

relate

information for all

Vol. 33 No. 9
June 2006
ISSN 07904290

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Compensation for Personal Injuries

If you are injured in a car accident or in an accident at work or while you are on another person's premises, you may be able to claim compensation if you can show that another person was responsible – for example, the other driver, your employer or the owner of the premises – and that you suffered a loss as a result of the injuries. In order to establish that someone else was responsible, you have to show that he/she acted negligently. Negligence is a common law concept – it is not defined in legislation. Whether or not a person was negligent depends on the legal standards which the person is required to meet and the precise facts of the particular case. For example, an employer is obliged to provide a safe workplace and a failure to do so would be negligent. (It could also be an offence under the health and safety laws and it could even be a crime but we are not concerned with those issues here.) Showing who was responsible for the accident is often called “establishing liability”.

If you can establish liability or if the other person accepts liability, then you may be able to claim compensation for any losses you have suffered as a result of the accident. In the legal world, compensation is usually called “damages” and the amount of compensation or damages is called “quantum” (literally, the Latin for “how much”). There are two kinds of damages: “special damages” are the costs of your medical treatment, the loss of income you incurred and related quantifiable costs; “general damages” are compensation for pain and suffering.

In some cases, the whole procedure may be very simple. The other person may accept liability – that is, they may agree that they were responsible for the accident and are therefore liable for the costs incurred by you as a result of the accident. You may agree between you what those costs are. This may all be done privately or with the involvement of solicitors, and no litigation is involved. It is most likely to involve an insurance company especially if the amount involved is large.



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Sometimes, one side may accept liability but there may be a dispute about how much compensation is payable. This may require that you make a claim to the Personal Injuries Assessment Board (PIAB) and may subsequently require that you go to court – how this works is described below.

If nobody accepts liability, then the issue has to be heard by a court and the court decides who is liable and, if necessary, how much compensation has to be paid. Sometimes the amount of compensation is agreed but the court has to decide if there was contributory negligence and, if so, the extent of it. Generally, if you are injured in a car accident where the other driver is at fault, you are considered to be contributorily negligent if you were not wearing a seat belt. This may also be the case if you are injured at work and you were not wearing the hard hat which was provided.

Claiming compensation

If you intend to make a claim for personal injuries compensation, you must inform the other side in writing within two months of the accident unless you have reasonable cause for not doing this. If you fail to do this, it may affect the amount of damages awarded or it may affect the costs you will get.

You must take a case within the time limits set out in the Statute of Limitations – in general, that means within two years if the accident happened after 31 March 2005. If the accident happened before then, you generally have three years or until 31 March 2007 (whichever comes first) in which to make a claim. (There are various circumstances in which the time limits may be longer.)

In most cases, you must now make your claim to the Personal Injuries Assessment Board (PIAB). The procedure is described below. The case may subsequently have to go to court.

Court cases

If you take a court case against another person, you are the plaintiff. The person you are suing is called the respondent. The court system is adversarial. That means that you put your case and the respondent argues against it. The judge then decides on the basis of the arguments put forward. The judge decides the amount of the compensation.

If you win the case, you are usually (but not always) awarded your costs – this means that the other side has to pay for your lawyers. There are rules about the

amount of costs you may be awarded – for example, if you had refused to accept an offer from the other side or if you had taken your case in a higher court than was necessary, you may not get all your costs.

Personal Injuries Assessment Board

The Personal Injuries Assessment Board assesses compensation for personal injuries in cases involving claims in relation to employers' liability, public liability and motor accidents. It was established under the Personal Injuries Assessment Board Act 2003 with the aim of reducing the cost of litigation by removing some cases from the courts and reducing the involvement of lawyers.

The PIAB deals with a range of civil actions:

- Employer's liability – if you take an action against your employer because of negligence or breach of duty during employment
- Motor vehicle actions
- Public liability – that is, if you take an action against a property owner because of injuries which occurred while you were using the property concerned

It does not deal with cases involving medical negligence or claims for which a specific statutory scheme has been established, such as the Garda compensation scheme.

A civil action in this context means an action which is taken in order to get compensation for personal injuries or for both personal injuries and damage to property if both occurred in the same incident. For example, if you are involved in a car crash you may look for compensation for personal injuries and for damage to your car.

Making a claim

All relevant cases must now be referred to the Board. (Legal proceedings which were started before the legislation came into effect during 2004 may proceed through the courts as usual. The PIAB is able to make assessments of damages on an ad hoc basis for cases where proceedings have started if both sides jointly apply for this.) You may not take a claim to court without the authorisation of the Board.

There is a standard application process – the forms are available from the PIAB. You should complete the forms and include copies of any correspondence you have had with the respondent as well as relevant receipts and vouchers for financial losses you are

claiming. You are called the “claimant” (in court proceedings, you are the “plaintiff”). When you apply, the PIAB gets in touch with the respondent and asks if he/she agrees to an assessment being made. He/she has 90 days in which to make that decision. If the respondent wants to raise any legal issues or considers that the claim may not be genuine, then the Board authorises the claim to go to court. The PIAB may not accept a case if it considers that the case is more appropriate for the courts – for example, if it considers that there is no suitable precedent to be followed or if you are looking for exemplary damages, that is, damages over and above the normal amount. If none of these factors applies, then the PIAB makes an assessment. If the respondent agrees to the assessment going ahead, that does not mean that he/she is admitting liability. The parties may agree a settlement at any stage of the PIAB process.

Costs

As a claimant, you have to pay a refundable fee with your application – this is currently €50. You also have to pay for a report from the doctor who is treating you. If both sides agree to the assessment, you get your fee and €150 towards the cost of the doctor’s report refunded.

Usually, the insurance company deals with a claim on behalf of the respondent. If the respondent is dealing with it personally, then he/she must pay a fee of €850 and any extra expenses incurred by the Board such as independent medical reports.

Legal advice

You do not need a lawyer to process a claim to the PIAB but you may have legal advice and representation if you wish. You have to pay your lawyers yourself. The PIAB originally intended that lawyers would not be directly involved in the process and it refused to deal with lawyers acting on behalf of claimants. However, this practice was challenged and the courts took the view that claimants were entitled to choose to be represented by lawyers. The costs of any legal advice are not awarded against either party.

In order to reduce the need for legal advice, the PIAB operates a helpline for claimants. You can get help with filling up the forms, for example.
Helpline: Lo-call 1890 829 121 Monday to Saturday 8am to 8pm

The assessment of damages

The PIAB deals only with the assessment of damages. It is not concerned with legal issues. This means that

it does not make decisions on whether or not a person is liable for the damage caused. It is concerned only with assessing the amount of the compensation to be paid in cases where liability is not in dispute.

The PIAB does not operate on an adversarial basis: it is inquisitorial. It makes its decisions on the basis of the documents submitted by the parties. It does not hold oral hearings. So, you send them your doctor’s certificate of injuries and the documents necessary to support your claim for compensation. You are likely to need documents showing how much income you lost and how this was calculated. The PIAB examines these figures to see if they are valid.

The Board has the power to ask various bodies for information which it considers is necessary to validate the claims made. For example, it may find out from the Department of Social and Family Affairs what payments, if any, you have received. It is also able to get information about vehicle insurance. It may get information from the Revenue Commissioners about your income – this is for the purpose of establishing what financial losses you incurred.

The PIAB assesses special damages on the same basis as the courts do – there are already various rules about how to do this, for example, there are rules about how social welfare benefits which you received are taken into account. General damages for pain and suffering are more difficult to assess – these are mainly based on the medical reports of your doctor. You may also be examined by an independent medical expert appointed by the PIAB. The PIAB has compiled a “Book of Quantum” which sets out the level of compensation that may be awarded for particular injuries.

Time limits

The PIAB must make its assessment within time limits. In general, the assessment must be made within nine months of the claim but longer periods are allowed for claims involving more than one respondent and other complexities.

After the assessment is made

The PIAB issues details of the assessment to the claimant and respondent showing, separately, the amounts for special damages and general damages. If you are the claimant, you have 28 days in which to decide whether to accept or reject: if you do not reply, you are deemed to have rejected it. The respondent has 21 days: if he/she does not reply, then he/she is deemed to have accepted it. If either side rejects it,

then the claimant is given authorisation to go to court. The time involved in the PIAB proceedings is not taken into account for the purposes of the Statute of Limitations.

Some assessments by the PIAB are ruled by the courts in the same way that voluntary settlements must be (that means that the judge decides whether or not they are adequate). These are cases involving people who do not have full legal capacity – minors and people of “unsound mind” (people with learning disabilities or degenerative mental illnesses). In these

cases, the claimant’s legal representation is paid for by the respondent.

If the assessment is accepted, then the money must be paid in a lump sum.

Application forms and further information for both claimants and respondents are available at:

www.piab.ie

Personal Injuries Assessment Board,

P.O. Box 8

Clonakilty

Co. Cork

Criminal Insanity

The Criminal Law (Insanity) Act 2006 was passed recently. It was first proposed in 2002. It comes into effect on 1 June 2006. The Act provides for changes in the law in relation to people who are charged with criminal offences and who may be suffering from a mental disorder.

The question of the mental state of a person charged with a crime may arise at two different stages – at the start of the trial and at the decision on guilt. Until now, people could plead “unfitness to plead” (which means that they are not fit to stand trial) because of insanity. There is no statutory definition of insanity. If the person could not understand the charge or was unable to instruct a legal team, challenge jurors or follow the evidence, then he/she could have been considered unfit to plead – this decision was made by a jury. If the trial proceeded and the person claimed insanity at the time the offence was committed, then he/she could be found to be guilty but insane – again, by a jury. This verdict, in spite of the way it is phrased, is actually an acquittal. The result of this finding is that the person was committed to the Central Mental Hospital and must stay there until the government decides otherwise.

The Act introduces a new finding of “unfit to be tried” and new verdicts of “not guilty by reason of insanity” and “diminished responsibility”.

Mental disorder is defined as including mental illness, mental disability, dementia or any disease of the mind, but does not include intoxication.

Fit to stand trial

Fitness to plead is being replaced by “fitness to be tried” and this is being given a statutory definition which is similar to the common law definition of “unfitness to plead”. The decision on whether or not a person is fit to be tried will be made by a judge.

This finding is not a decision on the alleged criminal activity. If the person is found to be unfit to be tried, then the trial is postponed. The judge decides what happens next. For example, the person may be committed to a psychiatric hospital or unit if he/she is considered to be suffering from a mental disorder and is in need of in-patient treatment under the terms of the Mental Health Act, 2001; alternatively, the person may be sent for out-patient psychiatric care. The person may be committed to a psychiatric hospital or unit for 14 days in order to establish whether or not he/she should be sent for treatment. The person may appeal against a committal order.

If the judge considers that there is a reasonable doubt that the person committed the alleged crime, the person may be acquitted.

The Director of Public Prosecutions may appeal against a decision that a person is unfit to be tried.

Not guilty by reason of insanity

The verdict of guilty but insane is being replaced by the verdict of “not guilty by reason of insanity”. The tests for this verdict are set out but they are similar to the tests for the old verdict. This decision will continue to be made by a jury. If this verdict is reached, the judge may order that the person be committed to a psychiatric hospital or unit in broadly the same way as applies in the case of being unfit to be tried.

Diminished responsibility

If a person is charged with murder, the verdict of not guilty by reason of insanity is one possible verdict. The Act also introduces the concept of diminished responsibility in murder cases. A conviction for murder brings an automatic life sentence. In other crimes, the judge has discretion in relation to sentencing and so can take into account any diminished responsibility which may exist. If a person charged with murder successfully pleads diminished responsibility, then the verdict will be manslaughter. The judge can then sentence the person to any length of time in prison.

Mental Health Review Board

The Mental Health (Criminal Law) Review Board is being established. Its main function is to review the

detention of people found not guilty by reason of insanity or unfit to be tried, who have been detained in a designated centre (for example a psychiatric hospital) by order of a court. It will also have responsibility for people who have been convicted of offences and who become mentally ill while serving their sentences. The Review Board must have regard to the welfare and safety of the person whose detention it reviews and to the public interest. It may assign a legal representative to the person unless the person proposes to engage one.

The Board will be made up of a legal chairperson and a number of other people, at least one of whom must be a consultant psychiatrist. It will be obliged to review each detention at least once every six months.

Habitual Residence Test for Social Welfare

The rules about habitual residence for the purposes of certain social welfare benefits were introduced in 2004. They have not been changed but they have been clarified in respect of Supplementary Welfare Allowance for EU nationals who have been working in Ireland.

The habitual residence test applies to the following payments:

Child Benefit and Early Childcare Supplement (see below for the other relevant rules about this)
 Unemployment Assistance
 Old Age (Non-Contributory) Pension
 Widow's and Widower's (Non-Contributory) Pension
 Orphan's (Non-Contributory) Pension
 One-Parent Family Payment
 Carer's Allowance
 Disability Allowance
 Supplementary Welfare Allowance except for exceptional needs and urgent payments

Each of these payments is subject to a number of other conditions and we are only concerned with the habitual residence condition here.

The habitual residence test means that, in order to get any of these payments, you have to show that you have been habitually resident in Ireland or in the Common Travel Area of the UK, the Channel Islands and the Isle of Man for "a substantial continuous period". If you have not been in Ireland for at least two years, it is presumed that you are not habitually resident. In order to get the payment, you have to show that this is not the case – in legal terms, you have to rebut the presumption. The fact that you have

been in Ireland for more than two years is not, in itself, conclusive proof that you are habitually resident.

When deciding whether or not you have been habitually resident, the Department of Social and Family Affairs looks at how long you have been living here, whether you lived here continuously, why you are living here, your future plans, whether you have family here and any other relevant factors. Each case is decided on its merits. The Department has issued guidelines on how the test operates. These guidelines are not legally binding. They state that the "most important factors for habitual residence are the length, continuity and general nature of actual residence rather than intention". Your nationality is not relevant. You are likely to be considered habitually resident if:

- You spent most of your life in Ireland
- You have been in Ireland for two or more years and you intend to remain here and make it your permanent home
- You have lived in other parts of the Common Travel Area for two or more years and you then moved to Ireland with the intention of settling here

The Department takes into account decisions which have been made by the European Court of Justice on

habitual residence. These show that there is a number of factors to be taken into account including:

- Your main centre of interest
- The length and continuity of your residence in a particular country
- The length and purpose of absence from a country
- The nature and pattern of employment in a country
- Your future intentions

The full guidelines are available at:

<http://www.welfare.ie/publications/hrc.html>

EU citizens in Ireland

The rules on habitual residence have to be implemented in a manner which does not conflict with the EU rules on freedom of movement for workers or with the EU rules on social security for migrant workers.

Child Benefit

A person from another EU member state who is working (this includes self-employment) in Ireland is entitled to Child Benefit for each qualifying child, regardless of how long he/she is in the country. The EU rules on social security for migrant workers provide that family benefits such as Child Benefit are payable by the country in which the worker is employed regardless of where the children live. The

same rule applies to the new Early Childcare Supplement. A person from another EU member state who is not working may have to meet the habitual residence rule in order to get Child Benefit and the Early Childcare Supplement.

Supplementary Welfare Allowance

The EU rules on freedom of movement for migrant workers provide, among other things, that workers from other member states must be treated in the same way as workers in the state in which they are employed. Workers who move to another member state are entitled to the same social and tax advantages as citizens. People who move to look for work but have not found it do not have this entitlement. The social and tax advantages do not have to be directly linked to working but if they are generally granted to workers, then migrant workers from other member states are also entitled to them. It has been clarified that weekly Supplementary Welfare Allowance (SWA) is such a social advantage and must, therefore, be subject to the principles of equal treatment to all EU workers regardless of nationality. So, if workers from another member state lose income because of unemployment or illness, they are entitled to claim weekly SWA. (Of course, if they have enough social insurance contributions, they may claim Unemployment Benefit or Disability Benefit.)

Mental Health Policy Report

The report of the Expert Group on Mental Health Policy, *A Vision for Change*, was published earlier this year. It makes a range of recommendations for the organisation and development of mental health services.

The closure of large psychiatric hospitals, the location of mental health services in units attached to general hospitals and the expansion of community mental health services has been Government policy since 1984. This report recommends that all psychiatric hospitals be closed and the resources be made available for the development of the mental health services.

The group recommends that the report should be accepted and implemented as a complete plan. The national mental health directorate within the Health Service Executive is to establish an implementation group to ensure that the recommendations are implemented.

The main recommendations of the expert group are as follows:

Organisation

- The mental health service should be organised nationally in catchment areas for populations of between 250,000 and 400,000. Organisation and management of services within each catchment should be coordinated locally by Mental Health Catchment Area Management Teams and managed nationally by a National Mental Health Service Directorate within the HSE.
- The involvement of service users and their carers should be a feature of every aspect of service development and delivery.

Services

- Mental health promotion should be available for all age groups.

- Well-trained, fully staffed, community-based, multidisciplinary Community Mental Health Teams (CMHTs) should be put in place for all mental health services.
- CMHTs should offer multidisciplinary home-based and assertive outreach care, and a comprehensive range of medical, psychological and social therapies.
- Links between specialist mental health services, primary care services and voluntary groups that are supportive of mental health should be enhanced and formalised.
- Mental health information systems should be developed locally. These systems should provide the

national minimum mental health data set to a central mental health information system. Broadly-based mental health service research should be undertaken and funded.

Mental health staff

Planning and funding of education and training for mental health professionals should be centralised in the new structures to be established by the Health Service Executive. A multi-professional manpower plan should be put in place, linked to projected service plans.

The full text of the report is available at: www.dohc.ie

Employment Permits

The Employment Permits Bill 2005 is being discussed by the Oireachtas. It may be subject to further amendment if agreement is reached in the social partnership talks. Here we briefly describe the contents of the Bill as passed by the Dáil.

The Bill proposes to give a statutory basis to the procedures for the application, grant and refusal of work permits. (The current rules are described in the July 2004 issue of Relate.) The procedures involved will be broadly similar to those which apply at present. It will apply to foreign nationals from non-European Economic Area (EEA) countries. (The EEA members are Norway, Iceland and Liechtenstein as well as the 25 member states of the EU. Switzerland is not an EEA member but is covered by basically the same rules as EEA members.) Initially, the Bill referred to the workers concerned as “non-nationals”: it now refers to them as “foreign nationals”.

Green card scheme

The Bill proposes the introduction of a “green card” type system for highly skilled migrant workers. It will replace the current work visa/work authorisation system. Green cards will be granted to people with specified skills in a restricted list of occupations in the salary range of €30,000 to €60,000 and to people in a more extensive list where the salary range is above €60,000. The relevant occupations will be identified in conjunction with the Expert Group on Future Skills Needs. (At present, the work visa/work authorisation arrangements apply to people in information and communications technology and medical and health professionals.) Green cards will be issued for two years initially and the holders will have the possibility of permanent or long-term residence after that. Holders will be able to bring their families with them and their

spouses will be entitled to work without a work permit. Like holders of work visas/work authorisations, Green card holders will be able to work within a specified sector and will be free to move within that sector.

Workers may apply for a green card if they have a job offer in writing and if they meet the relevant skills requirements.

Intra-company transfer scheme

There will be an intra-company transfer scheme for temporary trans-national management transfers. This scheme is strictly for temporary management level transfers within a company or group of companies and will allow for the temporary transfer of management staff from overseas companies to offices in Ireland for a period of up to five years.

Work permit scheme

The work permit scheme will apply to a restricted list of occupations with salary scales of up to €30,000 where there are significant labour shortages and to those occupations in the €30,000 - €60,000 range to which the green card scheme does not apply. The relevant occupations will be identified in conjunction with the Expert Group on Future Skills Needs. Employers must be able to show that the jobs in question could not be filled from within the EEA and that, at the time of applying, more than 50% of their employees were from the EEA states or Switzerland.

Work permits will be granted first for a period of two years, followed by a further period of three years. The fee will be the same as now, €500 a year, that is €1,000 for the first two-year period and €1,500 for the following three-year period.

Holders of work permits will be restricted to working for the employer named on the permit. If they wish to move jobs, they must get another work permit in respect of the new employer. This issue is being addressed at the social partnership talks and there may be further changes if agreement is reached there.

Holders of work permits will have no automatic right to bring their families to Ireland. In general, they may be able to do so if their income is above the level at which they would qualify for Family Income Supplement. This is not provided for in the legislation but it is the practice.

Protection for migrant workers

The Bill also sets out measures for the protection of foreign nationals who work here. It should be noted that foreign nationals who are legally working in Ireland have exactly the same rights under employment legislation as Irish or EU nationals working here.

The permit will be granted to the worker. The permit will relate to work with the employer who applied for it. The permit will contain a statement of the rights and entitlements of the worker. The statement of rights will include the information that the worker may change employment through the application for another work permit by a new employer. The statement will also include details of pay, rights under the national minimum wage legislation and any deductions which it is proposed to make from that pay – for example, for accommodation. The national minimum wage legislation provides for a

deduction to be made from the statutory minimum pay of an employee if the employee is provided with board and/or lodgings as follows:

For full board and lodgings: €54.13 a week or €7.73 a day

For full board only: €32.14 a week or €4.60 a day

For lodgings only: €21.85 a week or €3.14 a day

Employers will not be allowed to deduct expenses associated with recruitment from the employee's pay and will not be allowed retain any of the worker's personal documents.

General

The Minister for Enterprise, Trade and Employment will have the power to make regulations to specify:

- The maximum number of work permits which may be granted in a particular period
- The maximum number which may be granted in respect of a particular sector
- The categories of employment for which permits may be granted
- The categories for which they may not be granted
- The minimum pay that must be paid as a condition for getting a permit
- The qualifications and skills which permit holders must have

Work permits may be refused or withdrawn for a range of reasons. The Bill provides for an appeal against a decision to refuse or withdraw a work permit.

Fines for breaches of the new rules may be up to a maximum of €50,000 or up to five years imprisonment.

The text of the Bill is available at:
www.oireachtas.ie

Relate Subscription Rates:
Annual Subscription
(12 issues, January to December)
€15.85 post free

Each additional subscription sent
in the same envelope
€1.90 per year.



Individual copies 75 cent

Published by:

Comhairle
7th Floor, Hume House
Ballsbridge, Dublin 4.
Tel: 01-6059000 Fax: 01-6059099
E-mail: comhairle@comhairle.ie
Website: www.comhairle.ie

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