



ISME,  
17 Kildare Street,  
Dublin 2.  
20<sup>th</sup> February 2020

### **THE CONSTITUTION & CAPPING DAMAGES**

ISME thanks the Law Reform Commission (LRC) for its invitation to respond to its issues paper on capping damages. We believe the supposed constitutional impediments have been materially exaggerated and consider the dissertation in Chapter 3 effectively resolves the issue of the constitutionality of a legislative cap, even if it does not explicitly say so. Our responses to the four questions set in the issues paper are below, with our reasoning on the following pages.

**Q. 1 In your opinion, are there are any other constitutional concerns in addition to those discussed in Chapter 3 of this Issues Paper that should be considered in the Commission’s Report on this project?**

A. Yes. We consider that the current proposal by Government to delegate consideration of quantum exclusively to the Personal Injuries Guidelines Committee (PIGC) of the Judicial Council presents a real risk of a breach of the separation of powers. In the absence of clear and explicit primary legislation prescribing the level of (or the principles for setting the level of) general damages, the guidelines set by the PIGC are very likely to face legal challenge. The letter of the Chief Justice to the Justice Minister is self-explanatory in this regard (Annex 1).

**Q. 2(a) Do you consider that any of the models discussed in Chapter 4 satisfy the constitutional concerns raised in Chapter 3?**

A. Yes.

**Q. 2(b) If the answer to question 2(a) is “yes” please indicate which Model you consider would meet those constitutional concerns, and why?**

A. We consider Model 1 best avoids the issue of a breach of the separation of powers by the judiciary, with the delegated power of amendment per Model 3. This is effectively how the Civil Liability Act 1961 functions now.

**Q. 3 Is there any other model for capping damages in personal injuries cases, not considered in this Issues Paper, which you believe would be appropriate?**

A. No.

While there is a nominal simplicity to the Model 2 proposal, a change to the overall cap means that the damages paid for all lesser injuries are also changed. This may not be administratively desirable, nor logical, nor just. For example, it may in time be decided that the long-term impact of a toe injury with a severity level of 15% differs somewhat from that of a finger injury of the same level of severity. Under Model 2, no differentiation would be possible once the level of severity was set by the court. There is also anecdotal evidence that while awards levels in Ireland are very high for minor injuries, this is not the case for catastrophic injuries. Were the cap in the Model 2 proposal to be ‘pegged’ to the catastrophic injury level, and that was to rise at a later date, it would pull up 100% of awards levels, were it appropriate to do so or not. This fact might also serve as a disincentive to the judiciary to review the catastrophic injury quantum, on the basis it would affect all other awards. In our view, administrative simplicity should not trump common sense and justice.

We also ask the LRC to note:

1. The Civil Liability Act 1961 caps damages for fatalities and has survived 59 years without constitutional challenge. Unless this Act enjoys some unique characteristics in its construction, the principle that general damages can be fixed in primary legislation (and varied by statutory instrument) is already long established in law and is constitutional. The corollary of this is that any general assertion that a legislative cap on damages is unconstitutional logically means that the 1961 Act is unconstitutional, *or*, that it is drafted in some way which circumvents unconstitutionality. Either way, **the existence of the 1961 Act is incompatible with a general assertion that a legislative cap is unconstitutional.**

2. Mr Justice Nicholas Kearns's first recommendation of the Personal Injuries Commission (PIC) was to introduce a legislative cap on damages (Annex 2). This recommendation was redacted from the final PIC report.
3. Justice Kearns further set out the broad parameters within which he suggested that a bill to cap damages would survive constitutional challenge at the PIAB conference on 10<sup>th</sup> April 2019 in relation to the Civil Liability (Capping of General Damages) Bill 2019, stating: *'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 won't 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.'*<sup>1</sup> We think it quite unlikely that so senior a judge would materially err on so fundamental an issue as this.
4. The Constitution confers rights of access to the courts, not to given levels of quantum. Chapter 4 of the issues paper elucidates this issue very well.
5. The award of general damages was only assigned to judges in 1989, it rested with juries before that. While still of course made in a court setting, it cannot be said that the award-setting function was always the exclusive domain of the judiciary.
6. The calculation and award of damages or compensation are not reserved to the courts, and expert agencies like the WRC can award damages in the hundreds of thousands of euro consistent with labour law. The WRC also handles compensation issues relating to tenancies. Other quasi-judicial agencies such as the Criminal Injuries Compensation Tribunal routinely award compensation. There is nothing in law or the constitution to prevent the legislature from assigning the executive responsibility for the award of general damages to an executive agency (such as PIAB), once a right of subsequent access to the courts is not impeded by the legislature.
7. The Chief Justice, in his letter to the Justice Minister makes clear that any reduction in general damages below the 'going rate' reflected in the current Book of Quantum would require legislative change.
8. The Chief Justice also suggests in the same letter that assigning responsibility to the judiciary for recalibrating damages could expose them to the challenge that they were involved in the 'discharge of the statutory function of an executive agency' which might subsequently be 'subject to scrutiny by the courts;' an effective breach of the separation of powers. Further, by

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<sup>1</sup> <http://isme.ie/wp-content/uploads/2019/05/ADDRESS-TO-CLAIMS-MANAGEMENT-CONFERENCE-2019-3.pdf>

asking them to enter the policy-setting sphere, the Government is effectively asking them to make laws, a matter which is the sole prerogative of the Oireachtas. It truly would be an 'appalling vista' were we to go through an extensive and prolonged process of award-setting by the PIGC which was subsequently overturned as an unconstitutional breach of the separation of powers.

9. The objections to the adoption of a legislative cap on general damages largely mirror the historic objections to the imposition of legislative controls on rents. We were persistently told that any imposition of control on rents would be inimical to property rights, and repugnant to the constitution. However, when the exigencies of political necessity demanded it, the Dáil enacted the Planning and Development (Housing) and Residential Tenancies Act 2016, establishing Rent Pressure Zones. These have not, to date, fallen foul of the Constitution.
10. Lastly, if Government had genuine doubts about the constitutionality of capping damages via legislation, it would have asked the Attorney General for an opinion on the matter. It has not done so, despite ISME's asking. To us, this is indicative of a political, rather than a constitutional, difficulty with the introduction of a legislative cap.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Neil McDonnell', followed by a long horizontal line that ends in a circular flourish.

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**Neil McDonnell**

**Chief Executive**

## Annex 1

BUICHT UACHTARACH,  
RÉ D'ÉIRIÁNA CLIAITH 7,



THE SUPREME COURT, DUBLIN 7.  
Telephone: 01 888 6540

The Hon. Mr. Justice Frank Clarke  
Chief Justice

27<sup>th</sup> February 2019

Mr. Charlie Flanagan, T.D.,  
Minister for Justice and Equality  
Department of Justice  
St. Stephen's Green  
Dublin 2

### **Second Report of Personal Injuries Commission**

Dear Minister,

Thank you for your letter of the 13<sup>th</sup> inst. concerning the above. With a view to ensuring that your letter received the fullest consideration and response, I have consulted with the Presidents of the other jurisdictions through the Council of Presidents before replying. The views expressed are shared by them.

We are familiar with the two elements of Recommendation 1 of the Personal Injuries Commission's second report, being that

1. the future Judicial Council be assigned the function under its statute of compiling guidelines for appropriate general damages for various types of personal injury, and
2. pending introduction of such legislation, the judiciary participate with representatives of the Personal Injuries Assessment Board and your Department in the formulation of guidelines as to quantum in the case of claims for damages for soft tissue/whiplash injuries.

You very properly mention, in the context of the second element of the Commission's recommendation, the requirement that judicial independence and the separation of powers be respected and we need hardly add that those considerations must necessarily inform the Judiciary's response to any proposal for reforms in this area. Furthermore, the views expressed below cannot and do not purport to be a definitive – much less binding - interpretation of the law on any aspect of the matters under consideration, this being, of course, a matter for the courts in any particular case.

Can we first assure you of the willingness of the Judiciary to engage actively in considering appropriate measures in this area. However, we have real concerns about whether it is possible or appropriate to take steps without a clear legal basis.

While appreciating that the principal concern of your letter is the second element of the recommendation, we would very much wish to take this opportunity to confirm the Judiciary's openness to the incorporation within the Judicial Council's remit of a function of formulating and issuing appropriate guidelines on compensation in personal injuries cases. This could draw, where appropriate, on the experience of other Judiciaries in undertaking similar exercises, such as those of the Judicial College for England and Wales and the Judicial Studies Board for Northern Ireland, each of which bodies have been suitably resourced, and have had access to appropriate external expertise, in developing their respective Guidelines for the Assessment of General Damages in Personal Injury Cases. We look forward to engaging positively with you and your Department in finalising those proposals.

However, the second element of the Commission's recommendation would seem to raise a number of issues which, we suggest, merit very careful examination. The first possibility is that the existing PIAB legislation might be used.

It is worth recalling that the guidelines contained in the Book of Quantum under section 54 of the Personal Injuries Assessment Board Act 2003 do not - indeed, very likely could not, having regard to the duty of the courts to administer justice independently - be prescriptive for individual cases. This is, of course, in no way unique to the Irish legal environment.

The guidelines concerned are stated to be "general" guidelines as to "the amounts that may be awarded or assessed in respect of specified types of injury"; the court is required, in assessing damages, to "have regard to" the Book of Quantum; and that obligation "shall not operate to prohibit a court from having regard to matters other than the Book of Quantum when assessing damages in a personal injuries action."

It is also important to make mention of the fact that any legislation which confers a power, on either an office holder or a statutory body, to make regulations must comply with what has come to be known as the "principles and policies" test. Because the Constitution confers the sole law making power on the Oireachtas, it is not permissible for the Oireachtas to delegate that power to a third party except to the extent that the third party may provide detail where the principles and policies by reference to which that detail is to be provided can be found in primary legislation. The current PIAB legislation does not appear to contain any criteria by reference to which a recalibrated scale of damages in personal injuries actions could be formulated. On that basis there is a strong argument for the proposition that the Book of Quantum referred to in that legislation can only reflect the "going rate" rather than any "recalibration". On the basis of that argument it would undoubtedly require a legislative change before the Book of Quantum could do other than reflect the "going rate".

We note your proposal that members of the Judiciary with expertise in the area would join with representatives of your Department and the Personal Injuries Assessment Board with a view to identifying, as appropriate, revised guideline award levels for publication by the Board, taking into account the Quebec Task Force Whiplash Associated Disorder scale.

While fully appreciating that this is suggested with a view to giving practical effect to the second element of the Commission's recommendation, we do see it potentially exposing the guidelines process to challenge. Judicial participation might - however unwittingly - convey an impression publicly that judges had become involved in the discharge of the statutory function of an executive agency, and one whose rationale in setting the guidelines may be subject to scrutiny by the courts. Additionally, any expectation that such an exercise might lead to revision – perhaps significantly downwards – of guideline amounts may assume wrongly that the Book of Quantum on its present statutory footing is a norm-setting as distinct from a norm-following exercise.

We are, therefore, of the view that there are very considerable legal difficulties with using the existing PIAB legislation, and the Book of Quantum referred to in it, as a legal basis for any involvement of the Judiciary in formulating guidelines for the award of general damages in personal injury cases. The legal issues which we have identified would almost certainly lead to a succession of challenges which would inevitably be followed through to the higher courts. We would be reluctant to support a measure which would involve the participation of judges in a process which was so likely to be open to challenges in the courts. In addition, either such challenges would be successful, in which case nothing would be gained by the process, or if unsuccessful would be likely to delay by a very considerable period the time before which there would be any clarity as to the legal position. This might, indeed, negate the very purpose of the alternative suggestion which is to have these matters dealt with in a shorter timeframe than that which is anticipated to be likely to occur before a Judicial Council is up and running.

A second possibility might be a model outside the PIAB structure. Having set out the reasons why we are concerned that it would not be appropriate to seek to achieve the end indicated in the alternative proposal of the Commission through the use of the PIAB legislation, we would have equal concerns about any other model which did not have a clear legal basis. The law at present leaves it up to individual judges to determine damages while having regard to case law (in particular that of appellate courts) and the Book of Quantum. The requirement to have regard to the Book of Quantum is clearly provided for in law. The status of any other set of recommendations which did not have a clear legal basis would be very much open to challenge with all of the difficulties which we have already identified.

In summary, the Judiciary's preference would be that any new guidelines regime in this area should have a clear legal basis and should ideally

- be assigned within the Judiciary
- be appropriately resourced, and
- be fully articulated in statute as to
  - the powers of the guidelines setting body, including in relation to the potentially contentious issue of review of existing award levels
  - the sources of information from which it may draw and
  - the standing in law of the guidelines issued.

Obviously, we are not privy to whether it would be feasible to legislate for such a solution in the short term as opposed to awaiting its incorporation in the Judicial Council Bill. Clearly, if such a statutory structure were to be established in the near future, same could be incorporated into the Judicial Council in due course.

Whatever be the position, we would wish to assure you of the Judiciary's willingness, within the bounds necessitated by the separation of powers, to engage actively with you and your Department on the design of the appropriate solution.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'F. Clarke', written in a cursive style.

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Frank Clarke  
Chief Justice

## Annex 2

### PIC RECOMMENDATIONS

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1. Having regard to the significant discrepancy between Irish payments for whiplash type injuries and those in other jurisdictions, the PIC, in recognition of the impact of these payments on both consumers and the business community who require insurance cover recommends that the Government introduce in early course legislation to regulate the amounts or ranges of compensation for the categories of injuries identified in the first PIC Report and thereafter consider the introduction of further legislation to regulate general damages in all personal injury claims. This approach will achieve a greater level of consistency in the assessment of general damages generally.
2. In recognition of every citizen's right of access to the courts, the PIC recommends that any such legislation contain a provision whereby, in exceptional cases, a court may award an increased payment, subject to such maximum percentage as may be determined by the legislation
3. As an alternative to, or in conjunction with, the steps outlined in Recommendation No. 1, the PIC believes that a shared approach between the Executive and Judiciary in finding the best solution to fixing appropriate levels of compensation is desirable. This would permit guidelines for general damages in soft tissue injury cases - and indeed all other injuries - to be drawn up by the proposed Judicial Council - when it is established. This would enable the judiciary to take shared "ownership" of the process by advising on appropriate levels of compensation and in producing a revised Book of Quantum along with