1. INTRODUCTION

The Civil Liability and Courts Act of 2004 is approaching its third birthday. At the time that it was introduced, it was heralded as being the greatest single change in the litigation landscape since the original Civil Liability Act in 1961. Many commentators (including myself!) referred to the potential cataclysmic change which the Act would introduce. New concepts such as “Verifying Affidavits” “Personal Injury Summonses” “Mediation Conferences” “Section 17 Formal Offers” were all new and potentially frightening introductions to the Personal Injury world.

Further, the Act changed the Statute of Limitations from three years to two years, which together with the Personal Injuries Assessment Board Act of 2003, meant that it was difficult to ascertain precisely when a case became Statute Barred.

To add to the confusion, the provisions of Section 7 (d) of the Act which amended Section 5(a) of the Statute of Limitations (Amendment) Act of 1991 are very confusing.

The Act has bedded down somewhat, and the issue to be addressed is whether or not it has made any significant difference to our world as Barristers.

2. SECTION 7 – CHANGES TO THE STATUTE OF LIMITATIONS ACT

It might be useful to start an assessment of the Act with the changes to the Statute of Limitations. I have previously spoken about the history of the Act, and the various changes which have occurred. However from discussing the matter with colleagues, it is patently clear, that the most confusing aspect is Section 7(d). It inserted the following provision into the Statute of Limitations (Amendment) Act of 1991:

“5(a)(1) Where the relevant date in respect of a cause of action falls before the commencement of Section 7 of the Civil Liability and Courts Act 2004, an action ... in respect to that cause of action shall not be brought after the expiration of -

(a) two years from the said commencement, or

(b) three years from the relevant date,

whichever occurs first.
The commencement date was the 31st March 2005. Two years from that date was the 31st March 2007, three weeks ago. Therefore from now on, any accident which occurs is going to have a two year simpliciter, Statute of Limitations period.

However as Counsel, we are going to be asked to draft proceedings relating to accidents which have taken place over the last two years. In those circumstances, the provisions of the new Section 5(a) clearly apply. In every occasion which I have been asked for my views in relation to whether a case is Statute Barred or not, I had to get out both the 2004 Act and the PIAB Act of 2003. The reason for this is that the PIAB Act stopped time.

Under Section 50 of the PIAB Act:

“In reckoning any period of time for the purposes of any limitation period in relation to a relevant claim specified by the Statute of Limitations 1957 or the Statute of Limitations (Amendment) Act, 1991, the period beginning on the making of an Application under Section 11 in relation to the claim and ending six months from the date of issue of an authorisation, as appropriate ... shall be disregarded.

So therefore once PIAB have accepted an Application under Section 11 of the Act, time stops, and doesn't start again for another six months from the date of issue of an authorisation.

In the vast majority of cases therefore, the relevant Statute of Limitation period is probably longer than it was, since the vast majority of Personal Injury actions, are ones to which the PIAB Act apply and therefore, for the period of time in which the case is within the PIAB system, time stops plus a further six months from the date of authorisation.

Most prudent Solicitors, continue to investigate cases, seek medical reports, and prepare a Brief for Counsel, in cases where they believe there either will not be an assessment or alternatively the assessment will not be sufficient.

In such cases, we are likely to be asked to draft Proceedings. Therefore for most cases, the issue of the Statute of Limitations does not arise. However a word of caution:
The PIAB Act does not apply to all civil actions. Any civil action which relates to the provision of a health service to a person or the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person is specifically excluded.
3. ASSAULT CASES – BULLYING CASES

There are other types of cases, in which there is continual confusion. What about assault cases? What about bullying cases?

These cases raise two questions. Firstly does the PIAB Act apply, and should the matter be sent to PIAB? Secondly even if the matter is not sent to PIAB, is the action one in which a Personal Injury Summons should be issued as opposed to a Plenary Summons and Statement of Claim.

I have to say, that there is still great confusion in relation to this matter. It is a similar confusion, to the one which arose about whether or not cases relating to the MIB were actions which should go to PIAB.

That matter was ultimately determined by the Act in the case of Campbell –v- O’Donnell and MI B 26th July 2005.

This was a case in which the Plaintiff was travelling in a motor car which was struck by another car, the property of the First Named Defendant and driven by the Second Named Defendant. The car was not insured. The MIB were the Third Named Defendant.

Finnegan P was asked to determine whether or not, the action was one in which the Plaintiff was not entitled to issue proceedings without reference to PIAB, as had been pleaded in the Defence.

He went through the Act, and noted that it applied to certain “Civil actions”. A “Civil Action” is defined at Section 4 of the Act as being:

“An action intended to be pursued for the purpose of recovering damages, in respect of a wrong, for:

(a) Personal Injuries; or

(b) Both such injuries and damage to property (but only if both have been caused by the same wrong),

but does not include -
(i) an action intended to be pursued in which, in addition to damages for the foregoing, as is bona fide intended, and not for the purposes of circumventing the operation of Section 3, to claim damages or other relief in respect of any other cause of action.

(ii) an Application for compensation under the Garda Compensation Acts and that

(iii) an action intended to be pursued in respect of an alleged breach by the State or any other person of a provision of the Constitution.

(iv) an action intended to be pursued under Section 3 of the European Convention and Human Rights Act of 2003.

He quoted Section 3 of the Act, which sets out what civil actions the Act applies to. I think it is worth setting this out in some detail since I believe there is serious confusion and indeed contradiction, between what is a “Civil Action” as far as PIAB is concerned and what is “Personal Injury Action” as per the Civil Liability Act.

The Section reads as follows :-

“This Act applies to the following Civil Actions:

(a) A civil action by an employee against his or her employer for negligence or breach of duty arising in the course of the employees employment with that employer.

(b) A civil action by a person against another arising out of that others ownership, driving or use of a mechanically propelled vehicle.

(c) A civil action by a person against another arising out of that other's use or occupation of land or other structure or building.

(d) A civil action not falling within any of the preceding paragraphs (other than one arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person or the provision of any medical advice or treatment to a person).
Finnegan P then went on to define the function and role of the MIBI. He pointed out that the MIBI is not defined in any Statute, but felt that it was best understood in the context of **Section 76 of the Road Traffic Act of 1961**.

It is important to know, that the MIBI is not a “Tort Feasor”. It is, in essence, a compensation fund of last resort where, in a case where the MIB is a Co-Defendant with another insurer, the “One Per Cent Rule” applies and the MIB can escape the obligation of payment to a Plaintiff where the other insurer, is held to be at least one per cent responsible. Therefore any claim against the MIB is not based upon any wrong committed by the MIB. It was for this reason that many parties believed that the manner in which the PIAB Act had been drafted meant that MIB cases, did not have to go to PIAB.

However the practicality of the matter was ultimately dealt with by Finnegan P where he said as follows:

> “The legislative intention was to prohibit the bringing of legal proceedings in respect of claims for compensation for personal injuries or personal injuries and damage without the procedure before the Personal Injuries Assessment Board established by the Act being complied with. However the Act is not of universal application to these circumstances but is to apply only in certain situations. The phrase used is “compensation” and not damages. While damages are compensatory in nature historically the two words damages and compensation have a different meaning. The former are available at common law while compensation and not damages was available in a Court of Equity.”

He pointed out that the words used in the Act were misleading. Indeed he attempted to have recourse to the long title of the Act to help him. It didn’t.

Ultimately, he considered whether or not the action came within the exception of Section 4(1)(i). He said as follows:

> “The question is whether this action in addition to damages for the wrong giving rise to the same is intended to claim damages or other relief in respect of any other cause of action ... It is a cannon of construction that words are primarily to be construed in their ordinary meaning or common or popular
sense and as generally understood unless the context requires some special or particular meaning to be given... In this sense the cause of action against the uninsured Defendants is negligence. As against the Bureau there is strictly speaking, no cause of action as the law does not confer upon a non party a right to sue upon a contract. However it is the negligence of the uninsured Defendant that triggers the proceedings and without which the proceedings could not be maintained even with the concession invariably made by the Bureau that an action is maintainable against it.”

He went on to find therefore, that an action against the Bureau was similar as that as against an uninsured Defendant and therefore the action did not come within the exception as set out in Section 4(1)(i).

As one can see, in essence, the Court acted in a logical way, to achieve the intention of the legislature.

Turning to the issue of Assault and Bullying cases, there is of course a difference between such cases. An assault action, per se, against an assailant, is one which has a Statute of Limitations period of six years. An action against an employer of an assailant, is a negligence action, and therefore as things stand, has a two year Statute of Limitations period. Therefore it seems to me, that an action against an assailant, which of course is an action which can be heard before a jury in which one is claiming damages for assault and battery is clearly a “civil action” however I believe it is a civil action, to which Section 4(1)(i) applies namely it is an action intended to be pursued in which, not for the purposes of circumventing the operation of Section 3 of the Act, the Plaintiff, in addition to seeking damages for personal injury seeks damages or other relief in respect of any other cause of action. It is a tight call and one always runs the risk, that the Court will come to the similar conclusion as Finnegan P (as he then was).

As always, there is a practical answer to this matter. PIAB generally tend not to assess such cases.

It seems to me however, that actions against employers of persons who assaulted the Plaintiff, are actions in negligence and therefore are actions which should go to PIAB. Again, from a practical perspective, PIAB inevitably chooses not to assess such cases.
The next issue to be address is thereafter, whether a Personal Injury Summons should be brought or a Plenary Summons and a Statement of Claim. It is my practice, to advise that in cases which have gone to PIAB, a Personal Injury Summons should issue.

However one will never be entirely certain, until the matter is litigated.

Accordingly if one was to be cautious in relation to such matters, it is more prudent to send the matter to PIAB, allow time to stop and thereafter issue proceedings.
4. JUDICIAL INTERPRETATION OF THE 2004 ACT

There has been a very interesting Judicial response to the Act. Prior to the Act, the Courts had been highly critical of false and exaggerated cases as one can see from the various determinations of the Supreme Court in Vessy -v- Dublin Bus [2001] 4IR 192, Shelley-Morris -v- Dublin Bus [2003] IR and O'Connor -v- Dublin Bus [2003] 4IR 459. Thereafter the Legislature introduced the 2004 Act, making it a criminal offence publishable on conviction by indictment of a fine not exceeding €100,000 and or ten years imprisonment. Section 25 created a second offence whereby a person who gave dishonest evidence knowing it to be dishonest was guilty of a crime and obviously Section 26 had the most practical effect whereby the action should be dismissed. The sanctions were mandatory, unless injustice would ensure.

I have previously spoken about a number of High Court and Supreme Court Decisions where the Court was slow to use the draconian powers set out in the 2004 Act, [see Mulcern -v- Flesk Unreported Kelly J 25 February 2005 and Powers -v- Jordan, Supreme Court Unreported 15 April 2005].

A. A further issue arises as to whether or not the Book of Quantum applies to cases which were instituted after the commencement date. I am firmly of the belief, that the Book of Quantum does not apply. Under Section 6 of the Act, to proceedings which commenced prior to the date of commencement of that Section which was the 20th September 2004. In other words, when Judges make reference to the Book of Quantum in cases which were instituted prior to that date, they are wrong.

It is quite surprising, nonetheless, given the number of Personal injury actions which come before the Courts, how seldom the Act seems to be referred to in written Judgments. Indeed a Justis search, will reveal only twelve cases, most of them not relevant to the issue. Three however are.

B. In Corbert -v- Quinn Hotels Limited Unreported 25th July 2006, Finnegan P refused an Application pursuant to Section 26 of the Act where it was contended, that the Plaintiff gave evidence that was false and misleading in a
material respect which she knew to be false or misleading. He said as follows:

“I refuse that Application as while the Plaintiffs evidence was indeed misleading I am satisfied she gave her evidence honestly believing same to be true and that she had not intended to mislead the Court in any respect.”

C. Perhaps the most interesting case in which the provision of the Act were dealt with, is the case of Kerr -v- Molloy and Sherry and Others Unreported 16th November 2006 where Herbert J came to the conclusion that the Plaintiff had indeed seriously exaggerated his injuries and that he was satisfied that the Plaintiff knew he was exaggerating his injuries.

In that case Counsel for the First Named Defendant read out the provision of Section 26 of the Act to the Plaintiff and the Court adjourned for some time to enable the Senior Counsel for the Plaintiff explain to the Plaintiff the meaning and effect of the Section in plain ordinary terms. Herbert J said as follows:

“I am driven by the evidence to the conclusion that this Plaintiff is seriously exaggerating his injuries and that his evidence with regard to his inability to work and his suffering constant pain in the area of his right big toe is false in a material respect. I am satisfied on the evidence that the Plaintiff knows this evidence is false. I must therefore ask myself whether to dismiss his action would result in an injustice being done”.

He went on to read the Medical Reports and came to the following view.

He said:

“Given the clear Medical Reports ... the Court was not at any stage mislead by the replies (of the Plaintiff). In these circumstances, I believe it would be altogether disproportionate and therefore unjust to dismiss this Plaintiffs action, though I would have done so had he made a claim for loss of earnings or loss of ability to compete in the labour market”.
He then awarded him €12,500.

At a further Hearing relating to the issue of costs, the case of O’Connor – v- Dublin Bus was raised. Herbert J, ultimately came to the conclusion, that since the Plaintiff’s action was one which should have been instituted in the Circuit Court, on any reading of the Medical Reports, it was one in which penalties of the Courts Act of 1991 should apply and therefore from whatever Order of Costs was made, (which was a Circuit Court Order), the Plaintiff was obliged to pay to the Defendant the difference in litigating the action in the High Court as opposed to litigating the action in the Circuit Court, a task which Herbert J allowed the Taxing Master to undertake, the net effect of which, was the Plaintiff received nothing.

Therefore it would seem, that the Courts are slow to impose the draconian consequences of the Act, and as yet, there is no reported Decision where a Court has dismissed the Plaintiff’s action, in circumstances, where it would not have otherwise have dismissed the Plaintiff’s action but for the exaggerated and misleading evidence of the Plaintiff.
5. **THE BOOK OF QUANTUM**

The Book of Quantum is now four years old. It is extraordinarily out of date. It was of little use when it came into being, and now must be less than useful. Interesting, under Section 54(b) of the Act it was a principal function of PIAB, to prepare and publish a document containing general guidelines as to the amounts that may be awarded or assessed in respect of specified types of injury. Further it was a function of the Board to collect an analyse of data in relation to amounts awarded on foot of or agreed in settlement of, Civil actions to which the Act applied. There doesn't seem to be a Statutory obligation, to update the Book of Quantum. It is perhaps for this reason, that Courts have been slow to take into consideration the Book. A year and a half ago, Budd J in the case of *McFadden -v- Weir*, Unreported 16 December 2005 said as follows. Having gone through a number of cases including a very interesting case called *MN -v- SM [2005] 4IR 461*:

“I have considerable reservations about the usefulness of the PIAB Book of Quantum as so much depends on ones assessment of the personality of the individual Plaintiff and how devastating the effect of the particular injuries have been on such a person with the relevant particular circumstances and character.”

While a number of other High Court Judges have made reference to the Book of Quantum, it seems to me that its effectiveness is now negligible. From a practice perspective, hardly any Counsel make reference to the Book of Quantum in attempting to settle cases. Further, it’s extraordinarily broad sweep of categories, and of awards per injury, make it pretty useless.
6. DAMAGES

I referred to the case of **MN –v- SM**, a decision of Judge Denham, in regard to the assessment of damages in a sexual abuse case. That was a case in which the Plaintiff was awarded the sum of €600,000 in the High Court against a Defendant arising out of sexual abuse over a period of five years culminating in rape. The Supreme Court held that a sum of €350,000 would be more appropriate. In so doing however, it set out a number of relevant factors which should be considered in assessing the level of General Damages. These are that an award of damages must be proportionate in three regards:

(i) It must be fair to the Plaintiff and the Defendant.

(ii) It should be proportionate to social conditions, bearing in mind the common good.

(iii) It should be proportionate with the legal scheme of awards made for other personal injuries.

When all three are taken into consideration, it fell to the Court to balance, weigh and determine these factors.

Denham J assessed the whole concept of General Damages, in reference to the case of **Synnott –v- Quinnworth** [1984] LRM523 where O'Higgins C.J. felt that there must be a limit to General Damages, particularly in the context where the Plaintiff was paid significant Special Damages which would cover his expenses and loss of earnings into the future. He said as follows:

“What is to be provided for him in addition in the way of General Damages is a sum, over and above these other sums, which is to be compensation, and only compensation. In assessing such a sum, the object must be to determine a figure which is fair and reasonable. To this end, it seems to me, that some regard should be had to the ordinary living standards in the country, to the general level of incomes, and to things upon which the Plaintiff might reasonably be expected to spend money.”
It is that Decision that has often been interpreted, as being one where, if there are significant Special Damages, the General Damages may be reduced somewhat. Indeed while that was indeed a view expressed by practitioners, it never had a Judicial voice. Denham J gave it one. She said as follows:

“I would adopt and apply the general principal set out by O’Higgins C. J. with one significant difference. In a case where catastrophic injuries have occurred and where a Plaintiff is left, for example, a paraplegic, there will be a significant award of Special Damages. This considerable sum of Special Damages is a factor in determining the level of General Damages when the overall situation is considered by the Court and may result in a reduction in the level of General Damages awarded.”

In Keeley –v- the Minister for Health [1999] 2 IR Morris P felt, that the “Cap” should be IR£250,000. In McEneaney –v- Monaghan County Council, O’Sullivan J felt it should be £300,000, the Euro equivalent of £300,000 is €380,921.42. Denham felt, the equivalent today was in excess of €300,000.

She went through various statutory schemes including The Redress Board which assessed the maximum award at €300,000 and the Personal Injury Assessment Board Book of Quantum for a paraplegia up to €300,000.

She summarised by saying as follows:

“In all the circumstances of this case, I am satisfied that an award of General Damages to the Plaintiff should be at the higher end of the range of awards of General Damages and Personal Injury actions generally. Bearing in mind all the circumstances of the case and the relevant factors, the very serious injuries to the Plaintiff, yet allowing that they are not the worst case scenario, I am satisfied the appropriate award to the Plaintiff would be €350,000.”

Geoghegan and McCracken J concurred.

This is fascinating stuff. Having noted that the Book of Quantum assessed the most serious injury at €300,000, and that the Redress Board did the same, and having noted that the case before her was not the most serious of cases, she assessed General Damages in the sum of €350,000, €50,000 in excess of the maximum set out in the Statutory Schemes.
This case should also be seen in the context of the Supreme Court’s recent Decision in **Shortt – v- An Garda Siochana and Others.** Finnegan P, in October of 2005 assessed General Damages under the **Criminal Procedure Act** of 1993 at €500,000, Exemplary Damages at €50,000 together with other Special Damages making a total award of €1.9 million. In assessing the General Damages under the **Criminal Procedure Act** of 1993, the then President felt it analogous, to assessing the General Damages in a defamation action. This was a case, of very serious case of false arrest and perjury on the part of An Garda Siochana.

The Supreme Court gave its Judgement a number of weeks ago.

Murray C J, relied upon the principals laid down in **Conway – v- INTO [1991] 2IR** where Finlay C J had felt that there were three categories of damages being Ordinary Compensation Damages, Aggravated Damages and Punitive or Exemplary Damages, which seem to be the same thing.

The differences between Aggravated Damages and Punitive Damages, are that Aggravated Damages are Compensatory Damages by reason of the manner in which the wrong was committed, the conduct of the Wrongdoer, the commission of the wrong, and the conduct of the wrongdoer in the Defence of the claim. Punitive Damages or Exemplary Damages arise from the nature of the wrong which was being committed and is intended to mark the Courts particular disapproval of the Defendants conduct in all the circumstances of the case, so while Aggravated Damages, relate to the manner in which the Defendant acted towards the Plaintiff, Punitive and Exemplary Damages, are a measure of the Courts displeasure.

The Court therefore increased the award for General Damages, to include Aggravated Damages from €500,000 to two and a quarter million euro, and increased the award for Exemplary Damages from €50,000 to €1million making a total of €4.6 million.

The time has come, for the Bar, to take the issue of damages to the Judiciary. Traditionally, the Bar has never suggested to the Court the level of damages. I believe that should change. In circumstances where the Supreme Court on two occasions, have raised the bar so to speak, the position of a person whose life is ruined by the negligent action of another must be revisited.