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Is Capping Damages in Personal Injuries Actions Constitutional?

The Law Reform Commission (**LRC**) has published a report examining whether it is constitutionally permissible to place an upper limit on general damages in personal injuries cases (the **Report**). A full copy of the Report can be accessed [here](#).

They assessed a number of options and made recommendations as to their constitutionality. The preferred option was to allow the court to set the cap having considered the guidelines that will be drawn up by the Personal Injuries Guidelines Committee (the **Committee**).

Background

The Cost of Insurance Working Group and the Personal Injuries Commission published reports in 2017 and 2018 which made a number of different recommendations, including that the LRC consider the constitutionality of capping general damages in personal injury actions.

The Committee was also established in April 2020 under the Judicial Council Act 2019 (the **Act**). The Committee is in the process of drafting new guidelines for awards of general damages in personal injury cases (the **Guidelines**) which are anticipated to be published on 29 October 2020 and which will replace the Book of Quantum. You can read our previous briefing on the Act [here](#).

The Programme for Government, published in June 2020, contains a number of proposals relating to the Irish insurance industry and includes a recognition of the work of the Committee and the possible requirement for constitutional change to establish guidelines on personal injury awards. Accordingly, this is a dynamic area which will continue to change for some time.

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Existing Law

General damages provide for non-pecuniary loss, such as damages for pain and suffering or for loss of amenity. They are intended to compensate a claimant for physical or mental injury and are distinguished from special damages, which reflect actual financial loss such as loss of wages or past/future medical expenses. The Courts have consistently provided - most recently by the Supreme Court in *Morrissey v Health Service Executive* [2020] IESC 6 - that claimant's should always receive 100% of their loss under the special damages heading. The *Morrissey* case also confirmed the judicial limit of €500,000 that has been placed on general damages for catastrophic injuries.

However, whilst the Court of Appeal has developed a 3 point scale to ensure that awards of general damages are proportionate to the injuries suffered - "*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*" - there has not to date been any form of cap on general damages in non-catastrophic cases.

The Report

The LRC put forward four possible models for capping general damages:

- ❑ Model 1: A mandatory cap is set by legislation, in which awards are categorised using a proportionality test similar to that currently applied by the Court of Appeal and the Book of Quantum. Although this passes the non-delegation test (as it is primary legislation) the LRC believes such a mandatory approach is open to constitutional challenge and is not recommended.
- ❑ Model 2: Legislation could be introduced, combining elements from two pieces of civil liability legislation from New South Wales (2002) and England & Wales (2018), so that awards are made for injuries according to how they are categorised, subject to an overall cap, with regulations allowing for a discretionary "judicial uplift" for certain injuries. This approach was deemed to be constitutionally permissible and open to recommendation, but was not ultimately preferred.
- ❑ Model 3: Legislation could be enacted providing for a cap, but delegating the power to determine the cap to a Government body or Minister in accordance with certain principles and policies. The LRC deemed, however, that delegating the setting of caps in this manner was even more vulnerable to constitutional challenge than model 1 and was not recommended.
- ❑ Model 4: The courts continue to set a cap for catastrophic injury cases, and adhere to a proportionality test for other awards of general damages with regard to the significant reforms anticipated in the forthcoming Guidelines. The LRC believes that the caps imposed by the Guidelines are likely to resist constitutional challenge on the basis that they are expected to reflect the proportionality test from recent case law and that the Act provides that they can be departed from as long as the courts state their reason(s) for doing so. Model 4 was therefore

recommended as the preferred approach, subject to the proviso that its resistance to challenge will ultimately depend on the precise content and application of the Guidelines.

Conclusion

The LRC emphasises in the Report that their role was to advise on a narrow constitutional question only and ultimately, the decision in relation to any policy or legislative initiatives is a matter for the Government; then the Oireachtas; with any constitutional questions to be determined by the Superior Courts.

They state in the Report that *“it would be entirely appropriate, and desirable, that the will of the Oireachtas, recently expressed through the enactment of the...Act...and under which it has conferred extensive functions on the [Committee], should be given some time to be applied in practice”*.

With that in mind, we await with interest the imminent publication of the Guidelines.

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