.26. The judge relied on the plaintiff's engineer and her principal medical witness to the effect that the onboard CCTV showed "*some movement of the plaintiff's head*". The plaintiff's case was that she was "*subjected to forces from below caused by the impact of the car to the ground floor of the bus"* and this was an entirely new engineering phenomena in the bus world. It seemed to originate from an orthopaedic surgeon whom the plaintiff first attended in April 2010, two years after the accident. The judicial reasoning then proceeded with some hypothetical speculation during which he seemed to be giving evidence to himself.[409]

The rejection of the s.26 application, however, was not the only issue in *Lackey*. The judge concedes that *"it was not unreasonable for the defendant to question the plaintiff and to raise the issues that they have raised".* However, he does so in the context of assessing, so he says, aggravated damages. It is clear that the judge was taking an opportunity to 'send out a message':[410]

> *"I am of the view that since the introduction of the 2004 Act which clearly impacts upon a plaintiff disproportionately more than on a defendant, the issue of aggravated/exemplary damages must always be in the mind of a court where it is alleged that the plaintiff is deliberately exaggerating his or her claim and/or being guilty of fraud or otherwise invokes the provisions of s. 26 of the 2004 Act. I think the issue of aggravated/exemplary damages is the only real deterrent to an irresponsible or indeed an overenthusiastic invocation of such a plea. I believe the courts should be at least as rigorous as they were of old when such a defence is maintained*."

[408] *Lackey v Kavanagh* [2013] IEHC 341

[409] CIE have experience of passengers phoning their solicitor from the scene of an accident when seeking an appointment with their doctor might have been a more immediate concern, in events that were not of a seriousness to warrant the attendance of an ambulance or other immediate medical attention. Many such instances developed into 'questionable' claims.

[410] A message which was rather contrary to the one advocated by Binchy.

The lack of rigour in tackling "*irresponsible or indeed an overenthusiastic"* plaintiffs in 'putting their case at its height' was the cause of the statutory intervention to tackle what was widespread abuse of the system. It is not open to the court to adopt an approach "*of old"*. The requirement on the judiciary under s.26 is mandatory, subject to materiality. The 'disproportionality' point does not stand up to scrutiny because defendants are disproportionally '*imposed upon'* by exaggerated claims.[411] Equally, judges now have the injustice exemption to dis-apply s.26 to a specific plaintiff. [412]

Later, in July 2013, this threat to defendants of aggravated damages continued. This plaintiff was a Household Assistant who had worked for 18 years at an institution for young boys but fell from a shower that she was cleaning in July 2010.[413] Liability was apportioned 75/25 in her favour but the defendants focused on the plaintiff's affidavit because relevant medical history was not all revealed originally in pleadings. The judge was highly critical of that defence. While this judge acknowledged that counsel for the plaintiff did not proceed with an application for aggravated damages, he said he was *"prepared to address that request"*.

In December 2013 there seemed to be a slight reprieve from the hostile attitude towards defendants. A claim involving relatively serious injury was dismissed because the plaintiff had knowingly misled a number of expert witnesses to exaggerate his injuries. [414]

A year went by without any developments on s.26. Then a decision in December 2014 related to a cyclist who was knocked from his bicycle in 2010 and negligence was conceded. [415] The plaintiff sustained a fracture of the L1 vertebra but the main

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[411] The concept of 'imposed upon' being taken from the Supreme Court in *O'Connor 2003*.

[412] Law Reform Commission in its 2000 Report on Aggravated, Exemplary and Restitutionary Damages stated in the context of aggravated/exemplary damages that it did '*not intend to endorse a 'compensation culture' in which excessive awards of damages are made*." http://www.lawreform.ie/_fileupload/Reports/rAggravatedDamages.pdf

[413] *Smith v HSE* [2013] IEHC 360. Binchy was quoted in the context of contributory negligence.

[414] *Creane v Gavin Waters* 2013 - unreported

[415] *Looby v Fatalski & MIBI* [2014] IEHC 564

issue of contention was the number of hours this keen cyclist was able to cycle post-accident. This sport restriction was relevant to the assessment of his physical symptoms and to allegations of depression. At the outset of the hearing, the plaintiff admitted lies that he said were told to enhance the value of his claim. The defendant accepted there was no false evidence at trial.[416] There were interesting discussions about proportionality and materiality after which the judge concluded it would be an injustice to dismiss. In one sentence he commented: *"The lies told were not sophisticated and were liable to be found out, as indeed they were by the private investigator."* That seems to imply that is to be assumed in all cases that defendants are incurring the cost of surveillance.

By December 2014 defendants essentially felt it was too risky to invoke s.26 because of the fear of a sanction of aggravated damages so they reverted to the common law precedents. This decision related to an employee who fell on a wet kitchen floor at work in January 2011 and it was a full defence pleading contributory negligence.[417] The plaintiff alleged a serious back injury. She had returned to work for a year but then maintained she could not continue and had not worked since. Schedules of special damages were revised on a number of occasions and ultimately totalled €163,907.94.The judge deemed the specials claim "*improper*". In cross-examination, it emerged that since the accident the plaintiff had been undertaking heavy exercise at a local gym but she did not reveal that to any of her doctors. In light of defence evidence that emerged at trial, the judge held that "*the plaintiff has not discharged the onus of proving that she is unable to resume her pre-accident employment….*" The reasoning for holding that plaintiff was, nevertheless, a truthful witness was:

> *"She readily conceded points against her and for example, volunteered in a frank manner evidence of her involvement in the gym when a dishonest plaintiff might not have done so safe in the knowledge that nobody was aware of it."*

This approach above reflects a certain naivety. The plaintiff probably knew 'the game was up' about her gym abilities. This reasoning also conflicts with other judicial

[416] *Looby* - Subsection (1) of S26 was not, therefore, relevant.

[417] *Daly v HSE* [2014] IEHC 560.

pronouncements that, apparently, plaintiffs should expect to be under surveillance.[418]

The judge dismissed the special damages claim and was critical of the manner in which it had been presented:

> *"It also seems to me entirely improper that such a large claim for special damages should be advanced without even the most basic attempt at verifying its validity…*
>
> *Solicitors are officers of the court and owe a duty to their clients and the court alike to ensure that patently exaggerated and unsustainable claims are not advanced in personal injuries litigation….*
>
> *All lawyers, and particularly those involved in personal injuries litigation on a regular basis, are perfectly well aware of the potential risks for their clients of mounting exaggerated claims and the draconian sanctions available to the court under [s. 26]. Accordingly, it behoves them to exercise considerable care in the analysis of claims for special damage before advancing them."*

Erskine (2007) referred to the sanctions being imposed in America for lawyers involved in questionable claims and something similar might be usefully considered in Ireland.[419] Contrary to the common law as reflected in *Vesey*, the judge then disentangled the plaintiff's claim with an award that included €400 for an MRI scan and €825 for travelling expenses in contrast to the special damages pleaded at €163,907. By definition this was a misleading claim.

2015 seemed more positive for defendants. In April there was dismissal of a complicated claim where the plaintiff changed his pleadings on a number of occasions in an Employer Liability action which was fully defended for an incident in 2007.[420] It was held that there was no evidence of negligence and an application under s.26 was also granted. The plaintiff unsuccessfully appealed to the Court of Appeal in October 2015 and subsequently brought the matter to the Supreme Court

[418] See *Looby*, analysed above.
[419] Daniel Erskine (n56) at footnote 350 on p56.
[420] *Waliszewski v McArthur* [2015] IEHC 264.

in February 2016 as a lay litigant but it was held that there were no grounds for further consideration.

A decision in December 2015 usefully clarified that neither s.26 nor aggravated damages need be pleaded as such matters could arise in the course of a trial. This Employer Liability claim was for a back injury in January 2007. [421] The defendant did not apply under s.26 and the case was dealt with under the common law. It is included in this review because of the extensive discussion of s.26 and it is another example of how the common law continued to operate in parallel with the statutory intervention. A brief recitation of the facts will suffice. All matters, including the plaintiff's credibility, were at issue and the defendant argued that the case made by the plaintiff in evidence was different from that alleged in the pleadings. The defendant contended that the plaintiff's claim emerged in June 2013, some six years and six months after the alleged accident, which was shortly after the plaintiff's engineer inspected the premises. The judge held that the plaintiff:

> *"At all times, he made the case that the injury occurred in January 2007. It is not surprising that the legal case is only refined after inspections and reporting. It is to be regretted that it required a motion before the High Court to facilitate this."*

Quite contrary to what the judge states above, and which seems to reflect the 'old regime', the requirements under s.11 of the Civil Liability & Courts Act 2004 are for an account of the accident to be detailed at the earliest opportunity in a letter of claim within a maximum of two months. From an insider perspective, I contend that to permit an engineering inspection before receiving details of the allegedly negligent occurrence would be to facilitate 'a fishing expedition'

The neurologist who examined the plaintiff for the defendant had reported that "*given his lack of truthfulness about his disability, it is difficult to accept anything that he states about his ongoing symptoms as being accurate"*. Bizarrely, the judge then opined:

[421] *Saleh v Moyvalley* [2015] IEHC 762

> *"It is noteworthy that the plaintiff undoubtedly would have been observed by private investigators by the defendant but no evidence was called to dispute the fact that the plaintiff walks with crutches. If he is malingering then he is an entirely consistent malingerer and has been since the proceedings."* [422]

Again there is the unreasonable assumption that all plaintiffs are being "*observed by private investigators by the defendant".* There is also an alternate conclusion to that reached above by the judge. The plaintiff may have obeyed the 11th Commandment – don't get caught.[423]

The judge accepted that there was "*some functional overlay*" but not that the plaintiff was a malingerer then turned his attention to aggravated damages:

> *"It is not new or startling to suggest that any allegation of fraud is made on peril and should not be made unless, at the very least, there is strong evidence to sustain it. The only thing that might be considered startling is that this antique rule should seemingly be forgotten***.**"

So called 'antique' rules need to come with a health warning. There was no evidence of wholescale abuse by defendants of s.26 as implied above. This is obvious from the relatively small volume of such applications relative to c.35,000 new injury claims annually. If the prospect of facing sanction causes a plaintiff to withdraw their case, it can be reasonably assumed that there was something they could not fix in the vulnerabilities of their claim and/or in its presentation.

The judge then went on to assess aggravated damages but ultimately held that:

> *"the defendant's attitude was not necessarily unreasonable. However, were it not for the report of* [defendant's neurologist] *and his express professional opinion, I would have concluded that the plaintiff was entitled to an element of aggravated or exemplary damages."*

[422] *Saleh*, para 45. This echoes *Looby* and in *Smith* that surveillance is, apparently, to be assumed.

[423] The judge also appears to be giving evidence to himself as to what are the normal claims investigation protocols. Neither the prohibitive cost nor the requirements of data protection legislation would sanction widespread surveillance of plaintiffs without some prior reasonable grounds of suspicion.

It seems that the responsibility now rests with defendant doctors rather than the burden of proof theoretically being on the plaintiff regarding causation. From a defendant perspective, tort principles seem to be turned on their head.

The first Court of Appeal decision on s.26 was delivered in June 2015. That case was fought by the MIB and involved a collision between two motorcyclists where the culpable party was uninsured. [424] In dismissing the s.26 application, the High Court judge had criticised defence counsel for unfair and misleading cross-examination of the plaintiff. The judge also concluded that DVD evidence did not establish that the plaintiff was engaged in remunerative employment since his accident. Despite these findings, the MIB appealed. They challenged all but the liability findings. As summarised by the Court of Appeal, even if the plaintiff had not mentioned his pre-existing back condition it had been self-evident to the doctor and it had also been indicated on a PIAB application. As Irvine J. commented, it was no surprise that the High Court judge referred to *Dunleavy v Swan Park Ltd t/a Hair Republic* that s.26 should not be seen as an opportunity to: *"seize upon anomalies, inconsistencies and unexplained circumstances to avoid a just liability. Great care should be taken to ensure in a discriminating way that clear evidence of fraudulent conduct in a case exists before a form of defence is launched which could unduly do grave damage to the good name and reputation of a plaintiff."* The two other Court of Appeal judges echoed those criticisms in strong terms.

I was personally and professionally embarrassed at the manner in which an effort was made to abuse the provisions of s.26 in this case.[425] MIB had in their possession evidence conflicting with the accusations they made against the plaintiff. There was no discussion about aggravated damages.

[424] *Kurzyna -v- Michalski & MIBI* [2015] IECA 135

[425] I made a formal complaint to the CEO of MIB.

In December 2015 the High Court dismissed a claim under s.26 by a person who falsely alleged he was wheelchair bound. That decision was subsequently upheld by the Court of Appeal in July 2017.[426]

The High Court in March 2016 dismissed an application under s.26 on novel grounds. The judge held that the plaintiff's inconsistent and apparently exaggerated symptoms after a minor motor accident were explained by her 'catastrophisation' of the situation. He treated her as an 'egg shell skull' case in awarding €100,000.[427]

In October 2016 there was a significant decision by the Court of Appeal overturning a High Court dismissal under s.26 in January 2012 for a 2005 accident between a motorcyclist and a taxi. [428] There are some issues with the reasoning in so far as it seems to contemplate a judge 'disentangling' the financial losses alleged by the plaintiff. [429] It also seems to ignore the bar on recovery of earnings not declared for tax. [430] But in the current context of addressing academic concerns, such as that of Binchy (2004) about lax defendant strategies, the decision may be considered a watershed. It is worth noting that although the Court of Appeal found the s.26 dismiss was unwarranted there is no mention of aggravated damages and the guidance is altogether more practical. Originally the High Court judge, in awarding €27,400 wage loss to date and only loss of opportunity at €40,000 instead of the substantial future losses alleged, had recognised the situation faced by the defendant who:

> *"had to deal with a claim from the plaintiff seeking, inter alia, €447,000 for loss of earnings into the future and €142,000 for loss of earnings to date. This claim was based on figures supplied to the plaintiff's actuary; which figures, I am satisfied, have no evidential basis whatsoever."*

[426] *Platt v OBH* [2017] IECA 221.
[427] *Plonka v Norviss* [2016] IEHC 137.
[428] *Nolan v Mitchell & Anor* [2012] IEHC 151 - [2016] IECA 298.
[429] Which would be contrary to *Vesey*.
[430] Introduced at s.28 of the Civil Liability & Courts Act 2004.

Those who expressed concerns about the fairness of the reforms are likely to welcome this decision by the Court of Appeal. It was held unfair to invoke s.26 without putting every material discrepancy to the plaintiff in the witness box because as the appeal judge speculated *"Who knows what* [Plaintiff] *would have said in his defence had such questions been put to him?"*[431] This indicates that every item of evidence which is disputed must be specifically put to the plaintiff rather than a 'hit and run' approach to cross examination. In practical terms, this will be a difficult balancing act because in other decisions the defendants were criticised, and threatened with aggravated damages, for 'oppressive' cross examination. There is an area of emerging jurisprudence.

As an aside, it may have been noted the numbers of years which had elapsed in most of these cases between date of accident and trial. These delays are, at least in part, the result of the lack of case management by the courts in the personal injury litigation system.

Because of the latest insurance cost crisis, there are calls to strengthen the statutory deterrents to exaggerated claims as reflected in the Government's Working Group report of 2018. However, their findings are also critical of the failures by insurers to more frequently invoke the available defences and this supports the point about 'lax strategy' raised by Binchy.[432] On the other hand, if there had been a less hostile attitude to defendants than reflected in the many of these cases then a better balance might have been struck and that would avoid the necessity to further curtail judicial discretion. The commentators reviewed in Chapter 2 paid little attention to fairness for defendants.

This review of case law has led to a number of conclusions relative to the concerns of academics summarised in Chapter 2. These are presented in the next sections of this chapter while also drawing on analysis of media coverage on cases dismissed in the Circuit Court where no written judgments are delivered.

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[431] *Nolan*, at para 50.

[432] Working Group Report on EL/PL at pages 115 to 135.
https://www.finance.gov.ie/updates/report-on-the-cost-of-employer-and-public-liability-insurance/

7.3 Conclusions

Conclusion 1 -This is not criminal fraud *per se*

Although Patton (2012) made distinctions between three different categories of "*systemic frivolity, exaggeration and fraud*" the academic commentary generally reflected a rather loose use of language by frequently invoking the fraud concept as a 'catch all' for these varying levels of mischief. [433] That terminological inexactitude is unhelpful in assessing s.26.[434] That is so for a number of reasons.

Fraud in the criminal law with a very precise meaning.[435] That fact has a number of distinguishing features that are not applicable to tackling exaggerated claims where a civil finding of fraud is involved, as summarised below:

1. In criminal fraud allegations the complainant must prove reliance. Defendants in exaggerated claims assert no such reliance. Indeed, they may well have evidence that contradicts the misleading allegations being pursued. In s.26 it is the intent of the plaintiff which is relevant.
2. In crime, the accused is innocent until proven guilty. No such presumption of honesty applies where the burden of proof rests on the plaintiff in negligence actions.
3. In crime, the charge must be proved beyond all reasonable doubt. In contrast, the precedents on s.26 require proof by the defendant on the balance of probabilities.[436]

[433] The occurrence of 'set up accidents' is not the issue here. IIF/ABI fraud campaigns may add to the view that it is only criminal activity (fraud, properly so called) that is unacceptable.

[434] Cases where challenges are based on the common law are different, where the classification of claims is within the three categories detailed by Denham J. in *Shelly-Morris v Dublin Bus*

[435] David Lusty, 'The meaning of dishonesty in Australia: Rejection and resurrection of the discredited Ghosh test' (2012) 36 Crim LJ 282.

[436] Which is 51% preponderance of the evidence - or a high balance, per some judges.

4. This is a private law matter rather than a criminal sanction from the perspective of society in public law.[437]

The reason why these distinction are important is that a mixture of criminal and civil approaches to the same set of facts does not work well in the adjudication of inter-party disputes.

There seems to be an emotive aspect attached to the term 'fraud'. Accordingly, it may be preferable to create a new category such as 'unjustified claim' so that exaggerated claims of the 'medium variety' can fail within a face-saving framework. The common law on actual fraud would continue to exist for extreme cases, as it has done in tandem with s.26 as reflected in the judgments reviewed.

Conclusion 2 Too successful a deterrent?

Many academics expressed their preference for the *status quo* even though Holland (2006) recognised the reality that there were 'little or no disincentives' to exaggeration in the pre-reform period but equally he predicted that s.26 would be rarely invoked. In fact, it seems that the deterrents introduced by s.26 were proving too successful for the tastes of some. There is certainly no evidence in the cases reviewed in this chapter of what Binchy (2004) viewed as a "*hostile attitude to plaintiffs who are victims of negligence but who have aggravated* [exaggerated] *their injuries".*

There was a balanced, if patchy, jurisprudence emerging until 2013 when, from a defendant perspective, 'the rot set in' with the decision in *Lackey v Kavanagh*, which unfortunately was not appealed by the car insurers. That case might have been distinguished on its facts or discounted as merely the opinion of one judge were it not for the fact that it was supported the following year with the reasoning in *Daly*

[437] Section 29 of Civil Liability & Courts Act 2004.

v HSE. [438] This was a turning point in the effort to tackle exaggerated claims because by this time defendants were too scared to invoke s.26 and had to fall back on the common law precedents. This touches, or should touch, on concerns of academics about "equality of arms" but there is sparse consideration of fairness for defendants.

The hostility towards defendants is clear from the *Daly* judgment as below:

> *"This section [s.26] was introduced into law not long after the decision of the Supreme Court in Shelley-Morris and, as noted above, acts as a very major* "nuclear" *deterrent to the mounting of fraudulent and exaggerated claims. It undoubtedly confers litigation advantage on defendants and has long been complained of by plaintiffs' lawyers as violating the principle of* "equality of arms" *in personal injury litigation."*

Given that the burden of proof is on the plaintiff, it is difficult to follow the logic above that the defendant is conferred with "litigation advantage" when they are faced with fighting an exaggerated claim, especially given that their defence can equally be struck out if their Affidavit proves to be misleading and they can also face the sanctions under s.29. While anyone can hold the personal opinion reflected above, it seems an extraordinary statement from the bench for a number of reasons.

Looking first at the facts.

The summary table below of the cases dismissed under s.26 displays the key feature accepted by the Court as proof of exaggeration or misleading evidence. Where the word 'video' or the term 'social media' is used, it indicates footage of plaintiff activity found by the judge to be have been materially inconsistent with alleged disabilities. The abbreviation CCTV means there was live footage recorded of the accident which proved that it occurred otherwise than alleged.

The table below merely identifies the judgment by the name of the plaintiff but full citations are in the footnotes and in the listing in the Appendix for Chapter 7:

[438] *Daly v HSE* [2014] IEHC 560. Para 61. Decision by Noonan J.

Plaintiff & citation	Key evidence or basis of dismiss
Carmello [2007] IEHC 362	Injury was in a different accident
Gammell [2009] IEHC 416	False account of assault, provocation
Danagher [2010] IEHC 214	Social media, & CCTV no negligence
Farrell [2010] IEHC 327	Video & false earnings loss
Higgins [2010]IEHC 527	Earnings loss claim while paid & Video
McKenna HC Mar 2011	Earnings loss claim while paid
Folan [2011] IEHC 487	Doctors were misled, had worked since
Nolan [2012] IEHC 151*	Social media on 'car drifting', wage questions (but CoA)
Rahman [2012] IEHC 478	Video & Doctors misled
Montgomery [2012] IEHC 443	Doctors were misled, excessive actuarial
Meehan [2012] IEHC 441	CCTV of accident & ticket tout v. loss alleged
Salako [2013] IEHC 17	Video & Doctors (massively) misled
Ludlow [2013] IEHC 153.	Misleading account of who was driving
Crean v Waters 2013 Unreported	Massively misled experts
Waliszewski [2015] IEHC 264	Injury was in a different accident
Platt [2015] IEHC 793 & CoA	Video – had alleged wheelchair bound

None of the above sixteen dismisses resulted from immaterial "*frailty of human recollection or the accidental mishaps that so often occur in the process of litigation".* [439] Plaintiff lawyers, as officers of the Court, could hardly complain about the rule of law and 'equality of arms' invoked as fairness for defendants which applied on the grounds indicated above.

On the other side of the balance, there were four cases which might have been dismissed where the judges applied the injustice exemption under s.26, described as 'the out clause' by Binchy (2004). These resulted in fair value awards, although usually lower than pleaded and sometimes substantially so.[440]

Additionally, s.26 applications were rejected outright in eight cases.[441] This is in addition to four cases where three judges turned their attention to threatening aggravated damages awards against defendants who mount robust defences.[442]

[439] As disparaged for s.26 grounds in *Dunleavy*.

[440] Injustice to dismiss applied in – *Mulkern; Kerr; Nolan v Kerry* (evidence fragile): Looby (lies admitted).

[441] S26 applications rejected (outright) in 9 cases: *Corbett v Quinn Hotels Limited* [2006] IEHC 222; *Dunleavy v Swan Park* [2011] IEHC 232; Lawlor v Carroll [2014] IEHC 579; *McLaughlin v McDaid* [2015] IEHC 810 (plaintiff was under duress from defendant); *Hamill v O'Callaghan* [2015] IEHC 542 but only €8,000 awarded: *Kurzyna -v- Michalski & MIBI* [2015] IECA 135 (both in the High Court and on appeal); *Maloney v White* [2016] IEHC 44 (provocation led to RTA so 25% contrib.); *Plonka v Norviss* [2016] IEHC 137: Darragh (multiple Plaintiffs) v Feeney & Ors [2017] IEHC 514.

[442] *Lackey v Kavanagh* [2013] IEHC 341; *Smith v HSE* [2013] IEHC 360; *Daly v HSE* [2014] IEHC 560 – although financial losses rejected; *Saleh v Moyvalley* [2015] IEHC 762 (under appeal).

By reasonable inference from the passage in *Daly* cited above, it is because the legislation "*has long been complained of by plaintiffs' lawyers"* that the judiciary were caused to alter the "recent" jurisprudence. [443] The correct avenue for such complaint was to a higher court, if grounds of appeal existed. [444] The privileged position of being able to lobby judges personally is inappropriate if there is to be public and professional respect for the rule of law.

Arguments, often strongly made in individual cases, attempting to 'rescue' a misleading claim were either accepted or not on their merits.

A separation of powers issue also arises. Some judges seem to disavow their responsibility under the mandatory application of s.26 (as interpreted by precedent) in favour of their own better judgment on what constitutes '*a more level playing field*'.

The 'threat' to defendants is clear. However, that seems *ultra vires* in the way that the plan is announced by a number of the judiciary.

So what is the source of complaint by plaintiff lawyers?

A score of 16-17 is not a bad result. All those 33 cases had some element that caused difficulty for the plaintiffs.[445] Ultimately just over half were found in their favour, to varying degrees.

In some claims, lawyers might have fixed the vulnerabilities in their clients' cases by more thoughtful responses to pleadings.[446]

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[443] Presumably, plaintiff lawyers involved in cases where clients encountered some 'uncomfortable' evidence.

[444] As was successfully done in *Nolan v O'Neill & Mitchell* where the Court of Appeal overturned the original dismiss.

[445] In articles on s.26 a number of additional dismisses are cited that were based on plaintiff credibility but there is no mention of s.26 in the judgment. Two points arise. That dismissal at common law on grounds of credibility was so rare in the past that those cases did not warrant mention. Although s.26 cannot be 'blamed' for those dismisses there may be an inference that the discipline it has introduced is influencing the common law.

[446] It must be acknowledged that the original legal team in *Vesey* withdrew because of ethical reservations about the instructions they were receiving from their client about alleged losses.

Alternatively, exaggeration could have been detected if solicitors had challenged their clients at an early stage. The courts have held that lawyers have such an obligation before inflated claims are presented.[447]

Is such a careful approach so foreign to the old poker-playing way of conducting litigation that plaintiff lawyers find themselves incapable of getting up to speed with the new 'open and honest' regime? [448]

Conclusion 3 - Is there evidence of judicial activism or judicial incompetence?

There is no evidence of a 'hostile attitude' by the judiciary toward plaintiffs as apprehended by Binchy. He had pointed out in 2004 that:

> "*for the past 16 years or so, personal injury claims have been determined exclusively by judges, who are open to a reasoned legal argument…"*

Those reasoned arguments were tried by defendants and largely failed in the pre-reform period.[449] In now reviewing the s.26 cases it is impossible to explain the variances between judges on the interpretation of a relatively simple statutory provision. Analyses of the respective fact matrix in dismisses and refusals do not provide a solution.

This raises issues for judicial training and continuing professional development.[450] There seems to be merit in considering something equivalent to the Judicial Studies Board in England.[451]

[447] *Shelly-Morris*.

[448] The new regime was signalled in advance by articles in the Law Society Gazette, most of it resisting these reforms, but it provided information to members on how to best comply with the new law.

[449] Supreme Court cases, which all happen to have been pursued by CIE.

[450] There was a Judicial Studies Institute at one stage in Ireland for a short time.

[451] There was a variety of reasons for so many new judicial appointments. The creation of the Court of Appeal in 2014 absorbed nine of what many would consider the best judicial minds. Deaths and retirements also converged to cause a drain of expertise from the High Court over recent years.

The assignment of specialist judges, with medical and engineering expertise, warrants consideration.[452] The amounts of money awarded annually on personal injury claims are substantial. Even in financial terms, it is a task not to be undertaken lightly.

Binchy expressed views that were critical of defence counsel.[453] He may well be correct but some very strong defence cases were unsuccessful. In those assessments, plaintiffs' teams did not perform as well and often fell back on pleas to 'rescue' the valid parts of the claims. This raises issues about the attitude of members of the Bar Council towards personal injury actions, which were the largest single body of civil business annually.

For defendants, personal injury litigation is certainly an expensive process with unpredictable outcomes. Compared to the costs incurred, the actual award to the plaintiff, often much reduced from the level pleaded, was in many cases "*a mere drop in the proverbial bucket"* to coin an image from America used by Rasnic (2004). [454] Whether these cases should remain in the courts at all is a question for another day.[455]

Conclusion 4 – The role of the media in messaging about the law

Binchy (2004) urged that fighting more cases would 'send out a message'. The Appendix for Chapter 7 provides the media coverage on only 10 of the 16 claims which resulted in s.26 dismisses by the Superior Courts as reviewed in this chapter. Most of the cases challenged received no attention.

[452] The assignment of judges to cases for hearing on any one day is fairly random.

[453] William Binchy (n70) at p119.. *"Defence counsel have been curiously reluctant to test the limits of liability in negligence cases. For the past 16 years or so, personal injury claims have been determined exclusively by judges, who are open to a reasoned legal argument as to why in any case liability should not be imposed or damages awards should be subject to restrictions."*

[454] The 'life blood of the courts' as one judge termed it when resisting PIAB.

[455] Ken Oliphant research of which I had sight in March 2016 points to the benefits of compensation boards in Norway. In Ireland the PIAB undertakes independent assessment only of undisputed quantum.

Because written judgments are only available from the High Court, not all of which are published online, outcomes in the Circuit Court on exaggerated cases can only be assessed from media coverage. The Appendix for Chapter 7 includes a listing of 100 relevant headlines in mainstream newspapers over the year to January 2019. It is clear that a significant number of questionable claims are being dismissed, usually without invoking s.26.

The role of journalists in this context is significant, even bearing in mind that not all hearings at either level are comprehensively reported. A review of the relevant headlines has echoes of the Libor defence that 'everyone is at it'.[456] It is necessary to be wary of the context here given that the latest insurance cost crisis has brought a renewed focus on what is causing premium rates to escalate and those pursuing 'dodgey' claims are an obvious target.

There are two main themes that are a cause for concern relative to the identification by academics that the system is 'inundated' with questionable claims on the one hand, while on the other hand reservations about 'draconian measures' that might dissuade genuine seriously injured victims of negligence from pursuing their lawful rights.

When the articles, as opposed to the headlines, are subjected to analysis it becomes apparent that judges are not as 'daft' as they are often portrayed in this context. Some of the 'egregious' plaintiffs who invoked public outrage by securing compensation in what appeared to be unmeritorious circumstances were actually in receipt of offers by defendants, or their insurers, which required ruling because of lack of legal capacity either on grounds of youth or brain injury. These were not liability decisions handed down by judges.

Because of public pressure to curtail insurers from engaging in 'nuisance value settlements', which Binchy pointed out damage the perceptions of tort, it is only

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[456] The "everyone was at it" defence and the meaning of dishonesty.

https://www.lexology.com/library/detail.aspx?g=04ddb348-4ed4-454c-9d06-aeb0be56e97e

since 2016 that there has been more defences or at least more coverage of cases being fought. While the message that 'there is no such thing as a free lunch' is welcome from some perspectives, an error made by Government in 2014 by increasing the Circuit Court limit from €38,000 to €60,000 conveys the message that minor injury can secure big money.

All headlines which quoted financial figure are merely stating what is the limit of the court rather than what may have been the actual minimum terms of the plaintiff to finalise the matter. Such coverage, and the insurance sector's fraud helpline encouraging people to 'grass' on each other, may be counterproductive. Many people who might not have considered pursuing claims for minor injury may get the impression that there is a veritable 'pot of gold at the end of the rainbow' which can be readily had. As the media constantly remind the public, there are still very few sanctions imposed for pursuing exaggerated claims beyond the dismiss itself and sometimes an order to pay defendants' costs which is usually worthless. The 'whipping up' of a 'compo culture' narrative has led to some claimants being subjected to abuse on social media sites.

Many journalists seem less ready to dedicate resources to serious research on the hard data that justifies (or not) the increases in insurance costs. That is a balance one might expect from the Fourth Estate, at least outside of the 'red tops'. This issue is not confined to injury claims. The recently revealed scandal about overcharging in 40,000 tracker mortgages can be reported in a main stream newspaper as banks being obliged to make amends or with a contrast of spin in a tabloid as 'banks

coughing up'.[457] Interesting research could be undertaken by applying discourse theory to judicial reasoning and resultant media coverage.

The other persistent misinformation promulgated by the media relates to the use of the term 'insurance claims' for personal injury actions. There is also another important distinction that requires highlighting. These are not insurance claims. Briefly, insurance is a contract between the policyholder (motorist, employer etc.) and the underwriter of the risk. Those are only two parties to that contract. The injured party has no rights under the contract, hence the term Third Party, and axiomatically the Third Party is not bound by any of its terms such as 'utmost good faith'. This is the position in contract law, regardless of any legislation or other provisions to protect TP rights. Using the term 'insurance claims' feeds into the perception that people pay a premium as if it were a contribution to a central social insurance fund from which it will be their 'right' to claim at some stage. In the context of exaggerated claims, policyholders would not escape with the level of exaggeration attempted by Third Parties.

Conclusion 5- The responsibility of privileged voices.

The academic community, and other such privileged voices, also bear responsibility for the messages broadcast to the detriment of respect for tort. It is naïve to simply assert that 'tort is only for legitimate claims' as cited by Ilan (2009).

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[457] **Irish Times 5th February 2019 - Banks pay out €647m in tracker mortgage scandal as numbers rise. https://www.irishtimes.com/business/financial-services/banks-pay-out-647m-in-tracker-mortgage-scandal-as-numbers-rise-1.3781504?mode=amp. Banks cough up €647million over tracker mortgage scandal as 1,400 extra victims identified, Central Bank reveals.**

Binchy (2004) partly blames this image problem on nuisance value settlements by insurers.[458] The reality of their business, however, is one of constant cost-benefit analyses.[459] In contrast to the image of 'powerful insurance companies' as if they had unlimited resources to waste on litigation, their objective is to secure value for money. Their main priority is to set next year's premium pricing with a profit target.

Also, contrary to the impression often conveyed, it is claims managers and not defence lawyers who make the decisions on whether detecting exaggeration and fighting it all the way is a good business strategy.[460] Reliable information is key to making such decisions. McMahon & Binchy on Torts was the bible on this area of law in Ireland. After 20 odd years, the 4th edition was released in 2013.[461] For the first time it contains a section on exaggerated claims.[462] The brief summaries of those s.26 case in the latest edition omit to mention many of what might be regarded as the most pro-defendant findings. This is a text frequently consulted by the judiciary.

Even in his commentary on the common law approach prior to the introduction of s.26, Binchy (2013) politicises the issue:

> *"One can discern here a scarcely coded substantive message conveyed through ostensibly adjectival language. The substantive message is that an exaggerating plaintiff should suffer some sanction. It is coded by being translated into a series of propositions about permissible inferences of an evidential character. Hardiman J.'s language represents a sharp nudge to trial judges, encouraging a result in terms of verdict, whether on liability or quantum of damages, detrimental to the exaggerating plaintiff*". [463]

The passage above voices no condemnation of exaggeration, nor does it attempt any invocation for the rights of defendants in this context.

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[458] William Binchy (n70) at p121.

[459] The self-insured take a longer term view, as is demonstrated by the number of such cases involving exaggeration that were taken to the Superior Courts level.

[460] As recognised by Halliday *et al* in Street Level Tort (n290).

[461] It may be no coincidence that it was subsequent to that publication that decisions refusing s.26 applications started the threat against defendants of aggravated damages.

[462] This is included in the section on damages in McMahon & Binchy, *Law of Torts* (4th Ed, Bloomsbury 2013) p1567-1676 but I do not agree with that classification as these cases raise issues of a more fundamental nature for the integrity of tort.

[463] Ibid at p1665, at para 4.292 re Hardiman J. Supreme Court in *Shelly-Morris v Dublin Bus*.

Equally, I have attended a number of conferences which focused on an unremittingly pro-plaintiff perspective.[464] Various publications by the Law Society and the Bar Council display a similar bias in articles on exaggerated claims.

The exaggeration by injury claimants is an uncomfortable truth about tort.[465] It may not suit several perspectives to address that. This is not so much a matter of unmet legal need but one of over-servicing.[466] It is startling the number of the cases reviewed for this chapter which involved plaintiffs who had had other claims previously, mostly concealed. One can only conclude that repeat experience of the tort system seems to have reduced rather than increased respect for the law and that inference has implications for the administration of civil justice that need to be seriously considered.

Conclusion 6 - The egregious plaintiff.

While Ryan (2004) recognised that exaggerated claims had led to '*widespread criticisms of tort*' there were no solid proposals on how theory could address that challenge. Binchy (2004) seemed to object to "*the principle that untruthfulness should be met by an outright dismissal*".

Undoubtedly, there are egregious defendants.[467] But there are also egregious plaintiffs in the sense of having little respect for truth and justice in the pursuit of injury compensation. Such plaintiffs do not face the sanctions that hang over defendants.[468] As Binchy (2004) exhorted, a message needed to be sent out. It is not

[464] At one such event during a discussion on s.26 a High Court judge commented to the floor that *"defendants lie too*". That is not a fact I deny, although the requirement on them since the reforms to swear an Affidavit of defence was designed to curtail such activity and carries penalties. But 'two wrongs don't make a right'. Even egregious behaviour by defendants does not justify false claims by plaintiffs. Those two separate mischiefs need to be identified and appropriate deterrents implemented if required.

[465] From March 2015 England introduced measures to dismiss claims where the defendant can prove '*fundamental dishonesty*' under Section 57 Criminal Justice & Courts Act 2015.

[466] For example, when CMCs became regulated in England their number halved over a relatively short period.

[467] The asbestos scandal is just but one example.

[468] Criminal sanctions, whether under RTA or Health & Safety regulation, and such fines are not insurable so they do hit the pocket of the wrongdoer.

clear that the message has hit home given that exaggeration continues. Indeed, it seems to be condoned by certain judges in that it is forgiven by 'disentangling' and doing '*the best I can'* for the plaintiff. None of the academics reviewed in Chapter 2 had a solution for how this might be tackled under the common law principles of tort.

Ilan (2009) asserted that defendants were at fault for not exploring novel new defences.[469] However, as evidenced in the Superior Court cases reviewed for this chapter, efforts to merely enforce a statutory provision have now had the result of additional exposure for defendants in terms of aggravated damages.

Quill (2005) would have preferred a fundamental review of tort rather than the reforms that were proposed. That proposition risks reducing the rights of injured parties at large in real terms. It is difficult to see how that would be a priority reform compared to focusing solely on the exaggerating claimant as is done with s.26. That academic preference hardly seems proportionate. By defining discrete areas of mischief it is possible to devise more focused reforms than a broad brush approach to replacing the law of negligence. The latter might be interesting from a theoretical perspective but is likely to do most harm to the most vulnerable. Tort theory must address the reality of exaggerating claimants and find a way of encompassing a remedy to that moral hazard within its fundamental principles.

Conclusion 7 - What do we really really want?

A view that tort is designed to deliver compensation in only genuine cases is not supported by the reality of tort in action.

All the (theoretical) defendant seeks is that the plaintiff be required to discharge their burden of proof honestly. It is noted that negligence was admitted in many of

[469] Ilan (2009). "*It has been further argued that habitual defendants have been slow to address their grievances within the pre-existing litigation paradigm, which could be achieved through establishing principles to limit liability such as* ex turpi causa*, or the voluntary assumption of risk. Further arguments have criticised the fact that the new personal injury regime fails to innovatively address the notion of liability in any significant way, in contrast to developments in other jurisdictions*."

the judgments reviewed in this chapter. Plaintiffs were relieved of proving the essential elements of negligence but these other dimensions of honesty in the redress process are largely ignored in the tort literature.

There are two levels of the plaintiff's burden of proof, liability and quantum. The mere assertion of losses for the latter should not be sufficient.[470] This is not captured by the onus to prove causation. Again, in many of the decisions reviewed the fact of (some) injury caused by defendant negligence was conceded from the outset. But it is the extent of injuries and losses which is the gravamen of the challenges with exaggerated claims. Even where not dismissed under s.26, the award was often lower (often considerably so) than the quantum sought. By definition, these were exaggerated claims. This may call into question the suitability of the adversarial system for personal injury claims

It is doubtful whether the low level of evidence sought from plaintiffs on quantum would be acceptable in contract or commercial litigation. There seems no reason in principle why a more forensic discipline should not be imposed for proofs of financial losses in negligence actions. A coherence of remedies should not be abandoned because physical injury, which warrants general damages, is involved.[471]

While the maxim of 'best evidence' has fallen into disfavour, there may be merit in reconsidering it for personal injury.[472] Through a 'rule of law' lens that would certainly seem preferable to removing compensation and providing only care costs.[473]

But experience is the life of the law and there is no point in wilful blindness to the 'real world'. While the public may denigrate 'fraudsters', particularly during periods of premium increases, there is an ambivalence about who the bad guys really are. A

[470] I speak here not in terms of rules of evidence but as a fundamental feature of tort.

[471] Whether there are universal theories of tort itself is much contested. See Stephen D Sugarman, 'Doing away with tort law' (1985) Calif. L. Rev., 73, p555.

[472] *Hussey v Twomey & MIBI* [2009] IESC 1 on 'best evidence' and on attitudes societal changes. Rules for contract interpretation would look at the surrounding circumstances.

[473] As proposed at one stage by Former Prime Minister Cameron - 'care not cash' – and currently being discussed in Ireland as a potential further reform.

public survey published in 2003 just prior to the implementation of the reforms reflected purportedly adverse attitudes towards *'fraud'*:[474]

Table – Public attitudes to exaggerated claims

	Agree strongly	Agree	Neither agree nor disagree	Disagree	Disagree strongly	Don't know
I would consider inventing or inflating a claim if I knew I could get away with it.						
	1%	4%	9%	22%	57%	9%
People make fraudulent claims						
	27%	39%	13%	3%	2%	17%
Inflating a claim is dishonest						
	44%	40%	7%	1%	1%	6%
There should be a specific crime of insurance fraud						
	35%	41%	11%	2%	1%	10%

It will be noted above that (only) 84% of respondents considered inflating an insurance claim to be dishonest. However, it is of concern that as many as 9% did not know whether they would consider inventing or inflating a claim.

There was a substantial view among 66% of respondents that 'other people' make fraudulent claims. As many as 76% called for a specific crime to be defined as a deterrent yet only 79% of people denied that they would consider such a course of action. That indicates that over a fifth seemed to see nothing wrong in 'having a go'.

If the function of law is to control or guide behaviour, this survey indicates that the public perception was that widespread unmeritorious claims were accommodated by the tort system. This has implications for the subjective element requirement in the case law which is reviewed in this chapter because it seems that the presumption of honest innocence cannot be assumed nearly 80% of the time.

7.4 Did the concerns of academics prove defensible?

The wider issues and academic concerns.

[474] Published in 2003 by the Irish Insurance Federation of research undertaken by Lansdowne Marketing on a sample of 1,200 people aged 18+ interviewed at home on a face-to-face basis during fieldwork conducted by them in November 2002.

The focus of this chapter is on the concerns of academics reviewed in Chapter 2 about fairness as it arises in the context of exaggerated claims alone, both from the perspective of claimants and that of the public interest in a system that was 'inundated' with fraud (loosely so called).

Insurers still maintain that exaggeration is rampant but their lack of robust data to support such a contention makes it doubtful. Certainly media coverage of Circuit Court decisions in 2018 and 2019 on injury cases reflect more dismissals and withdrawal of claims than they do questionable awards in apparently unmeritorious circumstances. But that must be read in the context of more claims being fought by insurers because of the public pressure about escalating premium charges. There is no evidence in the claims frequency trends presented in Chapter 3 of an out of control claims culture. However, the social utility of the overwhelming volume of small claims warrants further detailed consideration.

On the issue of fairness, the written decisions of the Superior Courts reflect the jurisprudence which has emerged. The high point for analysis is provided in the October 2016 decision of the Court of Appeal in overturning a previous s.26 dismiss on the grounds that the application had been opportunistic and that the result was unjust.[475] However, that judgment does not condemn the section itself but rather the manner in which the cross examination was, and was not, conducted on the basis that every discrepancy should have been put to the plaintiff. This might be considered evidence of 'lax strategy' referred to by Binchy (2004). In other respects, there are a number of difficulties with that decision where it conflicts with the precedents at common law and on interpretation of s.26, and indeed with the findings of fact by the trial judge, but those do not require analysis for current purposes. The important point is that the courts are alert to, and mostly well capable of, maintaining the balance of justice rather than applying the 'blunt' instrument which was of concern to Holland (2006). There is no evidence of 'a negative attitude' to plaintiffs as forecasted by Binchy (2004).

[475] *Nolan v O'Neill & Mitchell* [2016] IECA 298 at para 89.

In 2019 there are renewed calls for further reforms. Having undertaken this case law analysis, there is not an overwhelmingly convincing argument for any further such measures. Until recently, the majority of the judiciary had proved themselves capable of applying the injustice exemption.

However, in the context of fairness to defendants there is now a threat of aggravated damages. [476] There might be no objection to that in principle but interrogation of those decisions where aggravated damages were threatened are not well founded either on their facts or in law.[477] This looks like an agenda.

Complaints by plaintiff lawyers are not good grounds for ignoring precedents. Those dismisses which are considered unacceptable can be challenged to a superior court, provided there are grounds of appeal as was successfully done in the *Nolan* case. If the Court of Appeal had felt a pressing need to pronounce on aggravated damages in the context of s.26, they had the ideal opportunity to do so in a 2015 case where they were so critical of the Motor Insurers Bureau of Ireland.[478]

Whatever respective academic views may be on s.26, it is an inescapable fact that judges are obliged to implement the law as reflected in the clear words of the statute as interpreted by precedent.[479] They have available the ultimate discretion if injustice should result, as empowered by the wording of s.26. Judges have also carved out other margins of discretion under materiality and subjectivity. However, an announced plan to divert the course of the jurisprudence on foot of complaints by plaintiff lawyers seems beyond judicial remit.[480]

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[476] After all, I argued for reverse aggravated damages as the defendant in *Vesey*. The intention was that any award would be set off against general damages but actual financial losses that were proven as specials would not have been sought to be reduced.

[477] Also not consistent with Supreme Court precedents on aggravated damages.

[478] *K Kurzyna -v- Michalski & MIBI* [2015] IECA 135

[479] As stated by the Supreme Court in *O'Connor 2003* (on costs), if the legislature had intended other factors to be taken into account they would have said so in clear language.

[480] "*Judges are people, but they are, first and foremost in their work, the disembodied personification of state power – just, lawful and impersonal. Emotion does not enter their deliberations, rather the great public sentiments of fidelity to the public, to the lawful power placed in their hands and to justice and right, are what guide them."* James Allsop, Chief Justice of the Federal Court of Australia. http://www.fedcourt.gov.au/publications/judges-speeches/chief-justice-allsop/allsop-cj-20140212

There is a sense of *déjà vu* here. What Patton (2012) called the *"contentious debate"* about PIAB relative to the views of lawyers, now rages in respect of s.26.

The difficulty which the current situation highlights is that if judges embark on a campaign that is not factually grounded then the danger is that the legislature will be convinced to introduce measures that are harsher from a plaintiff perspective. In my professional opinion, anything more 'draconian' than s.26 would be bordering on the unconstitutional. At the same time, however, I contend that s.26 should be applied in accordance with the law. That authority is in the statute as enacted by the legislature and the (relatively) consistent precedents established up to 2013. Consistency is considered an essential element of a system of justice.

In his analysis of PIAB, Quill (2005) advocated for the allowance of legal fees to claimants on the basis that "*they need independent assistance with the compiling of their claim".*[481] Similar calls were made by most academics reviewed in chapter 2, with the possible exception of Patton. In all of the cases reviewed for this chapter, plaintiffs had retained legal teams.[482] That did not, and in many cases could not, insulate claimants from the reality of evidence which resulted in dismissal, or only escaped dismissal where the injustice exemption was applied.[483]

Admittedly, the written judgments reviewed are probably the tip of the iceberg. But if the existence of s.26 is dissuading other exaggerated claims from proceeding to trial it is merely fulfilling part of its objective. Media reviews of Circuit Court dismissals in the year to January 2019 would indicate that this activity is a challenge to the integrity of tort law but is now being detected by judges.[484]

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[481] This was rejected by the High Court in *Plewa & Anr v PIAB* [2010] IEHC 516.

[482] Doing what I call 'law jobs' which is a term adopted from Llewellyn, KN. *The normative, the legal and the law-jobs: the problem of Juristic method*. Yale Law Review 1940, Vol 49, No 8, pp. 1355-`1400.

[483] Evidence ranged from surveillance videos, self-posted social media and claims for losses of earnings when the plaintiffs had actually been paid.

[484] Appendix 7.

Hedley (2004) explained why one of the three functions of traditional tort law, which was that of establishing the truth, had been "swallowed up". [485] This was because of disproportionate costs for the majority of cases. Appropriate enforcement of s.26 strengthens the quest for "*establishing the truth*" of injuries and/or losses alleged by claimants. It is difficult to find a principled objection to that aim.

The painting a 'David and Goliath' battle between a claimant and '*a powerful insurance company*' rather dramatises the reality of the process in the vast majority of claims for minor and moderate injury. [486] In this review of s.26 actions it is apparent that most plaintiffs '*gave as good as they got'* when challenged. This often entailed swearing to outright lies, and putting the onus on defendants to disprove mere assertions not based on credible evidence. Many plaintiffs are far from 'vulnerable' as they are so often portrayed in tort literature.

In other s.26 cases, plaintiffs' claims were still fully successful, even where there was 'fragile' evidence. In the remainder of cases, awards were made at lower (sometimes substantially lower) levels than sought because aspects of those claims lacked merit. The judiciary found that these aspects were not *"trivial matters nor mere inconsistencies"*. We must deal with the facts, as reflected in the case law, and not lawyers' anecdotes about an uneven playing field.

These are tort actions not insurance claims.[487] Or are we indulging in a fiction? Have tort principles been subsumed into the loss distribution mechanism of insurance? Without even adopting a carefully considered position on which approach might be correct, it seems there is a need to be clear as to which is to have dominance. While judges rarely refer to the existence of insurance indemnifying the defendant, it is difficult to imagine that they would act as they do if they believed (or even

[485] Steve Hedley (n69).

[486] It is often overlooked that David triumphed in the battle with Golaith.

[487] At one stage Atiyah advocated abolition of tort in favour of first party insurance in *The Damages Lottery* (Bloomsbury 1997). Ireland has the highest level of first party insurance in the EU. Policyholders could not hope to get away with the level of over-claiming identified in reviewing cases for this chapter.

pretended) that the defendant had to absorb an inflated award from their own resources.[488] This is not a debate about tort theories of duty, breach and causation etc. but merely about the instances of exaggeration addressed in this chapter by people whom the court found had attempted to "milk the system".[489]

Binchy (2004) speaks of the reforms "*restricting the rights of victims of tort*" to litigate. The judgments reviewed for this chapter related entirely to litigation. However, presumably he too would concede that defendants are entitled to expect fairness.[490] Indeed, he was critical of defence teams for not pursuing more challenges. It can be seen where that approach led defendants, in what were considered on the one hand not to be unreasonable defences, into aggravated damages being threatened.

The literature tends to the conclusion that tort has largely failed in its objective of deterring negligent behaviour. Perhaps it could do a better job of deterring unacceptable claimant behaviour. But s.26 is a statutory 'bolt on' rather than an essential element of proving a negligence claim for injury compensation.

Goldberg and Zipursky argue extensively that tort provides a right.[491] Rights also entail responsibilities. [492] A duty of candour on claimants should not be an anathema to tort principles. [493] If the formula for tort recovery is x+y+z equals damages, surely it is possible to add a post-condition of 'c', providing the claimant has not breached the duty of candour.[494] Tort theory could then accommodate such lack of candour as a defence in the classical sense without the necessity for statutory intervention.[495]

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[488] Nor the cost of defending an inflated claim that leads to a lower award when 'disentangled', or indeed the costs of a S26 dismiss when exaggeration is not otherwise discouraged.

[489] The phrase is taken from Irvine J in *Nolan v Kerry Foods Ltd* [2012] IEHC 208.

[490] William Binchy (n70).

[491] The civil recourse theory developed, or perhaps merely elucidated, by Goldberg & Zipursky is distilled as circular by Calabresi in 'Civil Recourse Theory's Reductionism' (2013) Ind. LJ, 88, 449.

[492] Similar to Holfeld and axiomatic co-relatives.

[493] Allowing for the adversarial system in which it currently operates but more towards the 'best evidence rule' than a poker game approach.

[494] Materiality and other relevant consideration can, of course, be built in to that proviso.

[495] James Goudkamp, *Tort Law Defences* (Bloomsbury 2013).

I was involved in fighting exaggerated claims at common law for decades and had an intimate involvement in devising the reforms which included s.26.[496] This provides me with a unique perspective.[497] This is one of my claims to a unique contribution to the knowledge in the current tort literature.

Has s.26 curtailed the 'fraud' with which academics considered the system was 'inundated' or has it been too 'blunt to the point of injustice'? This review of case law demonstrates the characteristics of claims which were justly dismissed. More s.26 applications should have succeeded if the legislation and precedents were correctly applied. Other cases were marginal and it fell to judicial discretion to find in favour of the plaintiff. Most judges did not adopt the *a priori* position as advocated by Binchy (2004).

Defendants complain loudly that s.26 is not enforced. But data analysis on the volume of claims fought indicates that this is just anecdote too, like the complaints of plaintiff lawyers. Some of the academic concerns in Chapter 2 might be consigned to that same category if they are overly influenced by practitioners with a plaintiff bent. Analysis demonstrates that most of the judiciary can be trusted to get the balance of power right. Other judges display a repeatedly pro-plaintiff bias which is just a normal fact of tort law in action and results in many, albeit expensive, successful appeals by defendants.[498]

In terms of overall impact of s.26 on the wider legal culture of honesty to rid the system of the 'fraud' identified by academics, as Chou En-lai replied when asked in 1968 what he considered to be the effects of the French Revolution:

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[496] There have been few negligence trials annually of the significance of s.26 in altering the claims environment since 2005. Those which stand out are *Thompson v Dublin Bus* [2015] IESC 22 where the Supreme Court overturned the notion of strict employer liability from a 2010 High Court decision. *Russell v HSE* [2015] IECA 236 upheld a 2014 High Court decision which altered the discount rate applicable to actuarial future losses from the 4% which had applied since *Boyne v Dublin Bus* [2003] 4 I.R. 47.

[497] England has now introduced similar, but less straightforward, measures on 'fundamental dishonesty'.

[498] Research by The Times (Irish Ed) indicated that 50% of cases were overturned by the Court of Appeal.

"*it is too early to tell*". [499]

[499] It is now generally thought that he was referring to the 1968 "revolution" but the reference to 1789 makes better copy.

Chapter 8 –Conclusions from this case study

In the substantive chapters it has been possible to analyse the *status quo* relative to the academic markers identified by those whose articles set out the basis of their concerns about the reforms and to demonstrate that the outcomes were considerably more favourable than predicted. Some criticisms were defensible even if for reasons other than those articulated in Chapter 2. [500] It is now possible to draw some overall conclusions from this case study.

The new insurance cost crisis from 2016

It may be considered ironic that as the results of the research were being written up, a new purported insurance cost crisis was being addressed by the Irish Government. The causes of recent sharp increases in premium rates are hotly contested. The extent to which published data from insurers' statutory returns do not support the increases, or seem otherwise open to a number of questions, were subjected to scrutiny in Chapter 6.

However, somewhat echoing assertions reviewed in Chapter 2 about reforms being motivated by insurers' pursuit of profits, that may prove to be an apt concern this time round. The difficulty is again emerging that there is no regulator empowered, or perhaps they are just uninclined, to challenge assertions by insurers in the face of quite contrary data.[501]

While it might be naïve to suggest that tort reforms should ideally be free of short-termism politics, there needs to be a watcher at the gate who is vigilant of self-

[500] As emphasised by Rabin: '*The question is always the status quo as compared to the proposed alternative system'* (n7) at p23.

[501] My evidence to the Joint Parliamentary Committee on 14th September 2016 was also covering in the media. *'Insurers are 'dictating reform agenda', committee hears'*. Irish Times 15 September 2016

https://www.irishtimes.com/news/politics/insurers-are-dictating-reform-agenda-committee-hears-1.2792596

serving vested interests.[502] That is a role that could usefully fall to independently minded tort academics who are prepared to undertake extensive robust statistical analyses.

Tort law, in so far as it is administered through the 'law & economics' theory of insurance, must withstand economic analysis. Most injured parties would be left without any compensation if the enforcement of their rights rested on the resources of individual private defendants. The victims of motor accidents are particularly privileged because even if the culpable party is uninsured there is a central fund financed by the law-abiding policyholders to deliver the tort entitlements of those claimants.[503] The notion that the wrongdoers pay is no longer a tenable concept in the vast majority of negligence actions. This fact was recognised by some of the commentators reviewed in Chapter 2.

8.1 Forget civil justice, it's civil procedure that's the problem

Commentators reviewed in Chapter 2 were correct that the pre-reform litigation system was 'sluggish' and excessively expensive, as supported by the data in this research. As demonstrated in Chapters 3 and 5, this has not changed radically in the post reform period up to 2019. [504] The exception is for the volume of claims finalised by or through PIAB. That aspect of the reforms has delivered substantial benefits by improving speed and efficiency, in addition to contributing to premium reductions between 2002 and 2013.

[502] There are also ramifications for diversity in the legal profession from the excessive focus on fee earning. See Lisa Webley and Liz Duff, 'Women Solicitors as a Barometer for Problems within the Legal Profession—Time to Put Values before Profits?'(2007). Journal of Law and Society, 34, p.374.
[503] Establishment of the MIB was a requirement of the 1972 EU motor insurance Directive. Both Ireland and UK had a pre-existing "gentlemen's agreements" between insurers and Government dating from 1955 to provide ex-gratia payments in instances of hardship and that became the compensation fund. However, it would be preferable from the perspective of injured parties that their rights be reflected in primary legislation.
[504] The reduction of legal costs is within the remit of the new Legal Services Regulatory Authority but only some sections of the legislation have yet been commenced by 2019.

To put my head well above the parapet, the interests of lawyers are not a valid dimension which should be permitted to influence tort reforms. The legal professions, being one of a set of privileged voices, at times seem to have overly influenced the academic community in Ireland. It is necessary for a healthy society that academics reflect an independent intellectual voice.[505]

The inestimable value of the legal professions, where necessary, must be viewed as a means to an end but not an end in itself.[506] The function of these 'law jobs' is to serve not to be served by the tort system. [507] That is not to deny that lawyers, and all the other professionals involved in 'the personal injury machine', do have the constitutional right to work and to earn a decent living.[508]

The modernisation of civil justice procedures is still advancing at a glacial pace. The professions may be the biggest losers financially if that continues. [509]

Litigants are not well served by archaic processes that emerged piecemeal during a different era and which should now be consigned to the past. There is a lack of effective regulation of both the allocation to and the consumption of resources in the courts system which is underfunded and inefficient.

8.2 The insurance industry is not to be trusted?

Academics were justified in their scepticism about the insurance industry and Chapter 6 questions the validity of data in annual statutory returns to the regulator.

[505] Some academics reviewed in Chapter 2 seemed to rely on anecdotes from lawyers and some also pursued an agenda for payment of fees to lawyers, even after the Superior Courts had determined that issue.
[506] The inestimable value of the legal professions is frequently demonstrated in the cases on the penumbra of the law, such as asbestosis victims, and when the Government abandoned claimants after the collapse of Setanta Insurance in April 2014.
[507] The term 'law jobs' from Karl Llewllyn as explored by Dowling at chapter 8 (n45).
[508] There is, however, no right to expect a job or certain level of profit to be guaranteed.
[509] This may also apply in the other common law jurisdiction in the EU being the UK (currently) - see Adrian Zuckerman, 'No justice without lawyers – the myth of the inquisitorial solution' (2014) CJQ 33(4), 335-374.

However, contrary to some projections, the premium charges did reduce for a sustained period over more than a decade subsequent to the interventions from 2002. Other issues, however, have emerged in this research after subjecting insurer performance to scrutiny.

While my hypothesis that high claims costs suit the financial strategy of insurers may not be proven in this dissertation, there is considerable evidence which points in that direction. It is volatility that insurers seem incapable of coping with rather than the claims levels *per se*. Most of the difficulties faced by the insurance industry arise from lack of competence and the absence of a rigorous regulatory culture in the broader interests of consumers.

The future for the traditional insurance industry looks grim.[510] It is not adequately serving the needs of its clients nor those of wider society.[511] Government has a conflict of interest by allowing itself to be influenced by insurers to the exclusion of wider considerations which should be weighed in the balance.

Insurers have knowingly and deliberately frustrated the redress rights of injured parties that have been extended under EU law.[512] Ireland, as an EU Member State, has supported that injustice.

The insurance industry is not transparent.[513] Such openness might reveal an appalling vista of inefficiency and short-termism, often fuelled by perverse incentives to secure an increasing market share.[514]

[510] The advent of autonomous vehicles may introduce further disruptive change.
[511] As examples. CMA report on insurers 'overcharging' TPs for repairs and replacement cars. The selling of policyholder data to CMC's and solicitors for a fee to pursue claims. Dual pricing to the detriment of renewing policyholders being investigated by FCA from January 2019.
[512] As reflected by the MIB cases cited in Chapter 5 on justice & fairness. Ireland, as an EU Member State, has repeatedly supported insurers' challenges at the ECJ to curtail the rights of victims, as has the UK.
[513] As concluded by the Joint Parliamentary Committee in its report of December 2016, and as subsequently stated by the Minister for State for Finance when establishing the Cost of Insurance Working Group.
[514] As of July 2020 there are two investigations being conducted, by CCPC and by EU DG Comp.

8.3 There are relatively few worthy claimants?

Academics reviewed in Chapter 2 were correct that in the pre-reform period the system was dominated by minor claims and 'gilders of lilies'. The data in Chapter 3 indicates that the value profile of small and moderate injury is largely unchanged in relative terms since the reforms. This is important because it demonstrates that there is no evidence of ballooning frequency as was feared from 'the expressway principle'. The exception may be seen in the years around the recession, although a reduction in PIAB consent rates during that period may indicate that more of those claims were challenged.

As demonstrated in Chapter 7, the extent of dismisses for exaggeration under s.26 of the Civil Liability and Courts Act 2004 has been disappointingly low from a defendant perspective. It seems that tort theory needs to have a 'bad faith' bar to recovery in order to recover from its negative public reputation. Insurers serve their own short term agenda with nuisance value settlements, and then factor this outlay into pricing, rather than pursuing this issue to the highest judicial level.[515]

As demonstrated in Chapter 4 on accidents, safety standards had already started to improve prior to the interventions in 2002, contrary to the view of some academics. Accident rates relative to various measures of economic activity have continued to decrease during a period of falling premium charges. There are, nevertheless, some serious accidents the victims of which ought to be a priority. However, the litigation system is still clogged up with far less needful cases and does not differentiate the good from the bad as demonstrated in Chapter 5.

Furthermore, delays in the Courts deny defendants their rights to fairness also. [516]

[515] At EU level insurers' federations say 'fraud' accounts for 10% of all claims payments annually, although this is contestable. Judge Nicholas Kearns, former President of the High Court and now Chair of the new Personal Injuries Commission, points to the fact that insurers have not pursued prosecutions of 'fraudsters'.

[516] The constitutional entitlement of defendants was upheld by the Supreme Court in *Gaspari v Irish Rail*. Delays mean that evidence goes cold. Wasted resources and uncertainly result from interminable litigation.

8.4 The media are part of the problem

Commentators reviewed in Chapter 2 were aware of the influence of the media on public perceptions of tort. It is only in recent times, with a further 'insurance cost crisis' being alleged, that newspapers are reporting on a greater number of the claims being dismissed. Hyperbolic headlines usually do not reflect the merits of those cases, good or bad.

The standard of journalism generally is deteriorating, apparently based on a view about the shortened attention span of readers and the inability of the public to grasp complex concepts.[517] Many reporters are now operating on a freelance basis and are not paid unless they secure a dramatic headline which demands publication.

Some consumer journalists are excellent but not a sufficient number of them undertake robust enquiries to challenge the assertions of insurers. Lazy journalism does not deliver the rigour expected from the 'fourth estate' for impartial reporting. This is an area for further research in the future.

8.5 Some of the judiciary have allowed their role to be compromised

Commentators reviewed in Chapter 2 were correct about the level of exaggeration in the system.

The analysis in Chapter 7 of the case law on s.26 of the Civil Liability and Courts Act 2004 indicates that some judges allowed themselves to be influenced by anecdotes from plaintiff lawyers. Some seem to have adopted an agenda of frustrating the legislative intent.

There is currently a tension between members of the Court of Appeal, who advocate proportionality in awards, and those judges of the lower courts who seem to pride themselves on generosity to plaintiffs. Many judges lack a sufficiently broad

[517] Personal feedback I have had from editors when drafting articles for newspapers and other publications.

perspective on the extent of the claims environment overall because they see only 6% at the tip of the iceberg. Sometimes sympathy seems to hold sway over the search for hard facts on the wider picture. The lack of sufficient written and clearly reasoned judgments is a failure of the adjudicatory role.

The judicial system does not allocate adequate accord to the rights of defendants to seek vindication, except perhaps at Court of Appeal level where a new jurisprudence is emerging. There are so few successful defences that they are not even reported in the annual statistics published by the Courts Service. It would be easy to classify a body of High Court decisions as a model of 'accident insurance' rather than reflective of the 'special morality of tort'.[518]

8.6 The EU Single Market for Financial Services is not working

Academics did not directly address this market issue but its relevance can be inferred from their references to insurer profitability which was analysed in Chapter 6.

Domestic dominant players persist in erecting barriers, real and 'imagery', that make the Irish market look unattractive. The regulator does little if anything to address that negative messaging.

The EU Commission continues a 'light handed' approach to regulation and is overly focused on prudential supervision to the detriment of other legitimate interests. Excessive solvency margins do not serve economic efficiency at a national level.

In sharp contrast to the aims emerging from ECJ interpretations of EU motor insurance Directives on the priority of 'victim protection', the EU Commission failed to harmonise protection of injured parties affected by insurer insolvencies. This should have been implemented before permitting 'passporting' of underwriters from the domicile of their authorisation into markets where they displayed limited appreciation of the local laws and culture. The roles of professionals such as auditors

[518] Ernest Weinrib. 'The Special Morality of Tort Law'. McGill Law Journal. Vol 34, 1989, No 3. P403-413.

and actuaries must also be called into question in view of the levels of insolvencies.[519]

The deficit of timely and transparent data on the Irish insurance market has proved detrimental to properly informing those who are interested in reviewing Government policy. This has now deteriorated further with the advent of Solvency 11 which has resulted in cessation of annual publications on matrix that were of interest in the context of wider social issues in a particular nation.[520]

The Irish market continues to become more concentrated and there is no EU single market competition available to benefit consumers.[521] Ironically, the vote by the UK to leave the EU may result in more players entering Ireland post Brexit.[522]

The reason these points are relevant to academic concerns about the reforms as reviewed in Chapter 2 is that dysfunctionality of the insurance market is likely to be addressed by reducing tort rights. It seems that is considered is easier than fixing the fitness and probity of the financial sector.

[519] This is the subject of ongoing litigation - Quinn v PwC.
[520] Much of the quantitative research in this thesis availed of data from the annual statutory returns on which the 'Blue Book' was based but that data is no longer published by the regulator.
[521] Harmonisation is resisted by insurers who assert there is no consumer demand for cross-border products.
[522] Post Brexit relocations by British insurers in 2019 are primarily to service their EU market but it is anticipated that some will also conduct local business to assist economies of scale.

8.7 So what, and where to next?

The empirical research in this thesis will make a valuable original contribution to bridging the gap between tort law in action and tort law in the books which is well known but under-researched. [523]

It is my conclusion that the main challenge with negligence claims is that tort principles are not being applied. The intervention of motor and liability insurance has wrecked the theory in the quotidian reality. Some academics reviewed in Chapter 2 did not really clearly express what tort is supposed to achieve.

For motor claims, the primacy of EU motor insurance Directives was not acknowledged. It is clear from the preamble to the 5th Directive, that protecting the victims of accidents is the priority over any other objectives that tort at common law might purport to pursue. As an example:

> *"The objective of protecting victims, present since Directive 72/166, cannot therefore be regarded as secondary to the objective of facilitating the freedom of movement of persons and the free movement of goods with a view to implementing the internal market."*[524]

A range of other ECJ cases have prevented insurers from availing of contractual terms, and even national road traffic legislation, which would traditionally have entitled them to deny indemnity.[525]

Rather than defending the rights of policyholders, as provided for under the standard contract of indemnity and in accord with the principle of 'holding the

[523] Presentation by Richard Lewis & Annette Morris, Cardiff School of Law and Politics, 3rd March 2016, British Institute of International and Comparative Law. *The Personal Injury Claims Process in England and Wales*.
[524] Para 37 in Vnuk – *Damijan Vnuk v Zavarovalnica Triglav* [2014] CJEU C-162/13 at para 37.
[525] *Evans v Secretary of State for the Environment, Transport and the Regions* (C63/01) [2005] All ER (EC) 763 ECJ (5th Chamber).

policyholder harmless', in essence the EU agenda is that the main objective of compulsory insurance is to shift the risk to society and to promote care for injured persons. Indeed, in 2005 the EU Commission unsuccessfully attempted to shift the common law burden of proof from plaintiffs to defendants contrary to the principles applied in negligence actions. [526] Essentially, this is a social insurance approach that does not sit well with orthodox tort theory. As Weinrib (1988) stated:

> *"I think we would not identify as tort law a mode of ordering that systemically exacted damages regardless of whether the defendant caused the injury that the damages were to repair. A legal arrangement under which compensation was triggered by the injury itself and not by its tortious infliction might be desirable, but it would be an alternative to tort law, not a version of it."* [527]

Tort waters have been muddied by commercial insurance and the EU compensation agenda is not consistent with common law principles under which proof of fault is fundamental.

Stapleton (1995) expressed the view that the thin blue line between insurance and tort had become blurred:

> *"in the postwar period those keen to extend support for the victims of misfortune made loose comparisons between tort and these other forms of response to misfortune which allowed an unfocused view to arise that tort law was somehow 'about insurance.' This then led some to argue that the law's traditional rejection of the relevance of insurance to liability was naive and should be now replaced by an approach that somehow took 'the realities of insurance' into account. As already noted, there has grown up more recently, especially in the United States, the argument that really we should see 'tort as insurance' and that, viewed as such, tort should be savagely cut back."*[528]

That paper seems to have anticipated developments in Ireland from 2016 where there are demands for further reforms, such as 'care not cash' for injured parties.

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[526] See review by Ivo Giesen, 'The Reversal of the Burden of Proof in the Principles of European Tort Law'. Utrecht Law Review Vol 6, Issue 1, Jan 2010, p22-32.

[527] Ernest Weinrib (n518).

[528] Jane Stapleton, 'Tort, Insurance and Ideology' (1995) MLR 1;58(6):820.

It is notable that the latest set of proposals to improve tort in action in Ireland are being spearheaded not by the Department of Justice but by the Department of Finance through a working group entitled 'cost of insurance'. None of that Government work to date has actually reviewed the efficiency of the insurance sector to ensure that only evidenced based reforms are implemented.

Similarly, the commentators reviewed in Chapter 2 largely operated from an evidence-free perspective. That runs the risk of being swayed by anecdote rather than speaking with well-informed independent voices. There was no real effort to defend tort. A forensic analysis of tort principles in action compared to the supposedly unified theory might have been a preferable approach.

Pro-plaintiff lobbyists do nothing to uphold the thin blue line between insurance and tort in their frequent focus on the need for lawyers to profit from the claims process. It might be preferable to explore a more viable alternative such as to remove injury claims from the adversarial legal system, thereby removing the need for lawyers in all but cases on the penumbra of the law.[529] One option would be to establish an inquisitorial Board along the lines of that operating in Norway. This could apply at least up to a certain threshold of seriousness given the predominance of 'frivolity' that permeates the existing system and the preponderance of small value claims as reflected in Chapter 5.

However, such a reform would also require more strict regulation of the insurance industry and monitoring of its actual efficiency in economic terms.[530] This case study demonstrates that the greatest current challenge is neither a 'compensation culture' nor a 'negligence culture' but rather the lack of a rigorous regulatory culture.[531]

There is much debate about proportionality in damages and in legal fees. In contrast, there is comparatively little research on the proportionality of premium charges to

[529] An additional benefit of the inquisitorial approach is that it would remove any imbalance of power.

[530] This assertion is largely based on the emergence of the latest insurance costs crisis examined in Chapter 6.

[531] These regulatory failures apply to the legal profession, the insurance industry, the medical community and to the judicial system.

actual claims costs as opposed to management expenses or shareholder dividends in this area of the financial services sector. In at least the area of compulsory motor insurance, tort has largely become a fiction.

Insurers alter tort law redress much more so than judges do through precedents.

It is thought-provoking to ask, who would lose most in a crash-less society?

Methodology Appendix

To address the academic concerns reviewed in Chapter 2, this thesis employed socio-legal research using case study techniques as developed by Yin[532]. It is inter-disciplinary research which also employs my professional insurance qualifications and experience. It is informed by an unusual insider perspective of a self-insured defendant. [533] Additionally, I had a prominent role spearheading the Irish Government's insurance reform programme from 2002 to 2014. [534] Both roles provided insights which are rarely adequately covered in the literature.

While I make no universal claims, for many people the real world context of tort is redress for personal injury claims. This is a current complex phenomenon as evidenced by the ongoing debates about reforms and the so called 'compensation culture'.

Deciding on the combination of multiple statistical data sources for in-depth insights was not difficult but securing the data proved to be a considerable challenge. Even judicial decisions of relevance were cumbersome to access because of the low volume of published judgments in Ireland and the limitations of the online search facility.[535]

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[532] Robert K Yin, *Case Study Research, Design and Methods* (2013 5th Ed Cosmos Corporation).

[533] As Group Liability Manager of the national transport company in Ireland from 1990 to 2013.

[534] Author was non-executive Chair of the Motor Insurance Advisory Board [MIAB] 1998 to 2004 and of the Personal Injuries Assessment Board [PIAB] 2004 to 2014.

[535] Only cases in the Superior Courts could be robustly tracked for the emergence of a new jurisprudence. I must record thanks to Courts Service and to the Library at Trinity College to which my supervisor Prof Lisa Webley kindly organised access.

The location of this research is the Republic of Ireland. Data for the entire Irish population, annually over several decades, is studied to avoid some of the pitfalls of small scale sampling which can undermine robust, reliable and valid inferences.[536]

Modes of analysis have been kept simple. Calculations are largely 'on the face' of the text so that there is no 'black box' element to arriving at valid conclusions. That is, where there are 'blue line' conclusions which often there are not, other than to rule out a nil hypothesis for the trends observed from the pre and post reform periods.

This practice orientated research is exploratory, descriptive and explanatory. To quote Prof. Lisa Webley, the case study "*has to date been relatively little used"* in empirical legal research.[537] This thesis will contribute to making the case study method "*worthy of a larger presence within the legal academic empirical tool-kit*". [538] I ventured into these choppy waters with my confirmation bias weighing me down but I have made an asset of that unique insider perspective.[539]

<u>The Logic model</u>

A doctrinal review of the tort literature on the law of negligence in relation to redress for personal injury essentially rests on the model that the trends in negligent accidents produce claims frequency which in turn drive costs that largely determine levels of insurance charges.[540] Accordingly, when insurance costs increase, or decrease, one would expect to identify movements in the trends of accidents or

[536] The text may cite samples from the comprehensive data for illustrative purpose in order to keep the size of the thesis manageable but the entirety of the data has been analysed in most instances and significant raw data is contained in Appendices cross referenced to chapter sections.

[537] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' (2016) at p 20. Published in Law and Method, October 2016. My supervisor could have written it about me as I have struggled with all those pitfalls!

[538] Ibid p21

[539] On a number of occasions where data seemed to indicate what I expected to find, further analysis proved that my 'taken for granted view' could not be supported by the evidence. During this research I learned more that I did not realise I did not know about quite a lot of things.

[540] *Ceteris paribus* – all other relevant factors being fixed.

claims or costs or market factors. Often a combination of these influences relate to one another in some identifiable pattern. It should then be possible to test how these complex casual interrelationships influenced legislative amendments and policy formation at a particular time of 'tort reforms', or to observe a greater arbitrariness than that reflected in the existing theoretical literature.[541] The role of academic 'privileged voices' is also subjected to scrutiny in this research question.[542]

The extent to which this research both confirms and refutes previous findings may not settle the ongoing debates about a 'compensation culture' or a 'negligence culture'. However, the triangulation of data analyses adds depth to what can otherwise be merely anecdotal argument. This thesis adds a third dimension to that debate with robust statistics on the insurance industry which is rarely included in the tort literature.

Theoretical Concepts - Framework

It is important to identify what this case study does not address. Tort doctrine, with all of its tensions and inconsistencies, is merely the background context and all that research was cut from the content of the final thesis.

Much academic literature tends to focus on the adversarial model of redress which does not reflect reality in empirical findings from the 'real world' setting. The new knowledge which this research advances is that trends in insurance costs, often justified on the basis of accidents and/or claims and their costs, which in turn lead to calls for reforms that usually involve reducing claimants' rights, reveal an imperfect answer to how tort theory really works in practice. The reforms introduced in Ireland from 2002 were described as 'radical', 'innovative', 'unique' and the 'greatest experiment of all'. Such conditions are appropriate to constructing a case study with validity.

[541] Even the much vaulted Pearson report was accused of having been over-influenced by insurers. See John G Fleming, 'The Pearson Report: Its "Strategy"'. MLR 1;42(3): 249-69.
[542] And the answer to that may have implications for legal education and training.

My focused literature review at Chapter 2 is on commentary in academic publications during the Irish reform programme to identify what those commentators considered to be the key markers of an optimal tort redress system and then to assess how defensible those assessments were in the light of subsequent events.

A series of sub-questions arose in the course of my research before I determined to narrow in on this specific area of personal injury claims with a particular emphasis on motor accidents for which insurance is compulsory. Opportunities for further research in the future are also highlighted in this document.

Chronology of key events

Tort reform programmes internationally tend to be part of contextual conditions that preceded such interventions. The history in the Irish context provides a rich source of archival material. Briefly, the major studies and proposals to resolve the perceived challenges of a 'compensation culture' and/or a complained of 'insurance cost crisis' are tabulated below:

YEAR	Source	Main Finding of relevance in the context of this RQ	Intervention
1986	Joint Parliamentary Committee Chaired by Minister Ivan Yates	Litigation costs accounted for 15% of the cost of motor and liability insurance	1988 abolition of trial by jury for personal injury
1990	Fair Trade Commission Report on restrictive practices in the legal profession	Litigation costs accounted for 25% of the cost of motor and liability insurance	Solicitors to be encouraged to advertise; increase monetary limits of the lower Courts
1996	Deloitte & Touche, Report on The Economic Evaluation of Insurance Costs in Ireland	Compensation 10 times higher in Ireland than in UK for comparable injuries.	None
1997	McAuley Report – Special Working Group on Personal Injury Compensation	Injured parties wait six times longer in Ireland than in England for negotiations to commence on their claims	None
2001	Final McAuley Report on a Personal Injuries Tribunal	Establish a 3 person tribunal of a neutral and a representative from employer and employee bodies to conduct oral hearings.	None because of resistance by the legal professions
2002 April	First Report of the Motor Insurance Advisory Board (MIAB).	Litigation costs added 42% to the cost of compensation. Recommends a Personal Injuries Assessment Board	67 recommendation adopted by Government including Interim Body appointed to establish the PIAB
2004 April	Final Report of the Motor Insurance Advisory Board	Litigation costs added 46% to the cost of compensation	Various reform measures
2004 July	Personal Injuries Assessment Board (PIAB) commences operation	Insurance costs reduce by 40% over a decade. Volume of litigation substantially reduced. Estimated saving to the economy of €1bl in legal costs.	Publication of a Book of Quantum and an inquisitorial model changes the legal culture.

A meta-analysis of the reports tabulated above provided benchmark data from the pre-reform period to capture the *status quo* for which most academics expressed a preference. Those measures were then assessed as against the post-reform data to identify the extent to which academic predictions proved defensible.

The stated criteria for objective measurement are trends in insurance costs relative to insurer profitability and the speed of redress to provide fair compensation to injured parties. There is also tracking of potential downsides such as reduction in the deterrent effect of tort or a questionable rise in claims frequency and exaggeration.

My Approach to this research

Being conscious of my bias it has been necessary to balance my insider perspective with objective data that is largely quantitative. In this longitudinal analysis of national statistics in the pre and post reform periods, triangulation is employed in a number of contexts.

(a) In quantitative analyses, use was made of more than one set of data from individual sources and also of data from a variety of sources. This enhances confidence in the conclusions drawn as divergence may indicate complexities in the subject that are not captured by the question and this prompts new lines of enquiry. Finalisation of personal injury claims is a very long tailed business with significant insurance run-offs, often well in excess of 10 years post-accident. Accordingly, what might at first appear to be 'outdated' data can only be assessed for its reliability when almost all liability exposures have been concluded for the accident years in question.

(b) Several theories of law and justice were reviewed to retrospectively identify an underpinning for the reform programme to establish the extent to which 'a claim to correctness' could be made for the measures adopted by the Irish

Government. [543] That doctrinal analysis seemed at variance with the predominantly negative commentaries as reflected in Chapter 2 on the focused literature review.

(c) Qualitative research was abandoned. This had been limited to structured interviews during fieldwork in Australia and New Zealand. This explored issues which still arise with an alternative reform of moving to a 'no fault' system as one of many options to the common law negligence model in Ireland and England. However, the subjectivity of interviewees was a challenge and it was necessary to focus on the succinct points which had been identified by academics reviewed in Chapter 2 as the key markers of an optimal tort redress system.

(d) In the context of fairness concerns raised by academics, a limited comparative law exercise was undertaken with EU law from which there is 'new governance' on historic tort principles. These regulations include wide ranging motor insurance Directives since 1972 which seek to harmonise compensation systems for people involved in motor accidents across the EEA. This is particularly pertinent since both Ireland and England have been deemed non-compliant by ECJ in respect of some of those directly effective provisions. This partial "loss of sovereignty" over the common law is a factor rarely referred to by academics in analysis of the reforms of negligence actions for personal injury but there are implications for tort theory.

(e) In the course of this research, the medical negligence actions stood so far outside the rubic of other 'ordinary' tort cases that I took a year out from my PhD research to study Medical Law and Ethics at Masters Level on the International Programme with University of London. [544] As a result, this led

[543] Alexy, R (Stanley L. Paulson and Bonnie Litschewski Paulson, tr.). *The Argument from Injustice: A Reply to Legal Positivism.* Oxford, UK: Clarendon Press, 2002.

[544] Graduated with Merit, March 2012.

me to regard clinical negligence as a field for further but separate research.[545] My focus then narrowed to claims handled under compulsory motor with some comparative analysis to non-compulsory liability claims for injury.

Impressive research in critical legal studies can be undertaken 'at the coalface'. I have the benefit of decades of experience from that insider perspective of managing personal injury litigation but axiomatically that background required reflexivity in the drawing of conclusions from data. It was often difficult to set out to prove myself wrong.

The law does not readily lend itself to scientific experimentation that can be expressed in a predictive formula, even though human behaviour can be more predictive than many of us would like to think as free agents. However, my previous second supervisor Prof Reza Banaker quickly pointed out that I was at risk of misleading a reader by giving the impression that I had undertaken an ethnographic study and he quite rightly highlighted that the start of my 'action research' predated any work on this thesis. Hopefully I have ensured that this does not detract from the validity of the analyses and narrative on how defects were identified by others in the redress system and how measures were devised to be implemented with considerably more than partial success. The credibility and persuasiveness of this research lies in the reality of 'the law in action' rather than addressing or resolving fundamental theoretical tort principles. Internalists and externalists both have a valuable role to play in academia.

While flagging a reservation above about subjectivity in some qualitative research undertaken in this area, I can appreciate valid objections that could be raised about the independence of my role as a researcher. To this I would counter on three grounds.

[545] There is a greater focus on causation in such cases. Patient health is already compromised before the treatment for which no doctor is likely to have given a guarantee of a cure. I consider these claims a category apart from 'ordinary tort', although many are straightforward where liability is conceded by practitioners but indemnifiers seem to persist in full defences possibly to curb claims frequency. Many of these are the most tragic injury cases.

First, such involvement provided me with a deeper understanding of the issues from a perspective that has not been extensively covered in the literature, being that of the self-insured defendant for over 20 years of litigation, and prior to that in the insurance industry in Dublin and London.

Secondly, while I have been dubbed 'the inventor'[546] of the reforms in Ireland, it will be obvious that it would be impossible for any one person to implement such wide ranging changes in the law and procedures as have been assessed by the commentators reviewed in Chapter 2. I had the advantage of 'standing on the shoulders of giants' because many previous reports and policy proposals, although not implemented, had at least teased out a number of thorny issues as well as identifying non-preferable alternatives.

Thirdly, there are benefits to having theory informed by practice after due reflection. Even if I were not conscious of the need for reflexivity it was forced upon me at several junctures during my professional career both by my 'political masters' and also by the challenges presented in numerous judicial reviews mounted against the PIAB. In the course of those administrative law actions the subject of 'bias' was raised, as I expect it may be in reaction to some aspects of this case study. It would be otiose to suggest that I was not supportive of, rather than coldly objective about, the reforms in which I was so intimately involved in a non-executive capacity. However, it would stretch credulity for it to be alleged that this was 'a one woman show' without all the checks and balances which arise from governance on both Boards (MIAB and PIAB) as well as the restraint of constitutionality which was fully respected.[547]

No one lens of theory proved sufficient for the multiple dimensions of this research. While I have reservations about 'hermetically sealed' labels, the most appropriate

[546] Various media reference from Parliamentary debates in 2003 re MIAB & PIAB.

[547] As confirmed by the Superior Courts in cases examined in Chapter 5 on justice and fairness.

nomenclature for my approach is evaluative through the lens of soft positivism. The research presented in this thesis is also exploratory and descriptive at times. At appropriate junctures I have challenged the 'taken for granted views' that underpin certain theories, and which also may have currency in social reality.

Appraisal of insurance questions required the explicit law & economics concepts of efficiency and "lowest cost avoider" to be tested. I examined whether, or to what extent, these hold true so that the possibly of other factors, not as yet identified in tort literature, could be exposed. The sole criteria by which the defensibility of academic concerns reviewed in Chapter 2 was determined is quantitative.

Certain aspects of this case study are supported by media citations because that medium feeds the public perceptions of tort in action. Those same media sources were relied on by some commentators reviewed in Chapter 2. Media plays an important part in creating legal culture. This is particularly relevant in the debate on 'the compensation culture' which is disputed by academics in both Ireland and England to varying degrees. It is also relevant to consider the extent to which justice should be seen to be done in public. Public perceptions of tort can be influenced by outlier cases that garner tabloid headlines and also, indeed, seem to have influenced some of the commentators reviewed in Chapter 2.

Contrary to what has been asserted by some, it was not insurers who sought the reform programme launched by the Irish Government in 2002. Instead, it was policyholders who found the increasing insurance costs unsustainable, for both private and commercial purchasers of motor and liability indemnity.[548] Indeed, I tentatively demonstrate a hypothesis that high claims costs actually suit insurers.

[548] Consumer Groups who launched sophisticated campaigns included MIJAG (Motor Insurance Justice Action Group) largely representing the interests of young motorists and AIR (Alliance for Insurance Reform) which was funded by entrepreneurs largely concerned about the cost of liability insurance.

This research may have transferrable lessons on reform of tort redress systems in other jurisdictions. It also addresses the extent to which academic commentary reflects independence of mind from the interests of the legal professions.

Data and analyses

Because of my career history and professional network I had some unique data access opportunities but have relied primarily on the wealth of publicly available information. These included the following:

- Central Bank [Financial Regulator] publications of individualised data by risk profile
- Central Bank publications of insurers' annual Statutory Returns - 'Blue Book'
- Insurers' annual Form 8 Statutory Returns
- Annual reports of the Courts Service – and raw data supplied on request
- Annual reports of PIAB statistics– and raw data supplied on request
- Annual reports of the Road Safety Authority on motor accidents
- Annual reports of the Health & Safety Authority -data on workplace accidents
- Central Statistics Office monthly index of motor insurance inflation
- Data obtained under Freedom of Information Act, or on OIC appeal
- Motor Insurance Advisory Reports 2002 & 2004
- Department of Social Protection on benefit certificates for claimants from 2014 - and raw data supplied on request
- Reports of the Cost of Insurance Working Group 2017 onwards

The research ranges over the time period 1992 to 2019. The period from 2002 is classified as the post-reform period as that is the year in which the interventions commenced.

Insurance market data are analysed by relevant classes of business for injury claims - being Motor, Public Liability and Employer Liability. Results are presented in the following categories for trends analyses:

1. Written/Earned premium income by class of business
2. Incurred claims cost by class of business
3. Volumes of claims notified and finalised by class of business
4. Average claims value by class of business
5. Speed of settlement by class of business
6. Profitability of insurers with analysis of investment income and expenses
7. The correlation between accident/costs trends
8. Claims settlements patterns through various modes of finalisation

Statistics from the Courts Service and from PIAB record the number of claims 'litigated' through formal processes. These volume and value trends provide insights into the proportion of redress delivered by each forum to assess their relative efficiency compared to the projections of commentators reviewed in Chapter 2.

National data on accident frequency is analysed relative to economic activity and to risk units, such as annual trends in registered vehicles and employment statistics. The rate of claims in each class is measured against accident trends in an effort to identify patterns in the propensity to seek redress and the effectiveness or otherwise of the deterrence objective of tort, with some rival theories proposed.

From these three perspectives (insurer data, accident data, claim data) of documentable outcomes for an entire nation it is possible to objectively, although not conclusively, assess the level of success attributable to the interventions. It is then possible to establish whether there is a robust basis for the views which stakeholders expressed in the debates on the innovative practices involved in the reforms which many resisted for varying reasons as detailed in Chapter 2.

Documentary resources

Other evidential sources included:

- Previous research reports for Government
- Denham Report 2004 on Court Practices & Procedures for injury litigation
- Academic literature
- Conference papers
- Case law at national and EU level
- Legislation at national and EU level
- Publications by representative bodies of the legal professions
- Reporting by national media

Aside from the relevance of the above items in the context of the research question, it is possible to identify some very clear standpoints of various stakeholders as indicators of legal culture.

Ethical and Copyright issues

While my close involvement in a non-executive capacity in both MIAB and PIAB, with the fellow members on both those Boards of 11 and 15 people respectively, enabled me to undertake a more textured analysis of data and documentation in this case study, it must be stated clearly that the sources upon which I have relied are publicly available.

The data is public source information under the terms of the EU Directive on the Re-Use of Public Sector Information 2003/98/EC and, therefore, copyright restrictions do not apply.[549] All tables and graphs in the substantive chapters are of my own creation.

[549] The Regulations on the Re-Use of Public Sector Information 2005 S.I. No. 279 of 2005 implemented the EU Directive on the Re-Use of Public Sector Information 2003/98/EC, which sees public sector information as an increasingly important primary material for digital content,

There may be occasions when I arrive at conclusions that are informed by my 'insider perspective' or by information which is not on the public record but that will be rarely and will be highlighted in context. In affirming that this work is my own, I must add the *caveat* that the original statistical analysis of individualised raw data on premium income and claims cost by gender, age and licence status was undertaken by Cyril Connolly in 2002.[550] That is not data which is centrally relevant to this case study and it has not been used. The content of the MIAB reports reflects the joint input of all Board members, although I undertook all the other numerative analyses, wrote both texts and undertook the editing after drafts were submitted to various stakeholders for their input.

I draw extensively on the contents of both of those MIAB reports to set out the 'before' scenario which reflects the *status quo* for which most academics expressed a preference. I must also declare loudly that I was non-executive Chairperson of PIAB from its inception until April 2014. That Board consists of a diverse membership.[551]

In a twist of irony, as the results of this research were being written up a debate about insurance costs reignited in 2016. Premium charges had dramatically increased since year end 2013 and there are now predictable calls in 2019 for reductions in the rights of injured parties. In a neat closed loop, it had been possible in this thesis to examine what went right and then what went wrong - again.

[At July 2020, there are two competition law investigations ongoing into the insurance market in Ireland so an embargo on publication of this thesis has been

products and services. The Directive encourages all Member States to promote the re-use of public sector information and expects that, by exploiting its potential, European companies will contribute to economic growth and job creation.

[550] Lecturer in statistics at DTI, Dun Laoire, Dublin but at the time a statistician with National Roads Authority.

[551] As set out in PIAB Act 2003.

secured until those enquiries have been completed lest this research could prove prejudicial to prosecutions.]

APPENDICES

Index to Tables by Chapter Paragraphs

Chapter 1.2 Average Settlement Ireland v England – McAuley 1997

AVERAGE TOTAL COMPENSATION			
Type of Claim	Ireland	England	Ireland/England
Overall	£19,439	£1,609	12.08
Motor	£20,462	£1,633	12.53
Employer's Liability	£21,457	£1,630	13.16
Public Liability	£11,773	£908	12.96

Chapter 1.3 MIAB 2002 Recommendations (at end of Chapter Appendices)

Chapter 3.3 General Damages v Special Damages – UK v Ireland

General Damages v Special Damages by Award Value Band Ireland 1996

Proportion of General to Special Damages by Award Size				
Total Award Range Irl£	No. of Cases	Average Special Damages £	Average General Damages £	Ratio of General:Special
0-20k	50	£1,609	£10,893	6.8:1
>20k-40k	53	£4,373	£24,016	5.5:1
>40k – 60k	29	£8,196	£38,966	4.8:1
>60k-100k	15	£18,631	£55,227	3.0:1
>100k-150k	10	£52,052	£70,100	1.4:1
>150k-200k	9	£74,348	£100,611	1.4:1
>200k	4	£110,209	£125,125	1.1:1

Source: McAuley Report 1997 Table 24, page 128

General Damages v Special Damages in settlements 1994-1997 Ireland

Ratio General to Special Damages - Ireland		
General Damages Irl£	No. of Cases	Ratio of General:Special
0-20k	82	6.50:1
>20k-40k	15	3.74:1
>40k – 60k	4	3.06:1
>60k-100k	5	2.22:1
100k+	21	0.94:1

Source: McAuley Table 25, page 129

General Damages v Special Damages in Settlements 1997 England

Ratio General to Special Damages - England		
General Damages £stg	No. of Cases	Ratio of General:Special
<1,000	8	29.95:1
>1,000 – 1,500	13	13.48:1
>1,500 – 2,000	9	54.90:1
>2,000 – 3,000	6	34.22:1
>3,000	4	14.14:1

Source: McAuley table 26, page 129

Chapter 3.4 Claims Volumes v Vehicles 2000-2013

Year	Veh's 000	Claims 000's	Claims/Vehicles
2000	1684	274	16%
2001	1770	264	15%
2002	1850	268	15%
2003	1937	285	15%
2004	2036	308	15%
2005	2140	336	16%
2006	2300	377	16%
2007	2440	423	17%
2008	2500	463	19%
2009	2470	466	19%
2010	2420	421	17%
2011	2430	326	13%
2012	2400	286	12%
2013	2483	245	10%

Chapter 3.8 Annual Operating Cost of PIAB & relative to awards 2009-2017

PIAB	Op Cost €ml's	Awards Made €ml's	Awards Accepted €ml's	Op Costs v awards made	Op Costs v awards accepted
2009	€10	€200	€118	5%	9%
2010	€10	€187	€108	5%	9%
2011	€11	€210	€123	5%	9%
2012	€11	€218	€128	5%	9%
2013	€11	€243	€143	4%	8%
2014	€11	€281	€166	4%	7%
2015	€10	€268	€151	4%	7%
2016	€11	€315	€169	3%	6%
2017	€11	€315	€169	3%	6%

Chapter 3.12A Motor Claim Numbers & Average Cost 1992-2013

Motor - Market Aggregate			
Year	No. Claims	Gross liability estimate	AVERAGE
1992	118,284	€570,232,783	€4,821
1993	127,717	€620,868,371	€4,861
1994	135,179	€645,922,806	€4,778
1995	151,273	€719,496,327	€4,756
1996	177,738	€884,517,821	€4,977
1997	196,477	€968,055,060	€4,927
1998	212,874	€998,602,663	€4,691
1999	237,020	€1,069,419,659	€4,512
2000	274,465	€1,171,199,473	€4,267
2001	264,343	€1,088,073,618	€4,116
2002	268,269	€1,033,709,537	€3,853
2003	285,444	€945,074,663	€3,311
2004	308,172	€994,012,757	€3,226
2005	336,294	€1,150,385,051	€3,421
2006	377,113	€1,324,137,624	€3,511
2007	422,875	€1,655,473,652	€3,915
2008	463,374	€1,880,363,000	€4,058
2009	466,329	€1,741,583,000	€3,735
2010	421,377	€1,642,534,000	€3,898
2011	325,904	€1,302,856,000	€3,998
2012	286,330	€1,209,757,000	€4,225
2013	245,053	€1,095,917,000	€4,472

Chapter 3.12B Employers Liability Numbers & Average Cost 1992-2013

EL	No. Claims	Gross liability estimate	Average
1992	8,375	€105,012,416	€12,539
1993	7,566	€107,659,584	€14,229
1994	8,240	€138,619,302	€16,823
1995	8,816	€155,068,235	€17,589
1996	9,848	€164,923,437	€16,747
1997	10,131	€202,139,882	€19,953
1998	10,244	€197,290,633	€19,259
1999	9,968	€197,235,323	€19,787
2000	11,908	€180,071,931	€15,122
2001	12,226	€152,408,988	€12,466
2002	7,373	€136,536,164	€18,518
2003	7,012	€143,661,889	€20,488
2004	7,767	€168,791,170	€21,732
2005	8,445	€175,387,817	€20,768
2006	9,210	€200,947,048	€21,818
2007	10,254	€246,395,524	€24,029
2008	11,878	€295,432,000	€24,872
2009	11,042	€247,334,000	€22,399
2010	11,010	€222,955,000	€20,250
2011	7,887	€180,463,000	€22,881
2012	6,671	€167,639,000	€25,130
2013	6,658	€173,101,000	€25,999

Chapter 3.12C Public Liability Numbers & Average Cost 1992-2013

PL	No. Claims	Gross Liability Estimate	Average
1992	14,986	€93,229,357	€6,221
1993	14,958	€111,631,061	€7,463
1994	14,772	€138,853,948	€9,400
1995	15,725	€138,797,733	€8,827
1996	16,428	€160,462,972	€9,768
1997	18,920	€172,323,782	€9,108
1998	19,391	€204,388,987	€10,540
1999	21,990	€217,862,950	€9,907
2000	26,823	€187,848,519	€7,003
2001	27,628	€191,436,169	€6,929
2002	17,857	€142,661,000	€7,989
2003	11,490	€154,897,577	€13,481
2004	13,163	€182,188,217	€13,841
2005	15,092	€205,864,253	€13,641
2006	16,613	€256,350,326	€15,431
2007	18,785	€340,822,484	€18,143
2008	21,558	€460,564,600	€21,364
2009	24,362	€470,303,000	€19,305
2010	23,256	€419,695,000	€18,047
2011	18,667	€264,452,000	€14,167
2012	14,597	€222,769,000	€15,261
2013	14,547	€255,066,000	€17,534

Chapter 3.12D Overall Gross Liability Estimates 1992-2013

Gross Overall Liability Estimates as at YE13				
Year	Motor	EL	PL	Total €ml's
1992	€570,233	€105,012	€93,229	€768,475
1993	€620,868	€107,660	€111,631	€840,159
1994	€645,923	€138,619	€138,854	€923,396
1995	€719,496	€155,068	€138,798	€1,013,362
1996	€884,518	€164,923	€160,463	€1,209,904
1997	€968,055	€202,140	€172,324	€1,342,519
1998	€998,603	€197,291	€204,389	€1,400,282
1999	€1,069,420	€197,235	€217,863	€1,484,518
2000	€1,171,199	€180,072	€187,849	€1,539,120
2001	€1,088,074	€152,409	€191,436	€1,431,919
2002	€1,033,710	€136,536	€142,661	€1,312,907
2003	€945,075	€143,662	€154,898	€1,243,634
2004	€994,013	€168,791	€182,188	€1,344,992
2005	€1,150,385	€175,388	€205,864	€1,531,637
2006	€1,324,138	€200,947	€256,350	€1,781,435
2007	€1,655,474	€246,396	€340,822	€2,242,692
2008	€1,880,363	€295,432	€460,565	€2,636,360
2009	€1,741,583	€247,334	€470,303	€2,459,220
2010	€1,642,534	€222,955	€419,695	€2,285,184
2011	€1,302,856	€180,463	€264,452	€1,747,771
2012	€1,209,757	€167,639	€222,769	€1,600,165
2013	€1,095,917	€173,101	€255,066	€1,524,084
Total	€24,712,192	€3,959,073	€4,992,469	€33,663,734

Chapters 4 and 6 Motor Premium & Technical Result by co. 2005-2014

Net Earned Premium Income (NEPI) v Technical Result (Tech) €ml's											
	2005	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**Cum**
Allianz											
NEPI	141	128	114	112	108	94	85	82	83	109	1,057
Tech	72	54	19	10	-8	21	21	20	-6	-35	169
TECH/NEPI	*51%*	*42%*	*17%*	*9%*	*-7%*	*22%*	*24%*	*25%*	*-7%*	*-32%*	***16%***
AXA											
NEPI	351	315	286	264	255	252	252	236	227	242	2,681
Tech	116	59	54	38	74	82	42	26	16	14	522
TECH/NEPI	*33%*	*19%*	*19%*	*14%*	*29%*	*33%*	*17%*	*11%*	*7%*	*6%*	***19%***
FBD											
NEPI	187	195	195	186	165	151	146	143	145	158	1,672
Tech	50	49	142	29	22	27	18	17	5	-20	339
TECH/NEPI	*27%*	*25%*	*73%*	*15%*	*13%*	*18%*	*12%*	*12%*	*4%*	*-13%*	***20%***
I P B											
NEPI	10	10	9	8	8	6	6	6	6	6	74
Tech	10	1	2	-9	3	6	5	3	3	2	25
TECH/NEPI	*101%*	*12%*	*19%*	*-121%*	*38%*	*93%*	*74%*	*47%*	*61%*	*30%*	***33%***
Zurich											
NEPI	149	137	132	131	139	64	59	64	58	54	987
Tech	68	15	35	27	1	11	4	0	-9	3	153
TECH/NEPI	*46%*	*11%*	*26%*	*21%*	*1%*	*17%*	*6%*	*0%*	*-15%*	*5%*	***16%***
AIG											
NEPI	29	34	34	32	35	47	54	43	43	49	401
Tech	13	10	11	2	2	2	2	-6	-6	-6	23
TECH/NEPI	*43%*	*29%*	*31%*	*6%*	*7%*	*5%*	*3%*	*-14%*	*-14%*	*-13%*	***6%***
Aviva											
NEPI	394	358	353	325	265	232	219	203	211	129	2,690
Tech	156	113	118	37	41	-29	57	-66	23	15	466
TECH/NEPI	*39%*	*31%*	*34%*	*12%*	*16%*	*-12%*	*26%*	*-32%*	*11%*	*11%*	***17%***
TOTALS	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**Cum**
NEPI	1,262	1,177	1,124	1,058	975	847	822	778	772	748	9,563
Tech	483	301	382	134	136	121	148	-6	26	-28	1,697
TECH/NEPI	*38%*	*26%*	*34%*	*13%*	*14%*	*14%*	*18%*	*-1%*	*3%*	*-4%*	***18%***

NB – excludes outlier Quinn, Liberty (only entered 2011) & RSAI (accounting issues)

Chapter 4.3 Pre-reform Accidents v Registered Vehicles 1990-2000

Year	Veh's 000's	Fatal	Fatal / Veh's 10,000	Serious Injury	Per 10,000 Vehicles	Minor Injury	Per 10,000 Vehicles
1990	105	432	4.1	2818	27	6611	63
1991	111	402	3.6	2358	21	7336	66
1992	113	384	3.4	2644	23	7544	67
1993	115	394	3.4	2553	22	7278	63
1994	120	371	3.1	2496	21	7733	64
1995	126	405	3.2	2822	22	9851	78
1996	134	415	3.1	2360	18	10602	79
1997	143	424	2.9	2182	15	10574	74
1998	151	408	2.7	1916	13	10486	69
1999	161	374	2.3	1867	12	10113	63
2000	168	362	2.2	1640	10	10018	59

Chapter 4.9 Accidents v Vehicles 2000-2014

Year	Veh's 10,000	Fatal	Injury Collisions	Fatal / Veh's 10,000	Injury/ Veh's 10,000
2000	168	362	7395	2.15	44
2001	177	360	6549	2.03	37
2002	185	346	6279	1.87	34
2003	194	301	5684	1.55	29
2004	204	334	5447	1.64	27
2005	214	360	6173	1.68	29
2006	230	321	5697	1.4	25
2007	244	309	5158	1.27	21
2008	250	254	6482	1.02	26
2009	247	220	6395	0.89	26
2010	242	185	5595	0.77	23
2011	243	172	5058	0.71	21
2012	240	152	5458	0.63	23
2013	248	179	4797	0.72	19
2014 *	252	179	5618	0.71	22

*Road Safety Authority methodology note for 2014.

Chapter 5.6 Court Injury Award Volumes by Jurisdiction 2006-2017

Awards	High Court	Circuit Court	District from 2014	Total PI trials
2006	*173*	*1,102*		1,275
2007	133	968		1,101
2008	124	966		1,090
2009	408	931		1,339
2010	392	980		1,372
2011	343	1,213		1,556
2012	375	1,485		1,860
2013	590	1,109		1,699
2014	1018	509	433	1,960
2015	469	1,012	501	1,982
2016	390	977	535	1,902
2017	400	1,075	374	1,849

Chapter 5.7 Court Injury Summons Issued by Jurisdiction 2006-2017

Summons Issued	High Court	Circuit Court	District from 2014	PI Summons
2006	2,673	5,000		7,673
2007	5,951	7,154		13,105
2008	6,466	6,931		13,397
2009	7,099	6,999		14,098
2010	7,068	7,567		14,635
2011	8,179	7,821		16,000
2012	8,791	8,073		16,864
2013	9,561	8,505		18,066
2014	7047	9852	864	17,763
2015	7,219	10,631	1142	18,992
2016	8,510	12,230	1,158	21,898
2017	8,909	12,497	1,011	22,417

Chapter 5.9 The 'Disappeared' Litigation 2006-2017

	Claim Volumes	Accepted awards	Potential litigation	PI Summons	*Disappeared*	As % Claims reg. PIAB
2006	18,750	3,403	15,347	7,673	*7,674*	41%
2007	20,137	5,000	15,137	13,105	*2,032*	10%
2008	24,722	5,670	19,052	13,397	*5,655*	23%
2009	25,919	5,387	20,532	14,098	*6,434*	25%
2010	26,964	5,038	21,926	14,635	*7,291*	27%
2011	27,669	5,875	21,794	16,000	*5,794*	21%
2012	29,603	6,124	23,479	16,864	*6,615*	22%
2013	31,311	6,476	24,835	18,066	*6,769*	22%
2014	31,576	7,519	24,057	17,763	*6,294*	20%
2015	33,561	6,716	26,845	18,992	*7,853*	23%
2016	34,056	7,071	26,985	21,898	*5,087*	15%
2017	33,114	6,788	26,326	22,417	*3,909*	12%
Total	337,382	71,067	266,315	194,908	*71,407*	21%

Chapter 5.10 Average PIAB Award Made v Accepted 2006-2017

Average Award	Made	Accepted	Variance
2006	€20,685	€19,689	-5%
2007	€22,057	€20,400	-8%
2008	€24,552	€23,164	-6%
2009	€23,166	€21,942	-5%
2010	€22,271	€21,485	-4%
2011	€21,339	€20,887	-2%
2012	€21,502	€20,839	-3%
2013	€22,847	€22,015	-4%
2014	€22,641	€22,073	-3%
2015	€22,878	€22,536	-1%
2016	€24,294	€23,914	-2%
2017	€24,876	€24,897	0%
TOTAL	€20,292	€22,162	9%

Chapter 5.14 Court Awards v. claims registered with PIAB 2006-2017

	Claim Volumes to PIAB	High Court	Circuit Court	District from 2014	Total PI trials	As % total claims
2006	18,750	173	1,102		1,275	7%
2007	20,137	133	968		1,101	5%
2008	24,722	124	966		1,090	4%
2009	25,919	408	931		1,339	5%
2010	26,964	392	980		1,372	5%
2011	27,669	343	1,213		1,556	6%
2012	29,603	375	1,485		1,860	6%
2013	31,311	590	1,109		1,699	5%
2014	31,576	1,018	509	433	1,960	6%
2015	33,561	469	1,012	501	1,982	6%
2016	34,056	390	977	535	1,902	6%
2017	33,114	400	1,075	374	1,849	6%

Chapter 5 Increased Speed of Resolution – claims paid v premium 2005-2014

Claims Paid/NEPI	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
ALLIANZ	67%	68%	76%	90%	93%	90%	88%	84%	77%	67%
AXA	62%	68%	82%	109%	99%	90%	91%	85%	89%	95%
FBD	50%	61%	68%	82%	85%	87%	81%	75%	78%	69%
IPB	65%	58%	67%	93%	76%	105%	83%	91%	102%	107%
LIBERTY							118%	100%	140%	115%
RSA	74%	74%	72%	93%	83%	77%	60%	54%	87%	97%
ZURICH	61%	66%	73%	85%	94%	139%	136%	125%	128%	135%
AIG	53%	47%	57%	75%	72%	64%	58%	82%	79%	70%
AVIVA	74%	71%	74%	83%	101%	103%	98%	129%	81%	133%
TOTALS	**64%**	**67%**	**74%**	**90%**	**93%**	**91%**	**87%**	**91%**	**93%**	**97%**

Chapter 6.2 Motor Profit v Premium 1983-1999

Earned Premium Income, Underwriting Result, Technical Result & Post-Tax Profit **Irl pounds**

					Relative to EPI		
Year	EPI	U/W Result	Tech Result	Post-Tax Profit	*U/W*	*Tech*	*Post tax*
1983	233	-52	25	13	*-22%*	*11%*	*6%*
1984	260	-32	60	30	*-12%*	*23%*	*12%*
1985	295	-23	60	30	*-8%*	*20%*	*10%*
1986	323	-18	59	30	*-6%*	*18%*	*9%*
1987	344	-33	53	27	*-10%*	*15%*	*8%*
1988	358	-49	30	16	*-14%*	*8%*	*4%*
1989	370	-116	-33	-17	*-31%*	*-9%*	*-5%*
1990	410	-130	-18	-10	*-32%*	*-4%*	*-2%*
1991	486	-80	29	17	*-16%*	*6%*	*3%*
1992	522	-45	72	43	*-9%*	*14%*	*8%*
1993	545	-50	57	34	*-9%*	*10%*	*6%*
1994	569	-47	75	45	*-8%*	*13%*	*8%*
1995	547	-51	77	47	*-9%*	*14%*	*9%*
1996	637	-91	31	19	*-14%*	*5%*	*3%*
1997	679	-114	31	20	*-17%*	*5%*	*3%*
1998	758	-98	17	11	*-13%*	*2%*	*1%*
1999	844	-126	-16	-12	*-15%*	*-2%*	*-1%*
Total	8,180	-1,155	609	343	*-14%*	*7%*	*4%*

Chapter 6.2A – Motor Underwriting Result v Net Earned Premium 1992-2013

€ml's Euro	**NEPI**	**U/W**	**Prop U/W v NEPI**
1992	660	-57	-8.6%
1993	691	-62	-9.0%
1994	720	-59	-8.2%
1995	694	-65	-9.4%
1996	808	-115	-14.2%
1997	862	-144	-16.7%
1998	961	-125	-13.0%
1999	1,072	-159	-14.8%
2000	1,232	-322	-26.1%
2001	1,468	-187	-12.7%
2002	1,594	18	1.1%
2003	1,702	212	12.5%
2004	1,685	328	19.5%
2005	1,606	421	26.2%
2006	1,562	258	16.5%
2007	1,529	356	23.3%
2008	1,438	33	2.3%
2009	1,349	-119	-8.8%
2010	1,242	-96	-7.7%
2011	1,202	47	3.9%
2012	1,114	-44	-3.9%
2013	1,054	-219	-20.8%
Total	26,245	-100	-0.4%

Chapter 6.2B – Liability Result v Net Earned Premium Income 2003-2013

LIABILITY €ml's	NEPI	U/W	*v. NEPI*	TECH	*v. NEPI*
2003	705	-27	*-4%*	77	*11%*
2004	737	71	*10%*	208	*28%*
2005	706	44	*6%*	191	*27%*
2006	670	223	*33%*	355	*53%*
2007	635	213	*34%*	335	*53%*
2008	593	208	*35%*	198	*33%*
2009	489	-7	*-1%*	86	*18%*
2010	380	48	*12%*	102	*27%*
2011	364	65	*18%*	118	*32%*
2012*	340	-148	*-44%*	-39	*-12%*
2013*	341	-60	*-17%*	-19	*-5%*
Totals	5,959	630	*11%*	1,610	*27%*
Outliers*					
2012	78	127		99	
2013	34	81		82	
Excl.	5,847	838	*14%*	1,692	*29%*

Chapter 6.4 Investment Income v.Net Earned Premium by co 2005-2014

Motor	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Allianz	8%	6%	10%	6%	17%	3%	8%	14%	1%	7%
AXA	9%	15%	19%	20%	14%	13%	13%	6%	4%	2%
FBD	11%	12%	12%	11%	10%	11%	9%	8%	8%	8%
IPB	47%	51%	43%	-109%	17%	12%	-1%	60%	32%	28%
Liberty							5%	24%	9%	14%
RSA	18%	9%	7%	8%	10%	0%	4%	7%	-1%	6%
Zurich	10%	11%	11%	10%	9%	13%	13%	10%	10%	9%
AIG	10%	4%	5%	-2%	13%	11%	7%	5%	4%	3%
Aviva	16%	15%	15%	15%	13%	13%	10%	8%	1%	10%
TOTAL	12%	12%	14%	12%	12%	10%	9%	10%	4%	7%

Outliers to note – RSAI 2013, AIG 2008 plus IPB (a mutual) in 2008 and 2011.

Chapter 6.5 Management Expenses & Brokers' Commissions 2005-2014

Motor Net €ml's	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Allianz										
EPI	141	128	114	112	108	94	85	82	83	109
COMM	8	7	7	3	6	4	5	4	6	9
XP'S	18	17	19	20	17	15	18	18	17	19
COMMS/EPI	6%	6%	6%	3%	6%	4%	6%	5%	7%	8%
XPS/EPI	13%	14%	17%	18%	16%	16%	21%	22%	21%	17%
AXA										
EPI	351	315	286	264	255	252	252	236	227	242
COMM	9	10	8	10	11	11	12	12	14	17
XP'S	60	58	60	75	48	45	52	49	40	43
COMMS/EPI	3%	3%	3%	4%	4%	4%	5%	5%	6%	7%
XPS/EPI	17%	18%	21%	28%	19%	18%	20%	21%	18%	18%
FBD										
EPI	187	195	195	186	165	151	146	143	145	158
COMM	0	0	0	0	1	1	1	1	1	1
XP'S	28	33	36	38	36	34	36	36	39	42
COMMS/EPI	0%	0%	0%	0%	0%	0%	0%	0%	0%	1%
XPS/EPI	15%	17%	18%	21%	22%	22%	25%	26%	27%	27%
I P B										
EPI	10	10	9	8	8	6	6	6	6	6
COMM							0	0	0	0
XP'S	1	1	1	1	1	1	1	1	1	1
COMMS/EPI							1%	0%	1%	1%
XPS/EPI	12%	13%	14%	14%	13%	14%	17%	17%	20%	17%
Liberty										
EPI							19	125	109	117
COMM							0	1	1	3
XP'S							7	45	35	38
COMMS/EPI							1%	0%	1%	3%
XPS/EPI							36%	36%	32%	33%
RSAI										
EPI	76	77	75	70	83	104	149	180	154	172
COMM	5	5	5	7	12	15	23	25	27	21
XP'S	18	16	12	15	6	15	15	13	20	33
COMMS/EPI	6%	7%	7%	11%	14%	14%	16%	14%	18%	12%
XPS/EPI	23%	20%	17%	21%	8%	14%	10%	7%	13%	19%
Zurich										
EPI	149	137	132	131	139	64	59	64	58	54
COMM	9	8	8	9	14	12	10	12	10	10
XP'S	19	19	20	28	16	15	21	19	14	17
COMMS/EPI	6%	6%	6%	7%	10%	19%	18%	19%	17%	19%
XPS/EPI	13%	14%	15%	21%	12%	24%	36%	30%	25%	32%

AIG										
EPI	29	34	34	32	35	47	54	43	43	49
COMM	2	3	3	3	6	8	8	5	6	7
XP'S	2	3	3	4	5	6	7	9	11	10
COMMS/EPI	8%	9%	8%	10%	16%	17%	15%	12%	13%	14%
XPS/EPI	8%	8%	8%	11%	15%	12%	14%	20%	26%	20%
Aviva										
EPI	394	358	353	325	265	232	219	203	211	129
COMM	32	32	38	29	21	25	21	23	21	19
XP'S	41	45	54	69	60	49	43	94	38	17
COMMS/EPI	8%	9%	11%	9%	8%	11%	10%	11%	10%	14%
XPS/EPI	10%	13%	15%	21%	23%	21%	19%	46%	18%	13%
TOTAL of Above										
	2005	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**
EPI	1,329	1,245	1,190	1,120	1,050	944	983	1,076	1,029	1,030
COMM	65	66	70	63	71	75	80	82	86	87
XP'S	186	192	204	249	189	179	198	284	215	220
COMMS/EPI	5%	5%	6%	6%	7%	8%	8%	8%	8%	8%
XPS/EPI	14%	15%	17%	22%	18%	19%	20%	26%	21%	21%

Note: varies from overall market figures at C6.7 by exclusion of small outliers

Chapter 7 Exaggerated Claims – review of case law pre and post s.26

Date decision	Parties & citation	Dismiss?
1. 1/11/01	*Vesey v Bus Eireann* [2001] IESC 93	N but pre s26
2. 1/12/02	*Shelly-Morris v Bus Atha Cliath* [2002] IESC 74	N but pre s26
3. 1/12/03	*O'Connor v Bus Atha Cliath* [2003] IESC 66	N but pre s26
4. 6/5/04	*O'Flaherty v O'Mathuna Baid Teo* [2004] IESC 28	Y but @ Common Law
5. 25/2/05	*Mulkern v Flesk & anor* - [2005] IEHC 48	N
6. 25/7/06	*Corbett v Quinn Hotels Limited* [2006] IEHC 222	N
7. 16/11/06	*Kerr v Molloy & Anor* [2006] IEHC 364	N but
8. 26/10/06	*Carmello v Casey & Anor* [2007] IEHC 362	Y
9. 21/1/09	*Hussey v Twomey & MIBI* [2009] IESC 1	N but n/a
10. 5/2/09	*Flanagan v Dublin Bus* [2009] IEHC 98	Y but on Liability
11. 28/7/09	*Gammell v Doyle* (pub)& White [2009] IEHC 416	Y
12. 11/11/09	*Hegarty v CIE* [2009] IEHC 495	N
13. 18/12/09	*Behan v AIB* [2007] IEHC 554	Y but on Liability
14. 26/3/10	*Danagher v Glantine Inns* [2010] IEHC 214	Y
15. 1/7/10	*Farrell v Dublin Bus* [2010] IEHC 327	Y
16. 18/11/10	*Higgins v Caldark and Quigley* [2010]IEHC 527	Y
17. 1/3/11	McKenna v Dormer Services - UNREPORTED?	*Y*
18. 5/4/11	*Boland v Dublin CC & Ors* [2011] IEHC 176	Y but n/a
19. 27/5/11	*Dunleavy v Swan Park Ltd* [2011] IEHC 232	N
20. 25/10/11	*Forde v Central Parking* [2011] IEHC 407	Y but n/a
21. 16/11/11	*Folan v O Corraoin and Ors* [2011] IEHC 487	Y
22. 2/12/11	*Ahern v Bus Eireann* [2011] IESC 44	N
23. 20/1/12	*Nolan v O'Neill* & *Mitchell* [2012] IEHC 151 & CoA	Dismiss Overturned
24. 23/2/12	*Goodwin v Bus Eireann* [2012] IESC 9	N but pre s26
25. 30/3/12	*Nolan v Kerry Foods Ltd* [2012] IEHC 208	N
26. 11/10/12	*Rahman v Craigfort Taverns Limited* [2012] IEHC 478	Y
27. 23/10/12	*Montgomery v Minister for Justice*[2012] IEHC 443	Y
28. 26/10/12	*Meehan v BKNS & anor* [2012] IEHC 441	Y
29. 30/11/12	*De Cataldo v Petro Gas* [2012] IEHC 495	Y but on Liability
30. 25/1/13	*Salako v O'Carroll* [2013] IEHC 17	Y
31. 12/4/13	*Ludlow v Unsworth & Zurich* [2013] IEHC 153.	Y
32. 17/7/13	*Lackey v Kavanagh* [2013] IEHC 341	N
33. 26/7/13	*Smith v HSE* [2013] IEHC 360	N
34. 27/11/14	*Lawlor v Carroll* [2014] IEHC 579	N
35. 13/12/13	Creane v Gavin Waters (unreported)	Y
36. 3/12/14	*Looby v Fatalski & MIBI* [2014] IEHC 564	N
37. 9/12/14	*Daly v HSE* [2014] IEHC 560	N but
38. 24/4/15	*Waliszewski v McArthur* [2015] IEHC 264	Y
39. 24/6/15	*Kurzyna -v- Michalski & MIBI* [2015] IECA 135	N
40. 30/7/15	*Hamill v O'Callaghan* [2015] IEHC 542	N but low award

41. 31/7/15	*Boyle v Governor St Pat* [2015] IEHC 532	N
42. 19/10/15	*Waliszewski v McArthur* [2015] IECA 298	Y – appeal failed
43. 3/12/15	*Saleh v Moyvalley* [2015] IEHC 762	N but appeal
44. 10/12/15	*McLaughlin v McDaid* [2015] IEHC 810	N
45. 11/12/15	*Platt -v- OBH & anor*[2015] IEHC 793	Y
46. 26/1/16	*Maloney v White* [2016] IEHC 44	N
47. 1/2/16	*Waliszewski v McArthur* [2016] IESCDET 17	Y appeal refused
48. 18/3/16	*Plonka v Norviss* [2016] IEHC 137	N
49. 21/10/16	*Nolan v O'Neill* & *Mitchell* [2016] IECA 298	Overturned by CoA
50. 31/7/17	*Darragh (multiple Pltff's) v Feeney* [2017] IEHC 514	N

Key: An entry under the column "Dismiss?" which shows "*Yes, but*" indicates that the claim was not dismissed on the basis of an application under s.26 but on some other grounds of liability. An entry which states "*No, but*" indicates that an application under s.26 was rejected but lower damages than sought were awarded.

Media coverage on s.26 Dismisses & Defences - *'send out a message'*

	Traceable media?
1	*Vesey v Bus Eireann* [2001] IESC 93 **Award to 'persistent liar' is cut in half** http://www.independent.ie/irish-news/award-to-persistent-liar-is-cut-in-half-26067843.html
2	*Shelly-Morris v Bus Atha Cliath* [2002] IESC 74 **Court cuts damages over false claims** http://www.irishtimes.com/news/court-cuts-damages-over-false-claims-1.1108743
3	*O'Connor v Bus Atha Cliath* [2003] IESC 66 **Claimants may pay for exaggerating injuries** http://www.irishtimes.com/news/claimants-may-pay-for-exaggerating-injuries-1.400973 **Ruling means injuries claims could backfire** http://www.irishtimes.com/news/ruling-means-injuries-claims-could-backfire-1.515553 **Court decision signals tougher stance on claims** http://www.independent.ie/irish-news/court-decision-signals-tougher-stance-on-claims-25919302.html
4	*O'Flaherty v O'Mathuna Baid Teo* [2004] IESC 28 – no trace
5	*Mulkern v Flesk & anor* - [2005] IEHC 48 – no trace
6	*Corbett v Quinn Hotels Limited* [2006] IEHC 222 – no trace
7	*Kerr v Molloy & Anor* [2006] IEHC 364 – no trace
8	*Carmello v Casey & Anor* [2007] IEHC 362 – no trace
9	*Hussey v Twomey & MIBI* [2009] IESC 1 – no trace
10	*Flanagan v Dublin Bus* [2009] IEHC 98 – no trace
11	*Gammell v Doyle* (pub)& White [2009] IEHC 416 **Victim's false evidence sees judge dismiss damages claim** http://www.irishtimes.com/news/victim-s-false-evidence-sees-judge-dismiss-damages-claim-1.708566
12	*Hegarty v CIE* [2009] IEHC 495 – no trace
13	*Behan v AIB* [2007] IEHC 554 – no trace
14	*Danagher v Glantine Inns* [2010] IEHC 214 **Man sues nightclub for alleged assault by staff** http://www.irishtimes.com/news/man-sues-nightclub-for-alleged-assault-by-staff-1.639705
15	*Farrell v Dublin Bus* [2010] IEHC 327 **Whiplash claim against Dublin Bus dismissed** http://www.irishtimes.com/news/whiplash-claim-against-dublin-bus-dismissed-1.861858 **You've some neck Mary!!** http://irishtaxi.org/forum/index.php?topic=7087.0 **Car crash woman loses claim over mowing lawn** http://www.independent.ie/irish-news/courts/car-crash-woman-loses-claim-over-mowing-lawn-26668044.html **This woman drove a taxi and took holidays to the US. She also claimed €31,000 in illness benefit** http://www.independent.ie/irish-news/this-woman-drove-a-taxi-and-took-holidays-to-the-us-she-also-claimed-31000-in-illness-benefit-26765872.html
16	*Higgins v Caldark and Quigley* [2010]IEHC 527 **Builder's claim over lost thumb rejected** http://www.independent.ie/irish-news/courts/builders-claim-over-lost-thumb-rejected-26700788.html

17	McKenna v Dormer Services – no trace **Plumber lied to court in his claim for loss of earnings** http://www.independent.ie/irish-news/courts/plumber-lied-to-court-in-his-claim-for-loss-of-earnings-26713844.html
18	*Boland v Dublin CC & Ors* [2011] IEHC 176 – no trace
19	*Dunleavy v Swan Park Ltd* [2011] IEHC 232 **Artist gets €45,000 damages after hair fell out following 'disastrous' salon visit** http://www.independent.ie/irish-news/artist-gets-45000-damages-after-hair-fell-out-following-disastrous-salon-visit-26737180.html
20	*Forde v Central Parking* [2011] IEHC 407 – no trace
21	*Folan v O Corraoin and Ors* [2011] IEHC 487 – no trace
22	*Ahern v Bus Eireann* [2011] IESC 44 – no trace
23	*Nolan v Mitchell & O'Neill* [2012] IEHC 151 (CoA overturned) **Claim dismissed after film shows 'injured' man racing** http://www.independent.ie/irish-news/claim-dismissed-after-film-shows-injured-man-racing-26813397.html **Stunt-driver gave shows in Malta, while seeking injury claim** - MaltaToday.com.mt http://www.maltatoday.com.mt/sports/motorsports/15382/stunt-driver-gave-shows-in-malta-while-seeking-injury-claim-20120121#.VwKeofB4WrU
24	*Goodwin v Bus Eireann* [2012] IESC 9 – no trace
25	*Nolan v Kerry Foods Ltd* [2012] IEHC 208 – no trace
26	*Rahman v Craigfort Taverns Limited* [2012] IEHC 478 – no trace
27	*Montgomery v Minister for Justice*[2012] IEHC 443 – no trace
28	*Meehan v BKNS & anor* [2012] IEHC 441 – no trace
29	*De Cataldo v Petro Gas* [2012] IEHC 495 – no trace
30	*Salako v O'Carroll* [2013] IEHC 17 **Judge: Woman seeking crash damages 'only used the crutch when attending a medical examination'** http://www.independent.ie/irish-news/courts/judge-woman-seeking-crash-damages-only-used-the-crutch-when-attending-a-medical-examination-29022826.html
31	*Ludlow v Unsworth & Zurich* [2013] IEHC 153 – no trace
32	*Lackey v Kavanagh* [2013] IEHC 341– no trace
33	*Smith v HSE* [2013] IEHC 360 – no trace
34	*Lawlor v Carroll* [2014] IEHC 579 – no trace
35	Creane v Gavin Waters (unreported) – no trace
36	*Looby v Fatalski & MIBI* [2014] IEHC 564 Judgments: Key cases in brief http://www.irishtimes.com/news/crime-and-law/judgments-key-cases-in-brief-1.2094386
37	*Daly v HSE* [2014] IEHC 560 – no trace

38	*Waliszewski v McArthur* [2015] IEHC 264 – no trace
39	*Kurzyna -v- Michalski & MIBI* [2015] IECA 135 – no trace
40	*Hamill v O'Callaghan* [2015] IEHC 542 – no trace
41	*Boyle v Governor St Pat* [2015] IEHC 532 – no trace
42	*Waliszewski v McArthur* [2015] IECA 298 – no trace
43	*Saleh v Moyvalley* [2015] IEHC 762 **Meat factory worker awarded €415,0000 over back injury** http://www.irishtimes.com/news/crime-and-law/courts/high-court/meat-factory-worker-awarded-415-0000-over-back-injury-1.2453483 **Meat factory worker awarded €415,0000 after he sued employer over back injury** http://www.independent.ie/irish-news/courts/meat-factory-worker-awarded-4150000-after-he-sued-employer-over-back-injury-34257009.html **Meat factory worker awarded €415k over 'chronic' back injury** http://www.independent.ie/irish-news/courts/meat-factory-worker-awarded-415k-over-chronic-back-injury-34258069.html
44	*McLaughlin v McDaid* [2015] IEHC 810 **Man who lost half his foot in quarry accident gets €453k** http://www.independent.ie/irish-news/courts/man-who-lost-half-his-foot-in-quarry-accident-gets-453k-34277862.html
45	*Platt -v- OBH & anor*[2015] IEHC 793 **Dishonesty of man who sued hotel for injuries was 'relentless'** https://www.irishtimes.com/news/crime-and-law/courts/high-court/dishonesty-of-man-who-sued-hotel-for-injuries-was-relentless-1.3170116 **Judge criticises 'relentless' dishonesty of claimant as she dismisses action over hotel window fall** https://www.independent.ie/irish-news/courts/judge-criticises-relentless-dishonesty-of-claimant-as-she-dismisses-action-over-hotel-window-fall-35977359.html **Injuries claim over hotel fall is dismissed** https://www.independent.ie/irish-news/courts/injuries-claim-over-hotel-fall-is-dismissed-34280931.html
46	*Maloney v White* [2016] IEHC 44 – no trace
47	*Waliszewski v McArthur* [2016] IESCDET 17 – n/a
48	*Plonka v Norviss* [2016] IEHC 137 – no trace
49	*Nolan v Mitchell & O'Neill* [2016] IECA – no trace
50	*Darragh (multiple Pltff's) v Feeney* [2017] IEHC 514 **Court rejects car hire firm's claim crash was staged- High Court rejects appeal of Circuit Court decision awarding sums to seven men** https://www.irishtimes.com/news/crime-and-law/courts/high-court/court-rejects-car-hire-firm-s-claim-crash-was-staged-1.3172881

Media coverage on hearings of personal injury claims etc over a year to January 2019

Key: D is a Dismiss and if more than one plaintiff the number is given. W indicates a claim withdrawn at trial. S is for a settlement mid-trial. R relates to the ruling of a settlement offer where claimant lacking legal capacity. A stands for an award. C denotes a criminal hearing relating to previous claims. G relates to items of general interest in the context of Chapter 7.

1	21/1/19 Eight people involved in two car crash lodged injury claims totalling almost €500,000	Code
	https://m.independent.ie/irish-news/courts/eight-people-involved-in-two-car-crash-lodged-injury-claims-totalling-almost-500000-37733040.html	A
2	11/1/19 Some insurance firms settling claims without medical reports to prove injuries	G
	https://www.irishtimes.com/news/ireland/irish-news/some-insurance-firms-settling-claims-without-medical-reports-to-prove-injuries-1.3753868	
3	10/1/19 Fraudulent insurance claims 'the scourge' of the legal profession, former Law Society President says	G
	https://www.breakingnews.ie/ireland/fraudulent-insurance-claims-the-scourge-of-the-legal-profession-former-law-society-president-says-896715.html	G
4	9/1/19 Almost 50% of claims Allianz brings to court are 'potentially fraudulent' Insurer challenged over 1,500 claimants in the courts last year	G
	https://www.irishtimes.com/business/financial-services/almost-50-of-claims-allianz-brings-to-court-are-potentially-fraudulent-1.3752196	
5	21/12/18- Ash Wednesday claim illustrated absurdity of personal injuries regime	R
	https://www.limerickpost.ie/2018/12/21/ash-wednesday-claim-illustrated-absurdity-of-personal-injuries-regime/	
6	5/12/18 - Sales assistant who fell from ladder has personal injuries claim against Dunnes Stores dismissed	D
	https://www.irishlegal.com/article/high-court-sales-assistant-who-fell-from-ladder-has-personal-injuries-claim-against-dunnes-stores-dismissed	
7	4/12/18 - 'I'm a God fearing man, I wouldn't tell lies' - man tells court after judge throws out compensation claim	D
	https://m.independent.ie/irish-news/courts/im-a-god-fearing-man-i-wouldnt-tell-lies-man-tells-court-after-judge-throws-out-compensation-claim-37589953.html	
8	1/12/18 Policy-holders will pay up to €50k in legal bills after man who lost finger climbing Luas fence loses High Court action https://www.independent.ie/irish-news/courts/policyholders-will-pay-up-to-50k-in-legal-bills-after-man-who-lost-finger-climbing-luas-fence-loses-high-court-action-37585326.html	D
9	30/11/18 'Absolutely extraordinary': Judge throws out two brothers' €60k crash claim	2D
	https://m.independent.ie/irish-news/courts/absolutely-extraordinary-judge-throws-out-two-brothers-60k-crash-claim-37581722.html	
10	29/11/18 Man who fractured wrist on 'boxing machine' in pub awarded €30K damages	A
	https://m.independent.ie/irish-news/courts/man-who-fractured-wrist-on-boxing-machine-in-pub-awarded-30k-damages-37578391.html	
11	27/11/18 Cyclist injured when entering road from pathway has personal injuries claim dismissed	D
	https://irishlegal.com/article/high-court-cyclist-injured-when-entering-road-from-pathway-has-personal-injuries-claim-dismissed	
12	26/11/18 Woman avoids jail following major investigation into staged car crashes	C
	https://m.independent.ie/breaking-news/irish-news/woman-avoids-jail-following-major-investigation-into-staged-car-crashes-37563693.html	
13	24/11/18 Two-thirds of insurance claims withdrawn when followed up by gardaí	G
	https://www.breakingnews.ie/ireland/two-thirds-of-insurance-claims-withdrawn	
14	23/11/18 'My body is destroyed from people driving into me' - accident-prone man's compensation claim dismissed	D
	https://www.independent.ie/irish-news/courts/my-body-is-destroyed-from-people-driving-into-me-accidentprone-mans-compensation-claim-dismissed-37559489.html	

15	21/11/18 'He jumped out of the car to stop witness taking photographs' - Elderly man forced to defend €75k injuries claim	D
	https://www.independent.ie/irish-news/he-jumped-out-of-the-car-to-stop-witness-taking-photographs-elderly-man-forced-to-defend-75k-injuries-claim-37548218.html	
16	17/11/18 Judge warns claimants gardaí will be targeting would-be scammers	G
	https://www.independent.ie/irish-news/courts/judge-warns-claimants-garda-will-be-targeting-wouldbe-scammers-37537638.html	
17	16/11/18 Driver branded 'liar' by judge as insurers cite industry fraud of €90m	D
	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/driver-branded-liar-by-judge-as-insurers-cite-industry-fraud-of-90m-1.3698847	
18	12/11/18 Lorry driver withdraws €60k claim after admitting he continued to drive after incident	W
	https://m.independent.ie/irish-news/courts/lorry-driver-withdraws-60k-claim-after-admitting-he-continued-to-drive-after-incident-37519193.html	
19	10/11/18 Editorial: 'Judges and politicians share blame for insurance fraud'	G
	https://m.independent.ie/opinion/comment/editorial-judges-and-politicians-share-blame-for-insurance-fraud-37513180.html	
20	7/11/18 Judge throws out three personal injury claims	3D
	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/judge-throws-out-three-personal-injury-claims-1.3689977?mode=amp	
21	3/11/18 'It's incredible… unreal' - judge throws out personal injury claims for €120,000 over 'car filled with smoke'	2D
	https://www.independent.ie/irish-news/courts/its-incredible-unreal-judge-throws-out-personal-injury-claims-for-120000-over-car-filled-with-smoke-37487420.html	
22	2/11/18 Welder who tripped over walking aid loses claim	D
	https://www.independent.ie/irish-news/courts/welder-who-tripped-over-walking-aid-loses-claim-37484467.html	
23	23/10/18 Wife of 'notorious criminal' part of 'contrived accident' that led to €240,000 claims	4D
	https://www.independent.ie/irish-news/courts/wife-of-notorious-criminal-part-of-contrived-accident-that-led-to-240000-claims-37448342.html	
24	23/10/18 Irish MMA fighter who was recorded fighting after alleged injury withdraws €60k claim	W
	https://www.independent.ie/irish-news/courts/irish-mma-fighter-who-was-recorded-fighting-after-alleged-injury-withdraws-60k-claim-37449834.html	
25	22/10/18 Woman awarded €550,000 after 'tram surfing' injury 'afraid to leave her house' following online abuse	R
	https://www.breakingnews.ie/ireland/woman-awarded-550000-after-tram-surfing-injury-afraid-to-leave-her-house-following-online-abuse-877325.html	
26	18/10/18 State accuses insurers of dodging €20m	G
	https://www.independent.ie/business/irish/state-accuses-insurers-of-dodging-20m-37405914.html	
27	13/10/18 Car insurance case lifts the lid on a litany of fraud cases	6D
	https://www.irishtimes.com/news/crime-and-law/car-insurance-case-lifts-the-lid-on-a-litany-of-fraud-cases-1.3661709	
28	10/10/18 Man faces legal costs bill after withdrawing road accident claim	W
	https://www.irishtimes.com/news/crime-and-law/courts/high-court/man-faces-legal-costs-bill-after-withdrawing-road-accident-claim-1.3658995	
29	8/10/18 Woman who claimed she slipped on grape facing costs bill after action dismissed	D
	https://www.irishtimes.com/news/crime-and-law/courts/high-court/woman-who-claimed-she-slipped-on-grape-facing-costs-bill-after-action-dismissed-1.3655486?mode=amp	
30	4/10/18 Wedding guest who sued hotel after allegedly slipping on bouquet petals settles	S
	https://m.independent.ie/irish-news/courts/wedding-guest-who-sued-hotel-after-allegedly-slipping-on-bouquet-petals-settles-case-37385373.html	
31	3/10/18 'Don't call me love' - judge's words to man in unsuccessful €60k damages claim	D

	https://m.independent.ie/irish-news/courts/dont-call-me-love-judges-words-to-man-in-unsuccessful-60k-damages-claim-37381065.html	
32	27/9/18 Chief Justice backs plan for guidelines on personal injury claims to help reduce pay-outs	G
	https://www.independent.ie/irish-news/chief-justice-backs-plan-for-guidelines-on-personal-injury-claims-to-help-reduce-payouts-37359496.html	
33	23/9/18 Pursuing a personal injury claim should not be a risk-free gamble	G
	https://www.thetimes.co.uk/article/brenda-power-pursuing-a-personal-injury-claim-should-not-be-a-risk-free-gamble-0k8v5xrmd	
34	19/9/18 Damages for personal injuries in Republic 'among highest in Europe'	G
	https://www.irishtimes.com/news/crime-and-law/damages-for-personal-injuries-in-republic-among-highest-in-europe-1.3633653	
35	15/9/18 Insurers claim gardaí *[police]*'failing to prosecute scammers'	G
	https://www.independent.ie/business/personal-finance/insurers-claim-garda-failing-to-prosecute-scammers-37318798.html	
36	20/8/18 CLAIMS DROP Crackdown on car insurance fraud seeing results with huge drop in claims – which could mean reduction in premiums	G
	https://www.thesun.ie/news/3003676/crackdown-car-insurance-fraud-seeing-results/	
37	1/8/18 High Court judge overturns 'racket' injury claim ruling	A
	https://www.irishtimes.com/news/crime-and-law/high-court-judge-overturns-racket-injury-claim-ruling-1.3582255	
38	30/7/18 Six personal injury claims totalling €360k thrown out by judge	6D
	https://www.independent.ie/irish-news/courts/six-personal-injury-claims-totalling-360k-thrown-out-by-judge-37167224.html	
39	27/7/18 Judge tells housewife claim of substantial damage to car could not have come from 'minor tip'	D
	https://www.independent.ie/irish-news/courts/judge-tells-housewife-claim-of-substantial-damage-to-car-could-not-have-come-from-minor-tip-37160119.html	
40	25/7/18 Three men drop €180,000 whiplash case following incident on M50	3W
	https://m.independent.ie/irish-news/courts/three-men-drop-180000-whiplash-case-following-incident-on-m50-37152107.html	
41	19/7/18 Judge dismisses passenger's claim after rented car driven by 'dumb American' hit parked bus	D
	https://m.independent.ie/irish-news/courts/judge-dismisses-passengers-claim-after-rented-car-driven-by-dumb-american-hit-parked-bus-37135075.html	
42	19/7/18 Finland - Insurers pay out 30 million euros over fraudulent insurance claims in 2017	G
	https://yle.fi/uutiset/osasto/news/insurers_pay_out_30_million_euros_over_fraudulent_insurance_claims_in_2017/10311839	
43	13/7/18 Judge says mum failed to prove she was in car crash	D
	https://m.independent.ie/irish-news/courts/judge-says-mum-failed-to-prove-she-was-in-car-crash-37113120.html	
44	9/7/18 Paramedics scupper crash case as they give evidence in court in Aviva insurance claim	3D
	https://www.thetimes.co.uk/article/paramedics-scupper-crash-case-as-they-give-evidence-in-court-in-aviva-insurance-claim-rmp7qsfl6	
45	7/7/18 Four injury claims dismissed as CCTV of collision shown in court	4D
	https://www.independent.ie/irish-news/watch-four-injury-claims-dismissed-as-cctv-of-collision-shown-in-court-37085784.html	
46	6/7/18 Woman who sued 10 times in 10 years loses tea pot 'scalding' claim	D
	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/woman-who-sued-10-times-in-10-years-loses-tea-pot-scalding-claim-1.3556446	
47	26/6/18 Former model accused of 'try-on' as judge dismisses claims for 'contrived' accident	D
	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/former-model-accused-of-try-on-as-judge-dismisses-claims-for-contrived-accident-1.3544754	
48	24/6/18 Taxi-driver made eight personal injury claims in eight years, court hears	D

	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/taxi-driver-made-eight-personal-injury-claims-in-eight-years-court-hears-1.3541679	
49	19/6/18 Mother of boy (6) who broke an arm while 'gallivanting' in Eddie Rockets withdraws €60k personal injury claim	W
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50	15/6/18 'It's obscene, madness...' - schools 'ban pupils from running' after insurance bill soars	G
	https://www.independent.ie/irish-news/politics/its-obscene-madness-schools-ban-pupils-from-running-after-insurance-bill-soars-37012750.html	
51	28/5/18 Insurance doubles for GAA clubs in Ireland over past five years	G
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52	17/5/18 Street compensation system 'like an ATM to be exploited'	G
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53	16/5/18 Motorbike courier who claimed he was injured when van did sudden 'U turn' loses €60k claim	D
	https://m.independent.ie/irish-news/courts/motorbike-courier-who-claimed-he-was-injured-when-van-did-sudden-u-turn-loses-60k-claim-36913769.html	
54	9/5/18 Judge labels woman who brought damages claim a 'fraud'	D
	https://www.rte.ie/news/courts/2017/1114/920005-fraud-court/	
55	7/5/18 Judge 'cannot believe a word' from plaintiffs in insurance case	D
	http://www.bump.ie/news/judge-cannot-believe-a-word-from-plaintiffs-in-insurance-case/	
56	7/5/18 'No damage done' - Pictures of taxi rear-ended in accident for which three people brought claims	5D
	https://www.independent.ie/irish-news/courts/no-damage-done-pictures-of-taxi-rearended-in-accident-for-which-three-people-brought-claims-36872827.html	
57	6/5/18 Injury claims quashed as garda says damage in photographs 'not the damage I saw at scene'	D
	https://www.independent.ie/irish-news/courts/injury-claims-quashed-as-garda-says-damage-in-photographs-not-the-damage-i-saw-at-scene-36866604.html	
58	3/5/18 - Boy (17) receives €42,500 after cutting finger in woodwork class *[settlement ruling]*	R
	https://www.irishtimes.com/news/crime-and-law/courts/high-court/boy-17-receives-42-500-after-cutting-finger-in-woodwork-class-1.3482917	
59	3/5/18 - Woman who 'developed a fear of car park barriers' after incident in Aldi has €60k claim dismissed	D
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60	2/5/18 Water inspector loses damages case after slip on steep embankment	D
	https://www.irishexaminer.com/breakingnews/ireland/water-inspector-loses-damages-case-after-slip-on-steep-embankment-840533.html	
61	2/5/18- Family's personal injuries claim totalling €420k dismissed after judge rules there 'was no accident'	7D
	https://www.independent.ie/irish-news/courts/familys-personal-injuries-claim-totalling-420k-dismissed-after-judge-rules-there-was-no-accident-36866602.html	
62	1/5/18 - Woman who didn't leave home for two years settles her €60k case	S
	https://www.independent.ie/irish-news/courts/woman-who-didnt-leave-home-for-two-years-settles-her-60k-case-36861889.html	
63	28/4/18 - €600k in compensation paid to inmates due to injuries	A
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64	27/4/18 - Legal bill for €22,500 crash damages claim 'to exceed €100,000'	A
	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/legal-bill-for-22-500-crash-damages-claim-to-exceed-100-000-1.3476412	
65	27/4/18 - Man withdraws €60,000 claim after being told to stop 'ducking and diving'	W

	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/man-withdraws-60-000-claim-after-being-told-to-stop-ducking-and-diving-1.3474254	
66	21/4/18 - Judge dismisses injury claims by three people who only noticed they were hurt at least two hours after crash	3D
	https://www.thesun.ie/news/2473009/judge-dismisses-injury-claims-by-three-people-who-only-noticed-they-were-hurt-at-least-two-hours-after-offaly-crash/	
67	13/4/18 Woman loses €60,000 claim over go-kart crash buttock injury	D
	https://www.irishtimes.com/news/crime-and-law/courts/circuit-court/woman-loses-60-000-claim-over-go-kart-crash-buttock-injury-1.3460673	
68	13/3/18 Shop assistant who claimed she was injured lifting heavy TV drops €60k damages claim	W
	https://m.independent.ie/irish-news/courts/shop-assistant-who-claimed-she-was-injured-lifting-heavy-tv-drops-60k-damages-claim-36700335.html	
69	28/2/18 Love/Hate actor has €60k claim thrown out over Facebook posts	D
	https://www.independent.ie/irish-news/courts/lovehate-actor-has-60k-claim-thrown-out-over-facebook-posts-36648173.html	
70	8/2/18 'Human cannonball' withdraws injury claim	W
	https://www.rte.ie/news/courts/2018/0207/939103-human-cannonball-court/	
71	4/2/18 Solicitor facing allegations of misconduct over dealings with personal injury 'claims harvesting' site	G
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72	26/1/18 Worker who 'faked' injury loses unfair dismissal case after private investigator spots him carrying child	D
	http://www.thejournal.ie/bad-back-wrc-3817048-Jan2018/	
73	22/1/18 Woman loses €60,000 injury claim after court hears car hit empty van	D
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74	20/1/18 Man who had €60k claim thrown out says 'Oh, I see you've been looking at my Facebook'	D
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MIAB 2002 Recommendations

Extract from MIAB 2002 Report - RECOMMENDATIONS FOR A BETTER FUTURE

Introduction

As stressed elsewhere in this report, the MIAB did not examine safety issues in detail. That decision was taken early in the Board's term of office for the following reasons;

a. The complex issue of safety is the brief of the High Level Group which is monitoring the implementation of the Government's Strategy on Road Safety and there was no merit in the MIAB attempting to duplicate those efforts.
b. The MIAB is primarily concerned with how the current level of accident frequency affects motor insurance and how the consequent cost is allocated in premium differentials. The Board adopts a hard financial, rather than a humane, approach to the issue of accident trends. For a wide range of reasons, safety is too important to be considered in purely financial terms so it is left to another forum for appropriate action.

The duty of the MIAB under SI299/1984 is primarily to examine the system of premium differentials by driver profile. In addition, the brief from Minister Treacy required examination of the factors affecting the cost of motor insurance and the making of recommendations where appropriate. These recommendations are not presented in any order of priority. Many are inter-related to the extent that objectives are only likely to be achieved by co-ordinated action in a number of areas. The fact that long term measures are required only increases the urgency for appropriate action to commence immediately.

RECOMMENDATIONS OF THE MIAB

R.1 That priority be assigned to achieving the objectives set in the Government's Strategy for Road Safety for a wide range of reasons which extend far beyond the cost of insurance.

R.2. That the current system of unsupervised driving by provisional licence holders be reviewed and consideration be given to the introduction of a road safety and driver education syllabus in schools.

R.3. That the sanctions for flagrant breach of compulsory insurance obligations should be fines at a level more consistent with premium charges and should provide for vehicle confiscation, as applies to non-payment of road tax, with proceeds being assigned to the Motor Insurers Bureau of Ireland who are responsible for claims from victims of uninsured accidents.

R.4. That the unique position of compulsory motor insurance should be adequately reflected in the responsibilities of the new Irish Financial Services Regulatory Authority (IFSRA) as the Board are of the view that there is currently no

effective regulatory mechanism to balance the legitimate concerns of consumers with requirements for effective solvency supervision.

R.5. That central gathering of statistics on motor insurance premium and claims costs by driver profile be formalised by IFSRA, including monitoring by the new insurance regulator of data quality, to ensure that reliable information is available to inform public policy in future years and to improve market intelligence as provided for in EU Regulation No 3932/92.

R.6. That IFSRA supply regular marketwide statistics on motor premium differentials to the Equality Authority to assist in assessing insurers' compliance with the Equal Status Act 2000 and subsequently its proposed extension.

R.7. That IFSRA publish regular surveys of motor insurance quotations to engender price competition and to educate the public on premium variances within the market and that IFSRA liase with the Central Statistics Office on assessment of motor insurance inflation.

R.8. That IFSRA pursue the concept of a "one stop website" to provide consumers with across market information on the motor premiums available for specific risks - the placing of an obligation on insurers to notify their rates does not appear to offend EU law on freedom of services.

R.9. That a regulation be introduced to require insurers who refuse to quote for any particular risk to state their reasons in writing upon request, acknowledging the fact that insurers cannot be required under EU law to provide cover for any particular risk but equally subject to the anti-discrimination provisions of the Equal Status Act 2000.

R.10. That insurers undertake to comply with the provisions of the Equal Status Act 2000 in respect of drivers aged 65 and over, including advising them of their rights to freedom of contract, and to improve procedures for retirees who have a record on employers' fleet policies but are now seeking private motor insurance.

R.11. That insurers undertake to desist from applying policy terms, limitations or loadings that may be encountered by policyholders with disability issues relating to drivers or passengers unless there is evidence of additional risk.

R.12. That insurers operating in Ireland undertake to recognise EU driving experience and "No Claims Bonus" certification presented by other European citizens.

R.13. That a regulation be introduced requiring a minimum period of notice, of not less than 15 working days, to policyholders of the terms upon which renewal is offered to allow sufficient time for consumers to "shop around".

R.14. That a regulation be introduced to prescribe the issuing of "No Claims Bonus" documents with renewal notices to enable clients to market their business elsewhere for comparative quotes.

R.15. That a regulation be introduced to standardise renewal notices - detailing the calculation of premium from compulsory cover to the full coverage offered with elective elements clearly indicated and showing any loadings or discounts applied in both monetary and percentage terms.

R.16. That a regulation be introduced to tackle potential "confusion of illusion of choice" by requiring insurers who offer motor quotations under a number of business names and product images or through any direct outlets to state the identity of the insurance group of which they are part and that equally brokers should be obliged to provide each client with a list of the motor insurers for which they hold an appointment consistent with the provisions of the Investments Intermediaries Act 1995.

R.17. That insurers adopt rating practices that allow sufficient credit for accident free driving experience rather than filtering out risks solely on the basis of age.

R.18. That insurers desist from any practice of requiring collateral business to be placed with the company before a motor quotation is supplied and that this practise be reviewed by the Competition Authority should it persist.

R.19. That the existing Declined Cases Agreement between the Minister and insurers operating in Ireland, under which a quotation cannot be refused on the grounds of age alone, should be formalised by legislation.

R.20. That the number of refusals required under the existing Declined Cases Agreement be reduced from 5 to 3 in light of the market consolidation resulting from mergers.

R.21. That the Declined Cases Committee, currently consisting solely of insurer representatives, should include an external representative to report to IFSRA on the operation of the scheme.

R.22. That IFSRA agree standards of business practice with insurers governing dealings with private consumers and small businesses.

R.23. That IFSRA set rules for insurers to implement in concrete terms the duty of utmost good faith as it applies to insurers, as a corollary to the consumer's duty of utmost good faith, to redress the imbalance in bargaining power between insured and insurer. The objectives of these rules should include ensuring that direct clients do not pay for unnecessary or inappropriate cover offered by insurers and to require an appropriate duty of consultation with policyholders before liability payments are made on their behalf.

R.24. That regulation by IFSRA of insurance intermediaries should encompass the principle of "good faith dealing" to achieve the objectives as set out in the previous recommendation above.

R.25. That IFSRA issue clarification of the Consumer Credit Act 1995, or if necessary introduce alternate legislation, to control premium instalment plans.

R.26. That IIF agree with IBEC and other business associations on a set of guidelines for the handling of Third Party claims incorporating appropriate referral to commercial policyholders before compensation payments are made on their behalf.

R.27. That a Statutory Office of Insurance Ombudsman be established with an extended brief, including issues of quotation refusals and denials of policy indemnity for compulsory cover (IIF dissent), and allowing provision for moderate compensation to successful complainants.

R.28. That IIF agree a code of conduct with its member companies on anti-competitive behaviour subject to any more formalised measures which may ultimately be required by IFSRA under competition law.

R.29. That the format and content, as published in the "Blue Book", of insurers' annual Statutory Returns be amended to show clearly the accrual for the current accident year separately from movements in prior years' reserves.

R.30. That all relevant information in Statutory Returns be shown separately for private car, commercial motor, motorcycles and other main classes of motor business by coverage types.

R.31. That the format and content of Statutory Returns be reviewed in line with practice elsewhere in Europe to improve the quality and quantity of public information.

R.32. That the new insurance regulator issue revised guidelines to insurers to ensure more consistent completion of existing Statutory Returns in a manner which facilitates consistent comparisons and eliminates the current variations in practice between companies.

R.33. That the preparation and publication of Statutory Returns be amended to clearly reflect the cost of uninsured driving recording numbers of cases, amounts of payments and provisions for outstanding claims with other relevant information as deemed appropriate.

R.34. That detailed consideration be given to amending the Road Traffic Acts to require insurance on the vehicle, as in mainland Europe, rather than allowing claims to be declined on the basis of the driver's use but with appropriate measures to address the rights of insurers where premiums have been underpaid.

R.35. That, when the Fourth EU Directive on Harmonisation of Motor Insurance is incorporated into national law in 2003, Irish citizens are extended rights equal to those of visiting EU citizens to sue the vehicle insurer direct for compensation entitlements arising from motor accidents occurring in Ireland.

R.36. That the agreement between the Motor Insurers Bureau of Ireland and the Minister for the Environment be amended to clearly ensure that victims of uninsured, or defectively insured, vehicles can pursue their claims on no less favourable terms than apply to insured cases as consistent with the jurisprudence of the European Court of Justice, lest they be doubly disadvantaged by involvement in such occurrences.

R.37. That the Road Traffic Acts, and other relevant legislation, be amended to fully adopt the Articles of the various EU Directives on harmonisation of compulsory motor insurance so as to clearly uphold the rights of victims under European law in accidents involving uninsured, untraced, defectively uninsured or allegedly defectively insured vehicles or drivers and that the prescribed content of insurance certificates be reviewed for clarity of communication with the addition of wording highlighting that the rights of Third Parties are not effected by cover limitations in the policy document.

R.38. That Court procedures for personal injury litigation be radically reviewed in the interests of both genuine injured parties and premium paying policyholders, the majority of whom have not been involved in any culpable motor accident.

R.39. That an alternative to adversarial litigation be made available to parties where liability for a motor accident is not disputed but independent assessment of compensation is required. The MIAB endorses the model of the Personal Injuries Assessment Board proposed for employer's liability claims which might be extended to motor claims at an early opportunity.

R.40. That the current Court based system for assessing legal fees be reviewed as to its cost effectiveness in satisfactorily resolving disputes on litigation costs and that consideration be given to a framework which the public might regard as more independent of the legal establishment and from which more transparent information might be available to litigants on the allowable levels of fees.

R.41. That the Competition Authority's investigations of the professions should assign priority to the fees which impact on the cost of motor insurance given its compulsory nature and the recent high inflation rate recorded for insurance and that, on completion of those investigations, their findings be taken into account in a review of the effectiveness of self-regulation by the legal profession.

R.42. That the legislation on accrual of 8% interest on legal costs from date of trial should be revised in a manner consistent with the Prompt Payments of Accounts Act 1997 with a significantly reduced rate of interest and a reasonable period allowed from the date of bill presentation for payment or the resolution of legitimate queries.

R.43. That the draft 1998 legislation on advertising by Solicitors be progressed, with the additional requirement that all advertisements quote a revised rule by the Law Society summarising Section 68 of the Solicitors (Amendment) Act 1994 which prevents a percentage being deducted by lawyers from the compensation awarded to claimants. If an entitlement to advertise for personal injury claims is secured under competition law, that sufficient information be displayed to enable consumers to make price comparisons between professionals.

R.44. That, aside from legislation, the Incorporated Law Society of Ireland as a service to the public should require all advertisements by their members to state that a lawyer is not permitted to seek a percentage of a claimant's compensation and that such action is regarded as misconduct under Section 68 of the Solicitors (Amendment) Act 1994.

R.45. That the Health (Amendment) Act 1986 be reviewed to the extent that it represents a discriminatory charge levied only on those involved in motor accidents at multiples of the rate charged to providers of health insurance and inconsistent with rates charged to visiting EU nationals in a manner that may offend the Equal Status Act 2000 given that victims of motor accidents represent less than 1% of users of hospital services.

R.46. That consideration be given to the concept of "amicus curiae" for representations from the office of the Attorney General and/or IFSRA if an issue before the Courts has radical implications for the cost of insurance with consequent effects on the Irish economy particularly where the effect is retrospective.

R.47. That stringent measures be introduced to tackle fraudulent and exaggerated claims with loss of all compensation entitlements and appropriate criminal sanctions.

R.48. That all claims including allegations of earnings losses be supported by proof of declared earnings history from the Revenue Commissioners and records of benefits sought under social insurance with any earnings from "the black economy" to be excluded from claim assessments or negotiations.

R.49. That awards on costs to defendants are made automatic upon successful defences either on liability or on the extent of loss, to restore equity between litigants while acknowledging that methods of payment enforcement will always be a matter for judicial discretion under Examination Orders.

R.50. That the system of lump sum compensation payments be reviewed on the basis that the long term needs of the seriously injured may be better served by guaranteed annual payments.

R.51. That a system be introduced to facilitate pre-trial interim payments to the seriously injured in cases where liability is not a substantial issue but where there is a financial need to replace lost earnings or seek medical treatment.

R.52. That a system be introduced to facilitate the award of provisional damages where there is a substantial risk that the injured party's medical condition may deteriorate in the future.

R.53. That insurers pursue a policy of seeking to assist in the rehabilitation of injured parties where such action is appropriate.

R.54. That a system of case management be adopted by the Courts, with a panel of judges specialising in injury claims, to secure early hearings of non-complex cases which could be disposed of by a short trial and that the Small Claims Court system be extended to deal with property claims up to £5,000 arising from motor accidents.

R.55. That claimants be obliged to state their minimum settlement terms in litigation, supplementary to the current procedure which permits a defendant to tender their maximum offer whereby they secure protection from liability for further litigation costs.

R.56. That information on Irish compensation levels for various injuries be collated, such as in a book of quantum or guidelines as produced by the Judicial Studies Board in England, and that this data be published to assist earlier settlements between defendants and plaintiffs.

R.57. That the Court Bill 2001, entering the second stage in Dail, be amended so as NOT to increase current financial limits of the Courts beyond expressing the existing figures in convenient Euro amounts.

R.58. That the stamp duty (formerly levy) on motor insurance, if not abolished as repeatedly recommended by the Board, should be ring fenced for related matters which include road safety initiatives such as funding of the National Safety Council and the maintenance of a Policyholders Protection Fund to safeguard claimants' interests in the event of an insolvency of an insurer regulated in Ireland.

R.59. That a Motor Policyholders Protection Fund be established to pay claimants in the event of the insolvency of an insurer regulated in Ireland.

R.60. That a Policyholders Protection Fund be allocated an opening balance, estimated at £19ml, from the motor insurance levy collected up to 1993 from which sufficient allocation has been made to satisfy administration of the liabilities of the old PMPA.

R.61. That following introduction of the penalty points system, and subject to the provisions of data protection legislation, that insurers be permitted access to relevant information on the national driver file under provisions similar to Section 28 of the Road Traffic Act 1994.

R.62. That a forum be established drawn from the various Government Agencies whose actions effect the cost of compulsory motor insurance so that the full financial consequences of proposed legislation or administrative action are understood and factored into decisions.

R.63. That IFSRA should be pro-active in responding to media statements by insurers on trends in premium charges and related matters.

R.64. That, in the context of the Competition Bill 2001, consideration be given to incorporating the principle of "acting against the public interest".

R.65. That the Competition Authority would have a duty to review all further insurance mergers in the interests of the Irish economy, with appropriate reference to IFSRA, and that the process of consultation seek to protect the interests of specific policyholder groups since the effects of mergers may warrant consideration below issues of the market as a whole.

R.66. That the proposed Consumer Director in IFSRA would have a duty to highlight at EU level the unacceptable consequences for [segments of] the Irish market of further mergers in interests of social inclusion, given our island location at the far west of the EU with a small, although rapidly growing, market which may be unattractive to many players.

R.67. That when the Competition Authority assumes the new roles proposed under the Competition Bill 2001 it should review the area of compulsory motor insurance.

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ADDENDUM

My thesis was submitted in February 2019. Because of ophthalmic surgery I requested a Viva by Skype rather than being required to undertake the return journey Dublin to London. Permission was granted by the Graduate School Board in November 2019. I believe that was the first authorisation of a remotely conducted Viva by the University of Westminster, although Covid-19 has caused exploitation of technology to a degree that might not previously have been thought possible. I was successful at the oral examination which took place on 25th March 2020, subject to some minor amendments. At the suggestion of examiners in their report received on 27th April 2020 a brief commentary is added below on a significant recent development.

For some years I have been part of the public pressure for more transparency about insurance. In December 2019 the Central Bank of Ireland (CBI) published a report presenting their analysis from the newly established National Claims Information Database (NCID). I sent repeated emails to CBI seeking access to the underlying data. On 2nd March 2020 I became aware that the CBI, unannounced, had revealed online some very interesting additional statistical analysis which supports many of the revelations in this thesis.[552] My requests to CBI for the raw data, for which I always have a preference, have been repeatedly refused up to July 2020 despite the wording of NCID Act 2018 at section 12.[553]

This is a matter I will pursue. However, based on what is currently available some headline points warrant highlighting in the context of this research.

During the period between 2009 and 2018 when motor premium charges per policy increased by 42% the cost of claims incurred per policy actually reduced by 2.5%.

[552] CBI Annex 2. https://www.centralbank.ie/statistics/data-and-analysis/national-claims-information-database

[553] NCID Act 2018 s.12. (1) Subject to *subsections (2)* to *(4)*, the Bank may provide any data collected by it under *section 8* to any person, on request being made of it in that behalf by the person.

So far, my analysis of this newly available data indicates that less than half of insurers' annual income is expended on claims. From the Revenue Accounts on motor insurance for 2018 the starting point is total income of €1.3bl.The averaging of expenditure for settlements during the four years from 2015 to 2018 provides potential insights as summarised in the table below:

Income	**Value €**	**As % Income**
Premium	1,326,176,668	97%
Investment	28,799,578	2%
Other Income	13,950,942	1%
Total Income	**€1,368,927,187**	100%
Expenditure		
Vehicle damage net	168,240,078	12%
Injury Compensation	409,450,536	30%
Injury litigation fees	114,443,027	8%
Other Costs on Claims	14,442,265	1%
MIBI 'uninsured'	39,243,374	3%
Broker Commissions	120,806,531	9%
Management Expenses	206,126,639	15%
Other Expenses	9,139,647	1%
Interest	3,111,711	0%
Taxation	8,889,938	1%
Reinsurance	139,796,693	10%
Total Expenses	**€1,233,690,439**	**90%**
Insurer profits	**€135,236,748**	10%

The 10% profit level is said to be twice that earned by motor insurers in the UK.[554]

Only 7% of policies over the period 2010 to 2018 involved an injury claim. Injury compensation accounted for 30% of total income. Litigation fees accounted for 8% but a breakdown between claimant fees and insurers' own fees is not yet available. The 23% absorbed by broker commissions and insurers' management expenses are

[554] Cost of motor insurance claims fell by €10m between 2009 and 2018. Irish Times 2nd March 2020. https://www.irishtimes.com/business/financial-services/cost-of-motor-insurance-claims-fell-by-10m-between-2009-and-2018-1.4190600

largely fixed costs. This analysis must be considered preliminary. To date, I have raised three dozen questions about the classification of certain items of income and expenditure but replies remain outstanding from CBI as at July 2020.

There are numerous avenues for further research with this data which refutes assertions by insurers that tort claims are the driver of the excessive burden placed on law-abiding Irish motorists.

END