



Time to reduce the burden of personal injury claims

July 2016

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About the Ibec OHS Policy Committee

Ibec is Ireland's leading business representative organisation. We provide specialist regulatory advice and assistance to occupational health and safety (OHS) professionals working for members across all sectors of the economy.

The OHS Policy Committee provides a forum to discuss policy and regulatory matters, and allows members to network, share information and find common approaches to problems. We regularly disseminate feedback received from individual members on OHS issues that may affect other members. Where a more structured approach is needed to collect relevant facts or opinions, we work closely with Ibec's Research Unit.

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Foreword

Concern over the cost burden of personal injury claims and of related insurance policies is not new. The last serious effort by government to address the issue dates back to 2004, with the establishment of the Personal Injuries Assessment Board. Although the Injuries Board continues to play a helpful role, Ibec believes that the situation has deteriorated over the past few years. Many Irish firms now feel that the system as a whole is unfairly stacked against them, and that the resulting burden is a discouragement to job creation.

Ibec has adopted an evidence-based approach to verify the scale of the problem, conducting a large scale member survey earlier this year. We have also held informal, confidential discussions with a range of stakeholders in order to get a sense-check on the survey findings. Our current focus is on **Employer Liability and Public Liability**, which together account for 40% of claims lodged with the Injuries Board, and for one-quarter of the awards it makes. We have deliberately excluded motor-related claims from the scope of this study.

On behalf of Ibec, I would like to thank the members who responded to the survey. We are also indebted to the members of our OHS Policy Committee for their advice on the survey design, and to the following external bodies for providing numerous insights.

- Insurance Ireland
- Central Bank (Insurance Regulation Division)
- Injuries Board
- State Claims Agency
- Irish Public Bodies Mutual Insurance
- National Competitiveness Council (DJEI secretariat)
- Health and Safety Review
- Data Protection Commission

The Committee members hope that this report will catalyse a much-needed change in how personal injuries are dealt with in Ireland.



Andrew J Bowers
Director Operational Excellence, EMEA, Baxter
Chair, Ibec OHS Policy Committee

1. What needs doing to improve the personal injuries regime?

Below, we set out five sets of recommendations to address various problems that are described in this report. Ibec intends to engage with government, state agencies, insurers and the wider business community to encourage action on each of these.

1.1 The legal system must have due regard for published guidance on awards

As long as claimants (or their solicitors) regard recourse to the law courts as a low-risk route for getting additional compensation, they have a strong incentive to reject whatever figure the Injuries Board proposes. Ibec understands that the rejection rate used to be below 30% but has since crept up towards 40%. Court awards depend on the circumstances of the injury and of the claimant, but generally they show scant regard for the guidance in the Board's (2004 vintage) Book of Quantum. It is notable that some inordinately large injuries awards have recently been reduced following successful challenges in the Court of Appeal.

Ibec recommends:

- The forthcoming second edition of the Book of Quantum, currently being finalised by independent consultants, ought to be peer-reviewed and endorsed by at least one serving member of the Appeal Court prior to publication. Although the original edition was intended simply to reflect prevailing ranges of district and high court judgements, the new edition should include any adjustments the peer-reviewers consider appropriate.
- Without interfering with the judicial process, the Department of Justice could offer to provide funding for initiatives aimed at ensuring greater consistency in the application of the updated guidelines in making court awards. For example, the provision of one-to-one coaching by recently retired District and High Court judges could be of benefit to those appointed since 2014.

1.2 Initial screening of injury claims must be seen to be impartial

The Injuries Board was originally conceived as a public service for prompt settlement of compensation claims where the question of fault is not an issue. In our members' experience, however, the Board often seems to be taking the side of claimants. Ibec does not believe that this is intentional, but we nevertheless consider that the Board ought to take precautions to avoid any appearance of bias. Specifically, we recommend the following.

- The Board's website should place less emphasis on potential pay-outs ('click here to estimate what your claim may be worth') and focus more on the benefit of timely, objective, conflict-free settlements.
- The Board should agree to process claims only in cases where the claimant provides a completed application with full relevant facts (including any evidence to justify special damages) at the earliest feasible stage.
- The Board should require claimants to present themselves for independent medical examination within the Irish state when requested, regardless of where they are currently resident. Failure to attend, without good cause, should invalidate the claim.

1.3 The legal profession should promote better control of costs

From the moment that an Injuries Board award is rejected, a potential conflict arises between the interests of claimants and of their legal advisors, particularly where the latter expect to be paid by the hour rather than a percentage of the value of damages. Ibec understands that the amount of legal work could be reduced to some extent through the use of mechanisms to streamline court proceedings. Fixed fees would potentially provide another incentive to avoid unnecessary delays and complexity. We therefore recommend:

- Legal practitioners should adopt a voluntary code of practice to promote the use of pre-action protocols in liability claims where appropriate.
- The code should include guidance for claimants on appropriate levels of fixed fees for a typical court action where the only issue at stake is the appropriate level of compensation.

1.4 Insurers should publish more information on what is driving insurance costs

There continues to be public disagreement between the Injuries Board, insurance providers and the legal profession over what is driving up the cost of injury claims and hence of insurance policies. In Ibec's view, this ongoing 'blame game' is exacerbated by a lack of reliable, meaningful facts and figures. We therefore recommend the following.

- Insurers should develop a voluntary code of practice on common reporting standards that would enable insured firms to know whether their premiums are cost-reflective. If this requires pooling of commercially sensitive information, the sector should consider employing an external agent to anonymise the data. If designed carefully, this could be cheap and simple to administer.
- Failing this, the Government (in cooperation with the Central Bank) should impose reporting obligations that provide a more complete picture of what is driving liability insurance costs.

1.5 Firms need to make well-informed choices about dubious claims

Many of our member firms report being unhappy with decisions by insurers to settle personal injury claims that the firm itself believes to be spurious or exaggerated. We recommend the following.

- Employers wishing to take a more robust line against questionable claims should consider raising the level of excess on their policies. However, in doing so they need to be aware of the risks.
- Employers may rely on video surveillance to collect evidence for defence of claims. However, they need to be aware of, and fully compliant with, Ireland's data protection legislation.

The remainder of this report is set out as follows. Section 2 provides some examples of the experiences that our members are reporting. Section 3 outlines various issues that were highlighted through our desk research and subsequent exchanges of views with other stakeholders. Section 4 summarises the findings of our member survey, with a more detailed analysis being included in Appendix 1. Section 5 compares the current Irish guidelines on compensation for personal injuries with those prevailing in England and Wales. Section 6 concludes that action on these issues is urgently needed to help maintain Irish business competitiveness and thereby boost employment.

2. Irish businesses are deeply frustrated over personal injury claims

Since the start of 2016 we have received reports of Employer Liability (EL) and Public Liability (PL) insurance premium hikes that the members felt were unjustified. It was this in particular that prompted Ibec's Infrastructure Unit to commission the membership survey whose quantitative findings are summarised in Section 4.

On a related note, members reported numerous instances of insurance providers seemingly unwilling to contest personal injury claims that the firm strongly believed to be spurious.

Informal feedback we received over the past 18 months also included a number of issues concerning the Injuries Board. The most common complaint was that its website includes prominent examples of compensation awards recently made to employees or members of the public. This arguably serves to encourage claims that might not otherwise be lodged at all.

To test the waters on these points, Ibec's member survey invited respondents to elaborate on their individual experiences. We are not in a position to verify the factual accuracy of the responses received. However, the following four comments were typical, and serve to illustrate just how high feelings are running.

- *"The fact that the Injuries Board doesn't hear from us and our insurance company settles is preposterous. We have people that have made false claims and got awards. If it continues, we will become uninsurable."*
- *"The legal cost in defending a claim and the bureaucracy of the legal system is simply incredible. Regardless of being right or wrong the company whom the legal system adjudges to have the money will pay costs and damages in every case that I have seen. This system is seriously flawed and not fit for purpose. The Injuries Board is not working as it should or was intended."*
- *"We are very concerned with the level of settlements made by the courts. We see the number of claims increasing in our company and have to think the level of settlement is too high. We operate in the UK and the level of claims is lower."*
- *"We largely self-insure so see first-hand how claims are handled. It is an education. Because the judicial awards favour the plaintiff each time, the defendant has to prove his innocence. The burden of proof is very low for the plaintiff, while the bar for liability on the part of the defendant is also very low. This results in many, many cases not coming before a judge, but settled on the day depending on the judge drawn. Solicitors & barristers still get paid on both sides, so the only loser is the 'deep pocket' business. The insurers can recoup costs through higher premiums. There is no incentive to change the system. This is a hidden burden for businesses."*

3. Different stakeholder perspectives – but some common themes

There is ongoing public disagreement between representatives of Insurance Ireland, the Law Society and the Injuries Board, each seeking to disclaim responsibility for the recent spike in insurance costs for motorists. Several well-documented factors may be adversely affecting the insurer's costs; these include changes in court award limits, reduced discount rates for long term injuries, and tighter regulatory obligations on solvency. As noted by the National Competitiveness Council, however, it has proven very difficult to quantify the relative importance of these factors. Ibec believes this is principally due to a lack of meaningful data.

The same lack of reliable, relevant statistics applies equally to Employer and Public Liability insurance. For example, there are conflicting assertions even about the average cost of Employer Liability claims. The Central Bank of Ireland last year published a Bodily Injury Thematic Review which noted an increase of €4,300 in the average cost per EL claim between 2012 and 2014, bringing it up to €20,700. However, the average EL award reported by the Injuries Board for 2014 was far higher - over €32,000. Admittedly, this comparison is not strictly like-for-like. The Central Bank figure is forward-looking, based on insurers' provisions for outstanding claims at the year-end whereas the Injuries Board figure is based on awards actually made. Nevertheless, they seem difficult to reconcile. Ibec would have expected the Injuries Board figure to have been *smaller* than that of the Central Bank. After all, insurers should expect 40% of future claims to be rejected, leading to higher court awards and additional legal costs. One possible factor (but probably not the main one) is that insurers are liable only for amounts above the excess on a given policy.

Despite the lack of hard data, a number of common themes emerged during our engagement with the external stakeholders:

Firstly, while there has always been a range in the size of award for any given type and severity of personal injury, the upper end seems to have increased sharply over the past two years, with one stakeholder referring to it as 'a lottery'. Several stakeholders expressed the view that the size of an award seems to depend on which judge is hearing the case. They suggested two contributory factors in particular:

- The upper limit for awards in the Circuit and District courts increased in January 2014
- Several senior judges took early retirement later that year, prompted by new rules on the tax treatment of public sector pensions. They were replaced by a cohort of new judges, generally less experienced in personal injuries cases.

All of the stakeholders we interviewed are expecting that a new edition of the Book of Quantum will see upward adjustments. In theory this should remove the incentive for claimants to reject Injuries Board awards, thereby reducing the need for time-consuming, costly court proceedings. It may not work out that way in practice though. Law firms active in this area of litigation will undoubtedly analyse the new guidance carefully, looking for new commercial opportunities.

It is unclear whether the courts themselves will pay more attention than hitherto to the guidance. Given that it is neither written by the judiciary, nor endorsed by it, there could well be a continued lack of buy-in.

A number of stakeholders touched on the issue of catastrophic injuries, and the potential for Periodic Payment Orders (PPOs) to reduce the uncertainty over how best to provide for compensation over an extended period of years. The Central Bank sees PPOs as driving increased reserves, although other stakeholders see it as a cost-effective alternative to lump-sum settlements based on very low discount rates.

One respondent also mentioned the need for more streamlined pre-action procedures to avoid wasting court time. Arguably such protocols relate mainly to medical practitioners rather than to

employers, but even a small number of these high-value cases could drive up EL and PL insurance costs for everybody.

A number of stakeholders spoke candidly about the commercial risks of challenging questionable injury claims, even where the insured party has supporting evidence. Even if the challenge is successful, the insurance company may end up paying out more in legal costs than the amount if avoids paying to the claimant. It can prove very difficult to recover those legal costs.

A growing number of Ibec members, frustrated by their experience with the Injuries Board and with their insurers, have opted for very high excess amounts on EL and PL policies. This is in effect a move towards self-insurance. By doing so, they not only keep a lid on their annual insurance premium but also have more say on whether to contest a questionable claim.

It is common for our members to operate video surveillance cameras for site safety and security. These cameras may provide clear evidence that a claimed injury was either exaggerated or was the fault of the injured party. However, unless proper procedures are put in place and documented, such evidence may be ruled inadmissible in court. It is very important for employers to be aware of the current laws on data protection. They should also bear in mind that if a defence in court involves (unsuccessfully) challenging the honesty of the injured party, the judge may decide to award the claimant aggravated damages.

4. Member survey on injury claims between 2011 and 2015

Our on-line survey included questions about the safety management systems that firms have in place as well as numerical questions about accidents, claims and costs. We invited 2700 member companies to take part in our on-line survey. Approximately 15% of them responded. This section summarises the main findings. For further details, please refer to Appendix 1.

Accidents and claims

We were encouraged to learn that more than four out of five firms responding to the survey have safety management systems in place and consider employee safety to be a priority for their senior management. Ibec would hope to see this figure rise even higher in the future. It is not surprising, though, that the number of recorded workplace accidents per annum declined over this period for those we surveyed. Unfortunately, the benefit of this was more than offset by an apparent increase in the proportion of accidents leading to a personal injury claim.

Aggregate settlement costs for personal injuries in 2015 amongst those we surveyed were somewhat lower in 2015 than in 2011. We suspect, though, that this statistic is misleading, and that it is a reflection of the growing number of injuries claims from 2014 and 2015 that have yet to be settled in the courts.

Employer Liability insurance

Average EL insurance premiums in 2015 for firms in services and distribution sector equated to circa 0.9% of payroll cost. For the manufacturing sector, the corresponding figure was 1.6% of payroll.

Within each sector, the annual rate of increase of premiums also varied depending on how many injury claims a given firm had experienced in earlier years. This presumably relates to risk weightings on individual policies.

Across all three sectors, average annual cost of EL insurance (expressed as a proportion of payroll) rose by 5% in 2012, remained static for the following two years, and then rose by a further 7% in 2015. We are struggling to reconcile these findings with the Central Bank's assertion that the estimated average cost per EL claim jumped by 27% between 2012 and 2014. Further work would be required to know whether our trend data for insurance premiums has been biased by a hidden variable, such as the average level of excess on EL policies over the period.

Public Liability insurance

Average PL insurance premiums for the distribution sector equated to 0.7% of payroll cost in 2015, compared to 1.12% for the services and manufacturing sectors. Overall, the rates of premium increase in recent years are broadly consistent with the Central bank's analysis of claim costs.

- Service firms faced by far the biggest premium increases (20%) over the five year period, presumably due to an apparent doubling of the frequency of reported accidents.
- The manufacturing firms we surveyed experienced an average increase of 7% in premiums compared to 2011.

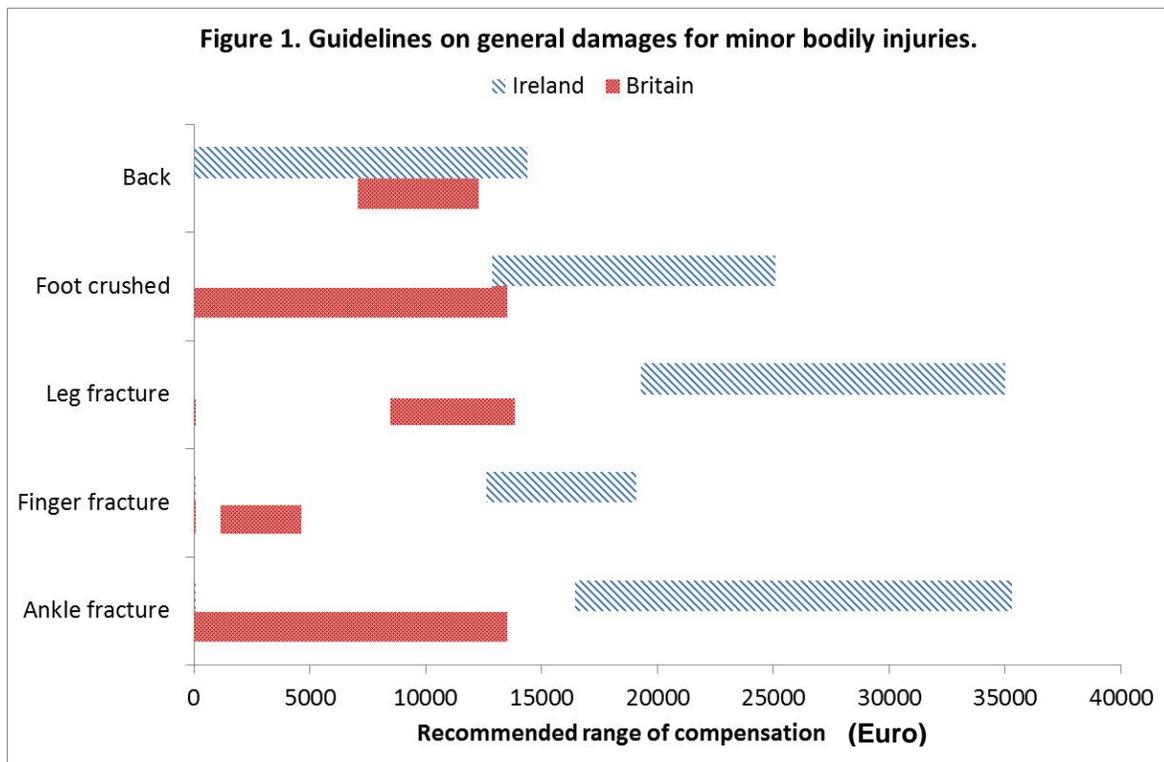
- Distribution sector firms saw an increase of just 4% over the period. Arguably, there should have been an absolute decrease in the average premium for distribution firms, given the observed sharp decrease in the frequency of their accidents and claims. However, the total number of distribution firms in the survey was quite small, and the cohort included one relatively large retailer. These particular statistics may therefore not be fully representative of the wider sector.

5. Comparison of Irish and British guidance on injuries awards

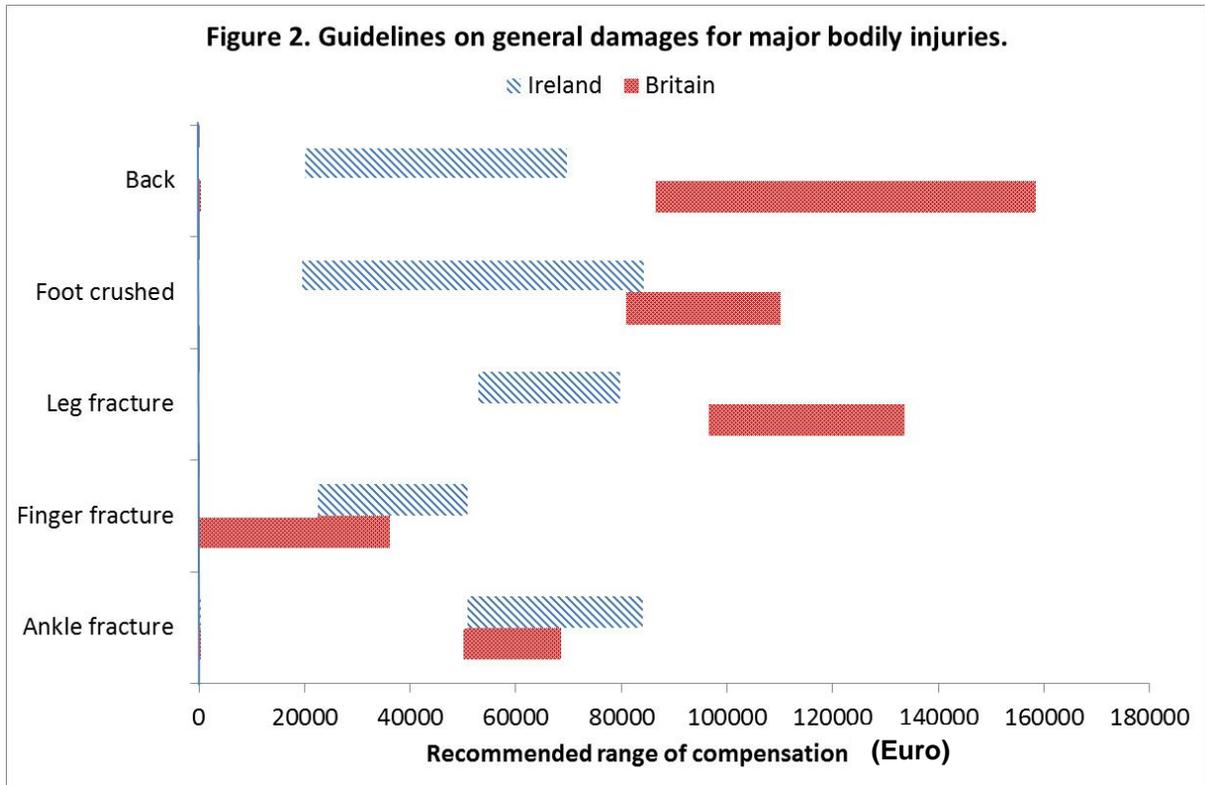
Irish courts, like the Injuries Board itself, are required by law to have regard to the Book of Quantum when assessing the amount of general damages for bodily injury. However, that guidance is now 12 years old, and the courts are at liberty to adjust award levels to reflect medical inflation and other factors. A second edition of the Book has been commissioned by the Board and is expected to issue before the end of 2016. It will be written by independent consultants, although these presumably do not include judges and lawyers, either practising or retired.

The courts in England and Wales are required to have regard to 'Guidelines for the assessment of general damages in personal injury cases'. Ibec believes they are taken more seriously than is the case in Ireland. Regular updates are commissioned by the Judicial College, a national body responsible for training of all judicial office holders. The 13th edition (issued in 2015) was personally endorsed by Appeal Court judge Lord Justice Jackson, who had previously led a major review of civil litigation costs.

Common to the Irish and British guidance is the principle that the size of award depends on the nature and severity of the bodily injury. Figure 1 below compares the range of recommended compensation (expressed in Euros at a sterling exchange rate of 0.85) for a selection of typical minor injuries in the 2004 Book of Quantum and the 2015 Guidelines. (Minor injuries are classified as substantially recovered within 12 months of the accident.) It is noteworthy that the Irish guidance, despite being 11 years older, is substantially more generous in four of the five categories. In fact the gap is so large that there seems to be virtually no overlap between the two scales.



However, Figure 2 shows that for more serious, longer term, injuries, the comparison is more complicated. British guidance is substantially more generous than the Irish Book of Quantum for some injuries, but slightly less generous for others. Further work would be required to understand why this is. The discount rate that judges use for calculating the equivalent lump-sum value of compensation for long-term damage may well differ between Ireland and Britain, but it presumably does not depend on the type of injury.



6. Conclusion – a broken system that urgently needs overhauling

Our research confirms a slow but steady rate of increase in personal injury insurance premiums over recent years. We did not compare premiums with those in the UK, although we did compare the underlying claims costs. Given that the great majority of claims are for minor injuries, our data seems to suggest that Irish businesses are at a significant cost disadvantage compared to their British competitors. It would certainly be worth re-doing this analysis after the new Book of Quantum is published.

Our research uncovered ample evidence of an utterly dysfunctional system for settling injuries claims. Unless we take preventative action now, there is a risk that the rate of premium increases will start to accelerate. There are several factors to consider:

- The Central Bank, in its role as insurance regulator, notes that EL and PL compensation awards are rising faster than insurance premiums. However, its priority is to ensure adequate solvency of the insurers concerned. This will require increasing the reserves (and hence charging their customers more) regardless of the impact on business competitiveness.
- The insurance companies readily acknowledge numerous problems dealing with spurious injury claims. However, they have inadequate incentives to take a more robust line – the risks often outweigh the benefits.
- Even legitimate claimants have a strong financial incentive to regard the Injuries Board as a stepping stone to litigation. The Injuries Board is effectively in competition with the courts, because the Book of Quantum has not been regularly revised and is therefore not taken seriously. Ibec doubts whether this attitude will change following the publication of updated guidance unless there is explicit endorsement by Ireland's most senior judges.

To sum up, there can be no quick or easy fix, but it is imperative that we rectify these problems.

- Businesses and public bodies will avoid unnecessary costs and they may be able to create more jobs as a consequence.
- Insurers will find fewer of their customers opting for self-insurance.
- Claimants will continue to get fair compensation, only more quickly.
- The courts will cease to be backed up with injuries litigation cases dragging on for years.

The government should therefore not view these issues as solely affecting the private sector. Our research confirms that the whole economy stands to benefit. It is high time for action.

Appendix 1

Claims Survey - Methodology and Results

In early 2016 the Ibec research unit designed and conducted a member survey on employer and public liability insurances. Other insurance lines, such as motor or commercial fleet insurance and professional indemnity were deliberately excluded. A total of 367 companies participated.

The survey included a request to provide five years of data around accident and claims experience, employee numbers and cost of premiums and settlements. It also sought information on the safety management systems in place within companies.

Of the companies that participated, 48% are engaged in service provision, 40% are in manufacturing and the remaining 12% are in retail/distribution. They ranged in size from local businesses to large multinational corporations. Common to most of them was a high degree of proactivity on issues of safety management. Over 80% of the respondents operate a safety management system and a similar proportion place a high priority placed on safety at top management level.

In relation to **employer liability** insurance premiums, an increase of 13% was recorded by respondents across the five years examined, 2011- 2015. During this same period, the number of accidents fell by 5% while claims increased by around 8%. There was variation in accident and claims experience by company size, sector and region and this is explored further in this document.

It was not practical for our survey to identify the exact proportion of accidents in a given year that ultimately resulted in a claim. Instead, we calculated a proxy, namely the ratio of claims lodged in a given year to the number of reported accidents that year. This increased from 16.7% in 2011 to 18.9% in 2015, suggesting a marked increase in the propensity to claim on foot of an accident. The total cost of settlements (as reported by roughly half of the respondents) actually decreased from €9.6 million in 2011 to €8.9 million in 2015.

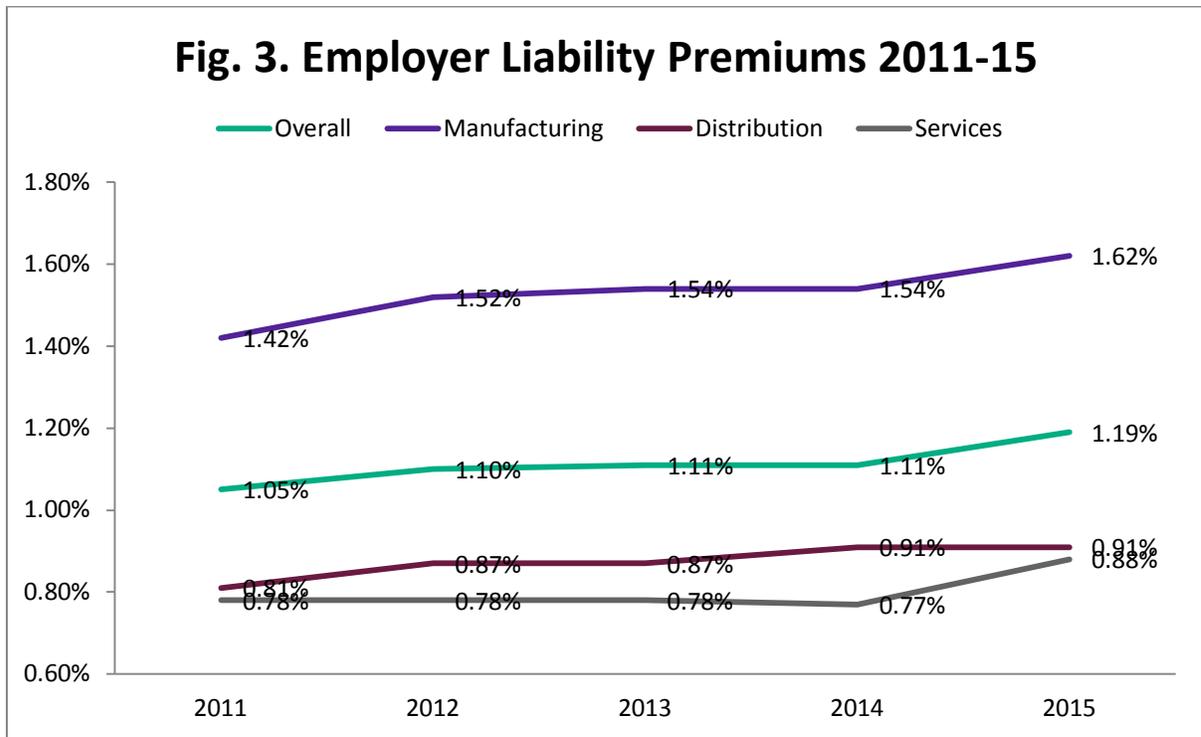
Of the 86 companies that had no claims over the five years, the average increase in premiums was 6.5% over the period. Of the 24 companies had claims across all five years surveyed, the average increase was 18.4%. The sample size is too small to be conclusive, but the observed difference in premium increases is in line with what we expected.

In relation to **public liability** insurance premiums, there was a 12.5% increase over the period 2011 to 2015. The number of accidents per annum during that period roughly halved over that period, and the number of claims decreased by a similar proportion. The overall conversion rate of accidents to claims rose from under 25% to over 27% over the period. However, the rate observed in each year also varies depending on the size of company. We are not sure why this is. The total cost of settlements reduced from €9.0 million to €7.9 million.

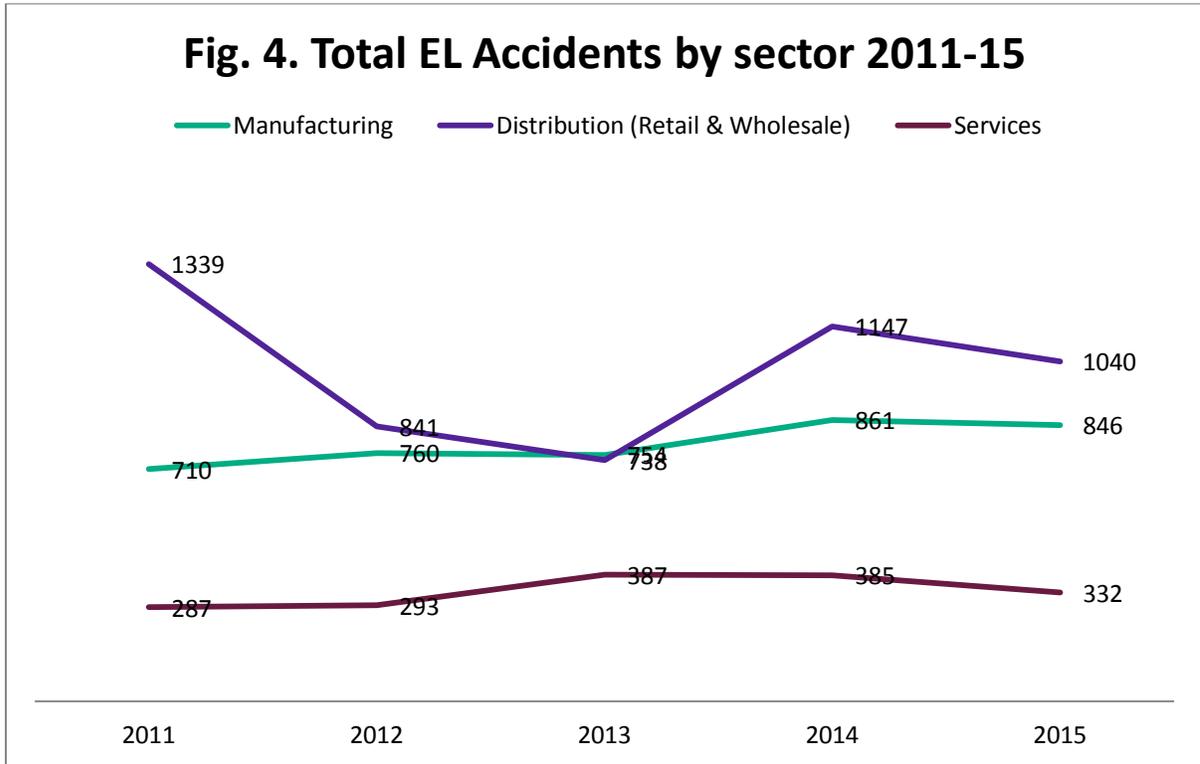
Most respondents reported a high level of engagement in **safety management practices**. Nearly three quarters provide regular training for employees in Occupational Health and Safety. Over 80% have a safety management system in place, including a case management system for accidents. A similar proportion conducts regular safety audits, and ensures that OHS is a regular agenda item for senior management. Almost two thirds of respondents indicated that they undertook regular OHS communications with contractors on-site and just over half undertook pre-employment medicals for new staff.

Employer liability

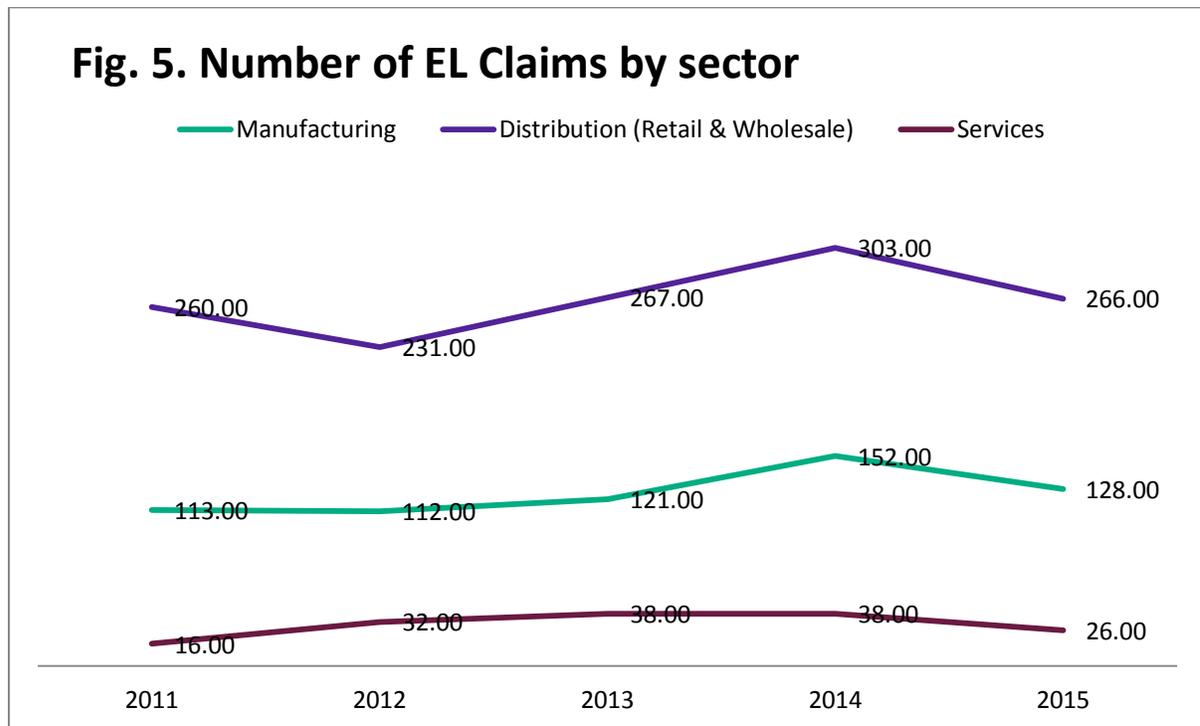
Respondents were asked to provide details of the cost of employer liability insurance as a percentage of payroll costs. Over the five years of the survey the annual cost of insurance increased from 1.05% to 1.19% of payroll. Figure 3 below shows the evolution of these premiums within three broad sectors of industry.



Across the same five years covered by the survey, the total number of reported accidents in the responding companies decreased by 5%. Figure 4 below shows the breakdown by sector.



Even though the number of EL accidents had decreased across the respondent companies, the number of claims increased by almost 8%. Figure 5 below gives the breakdown by sector. It should be noted that the cohort of distribution-sector respondents was relatively small, and the findings may be influenced by the inclusion of one relatively large retailer.



As might be expected, our analysis suggests that those respondents who experienced fewer claims seemed on average to face lower rates of premium increases over the period.

Some 86 companies had no claims over the five years surveyed. Most of these have fewer than 50 employees. The small firms reported an average increase of 8.4% over the period. When we include all companies who had no claims across the five years surveyed, the increase was just 6.5%. However, Table 1 below shows an anomalous result for firms employing between 100 and 249 staff than may merit further research.

Company size	2011	2012	2013	2014	2015	Overall % change
Less than 50 employees	1.07	1.07	1.12	1.11	1.16	8.4
50-99 employees	0.83	0.83	0.83	0.83	0.83	0.0
100 – 249 employees	0.55	0.55	0.47	0.47	0.51	-7.3
250 – 499 employees	0.15	0.17	0.17	0.15	0.15	0.0
Over 500 employees	0.01	0.01	0.01	0.01	0.01	0.0
Total	0.92	0.92	0.94	0.94	0.98	6.5

The 24 respondent companies reporting claims in all five years experienced an average increase of 18.4% over the period. However, as Table 2 below shows, the largest firms seemed to fare better than the others. This merits further investigation – one possibility is that they include multinationals who are insured outside Ireland.

Company size	2011	2012	2013	2014	2015	Overall % change
Less than 50 employees	No companies in this cohort					
50-99 employees	No companies in this cohort					
100 – 249 employees	1.70	1.70	1.70	1.87	2.03	19.0
250 – 499 employees	1.90	2.50	2.44	2.30	2.50	31.6
Over 500 employees	0.73	0.71	0.72	0.74	0.75	02.7
Total	1.14	1.28	1.27	1.27	1.35	18.4

Public Liability

The cost of public liability premiums increased from 0.96% in 2011 to 1.08% in 2015, an increase of 12.5%, a similar proportional increase to employer liability premiums. Figure 6 shows the breakdown by sector.

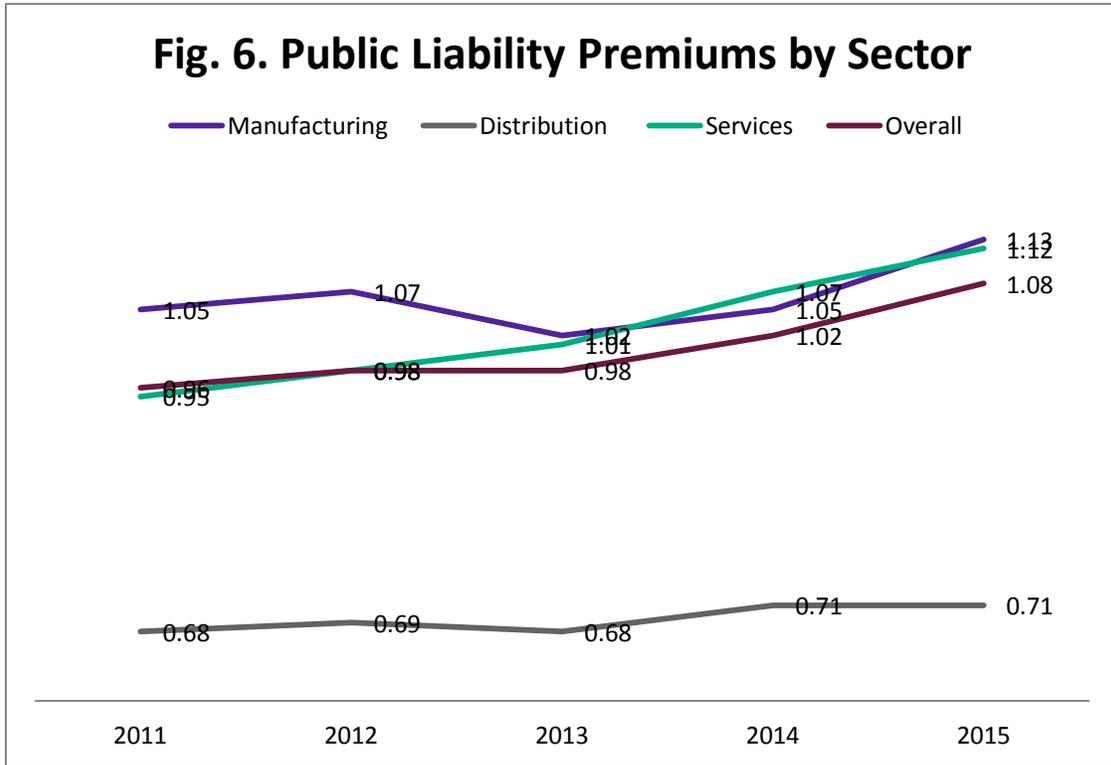
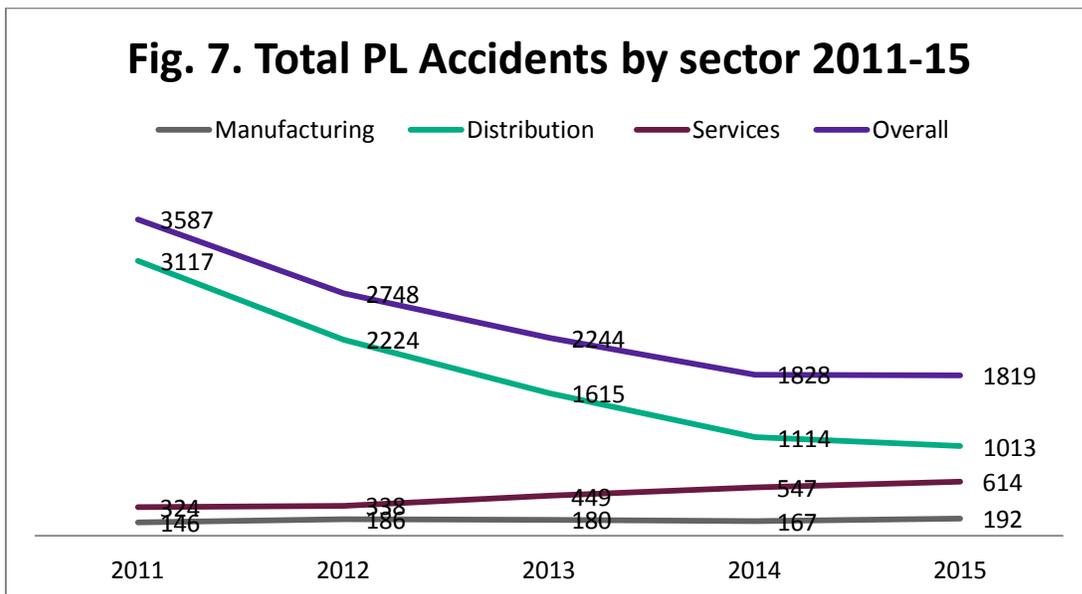
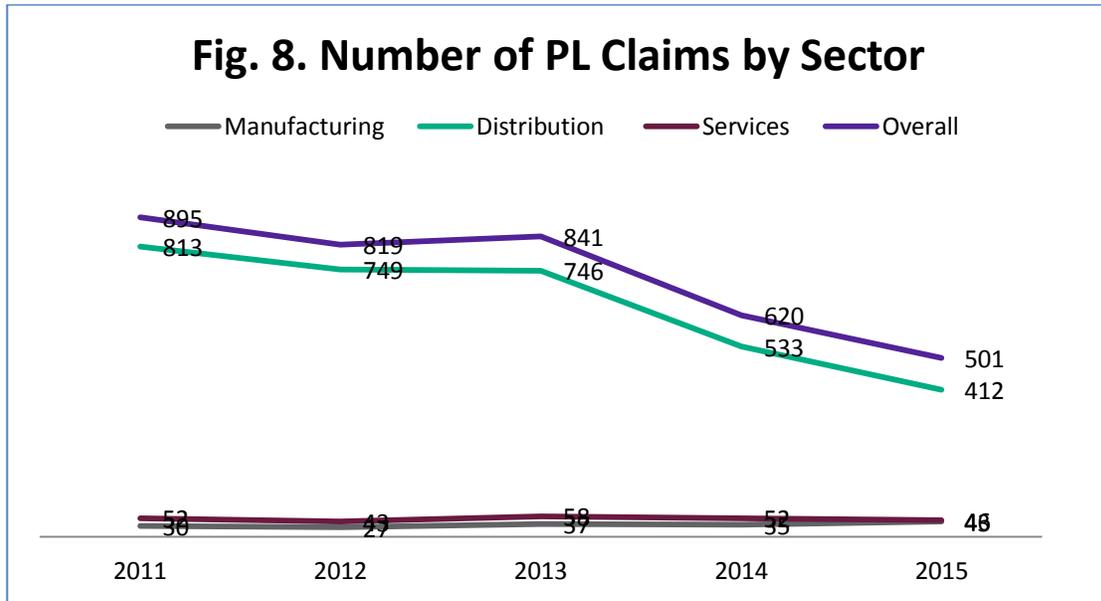


Figure 7 shows a downward trend in the number of accidents per annum. However, this may be skewed because of the small sample size in the distribution sector, including one relatively large company.



A similar downward trend in the number of PL claims per annum is evident in Figure 8.



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