

ADDRESS TO PIAB CONFERENCE 2019

CROKE PARK

10, APRIL, 2019

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I feel strongly that a decisive moment has arrived in this jurisdiction for making changes to our arrangements for compensating personal injuries, and in particular injuries occurring at the lower end of the scale, being whiplash/soft tissue injuries. Claims arising from this category account for over 70% of all injury claims in Ireland. Moreover, as the 2nd Report of the Personal Injuries Commission clarified beyond any doubt, we compensate claimants here at a rate 4.4 times greater than in the UK and at rates far in excess of most EU member States.

Let me clear away some initial points. First, every genuine claimant deserves to be fairly and reasonably compensated for an injury occurring from someone else's negligence. Second, as

Minister Flanagan made clear when speaking recently in the Seanad on the 2nd reading of the Civil Liability (Capping of Damages) Bill, 2019, insurers in this country are profitable organisations who have a major role to play in facilitating reductions in premiums where any recalibration and consistency of awards is achieved. A clear and unequivocal statement from the industry that premiums will come down if damages are moderate and consistent would be of enormous value in the current situation. Third, the PIC finished its work in September, 2018 so that if it is to fulfill the role envisaged for it by Senator Lawlors Bill, it will need be reconstituted – at least for the purposes of reviewing that legislative measure if it is enacted into law. Quite separately however, Minister Humphries has asked me if I would undertake a review after one year to report on progress in implementing the reforms advocated by PIC. However any views or opinions offered by me this morning are necessarily personal at the present time

The problems about insurance are immediate and urgent for the citizens of this country, as the testimony of Linda Murray both on radio to Sean O'Rourke and to an Oireachtas Committee last week demonstrated so forcibly. Her child-minding business in Navan is facing closure due to the impossibility of getting insurance cover at

an affordable level. Irish insurers, she said, won't touch businesses like hers because of the 'gravy train compo culture' plaguing this country. For the same reason, Aquadome in Tralee, one of the best known leisure parks in Ireland, faces closedown as its annual premium runs to 20% of its income, having doubled in the last year alone. It can only get cover by itself paying the first 185K of any claim. Kidspace in Rathfarnham is gone after a 25% surge in premium. Kiddies Kingdom in Bagenalstown is also gone for the same reason. Closure is now the order of the day for this and many other small businesses besieged by personal injury claims and rising premiums. This crisis has spread across many small businesses, leisure facilities, shops, places of employment and is now causing people to lose their jobs in areas where, but for this market distortion, would be thriving and prosperous. Those in a position to do something about must now finally get up and do the right thing

The key recommendation of PIC's 2nd report published in September, 2018, was its unanimous recommendation that the Judicial Council, once formally and legally established, be requested to provide guidelines for appropriate levels of general

damages, particularly in cases of soft tissue injuries. The CIWG left the issue of specific legislation to cap or fix tariffs for damages to the deliberations of the Law Reform Commission and this topic is included in their 5th programme for law reform. However, Any study by the LRC on this topic will take time – too much time for many in Linda Murray’s situation

Thus, it came as no surprise to me that a private members bill advanced by Fine Gael Senator Anthony Lawlor came before the Oireachtas last month to cap general damages for personal injuries. It may be expected that any such legislative proposal will run into a barrage of legal opposition on the basis that giving politicians the power to cap general damages, even in whiplash cases, would trespass on the judicial function and offend the principle of separation of powers. However it received approval in the Seanad and has gone now to 3rd stage. Minister Flanagan, in stating the Government would not oppose the Bill, nonetheless hinted strongly that significant amendments might be necessary to the Bill which might still fail because of constitutional constraints. I will return to this issue.

So, Where do we stand on the Guidelines recommended by PIC?

The JC Bill itself has been around forever but completed 4th stage in the Seanad on 2nd April. The PIC Commission recommended that the JC Bill be expedited and had been told it could be finalized by last Christmas. Neither of these things has happened. Minister Darcy, said in February that it could now take “up to two years” to finalise the setting up of the JC on a statutory basis. I read recently that his may have something to do with an inter-party agreement whereby Sinn Fein will support efforts to get the Judicial Appointments Bill completed in exchange for a Government commitment to provide for sentencing guidelines in the JC legislation. In recent days there have been spring-like signs and shoots of renewed efforts to progress the JC Bill. It completed Committee Stage in the Seanad on 2nd April, 2019 and I understand it is intended to bring forward amendments at Report Stage in the Seanad after Easter. I hope – in the event of there being any uncertainty about it – that one amendment will be to write in a specific power of the JC to issue guidelines, something I would have thought was already possible under s.7 (1) of the Bill as it presently stands, but absolute clarity and certainty in this area is an absolute must.

It was with considerations of possible delays and stalling of the JC Bill that PIC further recommended , in the period before the JC legislation is enacted, and in recognition that something needs to be done as a matter of urgency, that interim measures be put in place as quickly as possible. Even a measure limited to the provision of guidelines for soft tissue injuries would represent real progress. The task is not unduly onerous given that judges are the very people who determine levels of awards anyway. Judicial guidelines have existed in the U.K. and in Northern Ireland for many years now. While guidelines are by definition advisory rather than mandatory, it is nonetheless to be expected that, coming from within the judges own ranks, these guidelines would be well received and followed by trial judge, leading to consistency in awards, reduction of delays and appeals and generally usher in a fair and reasonable system for compensating deserving claimants than we have at present.

The PIC saw the interim measure as one to be managed and controlled by a cross section of judges invited by the Chief Justice to participate, who would have Court Service support for their work and who could also avail of work done by PIAB and/or avail of the PIC report as the judges saw fit. There was never any idea that

persons other than judges would be authoring or co-authoring these non-mandatory guidelines. I understand from the Department of Justice that there is an engagement ongoing with the Judiciary to try to resolve issues which have arisen in relation to this initiative.

Further, the PIC is acutely aware that the Court of Appeal has set new guidelines of its own in respect of general damages for more serious injuries. It has indicated that injuries should be assessed by reference to their gravity on a spectrum from minor to catastrophic, which is helpful and by reference also to percentages of bodily disability, which, again, for serious injuries, makes perfect sense and has already impacted on many decisions in the High Court. However, the reach of the Court of Appeal does not extend to minor whiplash/soft tissue injuries (which often do not lend themselves to assessment in this way) and where, moreover, cases are heard predominantly in the Circuit Court and appealed only as far as the High Court. They can't be got before the Court of Appeal and there is the rub. It is at this bottom tier of general damages that the problems are most acute and where the PIC united on a suitable remedy.

But If these efforts at a “soft solution” fail – if for example the judiciary feel unable to co-operate in compiling guidelines – the options for the Government are stark: either do nothing and allow the present situation continue, or to press on with legislation capping damages. The present capping Bill could, and perhaps should, in my view, be confined to soft tissue injuries alone because that is where the biggest problem lies. Capping of damages is nothing new. Compensation has been capped by the courts themselves and by law in the past without the heavens falling in. Thus in *Sinnott v Quinsworth* an upper ceiling for general damages was fixed – and later increased – by the Supreme Court. Compensation for mental distress suffered by relatives of persons dying in fatal accidents was capped by the Civil Liability Act, 1961 – with subsequent statutory revisions - and for over 50 years this form of statutory capping has avoided condemnation on constitutional grounds. Grief suffered in the aftermath of the death of a close relative would strike many as a more significant form of injury than a whiplash or soft tissue injury. I believe – and this I stress is only a personal view for the reasons already elaborated - that a limited measure in this formulation could (I wont say would) survive constitutional scrutiny if shown to be fair, proportionate and in the public interest because of the serious problems it attempts to

address. if it cures our present difficulties. judges would still be fixing the amounts, up to and including the cap set by legislation. if the alternative is that businesses continue to go under at an ever increasing rate, throwing people out of work and diminishing Ireland's reputation as a place where business can flourish in a post Brexit world, then those considerations will have to be factored in to any balancing of rights and interests in any constitutional evaluation

(2) Garda Fraud Investigation Unit

The frequency of exaggerated and fraudulent claims in this jurisdiction is now well known and there are daily reports in the media now of spurious and phony claims being thrown out by the courts. Against that background I was astonished to hear it suggested by Deputy Doherty that "only" 20 cases of suspected fraud had been reported to the Gardai since last Autumn. I would venture to suggest that we now read of that number of cases every week in our newspapers. Information given to CIWG by Ins Irl would suggest that nearly 500 cases were reported over the three

preceding years, with only a handful of prosecutions following on. Perhaps the new understanding evolved by the CIWG round-table fraud group between insurers and Gardai of what needs to be given to the Gardai before they can act or intervene may explain why, since last Autumn, there has been any reduction in “reported” as distinct from “Suspected” cases. I do not for one second believe that the incidence of exaggerated and/or fraudulent claims has dropped. It is hardly surprising that such claims abound in a jurisdiction where compensation levels are among the highest in Europe – and where the risk of detecting a fraudulent or spurious claim is small and where the risk of prosecution is virtually nil. I have spoken before about the signal success achieved in the UK by the establishment of the Insurance Fraud Enforcement Department, an arm of London Police, which is subsidized by the insurance industry in the UK. It works very effectively with a complement of about 50 designated police officers subdivided into a number of investigation teams. Their efforts have brought about many convictions and hundreds of prison years for convicted fraudsters.

Why do we have no similar success story in Ireland? On the one hand insurers must take some of the blame because without full

and detailed information suggesting fraud, the limited police resources do not permit them to follow up on every report. The same AGS team charged with fraud investigation have multiple other duties – such as the investigation, preparation and trial in the Anglo case which took 7 years to conclude. In short, fraudsters have had a clear run in this country to date. Its about time that changed.

Vigilant insurers here, or their legal advisors, can help themselves by carrying out detailed investigations of their own. The lack of an Irish IFED has forced many insurers to do precisely that – and where they have done so they have achieved signal success in seeing off dud claims. For example, In a recent report for 2018, MIB reported that of 116 suspect claims it had determined to resist and fight to the finish, 65 were dropped by claimants.

We make things difficult for ourselves in other ways. For example a search of the Court Service website will reveal High Court claims brought by a named individual against various defendants, providing useful information about multiplicity of claims or connections between claims. No such records exist for claims brought in the Circuit Court, a shortfall within the Court Service which may be a funding issue, but the absence of which makes

investigation of fraud rings and connected claims so much more difficult. And the Circuit Court is where much of this activity takes place, much of it being in the realm of soft tissue injuries involving vehicles with multiple occupants.

So why no Irish IFED? The Minister for Justice has in the past month referred to the fact that CIWG had proposed exploring the possibility that a specific unit, funded by the insurance industry, be established within the Garda National Economic Crime Bureau to tackle insurance fraud. There followed an engagement with Insurance Ireland and a proposal to Ins Irl was submitted by GNECB for establishing such a unit in 2017, to which II replied in August 2018. There then followed discussions between GNECB and the Asst Commissioner and on 13 December Minister Darcy met with the new Garda Commissioner who expressed the view that no branch of AGS should be funded other than from the exchequer. The Commissioner undertook to further consider the establishment of an insurance fraud investigation unit within the GNECB. On 12 March, Minister Darcy stated that “if the Commissioner agrees to the new unit, the funding will come from the exchequer”. This is a very welcome announcement but we now await Commissioner Harris’ response. This needs to be swift, clear

and positive. Fraud is crime, and rampant fraud makes a mockery of our compensation system, its legal practitioners and judges. It drags the whole system into disrepute and the public is clearly sick of it. The Sunday Business Post reported on 31 March just gone that Commissioner Harris is “All set to announce in coming weeks a new structure for An Garda Siochana to tackle insurance fraud. That's good – very good – if it is properly resourced

Lets be blunt. If the funds for same cannot be found within the more that 1 billion euro Garda budget for 2019, I think we must resign ourselves to the prospect of false and exaggerated claims continuing and burgeoning in numbers until we either get this unit or until insurers fully beef up their own internal fraud investigation capacity.

However, I sense a much increased level of awareness by judges at all levels of the reality of this problem and the very damaging effect it has on those paying insurance premiums, be they motorists, employers or those paying for public liability cover. With crash-out Brexit just around the corner, it has never been more important for this country to be seen as a good venue for the establishment of new businesses, large or small, all of which will be looking to overheads such as insurance premiums for workplace accidents, regularity and size of claims and

compensation. Many new businesses may be put off from doing business here altogether because of the widely reported and well known defects and failures in our personal injuries system. By not moving quickly to do things everyone knows need to be done, we are leaving ourselves open to reputational damage as a country with every possibility of consequential economic and business loss also. Warnings about knee-jerk reactions to the re-calibration of damages, despite the huge multiple in Ireland of awards over those elsewhere, emanating from certain parts of the legal profession are in direct conflict with the recommendations outlined in the unanimous report of the PIC in which both parts of the profession participated fully.

I would therefore encourage Ministers Flanagan and Darcy to step up the tempo and speed of bringing forward the relatively modest reforms advocated by PIC. The long-suffering business and motoring population deserve no less

Finally, I want to refer to the new templates for the medical evaluation of soft tissue injuries. PIAB commission 25,000 medico-legal personal injury medical reports every year. As part of the implementation of the first PIC Report PIAB has introduced the template recommended by PIC to enable more detailed grading of

soft tissue injuries and is continuing to engage with members of its own independent panel in relation to the new template. The response to date has been very positive. PIAB is also working with the medical professional bodies to support development of a training programme as recommended by PIC. In this area the medical profession have not been slow or dilatory. Surely the time is now for others who can help resolve current difficulties to act decisively and speedily