



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

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LAW REFORM COMMISSION PUBLISHES ISSUES PAPER ON CAPPING DAMAGES IN PERSONAL INJURIES ACTIONS

Issues Paper considers whether it is constitutionally permissible, or otherwise desirable, to legislate for capping damages in personal injuries cases

Paper seeks the public's views on a range of possible models for capping damages, taking account of developments in Irish law, and in Australia and in England and Wales

WEDNESDAY 11TH DECEMBER 2019 The Law Reform Commission has today published its *Issues Paper on Capping Damages in Personal Injuries Actions*. The Issues Paper is on a project that forms part of the Commission's *Fifth Programme of Law Reform*. The recent Reports of the Costs of Insurance Working Group (CIWG) and of the Personal Injuries Commission (PIC) recommended that the Commission should examine whether it would be constitutionally permissible, or otherwise desirable, to provide for a statutory regime that would place a cap or tariff on some or all categories of damages in personal injuries cases. The Commission has treated this as a priority project under its Fifth Programme, which was approved by the Government in March this year.

General context: work of the Cost of Insurance Working Group (CIWG) and the Personal injuries Commission (PIC)

The project and this Issues Paper comes against the background of considerable public discussion and debate on the cost of motor insurance, and of employer and public liability insurance, which in the past 10 years has fluctuated between periods of low premiums followed by periods of sharp increases, and later reductions. There have also been significant problems in obtaining cover in some service sectors such as pre-school and leisure-related sectors. This has been accompanied by considerable debate about why this happened, including whether it involved some insurers offering unsustainably low premiums which required later correction. There has also been debate about whether the fluctuation in insurance cost has been affected by the level of personal injury awards in the courts.

In order to address the cost of insurance, in 2016 the Department of Finance established the Cost of Insurance Working Group (the CIWG), which has identified a range of further statutory and policy reforms in two Reports published in 2017 and 2018. Arising from the first CIWG Report, the Department of Finance established the Personal injuries Commission (PIC), which published two Reports that analysed international clinical standards for measuring personal injuries, including soft tissue or whiplash injuries – the most commonly litigated type of injury – as well as the levels of awards for such injuries in



other jurisdictions. The recommendations in the two CIWG Reports involve complex matters that require whole-of-government engagement, statutory reform as well as actions by the insurance sector. Among the recommendations in the CIWG and the PIC Reports was that the Commission should examine whether some form of statutory cap on damages would be constitutionally permissible or otherwise desirable.

The Commission emphasises in the Issues Paper published today that the vast majority of the many issues discussed by the CIWG and PIC concerning the cost of insurance are outside the scope of this project. This project involves a narrow series of issues concerning the constitutionality of possible legislative models on capping damages. At the same time, the Commission states that it will fully take account of relevant developments in the law, including the recommendations from the CIWG and PIC that impact on this project, notably the fact that current guidelines on awards in the Book of Quantum will be replaced by guidelines to be published by a Committee of the Judicial Council under the *Judicial Council Act 2019*. While those guidelines under the 2019 Act will largely be based on court awards, a significant difference is that they will be able to depart from the “going rate” in court awards.

Recent developments in Irish law on damages for personal injuries

The Commission’s project is primarily about legislation that could cap what is called “general damages”, which is the sum of money awarded for an injured person’s “pain and suffering”, in other words, an amount that compensates for the actual physical or mental pain suffered by the person. How much is awarded will depend on whether the injury is temporary or permanent, and whether for example the person will never be able to play sport again or continue a full intimate relationship. General damages are completely separate from what are called “special damages”, which is the sum of money awarded for things like loss of wages or, in a very complicated or catastrophic injury, the ongoing future cost of medical care and medical equipment. The Issues Paper published today therefore discusses relevant developments in the law on general damages in order to assess the options for legislation on capping damages.

The Issues Paper notes that in Ireland, the courts have, through case law since 1984, developed and adjusted a maximum cap for general damages for the most catastrophic type of injury. This cap now stands at €500,000, which would apply, for example, to a case of person with complete quadriplegia (complete loss of the use of all arms and legs) and who remains fully conscious of the loss that this involves.

In addition, since 2015 the Court of Appeal has developed a three-point scale to ensure that awards of general damages are proportionate to the injuries suffered, and that they also take account of the upper limit of €500,000 for catastrophic cases. The Court of Appeal has stated that: “*minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories*”. The Issues Paper points out that this three-point scale approach to proportionality does



not mean the courts impose a definite amount or absolute cap in a specific category of injuries, but it provides a range of bandwidth for the three different categories. This mirrors the approach already applied in the Book of Quantum, and in similar Judicial Guidelines on General Damages published since the 1990s in England and Wales, and in Northern Ireland.

The Issues Paper also points out that the three-point approach of the Court of Appeal has had the effect that in a number of instances it has reduced High Court awards in respect of what it regarded as minor injuries, in some instances reducing the award by 50%. In other instances, the Court of Appeal has increased awards where it considered that the injuries were at the more severe end of the scale. In summary, all these developments have emphasised the need for the test of proportionality to be applied.

Complementing this case law on general damages, since 2003 legislation has provided for the publication by the Personal Injuries Assessment Board (PIAB) of wide-ranging guidelines for the award of general damages, called the Book of Quantum (the most recent edition dating from 2016). The Book of Quantum will be replaced by Guidelines to be published under the auspices of a Committee of the Judicial Council being established under the *Judicial Council Act 2019*.

Relevant constitutional issues for legislation on capping damages

The Commission's Issues Paper also examines in detail the constitutional provisions that it considers would be relevant to any legislation on capping damages. The key constitutional rights identified in the Issues Paper are: (1) the right to bodily integrity (the right to be free from any law that would adversely affect a person's health), (2) property rights (especially the right of access to courts and to an effective legal remedy where a person's rights are affected), and (3) the right to equality before the law (which includes that a person will not be subject to any arbitrary or irrational treatment by the law).

The Issues Paper also identifies that legislation on capping damages could be open to constitutional question if, in relation to the right to bodily integrity or property rights, it did not pass a test of proportionality. This is a test that means that any limits on these rights must not be arbitrary, must limit the rights as little as possible and that the limits must be proportional to a legitimate objective. Separately, capping legislation could also be at risk of a constitutional challenge if it either: (a) delegated the capping power to a Minister without providing sufficient guiding principles (this is called the "non-delegation" principle); or (b) involved an interference with the proper powers of the judiciary, that is, breached the appropriate separation of powers between the Oireachtas and the judiciary.

Possible capping models

Having considered these recent developments in the law and the relevant constitutional issues, the Issues Paper then discusses possible legislative models for capping damages. These take account of developments in Irish law and also in other jurisdictions, notably in Australia and in England and Wales. There, similar principles concerning the



award of general damages have been developed by the courts, and these have been supplemented by legislation, including legislation that has involved capping some or all categories of injuries. The Paper therefore discusses these enacted models from other countries, as well as possible variations that could be considered, against the background of the constitutional principles discussed in the Paper.

Model 1 proposes a cap set by primary legislation that would take a similar form to how sentencing occurs in most criminal cases, in which the courts impose sentences using a proportionality test, on a scale from zero (an entirely suspended sentence) to the maximum permissible sentence for the particular offence. Model 1 is also similar to the three-point scale applied in the case law on damages developed since 2015 by the Court of Appeal, the approach used in the Book of Quantum, and also in similar Guidelines published in England and Wales and Northern Ireland. (It can also be assumed that this is the approach likely to be taken in the Personal Injuries Guidelines to be published under the *Judicial Council Act 2019*.)

Model 2 proposes a scheme that combines elements of the New South Wales *Civil Liability Act 2002* and the England and Wales *Civil Liability Act 2018* under which general damages are capped and all awards for lesser injuries are indexed to the cap. Model 2 is similar to Model 1 in one respect, in that it allows the courts the discretion to determine the severity of the plaintiff's injuries and accordingly within which category those injuries should fall. However, Model 2 differs in a significant respect from Model 1 in that, once the court determines the severity of the plaintiff's injuries, it is usually required to award the corresponding percentage of the cap. In this way, the "caps" provided for in Model 2 operate like a tariff style system, under which the court determines the level of injury, and the Oireachtas would be providing for a fixed sum for general damages that should accompany that level of injury. Model 2 also reflects the England and Wales *Civil Liability Act 2018*, which provides for Regulations to be made setting fixed general damages tariffs for whiplash injuries in road traffic cases. The Lord Chief Justice for England and Wales must be consulted before formulating the tariffs in such Regulations under the 2018 Act. The England and Wales 2018 Act differs from the New South Wales *Civil Liability Act 2002* because the Regulations made under the 2018 Act provide for a "judicial uplift", that is, that the courts may in their discretion and subject to specified criteria award a sum for whiplash injuries greater than the tariff. Such a "judicial uplift" could meet constitutional requirements by allowing the courts to retain a certain level of discretion. However, this may conflict with the general purpose of a fixed tariff approach, in that there is the risk that uplifting may become the rule rather than the exception. This was a concern that arose in the operation of the presumptive minimum sentencing under section 27(3C) of the *Misuse of Drugs Act 1977* as amended.

Model 3 proposes that either Models 1 or 2 (or any other method of capping) could be enacted, but in which the Act would delegate determining the details of the cap to, for example, a Minister or some other Regulation-making body. This is similar to the approach in the *Civil Liability (Capping of General Damages) Bill 2019*, a Private



Member's Bill which passed Second Stage in the Seanad in March 2019. The 2019 Bill bears some similarities to the England and Wales *Civil Liability Act 2018*, in that it provides for a delegated Regulation-making power rather than setting a specified amount in the Bill itself. And it has the advantage that it sets out some principles and policies on which the Minister for Justice and Equality is to determine the tariff for general damages in particular categories of injuries. On the other hand, it mirrors the New South Wales *Civil Liability Act 2002* and differs from the England and Wales *Civil Liability Act 2018* in that it appears to provide for a mandatory cap without any possibility of an exceptional "judicial uplift"; and nor does it contain any provision for any advance consultation with the judiciary.

Model 4 could be described as involving an approach that is closest to the current position, in that it proposes that the courts should continue to determine the level of awards of general damages through case law, as supplemented by the significant new provisions for Personal Injuries Guidelines under the *Judicial Council Act 2019*.

In addition to setting out these four possible models for capping damages, the Issues Paper published today also invites interested parties to suggest any other approach to capping damages.

Issues Paper seeks views from interested parties by 31st January

The Commission's Issues Paper invites all interested parties to give their views on which of these models they think could meet the constitutional criteria identified in the Paper.

The closing date is Friday 31st January next year, and emailed submissions can be sent to a dedicated address, p5p9@lawreform.ie. The Commission will consider the views in the submissions received, and will then prepare and publish its Report, which will contain the Commission's final conclusions and recommendations.

The Issues Paper emphasises that the Commission is a statutory advisory body, so that the ultimate task of reforming the law, including in terms of assessing the relevant constitutional provisions, is a matter entirely for the Government and the Oireachtas.

**For further information / interview with Commissioner Raymond Byrne or other Commission spokesperson contact:
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Background Notes for Editors

The Law Reform Commission is an independent statutory body whose main role is to keep the law under review and to make proposals for reform. To date, the Commission has published over 200 documents (Consultation Papers, Issues Papers and Reports) containing reform proposals. The majority of these proposals have influenced the drafting and content of reforming legislation. The Issues Paper will be available on the Commission's website, www.lawreform.ie, from 9.30 am on 11th December 2019.