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LAW REFORM COMMISSION PUBLISHES REPORT ON CAPPING DAMAGES IN PERSONAL INJURIES ACTIONS

Report considers whether it is constitutionally permissible to legislate for capping general damages in personal injuries cases

Report concludes that the capping model recently enacted in the Judicial Council Act 2019 meets constitutional tests discussed in the Report and should be given time to be implemented. Report also concludes that another legislative model, based on a variant of Australian and English legislation, could also be constitutionally permissible

30TH SEPTEMBER 2020: The Law Reform Commission has today published its *Report on Capping Damages in Personal Injuries Actions*. The Report forms part of the Commission's *Fifth Programme of Law Reform* and it follows the publication of a consultative Issues Paper on this subject last December.

The Report examines 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 general damages in personal injuries cases. The recent Reports of the Cost of Insurance Working Group (CIWG) and of the Personal Injuries Commission (PIC) (see **Background Notes for editors**) recommended the Commission should examine this.

The Report discusses recent developments in the law on general damages, and also the constitutional requirements that the Commission considers are relevant to any legislation on capping general damages. The Report then discusses four possible legislative models, taking account of the constitutional provisions and the views in the submissions received on this project following the publication of the Issues Paper.

The Report concludes that, of the four models of legislation capping general damages, two of them appear, in principle, to be constitutionally permissible. The Report concludes that in respect of one of these, under which guidelines on general damages are to be published under the *Judicial Council Act 2019*, it would be entirely appropriate and desirable that the recently expressed will of the Oireachtas should be given some time to be applied in practice. The Report also comments that this conclusion is without prejudice to consideration of the merits of another possible legislative model, which involves a combination of a New South Wales 2002 Act and an English 2018 Act. The Report also emphasises that the Commission is an advisory body, and that the constitutionality of proposed or enacted legislation is primarily a matter for the Government (advised by the Attorney General), the Oireachtas and, ultimately, the courts.



Importance of distinction between general damages and special damages

The Commission notes in the Report that the questions raised in this project are about legislation that could place a cap on what are called **general damages**, which should be clearly distinguished from **special damages**.

General damages comprise the sum of money awarded for an injured person's non-financial loss (non-pecuniary loss), also referred to as damages for "pain and suffering" or "loss of amenity", in other words, an amount that compensates for the physical or mental pain suffered by the injured person. How much is awarded will depend on whether the injury is temporary or permanent and whether, for example, it means that the person will never be able to play sport again or continue a full intimate relationship.

Special damages, by contrast, comprise the sum of money awarded for actual financial loss (pecuniary loss) such as loss of wages and medical expenses already suffered; and, in a very complicated or catastrophic injury, future loss of wages and future cost of medical care and medical equipment.

The Commission's Report published today presupposes that any legislation on capping damages would involve capping general damages only. This is because the courts have consistently decided, most recently the Supreme Court earlier this year in the Ruth Morrissey case, that the award of special damages in a personal injuries case must involve an award of full, 100% compensation.

Recent developments in Irish law on damages for personal injuries

The Report 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 that, as confirmed earlier this year by the Supreme Court in the Ruth Morrissey case, now stands at €500,000, which was applied in Ruth Morrissey's own case.

Proportionality principle applied to damages awards by Court of Appeal since 2015

The Report also points out that 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*". 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 (2016), and in similar Judicial Guidelines on General Damages published since the 1990s in England and Wales, and in Northern Ireland.



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The Report 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 a proportionality principle to be applied.

Complementing this case law on general damages is the publication by the Personal Injuries Assessment Board (PIAB) of the Book of Quantum (2016) of wide-ranging guidelines for the award of general damages. The Book of Quantum will be replaced by Guidelines to be published under the auspices of the Personal Injuries Guidelines Committee (PIGC) of the Judicial Council, which was established earlier this year under the *Judicial Council Act 2019*.

Relevant constitutional issues for legislation on capping damages

The Report also examines in detail, taking account of the detailed and helpful submissions received by the Commission following publication of the Issues Paper, the relevant constitutional provisions identified in that Issues Paper, namely: (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 Report 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, that is, 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.

In addition, such legislation could also be at risk of a constitutional challenge if it either: (a) delegated the capping power to a Minister without providing sufficient principles to guide the exercise of the capping power (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.

Report considers four possible capping models

Having considered these recent developments in the law and the relevant constitutional issues, the Report then discusses four possible legislative models for capping general damages.

In the Issues Paper, the Commission had asked consultees to discuss these four models and had also asked whether consultees could suggest any other possible models of legislation on capping damages. The Report notes that consultees did not identify any other possible model, and therefore the Commission's analysis returned to those four legislative models in the Report.

The four models 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



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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 Report therefore discusses these enacted models, as well as possible variations that could be considered, against the background of the constitutional principles discussed in the Report.

Outline of and conclusions on Model 1

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 comparable Guidelines published in England and Wales and Northern Ireland; and, it can be assumed, the approach likely to be taken in the guidelines to be prepared by the Personal Injuries Guidelines Committee (PIGC) under the *Judicial Council Act 2019*.

In the Report, the Commission concludes that, while Model 1 has the benefit of being given effect to by an Act (primary legislation) rather than delegating that power, it appears to be at some risk of constitutional challenge on the ground that it is mandatory in nature. While this could potentially withstand challenge for the reasons discussed in the Report, the Commission considers that any capping legislation enacted through primary legislation would be less likely to be prone to constitutional challenge if it included a discretion to disregard any mandatory cap or caps for stated reasons, such as for exceptional reasons concerning the particular injured person.

Outline of and conclusions on Model 2

Model 2 proposes, in effect, a variation of the cap scheme in place under the New South Wales *Civil Liability Act 2002*, the variation being a “judicial uplift” provided for under 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 New South Wales 2002 Act provides for an upper cap or limit on general damages, and all awards for lesser injuries are indexed to the cap. This is, on one respect, similar to Model 1 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, it differs in a significant respect from Model 1 in that, once the court determines the severity of the plaintiff’s injuries, it is bound to award the corresponding percentage of the cap. In this way, the “caps” provided for in the New South Wales 2002 Act operate like a tariff style system, under which the court determines the level of injury, and the legislation provides a fixed sum for general damages that should accompany that level of injury. Model 2 varies from the New South Wales 2002 Act because it includes the provision in the England Wales 2018 Act that allows for the making of ministerial Regulations which would provide for a “judicial uplift”, that is, that the courts could in their discretion and subject to specified criteria award a sum for whiplash injuries greater than the tariff.

In the Report, the Commission considers that, while a direct “transplantation” of the New South Wales 2002 Act to Ireland would be unlikely to be regarded as constitutionally permissible, the



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Commission also concludes that Model 2 would be more likely to satisfy the constitutional issues identified in the Report if certain elements of the New South Wales 2002 Act were to be combined with the inclusion of the “judicial uplift” element from the England and Wales 2018 Act.

Outline of and conclusions on Model 3

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 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 that had passed Second Stage in the Seanad in March 2019. The 2019 Bill bore some similarities to the England and Wales *Civil Liability Act 2018*, in that it proposed a delegated Regulation-making power rather than setting a specified amount in the Bill itself, but it had the advantage that it set out some principles and policies on which the Minister for Justice and Equality would have determined the tariff for general damages in particular categories of injuries. On the other hand, it mirrored the New South Wales 2002 Act and differed from the England and Wales 2018 Act in that it appeared to provide for a mandatory cap without any possibility of an exceptional “judicial uplift” and it did not contain any provision for any advance consultation with the judiciary.

In the Report, the Commission concludes that Model 3, in the form proposed in the 2019 Bill, would be likely to be open to constitutional challenge on the basis that, among other matters, it would present constitutional difficulties because it involved delegating the setting of caps to a Minister. The Commission also considers that it would be more vulnerable to constitutional challenge than either Models 1 or 2. On that basis, the risks that would therefore arise have led the Commission to conclude that such a Model would not, from a constitutional perspective, be a desirable form of capping legislation to enact.

Outline of and conclusions on Model 4

Model 4 could be described as involving an approach that is closest to the current position. It envisages seeing the courts continuing to set a maximum upper limit or cap for general damages in catastrophic cases, and a proportionality test for other cases, taking into account the significant reforms arising from the establishment of the Personal Injuries Guidelines Committee (PIGC), which will prepare new guidelines under the *Judicial Council Act 2019* and which will replace the Book of Quantum. While the guidelines to be prepared under the 2019 Act will largely be based on court awards, a significant difference, in contrast to the Book of Quantum, is that the new guidelines will be able to depart from the current level of court awards. In addition, section 99 of the 2019 Act, which has not yet been commenced will, when commenced, amend section 22 of the *Civil Liability and Courts Act 2004*, so that the courts will no longer be required to have regard to the Book of Quantum in their assessment of damages. A court will, instead, be required to have regard to any personal injuries guidelines produced under the *Judicial Council Act 2019*. The amended section 22 will place a greater obligation on the court in that it will also place an obligation on the court to state the reasons for any departure from the guidelines in its decision. Currently, there is no obligation on a court to explain any departure from the Book of Quantum.



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In the Report published today, the Commission considers that caps imposed by Guidelines approved by the Judicial Council under the *Judicial Council Act 2019* will likely resist any constitutional challenge. Assuming that the Guidelines may broadly reflect the Book of Quantum and the recent Court of Appeal case law on the principle of proportionality in damages awards, the Commission considers that it is likely that the Guidelines will meet constitutional tests of proportionality. The Report notes that judges will be able to depart from the Guidelines made under the 2019 Act in particular cases, subject to an obligation to state the reasons for which they do so.

Overall conclusions and comments in Report

The Report notes that a number of consultees considered that Model 4 was the most appropriate based on their analysis of the relevant constitutional criteria, and was also preferable. A number of consultees considered that, even though Model 4 was their preferred option, Model 2 could, subject to variation, be regarded as constitutionally permissible but as a fall-back option only. The Report also notes that a number of consultees preferred Models 1 and 3.

In the Report, the Commission concludes that, in principle, legislation capping awards of general damages in personal injuries litigation could be constitutionally permissible. How any particular proposal is formulated will influence how likely or unlikely it is to be struck down. For instance, legislation that imposes a presumptive cap will, all other things being equal, be more likely to survive constitutional challenge than legislation imposing a mandatory cap. The actual amounts chosen in a cap, or caps, will also strongly influence whether the measure is taken to be proportionate under the relevant constitutional tests. The Commission reiterates that it is an advisory body, and that advice on any specific Government proposal presented to the Oireachtas for capping legislation rests with the Attorney General, that the Oireachtas has the sole and exclusive authority to enact legislation, and that, ultimately, the final resolution of any constitutional challenge taken to enacted capping legislation rests with the Superior Courts.

The Commission also points out that this Report is published within the current, fast moving, context of policy and legislative developments since 2018, when the CIWG and PIC first suggested that the Commission should consider examining the subject matter of this project and Report. It is important to note that the Commission, as an advisory body, invariably does, and must, take full account of the constitutional role of the Oireachtas as the sole law-making authority in the State, and of the constitutional role of the Government in its policy-making executive role, including its role in determining the timing of the commencement of much legislation, including the *Judicial Council Act 2019*. In that respect, the Commission notes in the Report that the establishment of the Judicial Council and the consequent establishment of the PIGC under the 2019 Act are significant expressions of the will of the Oireachtas and Government, and they have been fully taken into account by the Commission in the development of the Report.

The Commission adds that its Report remains a part of the wider, and continuing, review of the 33 recommendations and 71 actions flowing from the CIWG and PIC reports, and of evolving policy in this area. The Commission notes in this respect that the Programme for Government, adopted in June this year, contains a number of proposals relating to the insurance market in Ireland. Again, it



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is important to note that many of these fall outside the scope of this project and Report. Of those falling within scope, the Commission notes that the Programme for Government refers to “recognising the work of the Personal Injuries Guidelines Committee, under the Judicial Council, in providing guidance on personal injury claims” and “considering the need for a constitutional amendment to enable the Oireachtas to establish guidelines on award levels.”

The Commission emphasises in the Report that it has no role in reviewing or examining the contents of a Programme for Government, which sets out a range of policy proposals that are entirely a matter for the Government to pursue. The Commission notes, however, that this Report is being published against the background of the establishment of the Judicial Council in December 2019, that the Judicial Council first met in February this year, that the PIGC was formally established in April, that the PIGC is to prepare draft Guidelines later this year, and that, in the wider context of reform of the insurance market, they will be recognised by the Government who are also to consider the need for a constitutional amendment to enable the Oireachtas to establish guidelines on award levels.

The Commission states that it has noted these developments in the Report because they emphasise, on the one hand, the narrow focus of this project and Report and, on the other hand, the dynamic context within which the Report has been completed. The Commission concludes the Report by stating that there is merit in the perspectives of consultees who preferred Model 2 and those who preferred Model 4. In addition, the Commission considers that it would be entirely appropriate, and desirable, that the will of the Oireachtas, recently expressed through the enactment of the *Judicial Council Act 2019* and under which it has conferred extensive functions on the PIGC and the Judicial Council, should be given some time to be applied in practice. This is without prejudice to the consideration of the merits of any other model, such as Model 2, or a variant of it. In any event, the Commission emphasises again that, in expressing its views in this Report, the ultimate forums to consider what policy or legislative initiatives are to be taken in this or any other area are the Government (with the benefit of the advice of the Attorney General) and the Oireachtas.

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Background Notes for Editors:

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

The project and this Report 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



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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 premiums 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 Report 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 and Report. This project and Report involves a narrow series of issues concerning the constitutionality of possible legislative models on capping damages.

At the same time, the Commission's Report has fully taken account of relevant developments in the law, including the recommendations from the CIWG and PIC that impact on this project and Report. This includes that current guidelines on awards in the Book of Quantum (2006) will be replaced by guidelines to be published under the *Judicial Council Act 2019*. While those guidelines under the 2019 Act will largely be based on court awards, a significant difference is they will be able to depart from those court awards. The Report has also taken into account developments in case law since the publication in December last year of the Issues Paper on this project.

December 2019 Issues Paper and submission received

The Commission has treated this as a priority project under its Fifth Programme, which was approved by the Government in March last year. The Commission published a consultative Issues Paper on this project in December 2019, and received a large number of submissions from individuals and bodies with an interest in this area of law. In response to requests from consultees, the Commission extended the initial deadline for receiving submissions from the end of January to 6th March. The Commission found these submissions extremely helpful in its further analysis of the issues raised in this project and in preparing the Report being published today.

About the Law Reform Commission

The Law Reform Commission is an independent statutory body. The purpose of the Commission is to keep the law under independent, objective and expert review; to make recommendations for law reform and to make current law accessible for all.



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To be successful, law reform must be an inclusive process. As such, the consultation process is of central importance to the Commission's work. Consultation takes several forms:

- preparing Issues Papers to stimulate debate and discussion on the issues under consideration;
- receiving and considering submissions made in response to Issues Papers;
- hosting seminars, roundtable discussions and meetings with interested parties, experts, practitioners and representatives of interest groups.

Our aim is to develop and reform the laws of Ireland to ensure that they are equitable, modern, fair and efficient. We pursue this aim through the production of our consultative Issues Papers (including related public consultative events), final Reports, and our work on Access to Legislation (comprising the maintenance of the Legislation Directory, a collection of over 380 Revised Acts and the Classified List of In-Force Legislation).

Approximately 70% of our Reports have influenced the content of enacted legislation. Our research work is also frequently cited in court decisions and in academic commentary.

The Report will be available on the Commission's website, www.lawreform.ie, from 7am on **30TH SEPTEMBER 2020**.