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*Submission by Council of The Bar of Ireland to the
Joint Committee on Finance, Public Expenditure &
Reform and Taoiseach on the rising costs of motor
insurance*

7th September 2016



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Ms Brid Dunne

Clerk to the Joint Committee on Finance,
Public Expenditure & Reform and Taoiseach
Leinster House
Dublin 2

7th September 2016

RE: Meeting of Joint Committee – The Rising Costs of Motor Insurance

Dear Ms Dunne

Further to your letter of 30th August 2016, please find enclosed a copy of the submission of the Council of The Bar of Ireland.

As previously confirmed, the following representatives from the Council will attend the meeting on Tuesday, 13th September 2016 at 2:30pm:

- Paul McGarry SC, Chairman, Council of The Bar of Ireland
- Sara Moorhead SC, Treasurer, Council of The Bar of Ireland

Yours sincerely

Ciara Murphy
DIRECTOR

INDEPENDENCE
EXPERTISE
INTEGRITY

Submission by Council of The Bar of Ireland to the Joint Committee on Finance, Public Expenditure & Reform and Taoiseach on the rising costs of motor insurance

The cost of car insurance is said to have increased by 70 per cent over the past three years and, according to the Central Statistics Office, to have jumped by 38.3 per cent in the past year alone.¹ These increases are well in excess of EU trends. Insurance Ireland has attributed increases to a higher number of claims, excessive and inconsistent award levels, high legal costs, escalating levels of fraud, and the poor regulation of failed insurers. The representative body stated in its 2015 Annual Report that the level of awards being made in the Courts is at an all-time high, that whiplash awards are three times higher than in the UK, and that legal costs account for more than 60% of the compensation awarded in litigated cases. A sub-committee of the Policy and Research Working Group of The Bar of Ireland was convened in March 2016 to examine the issue.

Supported by research undertaken by the Policy Department, David Barniville SC, former Chairman, Council of The Bar of Ireland, issued a response in the June edition of *The Bar Review* (Volume 21, No. 3) (attached) together with an opinion piece published in *The Irish Times* (May 26, 2016) in which he raised The Bar of Ireland's concerns as to the veracity of the insurance industry's claims. He also expressed Council's full support for the establishment by the Department of Finance of a working group to carry out a review of policy in this area, and indicated its willingness to participate in any future consultative process. A formal request was issued to the Minister for Finance by Ciara Murphy, Director of The Bar of Ireland, in a letter dated 26th April 2016, and an invitation was subsequently extended to The Bar of Ireland to nominate two representatives to attend a hearing of the Joint Committee on Finance, Public Expenditure & Reform and Taoiseach on the issue.

Key Considerations

(i) The lack of transparency and incomplete disclosure of data by the insurance industry is a significant barrier to a comprehensive understanding of the claims environment

The insurance industry has failed to support its allegations with any reliable data and its claims are at odds with the published data of the Injuries Board and the Courts Service. The non-disclosure of data by the insurance industry on claims settled privately outside of the Court and the Injuries Board is a significant barrier to a comprehensive understanding of the claims environment and of the factors impacting on premium increases. Of the 31, 576 injury claims registered in 2014, only 9,046 went to Court or were finalised by the Injuries Board. Therefore, in 22,530 cases or 71%, there is no transparency regarding the cost of settling claims or the awards.

(ii) Financial mismanagement and imprudent pricing during 2012-2014 has led to premium increases in order to restore profitability

During the period 2012-2014, the insurance sector was effectively operating a boom-bust model, incurring losses of up to almost €500 million over three years. According to the Central Bank, "a number of insurance companies took a very optimistic view of future economic outlook, built up unsustainable overheads and followed an imprudent pricing and underwriting approach which

¹ *The Irish Times*, September 4, 2016, 'What is weighing down the car insurance industry?' (by Colm Keena)

resulted in companies' business plans becoming less resilient to downside risks such as an increase in frequency and severity of claims". A Department of Transport briefing document, released under the FOI Act stated that insurers had increased premiums to "return themselves to profitability or to boost profitability after a number of years of competing for market share with prices driven down accordingly and possible underwriting losses in some cases". If policyholders are being asked to pay extra to increase solvency for the stability of the financial services market, that needs to be explained clearly.

(iii) A €1 billion discrepancy between the premium income of Irish insurers and published awards warrants investigation

Dorothea Dowling has highlighted a €1 billion difference between premium income of Irish insurers and published awards.² Central Bank data shows that the income of the 10 companies which underwrite motor and insurance liability is currently €1.4bn a year. Court records show that during 2014, the courts collectively made 1,527 awards totalling €169 million in compensation. Many court awards were against organs of the State which are self-insured and therefore do not feed in to the total of payments made by insurers, but these two sets of data account for only €335 million in compensation. Compensation payments are not the only factor in insurance costs. Claims must be assessed for validity of either quantum or liability or both. In the case of uncontested claims assessed by PIAB that usually adds 6 per cent to the cost of the award, but in the case of litigation it is estimated at more than 50%. Even allowing for those administrative percentages adding €95 million to the overall costs, we arrive at a total outlay of €430 million. This is a gap of €1 billion between premium income and awards made.

(iv) Increase in the number of claims is due to increased economic and social activity and higher traffic volumes

The Injuries Board Annual Overview for 2015 showed an increase of 6% in the number of new claims submitted to the Board in 2015 compared with 2014 (33,561 new personal injury claims in 2015 compared with 31,576 claims in 2014). The Board noted that this "reflects increased economic and social activity and is not unexpected given there are more people at work, higher traffic volumes and higher footfall in public areas". That explanation for the fairly small increase in the number of claims mirrors the view of the Central Bank in its "Bodily Injury Thematic Review" published in November 2015. Noting that at that stage the insurance industry was observing an average increase of 8.3% in the number of private motor insurance injury claims from 2013 to 2014, the Central Bank observed that such increases were "in line with increases in motor fuel sales and road traffic fatalities in the same period", reflecting higher traffic volumes year on year.

(v) No significant increase is evident in the number of claims processed through the Injuries Board and award levels remain consistent

The non-adversarial model of the Injuries Board has succeeded in removing two-thirds of personal injury cases from unnecessary litigation. In 2015 it made 11,734 awards (of which 75% were motor claims) with a total value of €268.4 million in compensation (an average award of €22,878)

² *The Irish Times*, October 1, 2015, 'Time for another investigation into motor insurance prices' (by Dorothea Dowling)

compared to 12,420 awards and €281.2 million in 2014. Although the number of awards and the amount awarded by the Injuries Board fell in 2015 compared with 2014, the Board stated that the reduction in awards did not reflect any change to underlying claim volumes but was due to the timing of awards, with some claims from 2015 running into 2016. The Board projected that by the end of 2016, the number of awards annually would average 12,000 over the three-year period 2014-2016. No significant increase in the number of claims is evident from these figures. On the question of average awards by the Board, it was noted that these remained consistent in 2015 with the previous year. The average compensation award made by the Board in 2014 was €22,642 with a “modest” 1% increase in 2015 to €22,878. If the parties are not happy with the assessments of the Injuries Board, they are free to go to court and try their chances there, yet the Injuries Board has not recorded any major change in the number of people who are refusing to accept the assessments suggested to them by the board.

(vi) Increased awards reflect a major increase in clinical negligence claims

The Courts Service Annual Report for 2014 showed that for that year, the total amount awarded by the High Court in personal injury cases was €154,915,926, with the highest amount awarded being €9 million. The total awarded in 2014 by the Circuit Court in personal injuries cases was €13,794,354. For 2015, the total amount awarded in personal injury cases in the High Court was €168,106,004, with the highest amount awarded being €13,522,000, and the total amount awarded in the Circuit Court was €16,626,607. It should be noted, however, that there has been a major increase in clinical negligence claims and awards in the past two years (931 in 2014, 967 in 2015). These cases are primarily heard and determined in the High Court and since they do not have an impact on motor insurance claims, cannot be a contributing factor to the increase in motor insurance costs.

(vii) No significant impact evident as a result of the increase in Circuit Court Jurisdiction

The Courts Service Annual Report for 2014 considered the impact of the increase in the jurisdiction of the Circuit Court in personal injury cases from €38,000 to €60,000 with effect from February 2014. In summary, there were 7,047 personal injury actions commenced in the High Court in 2014 with 9,852 such actions commenced in the Circuit Court. This represented a 26% decrease in such cases commenced in the High Court and a 16% increase in the Circuit Court, compared to 2013. The Courts Service Annual Report for 2015 shows 7,219 personal injury actions (including 967 medical negligence) commenced in the High Court in 2015 (a modest increase of 2% on 2014) with 10,631 such actions commenced in the Circuit Court (an 8% increase on 2014). These figures do not reflect the sort of explosion of claims or proceedings commenced as one might have imagined from some of the public comment made in recent months.

(viii) Compensation awarded by the Court in respect of pain and suffering should be reasonable and proportionate in all circumstances

A person who sustains genuine personal injuries is entitled to be properly compensated for those injuries whether by settlements entered into by insurance companies or by awards made by the Injuries Board or by the courts. There are very few cases which are purely whiplash injuries without other injuries and symptoms. An injured claimant is entitled to be compensated for all of his or her

injuries. In the case of awards made by the courts, these are made by judges who are independent and have no vested interest in the outcome of the case. They are independent of the insurance industry and they are independent of claimants. They make awards based on what they assess to be fair and appropriate compensation to reflect the level of injuries disclosed in the evidence before them. If either side is unhappy with the level of an award, that party may appeal. The newly established Court of Appeal has been very active in reviewing awards of the High Court. The Court of Appeal stated in a recent judgment: "It is important that compensation when awarded by the Court in respect of pain and suffering should be reasonable and proportionate in all of the circumstances". The Court further stated that: "Damages awarded for pain and suffering must be reasonable having regard to the injuries sustained [and] must also be proportionate to the awards commonly made to victims in respect of injuries which are of significantly greater or lesser import".

(ix) CSO data on the cost of legal services accounts for solicitor fees only

In its 2016 report 'Costs of Doing Business in Ireland', the National Competitiveness Council stated that prices for legal services did not adjust downwards to the degree that might have been expected given economic circumstances and are 5.8% higher than 2010 levels. However this data relates to solicitors' fees only, based on 16 respondents to a CSO survey. Professional fees payable to barristers are not taken into account.

(x) During 2006-2013 professional fees in respect of barristers saw average decreases of between 26% and 50%

Contrary to popular belief, barristers' fees have fallen significantly. During the period 2006-2013, published figures from the various State agencies, who are the biggest consumers of barristers' services, show that professional fees in respect of barristers saw average decreases of between 26% and 50%. Counsels' fees represented 19% of the total budget of the Legal Aid Board in 2006, but fell to 11% in 2013. A 34% decrease in total fees paid to counsel occurred during this period, despite increases in the number of applications and cases handled. During the period 2008-2014, the DPP showed an average decrease of 30% in counsel fees and, according to the Annual Reports of the Attorney General and Chief State Solicitors Office, fees paid to counsel showed a decrease of 45% or more during the same period. These reductions are replicated in other areas of publicly funded work for barristers and are mirrored in other areas of private work.

(xi) The LSRA will introduce a new costs regime that will ensure greater clarity of the principles to be applied by Legal Costs Adjudicators in assessing costs

The Act will introduce a new costs regime that will ensure greater clarity of the principles to be applied by Legal Costs Adjudicators in assessing costs. The new system will require greater efficiency and transparency within the Office of the Legal Costs Adjudicators, greater visibility for clients in advance in terms of the costs of litigation, more detailed information on fee notes, a greater obligation to update costs information as a case progresses, and a facility for clients and opposing parties to challenge costs by means of the new adjudication system, replacing taxation. While not necessarily an issue for those acting on the defendant/insurer side, where scales of fees are routinely imposed by insurance companies on their own solicitors and barristers, the new costs regime will be important in terms of the plaintiffs' costs.

Insurance premiums and legal costs

A closer look at the facts contradicts recent headlines and points to the true causes of insurance premium rises.



David Barniville SC
Aedamair Gallagher

Allegations

Insurance Ireland, the body representing 95% of the domestic and international-based insurance sector in Ireland, has in recent weeks been actively propagating the message that increasing insurance costs, particularly motor insurance premiums, are attributable to a higher number of claims, excessively high court awards and rising legal costs. It is claimed that costs are “too high” and “account for more than 60% of the compensation awarded”.¹ It is accepted that motor insurance premiums are rising (reportedly by between 20% and 35% in the past 12 months).² But there is simply no foundation in the allegations that these hikes are directly attributable to increasing numbers of claims, increasing awards or increasing legal costs.

In late 2015, Maurice Priestley, in his capacity as the former Interim CEO of the Personal Injuries Assessment Board (now known as the Injuries Board), stated that the number of personal injury claims litigated in court fell in 2014, revealing that the scale of rising insurance premiums is “at odds” with the

Board’s own data and does not demonstrate a link between insurance claims and increased premiums.³ With only a reported 10% of claims being dealt with through the courts, one would have to ask where the insurance industry is getting its data.⁴

Of most concern is the €1 billion difference which has been highlighted between the premium income of Irish insurers and published awards, revealing serious data inconsistencies that need to be addressed. As Dorothea Dowling, former Chairperson of the Motor Insurance Advisory Board and former Chairperson of the Injuries Board, has said, we are simply being asked to “take the industry’s word for it” and that is not good enough.⁵

With only a reported 10% of claims being dealt with through the courts, one would have to ask where the insurance industry is getting its data.

The allegations and counter allegations have been much debated in the media over the past few weeks.⁶ Perhaps the most interesting and measured contribution to the debate came from Michael Noonan TD, the Minister for Finance, in a speech to Dáil Éireann on April 20, 2016, where he referred to various potential contributory factors to rising motor insurance premiums and announced the establishment of a working group to look into this.

Financial mismanagement

The costs associated with personal injury claims are usually front and centre when it comes to laying blame for premium hikes, but indications of poor business acumen and financial mismanagement in the insurance sector would suggest that there are other, more serious, factors at play.

During the period 2012–2014, the insurance sector was effectively operating on a boom-bust model. According to the Central Bank: “A number of insurance companies took a very optimistic view of future economic outlook, built up unsustainable overheads and followed an imprudent pricing and underwriting approach which resulted in companies’ business plans becoming less resilient to downside risks such as an increase in frequency and severity of claims”.⁷ The spectacular demise of Quinn and Setanta made it clear that insurance companies were competing far too aggressively and at the expense of profitability. They simply were not charging enough, resulting in losses of almost €500 million in three years – losses which inevitably fell to the consumer.⁸

A policy review

In his speech to the Dáil on April 20, 2016, Minister Noonan identified a range of possible factors which may have contributed to the increase in the cost of motor insurance in Ireland in the past 12 months. Among the reasons noted by the Minister are the frequency and scale of claims, the cost of claims and the operation of the insurance market. The Minister noted an increase in the frequency of claims over the past year, which he was advised was associated with improving economic conditions, and also referred to an increase in the number of large claims. Reference was also made to increases in the jurisdiction of the Circuit Court since February 2014, which the Minister said may possibly be leading to increased legal costs, the alleged increased engagement of solicitors in handling of claims, and a recent decision of the High Court (upheld on appeal by the Court of Appeal)⁹ on the real rate of return in a catastrophic injury case.

The Minister referred to advice received from the Central Bank on some of these areas, and to the advice he had received that competitive conditions in the Irish insurance market and insurance companies’ focus on maintaining market share had provided an impetus to lower premiums, which was sustainable while there were positive investment returns but was no longer so due to lower returns. Significantly, the Minister reported that he had established a review of policy in the insurance sector in consultation with the Central Bank and other Departments and agencies, the first phase of which is to examine the framework for motor insurance compensation in light of the collapse of the Setanta insurance company. This work is being conducted by a joint working group comprising officials of the Department of Finance and the Department of Transport. The Minister reported that the group had already met with a number of “key stakeholders” with an interest in the insurance compensation framework in Ireland including the European Commission, the Irish Brokers Association, the State Claims Agency, the Central Bank, Insurance Ireland and the Accountant of the Courts of Justice.

Council of The Bar of Ireland has welcomed the establishment of this working group and agrees with its principal objective, which is to identify the features of a motor insurance compensation framework that is “comprehensive, effective, affordable and consumer focused”. It is noted that the outcome of this work will be used as part of a wider review of policy in the insurance sector,

which will examine the factors contributing to the cost of insurance. Officials in the Department of Finance working with the Central Bank have apparently already met a number of stakeholders, including officials in the Department of Jobs, Enterprise and Innovation and the Injuries Board. It is understood that a consultation process in this area will continue over the coming months, which will extend to other stakeholders “in due course”.

Following publication of his speech, Council of The Bar of Ireland wrote to the Minister on April 26, 2016, informing him of its interest in contributing to the consultation process and in providing appropriate input and assistance to the working group. Council felt that as the body representing the overwhelming majority of barristers in practice in the State, who work for claimants and insurance companies in these cases, and in the interests of ensuring a full, thorough and balanced examination into the alleged contributing factors to the increase in the cost of motor insurance, it would be appropriate, and of assistance, to consult with The Bar of Ireland. It is hoped that such consultation will take place.

The costs associated with personal injury claims are usually front and centre when it comes to laying blame for premium hikes, but indications of poor business acumen and financial mismanagement in the insurance sector would suggest that there are other, more serious, factors at play.

According to the Injuries Board, access to data is essential to ensuring a comprehensive understanding of the claims environment and of the factors impacting on premium increases. Council of The Bar of Ireland shares the view of the Injuries Board in its recently published Annual Overview for 2015 that: “Greater transparency and data sharing by key stakeholders is vital in ensuring an appropriate policy response to the upward trajectory of insurance premiums”.¹⁰ Council also agrees with the sensible comments of the recently appointed Chief Executive of the Injuries Board, Conor O’Brien, concerning the information gap that still exists in terms of data from the insurance companies. In announcing the Board’s Annual Overview for 2015 on April 1, 2016, he said:

“A comprehensive understanding of the broader personal injury environment requires the publication of data relating to cases that are settled outside of the Board’s model. Bridging this significant information gap should be in the best interest of all stakeholders and an important step in better understanding any claims-related factors impacting on insurance premium increases.”

The true position

Since a fair amount of the public debate on this issue has focused on an allegedly significant increase in the number of claims in the past 12 months or so, and on an alleged increase in the cost of such claims, and since these issues have featured as potential contributing factors to the increased cost of

motor insurance, it might be helpful to refer to some of the published statistics in these areas. The Courts Service, the Injuries Board and the Central Bank have all recently published important material on these areas.

First, on the question of an increase in the number of claims, the Injuries Board recently published the outcome of its Annual Overview for 2015. This showed an increase of 6% in the number of new claims submitted to the Board in 2015 compared with 2014 (33,561 new personal injury claims in 2015 compared with 31,576 claims in 2014). The Board noted that this “reflects increased economic and social activity and is not unexpected given there are more people at work, higher traffic volumes and higher footfall in public areas”. That explanation for the fairly small increase in the number of claims mirrors the view of the Central Bank in its “Bodily Injury Thematic Review” published in November 2015. Noting that at that stage the insurance industry was observing an average increase of 8.3% in the number of private motor insurance injury claims from 2013 to 2014, the Central Bank observed that such increases were “in line with increases in motor fuel sales and road traffic fatalities in the same period”, reflecting higher traffic volumes year on year. These views were also reflected in Minister Noonan’s speech on April 20, 2016. The Courts Service Annual Report for 2014 (published in June 2015 and the most up-to-date figures available) considered the impact of the increase in the jurisdiction of the Circuit Court in personal injury cases from €38,000 to €60,000 with effect from February 2014. In summary, there were 7,047 personal injury actions commenced in the High Court in 2014 with 9,852 such actions commenced in the Circuit Court. This represented a 26% decrease in such cases commenced in the High Court and a 16% increase in the Circuit Court, compared to 2013. While the Courts Service Annual Report for 2015 is not due to be published until later this year, and until then the figures for 2015 will not be available, it is likely that the figures for 2015 will show an increase in the number of Circuit Court personal injury cases commenced and probably a decrease in the number of High Court cases commenced compared with 2014. To date, however, the publicly available material does not show anything like the sort of explosion of claims or proceedings commenced as one might have imagined from some of the public comment made in recent months.

A similar picture is presented from the published material available on the number and level of awards. In its Annual Overview for 2015, the Injuries Board noted that it made 11,734 awards for personal injury compensation and awarded a total of €268.4 million in compensation in 2015 compared to 12,420 awards and €281.2 million awarded in 2014. Although the number of awards and the amount awarded by the Injuries Board fell in 2015 compared with 2014, the Board stated that the reduction in awards did not reflect any change to underlying claim volumes but was due to the timing of awards, with some claims from 2015 running into 2016. The Board projected that by the end of 2016, the number of awards annually would average 12,000 over the three-year period 2014–2016. No significant increase in the number of claims is evident from these figures.

On the question of average awards by the Board, it was noted that these remained consistent in 2015 with the previous year. The average compensation award made by the Board in 2014 was €22,642 with a “modest” 1% increase in 2015 to €22,878. The Courts Service Annual Report for 2014 showed that for that year, the total amount awarded by the High Court in personal injury cases was €154,915,926, with the highest amount awarded being €9 million. The total awarded in 2014 by the Circuit Court in personal injuries cases was

€13,794,354. For 2013, the total amount awarded in personal injury cases in the High Court was €134,119,921 and in the Circuit Court, €13,243,153. It should be noted, however, that there has been a major increase in clinical negligence claims and awards in the past two years. These cases are primarily heard and determined in the High Court and since they do not have an impact on motor insurance claims, cannot be a contributing factor to the increase in motor insurance costs. In its November 2015 Report, the Central Bank looked at the costs of claims in private motor injury cases and noted that the average cost for each accident year was approximately €23,400 for 2012 rising to €25,200 for 2014, being an 8% increase from 2012 to 2014. It noted that there was some evidence of a continuation of this trend into 2015. It is hard to see this as explaining the reported increases of up to 35% in the cost of motor insurance premiums in the past 12 months. Doubtless, all of this will be considered by the working group established by Minister Noonan.

The Bar of Ireland has established a sub-committee of its Policy and Research Working Group to continue to review this area and to assist in its contributions to the working group recently established by Minister Noonan.

Damages higher in Ireland?

An argument often made by the insurance industry is that damages awarded to injured claimants are higher in Ireland than in other jurisdictions. This, the argument goes, means that awards in Ireland (whether by the courts or by the Injuries Board) are higher than they ought to be and are, therefore, excessive. The example often given is in the case of damages awarded for whiplash injuries. It is said that such cases are often settled (by insurance companies) for up to three times the amount for which they settle in the United Kingdom. A number of points can be made in response to this argument.

The first is that under our system, a person who sustains genuine personal injuries is entitled to be properly compensated for those injuries whether by settlements entered into by insurance companies or by awards made by the Injuries Board or by the courts. There are very few cases which are purely whiplash injuries without other injuries and symptoms. An injured claimant is entitled to be compensated for all of his or her injuries.

Secondly, in the case of awards made by the courts, these are made by judges who are independent and have no vested interest in the outcome of the case. They are independent of the insurance industry and they are independent of claimants. They make awards based on what they assess to be fair and appropriate compensation to reflect the level of injuries disclosed in the evidence before them. If either side is unhappy with the level of an award, that party may appeal. The newly established Court of Appeal has been very active in reviewing awards of the High Court. The Court of Appeal stated in a recent judgment: “It is important that compensation when awarded by the Court in respect of pain and suffering should be reasonable and proportionate in all of the circumstances”.¹¹ The Court further stated that: “Damages awarded for pain and suffering must be reasonable having regard to the injuries

sustained [and] must also be proportionate to the awards commonly made to victims in respect of injuries which are of significantly greater or lesser import".¹² The concept of reasonableness and proportionality is inherent in the exercise undertaken by a court in assessing the appropriate level of damages in any case.

Thirdly, while it may be that in some cases, the level of damages awarded in respect of particular injuries in Ireland is greater than might be awarded in another jurisdiction, that is not so in respect of all types of claims. For example, damages for pain and suffering in catastrophic cases is capped by our courts at €450,000,¹³ whereas in other jurisdictions (such as Northern Ireland and England and Wales), the general damages in equivalent cases can be higher. It should be said that these cases involve the most seriously injured claimants coming before the courts. In this context, it is noted that the Injuries Board is in the process of conducting a review of its Book of Quantum, which provides a guideline of injuries and value ranges of damages appropriate to particular injuries. As Minister Noonan pointed out in his speech to the Dáil, the Book of Quantum is not a recommendation for compensation levels but is rather a reflection of the prevailing level of awards being made by the courts, settlements entered into by insurance companies and by the State Claims Agency, and awards made by the Injuries Board. Its purpose, therefore, is not to lead to an increase or decrease in the level of awards, but rather to ensure that the awards are reflective of compensation levels in these areas. Part of the difficulty, however, is in obtaining information from insurance companies on settlements entered into by them. It is that absence of data that led to the Chief Executive of the Injuries Board recently calling for publication of data relating to cases settled by insurance companies.

The Bar of Ireland has established a sub-committee of its Policy and Research Working Group to continue to review this area and to assist in its contributions to the working group recently established by Minister Noonan.

Legal fees in general

According to the recent report of the National Competitiveness Council (NCC), an economic advisory body to the Government, legal costs are 5.8% higher than 2010 levels, having failed to "adjust downwards to the degree that might

have been expected given economic circumstances".¹⁴ It ought to be highlighted that the legal services data used in this analysis relate to solicitors' fees only and are based on 16 respondents to a CSO survey.¹⁵ Professional fees payable to barristers are not captured by the report.

Contrary to popular belief, barristers' fees have fallen significantly. During the period 2006-2013, published figures from the various State agencies, who are the biggest consumers of barristers' services, show that professional fees in respect of barristers saw average decreases of between 26% and 50%.

Counsel's fees represented 19% of the total budget of the Legal Aid Board in 2006, but fell to 11% in 2013. A 34% decrease in total fees paid to counsel occurred during this period, despite increases in the number of applications and cases handled. During the period 2008-2014, the DPP showed an average decrease of 30% in counsel fees and, according to the Annual Reports of the Attorney General and Chief State Solicitors Office, fees paid to counsel showed a decrease of 45% or more during the same period.

These reductions are replicated in other areas of publicly funded work for barristers and are mirrored in other areas of private work.

The Legal Services Regulation Act

How will the new Legal Services Regulation Act, 2015 affect the situation? The Act will introduce a new costs regime that will ensure greater clarity of the principles to be applied by Legal Costs Adjudicators in assessing costs. The new system will require greater efficiency and transparency within the Office of the Legal Costs Adjudicators, greater visibility for clients in advance in terms of the costs of litigation, more detailed information on fee notes, a greater obligation to update costs information as a case progresses, and a facility for clients and opposing parties to challenge costs by means of the new adjudication system, replacing taxation. While not necessarily an issue for those acting on the defendant/insurer side, where scales of fees are routinely imposed by insurance companies on their own solicitors and barristers, the new costs regime will be important in terms of the plaintiffs' costs.

Overall, the new system is likely to be positive and should ensure a reasonable and proportionate means of assessing legal costs.

Whether that will please the detractors is anyone's guess.

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6. See, for example, *The Irish Times*, May 2, 2016, 'Motor insurers charging more to 'boost' profits' (by Mark Hilliard); *The Irish Times*, May 4, 2016, 'The great motor insurance price hike mystery' (by John McManus); *The Sunday Independent*, May 8, 2016, 'The growing insurance gap' (by Dan White); and, *The Irish Times*, May 9, 2016, 'Uncertainty in motor insurance sector can be eased' (by Kevin Thompson).
7. Deputy Pearse Doherty. Dáil Debates Vol. 907 No. 1, April 20, 2016: page 37.
8. *The Irish Times*, March 14, 2016, 'More motor insurance price hikes on the way' (by Conor Pope).
9. *Gill Russell v HSE* [2015] IECA 236 (November 5, 2015).
10. Injuries Board. 2015 Annual Overview. 2016 [online] Available at: <http://www.injuriesboard.ie/eng/News-Information/Press-Releases/Injuries-Board-2015-Annual-Overview.pdf>.
11. *Payne v Nugent* [2015] IECA 268 (November 10, 2015) per Irvine J. at paragraph 16.
12. Per Irvine J. at paragraph 19.
13. *Yang Yun v MIBI* [2009] IEHC 318.
14. National Competitiveness Council (NCC) (April 2016), *Costs of Doing Business in Ireland 2016* [online]. Available at: <http://www.competitiveness.ie/Publications/2016/Cost-of-Doing-Business-2016.pdf> page 6.
15. NCC (April 2016), page 43, Figure 45 and footnote 35.

Insurance rises not attributable to court actions



Colm Keena

Legal Affairs Correspondent

No evidence to show court awards to blame for fuelling spectacular rises

It is interesting to look at the extraordinary rise in the cost of car insurance through the prism of the data available from the Personal Injuries Assessment Board (PIAB).

The cost of car insurance is said to have increased by 70 per cent over the past three years and, according to the Central Statistics Office, to have jumped by 38.3 per cent in the past year alone.

Explanation for such an unsustainable surge in the cost of premiums has included comments from the insurance industry that they reflect a rise in the size of court awards, and an increase in the number of cases going to court.

Yet the PIAB has not recorded any major change in the number of people who are refusing to accept the assessments suggested to them by the board.

The board assesses the value of all claims where liability is not contested, and if the parties are not happy with the assessments, they are free to go to court and try their chances there.

Had there been a dramatic increase in the size of awards being given out in the courts, one would expect this to contribute to an increase in the percentage of PIAB assessments being rejected by claimants who chose to go to court instead. But this is not the case.

Particular injuries

The assessments arrived at by the PIAB come from its so-called book of quantum – a guidebook on how much should be awarded for particular injuries, based on data from insurers, the State claims agency, the courts and the board itself.

So they are, in essence, assessments based on market data, and they haven't been rising at anything like the rate

of car insurance premiums.

Also, a massive differential developing between the size of awards in the book of quantum and those available from the courts would be expected to persuade more people to risk the cost of going to court. But that hasn't been happening.

Furthermore, since 2014, the courts have been instructed to use the book of quantum as a guide for their awards.

Solicitor involvement

Another suggested driver behind the rise has been the alleged increased involvement of solicitors.

Some 90 per cent of the cases that come before the PIAB involve the use of a solicitor, but that has remained steady in recent years. The cost is paid by the claimant and does not influence the assessments.

There was a 6 per cent rise in applications to the board last year, to 33,561, of which three-quarter were traffic incidents. If there is an increase in the numbers driving, there is surely also an increase in the number of people taking out car insurance. It is hard to see how that can be a factor in driving up premiums so spectacularly.

Other factors mentioned include historical underpricing during the boom, the cost

“A good place to start would be with a reliable examination of the patient

of paying for the collapse of Setanta Insurance, low bond yields, and other factors that mean insurance companies have to rely more heavily on premiums to create adequate reserves and profit margins that make the insurers sustainable.

Unlike many other jurisdictions, including the UK, the Irish car insurance market does not have publicly available aggregated information on issues such as the number of claims each year, their average size, the legal costs associated with processing the claims, etc.

If we want to diagnose what is wrong with the car insurance market here, a good place to start would be with a reliable examination of the patient. That might allow the contributors to the huge rise in premiums to be identified, and each to be given a relative weight.

What to do about the crisis could then be addressed.

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Political row: The new opposition for Ed Balls will be his fellow contestants on *Strictly Come Dancing* next month. His appearance on the BBC One show, timed for the publication of his book *Speaking Out*, is part of what the former shadow chancellor has called his midlife crisis. News, page 4; Interview and exclusive book extract, Magazine

Insurers cheat motorists

Premiums soar despite £500m savings from falling whiplash claims

Graeme Paton

Transport Correspondent

Insurance companies are overcharging motorists for cover despite measures that have helped the industry to save half a billion pounds in the past three years.

Premiums have jumped by as much as a fifth in the past 12 months alone — adding about £15 to bills — even though a government crackdown on the no-win, no-fee industry has led to a drop in whiplash claims.

New figures seen by *The Times* show that personal injury cases have fallen by 25,000 under the reforms, in a move that has saved insurers almost

£520 million. MPs suggested that companies had reneged on a pledge to cut prices after the changes, which were designed to remove Britain's tag as the "whiplash capital of Europe".

Louise Elftman, chairwoman of the Commons transport select committee, said: "The bottom line is that the insurance industry promised that they would reduce premiums as whiplash claims fell and, if they haven't done it, they've reneged on their promise. Fraud must be wiped out but the insurance industry must also honour its promises."

Brian Dixon, vice-president of the Association of Personal Injury Lawyers, said: "Injured people are being made

scapegoats for an insurance industry which is so dysfunctional that it cannot keep premiums under control and which is hitting motorists in the pocket year in, year out. Insurers' first duty is to their shareholders."

Ministers began to curb the no-win, no-fee industry in 2013. Measures included abolishing referral fees and stopping the money earned by lawyers for handling claims.

Data from the Association of British Insurers (ABI) suggests that the move has directly affected the claims system. Figures show that 365,000 claims were made for motor-related personal injury in 2013, but this was cut to 342,000 both

in 2014 and last year. At the same time the average cost of these claims, including damages and legal fees, has fallen from a high of £11,365 three years ago to £10,738 in 2014 and £10,614 last year.

It suggests that the overall cost to the insurance industry of these claims has dropped from more than £4.1 billion in 2013 to £3.6 billion last year. More insurance prices, however, have actually risen over the past 12 months.

One study by Confused.com, which was based on analysis of prices quoted to motorists, found that the average policy stood at £715 over the three months to the end of June. It was a rise of 19 per cent

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