CONSTITUTIONAL AND ADMINISTRATIVE LAW FRAMEWORK OF THE PERSONAL INJURIES ASSESSMENT BOARD

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I. THE ANATOMY OF THE BEAST

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.

This oddness is exacerbated where a tribunal – which is essentially what PIAB is - becomes involved. For tribunals are anomalous beasties which do not fit well into any established legal category. Moreover, PIAB is an obstacle in the path to court and of all the parts of the Constitution, the ones about which the law is most strict are those which protect the position and independence of the courts.

The first issue which arises is the major structural provision, concerning the judiciary, Article 34.1 which states in relevant part: "Justice shall be administered in courts… by judges…" There are two limbs to this. The first leg is that, as Article 34.1 states: only courts can 'administer justice'. However, in my opinion PIAB is not 'administering justice', if only because its decision is not final and binding.[1]

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[1] For the gory details as to the meaning of the 'administration of justice', see Hogan and Whyte, JM Kelly's *The Irish Constitution* (Butterworth, 2003) at pp. 610-29 and Morgan, *Separation of Powers in the Constitution* (Round Hall Sweet & Maxwell, 1997), Chapter 4.

So I shall move on to the second limb of Article 34.1. This is to the effect that a court cannot be unreasonably interfered with in the administration of justice or the independence of the courts.[2] In the present context, the question is whether the requirement that to proceed to court, the applicant must first go through the PIAB process, violates this principle. Is this situation analogous to *Macauley v. Minister for Posts and Telegraphs*,[3] which centred on a requirement that before anyone sued the State, they had to have the Attorney's permission? This requirement was held to violate a citizen's right of access to a court.

But the point of distinction between PIAB's involvement and the Attorney General's fiat is that the claimant is perfectly free to reject the assessment made by the PIAB. The claimant must go through the process but at the end they may then decide to go to court. A close analogy is the requirement of counselling before one can go for a divorce. Another analogy is the usual pre-trial processes before a civil action. The PIAB procedure may be unusual in that the PIAB is a body rather than a series of procedural steps under the control of, say, the Master of the High Court and PIAB is separate from and independent of the court. But this is not important since the claimant's progress to the court cannot be vetoed by the PIAB. For after jumping through the hoop, the claimant may decide not to accept the PIAB's proposal.

II. PARTICULAR POINTS

The following four points are worth considering.

A. Right to legal representation

The Board wished to prevent lawyers from being involved. This policy came up for testing, as it was inevitable that it would,

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[2] I am not distinguishing between (a) one's right to litigate a justifiable controversy, under Art 40.3.1, and (b) non-interference with a court's authority to hear a case, under Art 34.1 or 34.3.1°. Are these not two (or even three) sides of the same coin or what the great patriarch of Irish Constitutional law, John Kelly called, (in the Preface to the book noted in footnote 1) "familiar root concepts gone to seed".

[3] [1966] IR 345 (H.C.).

in *O'Brien v. The Personal Injuries Assessment Board.*[4] Here the main issue centred on the question of whether the Personal Injuries Assessment Act 2003 gave any authority to the PIAB to exclude lawyers. The High Court held, on a straightforward interpretation of the Act without involving the Constitution, that it gave no such authority. An appeal to the Supreme Court is pending but is unlikely to be heard until late 2006. However, my view is that the High Court's decision will probably be upheld.

As regards the Board's practice, pre-*O'Brien* it wrote directly to the claimant. Following the High Court decision, it changed this practice so as to write to the solicitors (where a claimant has one); with a copy of a communication being sent to the actual claimant only where it related to a statutory event, such as a notice of assessment. And at a hearing to finalise the Order in *O'Brien*, MacMenamin J. indicated that he considered that this new procedure was in accord with the law.

In *O'Brien* it was held fairly readily that there was no statutory authority for the exclusion of lawyers. But the live question is whether legislation, specifying explicitly the point that lawyers were barred would be constitutional. What MacMenamin J. had to say on this point is of interest, despite being, strictly speaking, *obiter.* In a page and a half section at the end of his judgement, MacMenamin J goes into the application of the constitution right to legal representation, which is an aspect of the broad concept of constitutional justice. He remarks:

> But the right to legal representation applies to administrative procedures where the matters in issue are of serious consequence to the parties or impinge upon their rights. Assessment by a statutory body for compensation in respect of personal injury comes within this category. Indeed, it is of such importance that prior to, and even after, the inception of the Board, such right may be determined by a court of law.
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> Compensation for personal injuries may involve substantial sums of money, and the question of

[4] High Court, unreported, MacMenamin J., January 25, 2005.

> entitlement thereto may be of vital significance to a claimant and his or her family. In such circumstances, a contention that the issues before the Board are inconsequential is surely difficult to sustain.[5]

The learned judge expressly declined to consider whether the Board was acting in breach of the applicant's constitutional rights since this was not necessary to his decision. However, in that case, it seems tolerably clear by deduction from the passage quoted from *O'Brien*, that any amending legislation, of the type hypothesised here would be unconstitutional.

B. Award of Costs:

So it comes down to a question of the award of costs. Specifically, the question is whether, given, that legal assistance is permitted, but there is no general provision in the legislation about ordering either the PIAB or an insurance company to pay the applicant's costs, a court would read in this power, by reference to the Constitution. (Alternatively, to put what I think is essentially the same question, in a different form, if there were a provision expressly banning the Board from ordering the insurance company to pay the participant's cost, would such a provision be unconstitutional?)

In the first place, there is no general principle that the State must provide free legal aid to assist citizens in securing their rights. Kelly remarks: "Attempts to establish that the state has a positive constitutional duty to assist a civil litigant who is denied effective access to the courts because of factors such as poverty, for which the State is not directly and immediately responsible have almost invariably failed."[6] Moreover, Kelly was talking about the courts. Here we are talking only about a tribunal. Various authorities can be adduced for Kelly's proposition. For instance, in *Corcoran v. Minister for Social Welfare*[7] Murphy J. remarked that there was "[no] authority for the proposition…that the State would be bound to pay for [legal assistance for a party

[5] High Court, unreported, MacMenamin J., January 25, 2005, at 52.
[6] Kelly (footnote 1) at p. 1455
[7] [1991] 2 I.R. 175 (H.C.)

appearing before a lay tribunal]**."**[8] Essentially the same was said by Peart J. in *McBrearty v. Morris*[9] which concerned representation before a public inquiry chaired by a (retired) High Court judge. Such an inquiry might not be regarded as 'a lay tribunal' and so this case probably goes further than *Corcoran* and certainly further than we need to go to cover the PIAB. Moreover in the *O'Brien* case, McMenamin J. noted, apparently without disapproval, that "the Board is not empowered to award legal costs and expenses". In short it seems to me that there is no general principle which would require the PIAB to pay legal costs.

Next, is there a general principle which would require the respondent–insurance company to pay a claimant's legal costs? It is generally accepted in what cases we have, that constitutional rights are enforceable not only as against the State but also against private individuals. But this does not answer the question about the extent of a private individual's – in this case the insurance company's – obligation. What few cases there have been on a private individual's constitutional obligations have concerned their negative obligations *e.g.* a teacher's strike which prevented children from enjoying their right to private education.[10]

By contrast, what we are considering here is a positive obligation to pay the legal costs of a pre-trial process required by legislation. Normally, in litigation before a court the losing party pays the winner's costs. But this is a matter of judicial discretion, which is not always exercised in favour of the winner. Admittedly I know of no constitutional case in which the point has been tested, but it has never been suggested that there is a constitutional right for a winner, even before a court, to have his or her costs paid. In summary, probably there is no general principle requiring a successful complainant's costs before PIAB to be paid by the insurance company.

So far, I have been talking about the non-existence of a general principle requiring costs to be paid by the State or

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[8] [1991] 2 I.R. 175 at 183 (H.C.).
[9] High Court, unreported, May 13, 2003.
[10] *Crowley v. Ireland* [1980] I.R. 102 (S.C.).

awarded against the insurance company. However there are some exceptional cases in which there is a right that legal costs be paid. The most likely one in the present context is where there is an express provision authorising the award of costs. I can best explain this by the case of *O'Sullivan v. Minister for Social Welfare*[11] which centred on the Social Welfare (Consolidation) Act, 1981, s. 298(ii) of which empowers an appeals officer in the Department to award legal costs. The provision states:

> An appeals officer may, in relation to any matter referred to him under this section, award to any person any costs which he considers reasonable, and the award shall be payable by the Minister.

Following an oral hearing, the appeals officer refused to go beyond the £30.00 expenses which had been agreed between the Appeals Office and the Law Society. In striking down this refusal, Barron J. in the High Court relied on the following two statements of principle:

> In my view the appeals officer has a discretion. The basic question must be, was it reasonable to have legal representation? If it was, then there may be reasons for awarding costs even if the appeal fails, in such circumstances. Where the appeal succeeds then costs should be allowed save where the principles of fairness require otherwise.
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> The initial grounds given for the refusal justified the applicant's submission that the appeals officer had fettered his discretion. It seems to me that is why costs were not awarded. They are never awarded and as a result the stage has been reached where no consideration is given to whether or not they should be awarded.[12]

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[11] [1997] I.R. 464 (H.C.).
[12] [1997] I.R. 464 at 467 (H.C.).

These two principles – that the discretion should be exercised reasonably (though it must be said that over the past decade or so, the Courts have been slow to strike down for unreasonableness) and that discretion cannot be fettered – are well-established statements from the law of judicial review, and they should in principle apply to PIAB.

Now the equivalent, in the PIAB Act 2003, to the provision from the Social Welfare Act just quoted, is section 44 which allows the Board "in its discretion" to direct the respondent to pay the claimant "the whole or part of … those fees that in the opinion of the Board have been reasonably and necessarily incurred by the claimant…".

In principle the judicial review principles would apply to an application to PIAB as they did in *O'Sullivan*. But there are two points of distinction. First, there was an oral hearing in *O'Sullivan* at which an appellant would have to be represented either by a solicitor (or someone else, as is possible) or by himself. In contrast, dealings with PIAB are usually by way of written communication. Secondly, in its wording the 2003 Act adds in the word "necessarily" as well as "reasonably incurred". This would make things more difficult if a judicial review were taken against the PIAB. Remember too section 17 of the 2003 Act the gist of which is that there are a number of exceptional cases in which recourse to PIAB is not required before taking a court case. Most of the situations in which the assessment would prove too complex would be likely to fall within one or other of these exceptional categories. Thus, in what would have been happiest hunting ground for the argument that the claimant should be able to claim legal expenses, PIAB would not be involved in the first place. So this line of argument is unlikely to be a runner.

C. Bias against the complainant

Put briefly, the first and, I consider, more significant of the two broad rules of constitutional justice (the charter of procedural fairness which is among the unenumerated rights in Art 40.3.1º) is the rule that the deciding agency should not be biased.

Is PIAB biased against the claimant? There are two aspects to this contention. The first is that one of the major objectives of the PIAB is to reduce the cost of personal injury claims. In

response, it might be contended that the particular way the PIAB is to achieve this is by removing or reducing legal expenses and that the damages actually paid to the claimant are not to be reduced and indeed, according to PIAB's own figures, this has not happened. A more frontal response is that an administrative agency is entitled to adopt a policy.[13]

A second aspect concerns the way in which the Board is constituted. The Board has six members; the Director of Consumer Affairs; the Consumer Director of the Irish Financial Services Regulatory Authority; two members nominated by the ICTU; one by IBEC; and one by the Irish Insurance Federation. Each of these were made members not only because they bring a particular body of experience but also because they represent a particular interest. To put it simply, three of these members – those from the IBEC, the IIF and the Regulatory Authority - might be assumed to come from groups who have an interest in minimising the amount of the awards. By contrast the Director of Consumer Affairs and the two ICTU nominees might have a predisposition to increase the awards. So, in theory, either the claimant or the insurance companies might complain of bias.

Now certain objections may be made to this line of argument. For instance: the first decisions as to awards are taken not by the Board but by qualified and full-time assessors and the Board has no express power to give directions to these assessors However there is a counter to this sort of objection. It is that the 'no bias' rule is not just concerned with reality; but also with appearance. 'Justice must not only be done; it must be seen to be done', and the fact that a member of the Board might appear to (say) a claimant who is not legally advised to be partisan might suffice to violate the 'no bias' rule.

There is however a second objection. Admittedly, this might be criticised for being based on pragmatism: it does however emphasise the wider implications of the line of argument. It rests on the fact that the PIAB is an example of a rather common type of Irish institution. It is what we may call a 'balanced' tribunal. Examples include: the Labour Court and the Employment Appeals Tribunals which have equal numbers nominated by

[13] See Hogan & Morgan *Administrative Law in Ireland* (3rd ed.) at pp. 668-75.

employees or employers' organisations. Or to take an especially florid instance, Bord Pleanála. Here apart from the chairperson, the other six members must be variously a civil servant from the Department of Environment and Local Government or representatives of particular specialised groups, for instance, builders or environmentalists.

The characteristics which these 'balanced tribunals' share is that they all have to take decisions which are contested between members of polarised groups each of which has representatives on the tribunal. From the point of view of the reasonable lay-person, there seems to be a lot to be said for this type of arrangement. It is true that a classic administrative lawyer might raise his or her lands in Holy Horror and say that constitutional justice requires that each member of a tribunal must be impartial and not that the leaning of one member in one side may be cancelled out by the leaning of another member in the opposite direction. But whatever about classic administrative law, this assumption of cancelling out is exactly the basis of bodies like the Labour Court.

Thus, if the argument being considered were successful here, an awful lot of Irish administrative structures would be cut down. I believe that the pragmatic Irish judiciary would regard this as an 'appalling vista' and would recoil from it. And a cogent reason could be advanced for holding that there was no bias. This goes back to the points made earlier that the test in this area depends upon whether the person affected could reasonably suspect bias. Given the fact that the Board is balanced, I think that a court would take the view that there would be no reasonable suspicion of bias.

D. President of the High Court as appointing authority

Mr. David Holland SC makes an interesting point. He draws attention to the fact that under section 20 of the Civil Liability and Courts Act 2004, the President of the High Court is the appointing authority for the panel of "approved persons" from among whom a court appointed expert will be selected. He states in his paper entitled "Some Thoughts on Practicalities", that:

> The Section makes the President of the High Court the appointing authority and gives him no guidance whatsoever as to the criteria he should apply. One must wonder whether it is appropriate to impose upon the President the task of awarding lucrative government contracts. I have no doubt that any President of the High Court will approach the task with complete integrity but it seems to me to be invidious that the President should be placed in that position.[14]

If one conceptualises this criticism a little, it probably amounts to saying that here a non-judicial function is being vested in a judge. This, in my opinion could give rise to the question whether such an amalgamation would violate the Separation of Powers which in its pure form, holds that only a judicial function may be vested in a judge. Such a pure form certainly prevailed in Australia, (though it is probably no longer the law of Australia), according to the Judicial Committee of the Privy Council's well known decision in *Attorney General for Australia v. R. ex parte Boilermakers Society of Australia.*[15] In *Boilermakers*, it was held that an arbitral function in the field of industrial relations (a non-judicial function) could not be conferred on a court, on the basis that powers alien to the judiciary cannot be vested in a court, lest they undermine the integrity of the judicial branch.

In an appropriate context, might the *Boilermakers* doctrine be law in Ireland, where after all we do have a strong version of the Separation of Powers?[16] There is some support for the view that it might be, from Keane J. (as he then was), in *Neilan v.*

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[14] See David Holland SC, "Civil Liability and the Courts Act 2004: Some Thoughts on Practicalities", (2006) 6(1) *Judicial Studies Institute Journal* 43 at 49.

[15]]1957] A.C. 288.

[16] There is more leisurely discussion of these possibilities in Morgan, *Separation of Powers in the Irish Constitution* (footnote 1) Chapter 10. IV; L.R.C. *Public Inquiries including Tribunals of Inquiries* (L.R.C. C.P. 22-2003), para. 5. 16.

DPP.[17] However, this was only a tentative *obiter*. And by now, this line of argument has arisen squarely in the context of whether a judge may act as the Chairperson of a public inquiry. It arose in *Haughey v. Moriarty*,[18] where Geoghegan J. stated:

> It may well be a matter of legitimate public debate as to the extent to which it is appropriate that judges should be chairmen of boards, commissions, tribunals, *etc*., but that debate would merely arise out of a legitimate concern as to a potential conflict of interest in the future. It could not be suggested that there is anything illegal or unconstitutional about judges being appointed to any of these positions provided of course that they do not receive any remuneration.[19]

Despite this, it may well be that we have not heard the last word on this interesting point. Apart from *Boilermakers* and the Separation of Powers, could it not be argued, more fundamentally, in an appropriate case that to vest certain types of non-judicial function in the judiciary might be a threat to the notion of an independent impartial judiciary, as enshrined in the judicial oath in Art 34.5 and also in 35.1 of the Constitution?

CONCLUDING COMMENT

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.

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[17] [1990] 2 I.R. 267 at 268
[18] [1999] 3 I.R. 1.
[19] [1999] 3 I.R. 1 at 15.