



Informing Progress - Shaping the Future

FOIL Ireland learning event

The new Judicial Council Guidelines on General Damages

This FOIL Ireland learning event was presented on 18 March 2021, by **Fred Gilligan BL** and was joined on-line by 116 delegates. This is a summary of the presentation and a full set of the speaker's notes may be found here [Guideline general damages in Ireland - Fred Gilligan BL - Forum of Insurance Lawyers \(FOIL\)](#)

Background

The Guidelines arise out of the Judicial Council Act 2019, which established the Personal Injury Guideline Committee. The Committee was tasked with preparing new guidelines on the quantum of awards in personal injury cases, to replace the Quantum Book.

The Committee was required to have regard to:

- The level of damages awarded for personal injuries by courts in the State;
- The level of damages awarded for personal injuries by courts in such places outside of the State that the Committee or the Board of the Judicial Council considered relevant (i.e., other jurisdictions);
- The principles for assessing and awarding damages for personal injuries as determined by the High Court, the Court of Appeal and the Supreme Court;
- Guidelines relating to the classification of personal injuries;
- The need for more consistency in the level of damages awarded for personal injuries; and
- Such other factors as the Committee or the Board considered appropriate.

The Committee comprised seven judges from the five levels of court, i.e., from the Supreme Court to the District Court. It stressed that what it wanted to achieve was 'reality', recognising that there were many interest groups from which submissions had not been sought.

In preparing the Guidelines, the committee carried out substantial research into the law on damages in personal injury cases both in this and other jurisdictions.

The first obstacle was the percentage of awards decided by the courts. Only 0.54% of all personal injury claims for the period 2017-2019 were closed by awards of a court. The rest were either settled after proceedings had been issued, at the PIAB stage or, in a small percentage of cases, prior to PIAB. In another study, of 59,437 cases recorded, 318 were closed by court award.

The committee took into account recent jurisprudence and cases in which the Court of Appeal had reduced the awards significantly, including *Hume v. Crosby (2020) IECA242*; *Payne v. Nugent (2015) IECA268*; *Martin v. Dunnes Stores (Dundalk) Limited (2016) IECA85*.

Having reported back to the Judicial Council, the Committee's recommendations were passed on 6 March 2021 by 83 votes to 63. On 9 March, the Minister for Justice sought and obtained Cabinet approval for the Guidelines, which are likely to be implemented shortly, following the necessary amendment to existing legislation.

Process

The process addressed the following factors:

- *Restitutio in Integrum* (to place the injured party in the position they were in before sustaining injury).

The speaker observed that there was a feeling that recent awards and settlements had gone beyond this principle with some plaintiffs being overcompensated.

- Proportionality
 - Proportionality *inter se*

Here a comparison was made between the maximum awards that had been made for catastrophic injuries and the high levels of award made for moderately severe injuries, such as whiplash.

- Proportionality for both plaintiff and defendant.

The award is not intended to punish the defendant. Aggravated damages achieve that in appropriate cases.

- Proportionate to social conditions.

This took into account the cost of living within the jurisdiction relative to the sums that were being awarded for relatively modest injuries. (A report on the cost of living had been obtained from an eminent economist, Colm McCarthy).

This approach had been reflected in the case of *McNamara v. ESB (1975) IR1*, where, although the court recognised the severity of the infant claimant's injuries, it nevertheless said that they were not comparable with those of a tetraplegic and the original award was reduced. Other cases in which similar comments were made can be found in the speaker's notes.

The Committee therefore decided to set bands for both injuries and figures, rather than specific awards.

How the Guidelines were calculated

Catastrophic injury

It was noted that there were a significant number of *ex-tempore* decisions for which little real detail was available and so little judicial guidance. More detail is often available for awards in relation to catastrophic injuries and the committee was able to analyse the way in which these awards had developed over the years. The cases cited showed that in 1984, the cap on such an award was €150,000; in 2005 €300,000; and in 2008 €500,000. In 2020, in the case of *Morrissey*, the Supreme Court again awarded €500,000 and that was the starting point for the Judicial Council, which decided to increase the cap to €550,000. This new cap applies to catastrophic injuries or cases where there is a significant foreshortening of life.

The Committee then took into account the Colm McCarthy report on cost of living in the State and awards in other jurisdictions. Having looked at a range of other European countries, as well as England and Wales, the Committee took the view that €550,000 was the appropriate cap for catastrophic injuries.

In assessing general damages involving paralysis such as quadriplegia and paraplegia the Committee has set out that consideration ought to be given to the following criteria: i. Age; ii. Life expectancy; iii. Extent of residual movement; iv. Pain; v. Effect on other senses; vi. Psychological sequelae, including depression;¹¹ vii. Effect on familial and other relationships; viii. Level of independence.

Non-catastrophic injury

This was more complicated because of the lack of judicial guidance from reported cases, where many claims are dealt with in the Circuit Court. The Committee therefore sought assistance from relevant insurers and indemnifiers; it requested all District, Circuit and High Court Judges to examine each case in which they delivered an *ex-tempore* judgment and complete a detailed form; and it also undertook a comparative exercise as to how Irish awards compared to awards made in other jurisdictions, primarily Northern Ireland, England and Wales but also Germany and Singapore.

At the end of this exercise, the Committee had obtained data in respect of 328 cases, where the Irish Court's award was assigned to it together with an assessment by a member of the Committee as to the likely award the case would have received in the other four jurisdictions considered.

A leading analytics provider, Verisk, was then asked to carry out a statical analysis of the data in order to determine how Irish awards compared to those in foreign jurisdictions. Having assessed the data it was concluded that Irish awards are about 1.2 - 1.3 times higher than Northern Irish awards and about 2.3 times higher than English and Welsh awards. It transpired that Irish awards were also higher than their German and Singaporean counterparts.

Based on the results of the analysis conducted, the Committee were satisfied that the Guidelines have been set in a manner which is proportionate and fair to both plaintiffs and defendants, which is closely aligned with awards made for similar injuries in comparator jurisdictions but more closely related to the Irish standard of living. The Committee also hope that the Guidelines will promote predictability and consistency in awards of damages.

The speaker strongly recommended that the report should be considered alongside the new Guidelines (which run to 78 pages), to see the basis on which they have been set.

A summary of the Guidelines

There are 12 headings:

1. Injuries resulting in foreshortened life expectancy
2. Injuries involving paralysis
3. Head injuries
4. Psychiatric damage
5. Injuries affecting the senses
6. Injuries to internal organs
7. Orthopaedic injuries
8. Chronic pain
9. Facial injuries
10. Non – facial scarring and burns
11. Damage to hair
12. Dermatitis and other skin conditions

There are then bands of damages, with caps but these need to be considered in great detail in individual cases, with many factors to be taken into account, including subjective elements. Examples of the ranges and caps provided are to be found, starting at page 12, in the speaker's notes. Of particular interest is the very wide range of damages for 'other categories of brain injury', i.e., those not classified as 'severe', which are between €500 and €400,000.

There is a new category of damages for psychiatric injury, where the range is from €500 to €170,000.

A challenge for plaintiffs in the future will be determining what level of severity the case should be placed in, taking into account both objective and subjective factors.

The speaker's notes also contain a table (page 15) which provides a brief comparator of how the figures contained within the new Guidelines compare to those within the Book of Quantum. This reveals that while the brackets for some heads of damage have increased, a number have decreased. Of note are the figures for minor and moderate neck injuries, where the previous caps of €19,400 and €52,000 respectively are now €12,000 and €23,000 respectively. With 'whiplash' injuries, the bracket has been changed from €0-€52,000 to €500-€50,000, but with more constraint on exactly where an injury is placed.

There is scope for the court to exercise its discretion to exceed the bands, which may well apply in cases involving fractures to the clavicle. The Guidelines provide that for a simple fracture of the clavicle with a good recovery the range will be from €500 - €12,000 where recovery takes place within 2 years of the date of the accident. Experience suggests that there are many cases where recovery is less favourable than that.

Practice and procedure under the new Guidelines

The Personal Injuries Guideline Committee has given directions as to how the Guidelines ought to be used in a court setting. It is envisaged that at the conclusion of every case the trial Judge should ask counsel for each party to identify a reference to the dominant injury sustained and the relevant extract from the Guidelines, which most closely matches that, as has been supported by the evidence.

Submissions should then be made by counsel as to where, within the relevant bracket of damages, the plaintiff's injuries ought to be placed in terms of severity, i.e., top, middle or bottom.

The trial Judge, having considered the evidence and the Guidelines should then reach his/her decision. S/he *must* have regard to the Guidelines and if s/he wishes to depart from the Guidelines, s/he must set out their reasons for so doing.

In assessing cases of multiple injuries, the appropriate approach for the trial judge is to:

- Identify the most significant injury and bracket
- Uplift the award to ensure appropriate value for all of the additional pain, discomfort and limitations arising from the lesser injury or injuries
- Ensure proportionality at all times.

Where there are Pre-existing conditions:

- The court should have regard to those pre-existing injuries
- Consider the extent of exacerbation
- The extent of increased duration of pain and suffering
- Increased symptomology

Proportionality will prevent the value of one injury simply being added to another. The primary injury will be valued and then a lesser sum will be allowed for any additional injuries. Correspondingly, pre-existing conditions will see a reduction in the overall award.

Adoption of the Guidelines and the effect of adoption

Sections 98 and 99 of the Judicial Council Act 2019 amend section 54 of the Personal Injuries Assessment Board Act 2003 and section 22 of the Civil Liability Act 2004 respectively.

Section 22 of the Civil Liability and Courts Act 2004 shall thereafter read as follows (emphasis added):

*The Court **shall**, in assessing damages in a personal injuries action –*

- (1) Have regard to the Personal Injuries Guidelines (within the meaning of Section 2 of the Judicial Council Act 2019); and*
- (2) Where it departs from those guidelines state the reason for such departure in giving its decision*

The existing Book of Quantum remains in place until such time as the legislation is passed. Cases that are currently being assessed by the Injuries Board, i.e., prior to the commencement of the legislation and / or cases that are already before the Courts will have general damages assessed in accordance with the existing Book of Quantum. As the existing PIAB award becomes a tender, it would be seen as unfair to plaintiffs to introduce the Guidelines with retrospective effect. It is therefore likely to be at least three to six months before we see effects of the Guidelines by way of reduction in awards from PIAB; a reduction in settlements and potentially in court awards. (In the Q&A session which followed the presentation, one topic discussed was whether the Guidelines could apply to cases in PIAB where no assessment had yet been made. As will be seen, it is anticipated that the final rules will make clear where the cut-off is).

Summary

Once the Guidelines take effect, they are likely to result in a large number of Circuit Court cases falling into the District Court and smaller number of High Court cases dropping into the Circuit Court but with attendant costs savings for defendants.

Q&A

It is likely that there will be a period during which the courts will be applying both the old and new scales of awards, until such time as cases that have been started under the existing Book of Quantum figures have run through.

It is possible that once the Guidelines take effect, plaintiff lawyers may become more susceptible to pre-medical offers, in lower value claims, given the scales of costs available in the District Court. This is unlikely to happen, however, in a case where a plaintiff has ongoing symptoms.

Where plaintiffs' solicitors see symptoms continuing, particularly beyond two years, they may well refrain from putting the case into PIAB. Although potentially taking the case into the Circuit Court, the judiciary has been advised to note claims (particularly whiplash for which the Guidelines provide detailed advice) where further symptoms are alleged but difficult to disprove. The onus is shifting onto the plaintiff but defendants should also be prepared to investigate dubious claims.

Cases that have never been in PIAB are likely to be subject to the new Guidelines, even where proceedings have already been issued. This will result in a number of those cases falling within the District Court's costs regime.

If the new Guidelines do apply to cases which are in PIAB but not yet assessed, there is the potential for judicial review proceedings but it is to be hoped that the final rules will clarify exactly when they apply. The date of application to PIAB would be an alternative trigger.

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