



17 Kildare St.,
Dublin 2.

Mr Micheál Martin TD,
Government Buildings,
Merrion Street Upper,
Dublin 2.

13th February 2021

Dear Taoiseach,

I believe this is the first time that an ISME Chair has had cause to write to both the Taoiseach and the full cabinet, but I believe the circumstances warrant it.

ISME has been lobbying continuously on the cost of insurance for the last six years. My tenure as ISME Chairperson will come to an end in May this year without any material improvement in the cost of insurance. When my predecessor Ciaran Murtagh met with then Enterprise Minister Heather Humphreys in February 2018, she assured him that the Personal Injuries Commission (PIC), under the Chairmanship of Mr Justice Nicholas Kearns, would be the final and definitive piece of work required by Government in order to recalibrate personal injuries awards. She made the same assurances personally to me.

Chaired by an eminent judge, the legal profession in the form of the Law Society and the Bar Council was well represented on this Commission. It published its unanimously agreed report in July of 2018 and called for urgent action to address the issue of quantum for minor injuries in particular. Nothing further happened pending the leisurely formation of the Judicial Council.

The Judicial Council's webpage for the Personal Injuries Guidance Committee states: *"The Committee is exceptionally cognisant of the need to ensure that the guidelines which it produces are anchored in reality."* It goes on to say *"...the Committee does not... consider that its task will be aided by meeting with or considering submissions from third parties other than PIAB."*

ISME published its own [Fair Book of Quantum](#) in February 2019. In line with the findings of the Personal Injuries Commission Final Report of July 2018¹ that awards for minor injuries were 4.4 times the level paid in the UK, ISME proposed an 80% reduction in the awards for minor injuries, while leaving the awards for serious injuries unchanged. In view of the statement of the PIGC above, we were not surprised when the copies of our Fair Book of Quantum were returned to us by the Judicial Council with a letter stating they refused to read it.

How the PIGC intends to produce proposals for awards levels that are "anchored in reality" without external consultation is intriguing. However, we were shocked to learn from an Irish Times article of

¹ [Second and Final Report of the Personal Injuries Commission July 2018](#)

6th February² that the findings of the PIC “...could not be regarded as a reliable indicator of the level of such awards... because its conclusions were primarily based on settlements, not awards.”

We understand that this assertion is false, nevertheless we invite you to test its veracity with the members of PIC and with KPMG who researched the data. Not alone has the PIGC taken it upon itself to ignore the findings of a judge led Oireachtas Commission, it has also decided to introduce an uncited “*statistical analysis of data*” purporting to compare awards in Ireland with those in England, Wales and Northern Ireland. The mention of Northern Ireland is highly significant for several reasons:

1. For reasons associated with the troubles, its roads policing has traditionally been at levels of intensity far below that seen in Ireland, Wales and England. Its road safety statistics reflect this.
2. A small number of readily identifiable legal sources³ have repeatedly cited Northern Ireland data (such as it exists) since the publication of the PIC Report. How this has found its way into the deliberations of the PIGC is unfathomable, given the PIGC’s published refusal to entertain submissions from anyone other than PIAB. Perhaps PIAB has been feeding Northern Ireland award “data” to the PIGC? We suggest they are asked about this.
3. The benchmarking study carried out by the PIC was a large-scale exercise conducted to best international practice by KPMG. The notion that it is unreliable because it is primarily based on settlements is bogus: most damages are paid by way of settlement, not court award; less than 10% of damages paid are via the court award channel. The PIC data was a survey of the mixed settlement streams of insurance company payouts, and thus will be more statistically reliable than one (small and unrepresentative) channel. KPMG should be asked for its response to the PIGC.
4. The quotation of multiples of “1.2 to 1.3 times higher than in Northern Ireland...” is a blatant attempt to undermine the KPMG study, and must be corroborated by reference to data, or must be immediately resiled from by the PIGC. On page 18 of its final report, the PIC notes “*Our results, at a high level, indicate that soft tissue injury claim costs in Ireland are approximately 5.0 times that of the UK cost (including psychological injury). Note that this comparison is based on Irish claims data capped at €100,000 per claimant. The PIC determined that it would be more appropriate to cap the claims included in the analysis at €50,000, when capped at this figure, the results indicate, that soft tissue injury claim costs are approximately 4.4 times that of the UK cost (including psychological injury).*” In other words, the 4.4 multiple of awards size underestimates the factor of **FIVE** by which Irish awards exceed UK awards.
5. The spurious introduction of Northern Ireland data, and the reported rejection of the PIC data provided by KPMG, suggest a subjective selection of “accommodative” data by the PIGC which will seriously undermine the credibility and validity of the task it was commissioned to undertake.
6. The Judicial Council’s sudden, unseemly and uncharacteristic haste to publish guidelines by February 20th is almost certainly an attempt to pre-empt the commencement of the Civil Liability Act 2018 in the UK. This will slash awards for minor whiplash far below even those levels reported by the PIC, and will make ISME’s 80% cut to minor injuries look relatively modest. If the PIGC fails to reference and include the Civil Liability Act 2018 (UK) on 20th February, its findings will already be obsolete.

² <https://www.irishtimes.com/news/crime-and-law/judicial-council-committee-drafts-guidelines-on-personal-injury-awards-1.4477383>

³ <https://www.irishlegal.com/article/irish-lawyers-warn-against-blaming-damages-for-high-premiums-as-northern-ireland-hikes-payouts>

The reported remarks on the reliability of the PIC report are strongly suggestive of a clique within the judiciary who intend to adopt data on an à la carte basis in support of a high awards regime. This is unacceptable.

We have no issue with judges advising the legislature and executive on what they consider to be appropriate levels of quantum for injuries. However, the notion that the Judicial Council (as reported in the Irish Times on 6th February⁴) would sit in a form of video conclave and “vote” on the acceptance or otherwise of awards guidelines drawn up by their colleagues on the Personal Injuries Guidance Committee is surely an affront to Article 15.2.1 of the Constitution. The judiciary are appointed, not elected, and in our informed view, assigning to them the exclusive power to fix matters of public policy is a serious breach of the separation of powers.

The Government would do well to read again the letter of the Chief Justice to the then Justice Minister in February 2019, where he articulates the concerns of the judiciary regarding challenges to a revised damages regime if pursued via the PIAB legislation. Logically these concerns will remain even if damages are revised via the PIGC, and judges will find themselves, in some future courtroom, “correcting the homework” of their colleagues on the PIGC. See page three of the letter appended below.

Moreover, The Irish Times piece suggests judges stated: “*Any impact on insurance costs arising from proposed new guidelines for assessing personal injury awards depends on insurance companies passing on any resulting savings to consumer...*” This statement is not alone vacuous, it strays far from the competence of members of the judiciary. As a matter of fact established by the Central Statistics Office, the cost of motor insurance fell 46% in the five years after the establishment of PIAB in 2003, before rising again as the proportion of cases settled by PIAB fell. It is also a matter of fact established by the Central Bank⁵ that legal costs in litigated personal injuries cases below €100,000 average 63% of the value of compensation. These facts are not unconnected.

Historically, our judiciary has served Ireland well. But in more recent years, it has become apparent that the legal system as an entity has acted more in self-interest than in that of the society it serves. This is not mere opinion.

- The CCPC has highlighted the lengths to which the legal lobby went to stymie necessary legal reform. In her 2016 address to the Burren Law School,⁶ Isolde Goggin detailed the progress of the Legal Services Regulatory Act through the Oireachtas as an “*alarming example of how vested interests can influence the legislative process in their own interests.*”
- Criticism of our legal costs and inefficiencies have become an annual feature of the EU Commission Semester Reports.⁷
- The Law Society and Bar Council have both refused to investigate members of their ranks in personal injuries cases where the trial judge found that lawyers should have known the cases presented were fraudulent.

⁴ <https://www.irishtimes.com/news/crime-and-law/many-personal-injury-payouts-to-sharply-fall-under-new-guidelines-1.4477443>

⁵ <https://www.centralbank.ie/docs/default-source/statistics/data-and-analysis/national-claims-information-database/private-motor-insurance-report-2-ncid.pdf?sfvrsn=9>

⁶ <https://www.ccpc.ie/business/wp-content/uploads/sites/3/2017/05/Does-the-law-protect-incumbents-FINAL-29APR16.pdf>

⁷ https://ec.europa.eu/info/sites/info/files/2020-european-semester-country-report-ireland_en.pdf

- The then Justice Minister Mr Charlie Flanagan declared his surprise at a last-minute proposed amendment to the Perjury and Related Offences Bill in the Seanad at the behest of the Law Society, as they had declined to offer views at earlier stages of the Bill in the Seanad.
- Barristers and solicitors reacted negatively to a duty of candour practice direction⁸ imposed on them by the High Court.
- The relentless campaign against the passage of the Judicial Council Act meant that there were no formal procedures in place to address alleged judicial misconduct in the Oireachtas Golf Society scandal.

These are but a few examples of a legal system that appears to be spinning out of control, in its own self-interest. It is ironic indeed that as the rule of law is threatened by government in some Eastern European member states, we in Ireland are suffering injury to our legislature and our society by a judiciary which no longer appears to feel bound by the separation of powers or the common good.

The near hysterical assertion of constitutional limits to the legislature's ability to pass primary legislation on damages would be amusing were it not done with the seeming intent of depriving the Oireachtas of powers the Constitution exclusively confers upon it. In their submission on the capping of damages to the Law Reform Commission⁹, the Bar Council's definition of "the administration of justice" is so broad that one wonders if they see any role for politicians beyond the appointment of judges.

Furthermore, the existence of numerous pieces of primary legislation which cap damages or compensation, in either nominal or in relative terms, is well known to the members of the Bar. In our opinion, their apparent misstatement of the law in this regard seriously undermines the integrity of some of our most senior law officers.

It is extraordinary that after three decades of tribunals and reports, we are unwilling to learn the lessons of the past. Self-regulation doesn't work. It didn't work in the Church scandals; it didn't work with horse meat or the banks either. There is little time left to prevent an important deliberative process from being corrupted by a conclave acting in self-interest, entirely consumed by a form of group think. In our submission to the Oireachtas Finance Committee in 2019, ISME estimated the value to the legal lobby of personal injuries litigation (in 2015) at €351m per annum. They derided the figure at the time, but their actions since suggest our estimate was on the low side.

ISME has shown patience to the point of recklessness in waiting for reform. Our courts are egregiously pro-plaintiff, the judicial interpretations of our occupiers' liability laws are unfair, and the legal system looks after dubious plaintiffs while punishing blameless (but insured) motorists, businesses, charities and sporting bodies. In the words of a Court of Appeal Justice,¹⁰ our personal injuries litigation has become a matter of "the luck of the draw" where certain judges are reliable to the point of certainty in finding for the plaintiff. This is widely known in the court of public opinion, and some of these judges have been assigned nicknames reflective of their generosity by the counsel appearing before them.

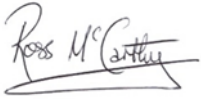
⁸ <https://www.irishtimes.com/news/crime-and-law/high-court-clarifies-practice-direction-for-immigration-and-asylum-cases-1.3764472>

⁹ <https://www.lawlibrary.ie/News/Written-Submissions-by-Council-to-European-Commiss.aspx>

¹⁰ <https://www.mhc.ie/latest/insights/the-luck-of-the-draw-court-of-appeal-discuss-inconsistency-in-awards-in-personal-injuries-actions>

The Government, and indeed the Oireachtas, now has a serious issue in its hands with (at minimum) a cohort of our judiciary. The Oireachtas legislates, the judiciary adjudicates. In the face of a grasping, avaricious legal lobby you, as the State's first minister, must assert the right of the Oireachtas to legislate, and the right of the State to act.

Yours sincerely,



Ross McCarthy
Chairperson, ISME

Copy

Leo Varadkar TD, Tánaiste and Minister of Enterprise, Trade and Employment
Eamon Ryan TD, Minister of the Environment, Climate and Communications; and Transport
Paschal Donohoe TD, Minister of Finance
Michael McGrath TD, Minister of Public Expenditure and Reform
Catherine Martin TD, Minister of Tourism, Culture, Arts, Gaeltacht, Sport and Media
Darragh O'Brien TD, Minister of Housing, Local Government and Heritage
Simon Coveney TD, Minister of Foreign Affairs; and Defence
Norma Foley TD, Minister of Education
Heather Humphreys TD, Minister of Social Protection; and Rural and Community Development
Roderic O'Gorman TD, Minister of Children, Equality, Disability, Integration and Youth
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Declan Hughes, Assistant Secretary General, Department of Enterprise, Trade and Employment
John Newham, Assistant Secretary General, Department of Enterprise, Trade and Employment

BUICHIURT UACHTARACH,
RÉPUBLÉIC ÉIREANN, DUBLIN 7.



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

The Hon. Mr. Justice Frank Clarke
Chief Justice

27th 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 13th 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.

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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,



Frank Clarke
Chief Justice