



**Informing Progress** - Shaping the Future

## FOIL Ireland learning event

# The Practical Application of the New Judicial Guidelines on General Damages

This Foil Ireland learning event was held on 24<sup>th</sup> June and was led by **Maura McNally S.C.**

### **The Judicial Personal Injury Guidelines and Personal injury Litigation.**

The Family Leave and Miscellaneous Provisions Act 2021. [Number 4 of 2021] Part 9 amends the *Judicial Council Act 2019* and the *Personal Injuries Assessment Board Acts* to make further provision in relation to the operation of personal injuries guidelines adopted by the Judicial Council; and to provide for related matters.

I refer you to ;-

S.I.No 182 of 2021; Judicial Council Act 2019 (Commencement) Order 2021, and S.I. No 180 of 2021; Family Leave and Miscellaneous Provisions Act 2021 (Part 9) (Commencement ) Order 2021.

The commencement date was Saturday 24<sup>th</sup> of April, 2021.

### **The new personal injury guidelines.**

#### **An example -Quantum;**

The new personal injury guidelines prescribe **considerations** that must be taken into account by the assessor (at PIAB) or the judge (if proceedings are instituted) when dealing with a claim.

In my submission, certain of these considerations were already being utilised by practitioners and more particularly defendants in trying to assess awards of damages. Some could be described as just *simple common sense*.

For example when addressing orthopaedic injuries, in particular neck injuries, the guidelines state with specificity;-

*the assessment of damages for whiplash injuries requires particular care. Allegations of such injuries are easily made and not easily disproved. Medical experts are reliant on the honesty of claimants. The evidence relating to such a claim requires careful scrutiny.*

*The court should make its findings of fact on the issues of:*

- i. Whether a whiplash injury was sustained; and*
- ii. If so the nature and extent of the injury.*

*Considerations include:*

- (i) age;
- (ii) nature, severity and duration of injury and consequential symptoms,
- (iii) extent of required medical intervention and treatment,
- (iv) presence of risk of degenerative changes,
- (v) impact on work ,
- (vi) interference with quality of life and leisure activities
- (vii) impact on personal relationships
- (viii) prognosis

### **Practical application.**

The application of the new guidelines on quantum will, at the determination of proceedings, ( either at the end of the PIAB stage, or as part of proceedings in Court) require submissions to be made by the parties to the proceedings underscoring the relevant category the injury should fall into when assessing damages.

The judicial guidelines require the continuation of *fairness* and more particularly *proportionality* of awards and it is this that allows the exercise of judicial discretion. Proportionality is the *correct relationship between all of the parts; each part considered with respect to the whole.*

The submissions to be made at the determination of evidence should include that one simply does not *tick a box* ( like a shopping-list) to indicate an injury to the hand, an injury to the leg, an injury to the back etc all of which should be added together as a shopping list! It is *proportionality* in respect of the injuries which must apply and it is that proportionality which requires to be addressed in an expert fashion to include reference to the guidelines themselves. The court (or PIAB) must be addressed on "what is proportionate in all of the circumstances".

A new category in the guidelines is called 'injuries resulting in or shortened life expectancy', to be considered under the heading of 'catastrophic injuries'. The increase in awards for catastrophic injuries has been quite limited in overall terms. In catastrophic injuries in Ireland, the cap was increased in the *Morrisey (2020)* case to €500,000. Back in 1984, when the cap was first introduced, it was €150,000. The cap is now €550,000, so the increase of €50,000 could be viewed as something of a *sop*.

The reality is that with a catastrophic injury, it is not the general damages the parties looks to. The larger part of the claim, for example with paraplegia, is the cost of the care for that person, for the remainder of their life. The average cost of permanent care (live-in care) in this jurisdiction is in the region of €250,000 per annum. That is for round the clock care in a specialised facility, with appropriate rehabilitation, physiotherapy, etc. When presented with a claim where the injured party is only 20 years of age when the life changing accident and injury occurs and if life expectancy is to 70, that is 50 years at €250,000 and that is where the large awards come from, i.e., from the special damages in that case.

The jurisdiction of the District Court is up to €15,000; that of the Circuit Court up to €60,000; and above those cases are heard in the High Court. In my past experience, the most regular category of cases heard in the lower courts was orthopaedic injuries. The Guidelines now prescribe that one must look 'considerations' ( as referenced above) .

Under orthopaedic injuries, neck injuries now allow various categories ranging from most severe (including paraplegia and quadriplegia) [€150,000-€300,000] to minor neck injuries [€500-€3,000]. As far as the application of those categories is concerned, both the employees of PIAB and the judiciary will have to look to submissions from the parties, so the same type of submissions that would be made to a court, will need to be made to PIAB.

The employees of PIAB are now trying to make the same assessment of the injuries and damages that a court is required to do. The court, however, has the benefit of oral submissions. It will be necessary to advise PIAB

that the defendant will be making submissions and those must then be sent in in the appropriate form. This will mean incurring the necessary expenditure at an early stage to gather the evidence, including a defence medical report.

Unfortunately, PIAB has not produced new forms to facilitate this. The judicial guidelines require the continuation of fairness and proportionality. The proportionality requires that the claimant is put, as far as possible, back into the position they would have been in but for the accident. But the defendant is not to be penalised ' by the award or the assessment: it must be fair to both parties.

The speaker issued a reminder that, following *Clarke v O'Gorman (2014)*, there is an assumption ( in PIAB) that in most cases liability will not be in dispute and an award will be made.( where the defendant is consenting to the assessment itself). It is therefore important to make submissions to PIAB not only in assessment only cases, but also where liability is in dispute and/or the extent of the injuries is to be challenged.

With the new category of shortening of life expectancy, quadriplegia is now €400,000-€550,00 and paraplegia €320,000-€450,000. Considerations include age; reduction in life expectancy; nature, duration and extent of injury; and impact on work and day-to-day life.

There are other considerations for other forms of paralysis, including the extent of residual movement; pain; the level of independence; and insight, i.e., the plaintiff's ability to appreciate the nature and extent of the injury. Both parties have input into the psychiatric/psychological aspect of the injury.

Another factor is the extent of any epilepsy and other sequelae from a head injury. With problems such as epilepsy, any associated conditions caused by medication must also be taken into account.

The effect of injuries affecting the senses should take into account, additional factors such as tinnitus.

The extent of scarring is a further consideration, where experience makes it clear that scarring on a young woman is more significant than on a young man. Particularly with younger women, the psychological impact must be taken into account, as well as the physical aspect. These factors will be addressed both by PIAB and the judiciary when making their assessments.

When looking at internal organs, considerations include the disturbance of bowel function; impact on sex life; and whether the enjoyment of food is impaired. With reproductive injuries, the considerations include whether the impact of the injury is total, or partial and its effect on sexual function. With both sexes, there will be consideration of whether or not they already had children; and any intention to have children/more children. Other factors depend on the sex of the plaintiff but scarring and the extent to which surgery may assist is common to both men and women. Many of these features were already being considered when valuing claims. Chest injuries are also dealt with under this heading.

Other factors to take into account are the risk of degenerative change in orthopaedic injuries; the extent and nature of any ongoing pain; with amputation, the site of the amputation and whether a prosthesis provides any amelioration.

Similar considerations apply to leg and foot injuries and hand injuries: where was the injury; how serious was it; did it involve amputation; and what is the impact on normal function?

With burns it is necessary to look at the site(s) of the injury and the percentage of the body affected. Were the burns full thickness, partial thickness or superficial?

The guidelines have 12 categories: catastrophic injuries (involving a reduction in life expectancy; injuries involving paralysis; head injuries; psychiatric damages; injuries affecting the senses; injuries to internal organs; orthopaedic injuries; chronic pain; facial injuries; scarring and burns; damage to the hair; dermatitis and other skin conditions.

These 12 categories have a multiplicity of sub-categories.

The speaker then went through the guidelines in relation to head injuries and particularly brain damage and pointed out the new categories and their valuations. These range from €550,000 for catastrophic injury to €500 for minor injuries.

Psychiatric damage was not previously assessed by PIAB but it is now required to do so. The range here is now €170,000-€500.

With chronic pain including fibromyalgia, chronic pain syndrome (ME), and the various other disorders, the guidelines look to reflect the impact of severity and prognosis. They recognise that where the primary area of pain is a particular part of the body, the guidelines for injury to that area may assist but that there may also be a psychiatric overlap.

Strangely, the guidelines for facial injuries do not discriminate between men and women, although in practice, as distinction is drawn, as previously mentioned.

The *McCarthy* cases were five judicial reviews brought in April 2021. These related to claims that as PIAB had delayed its assessment, the five claimants would have their damages assessed under the new guidelines, rather than the old and the damages would be lower. Leave to pursue JR has been granted but as yet there has been no determination. There is the possibility that plaintiffs suffering injuries in the same accident may have their damages assessed by PIAB under different regimes, because one legal adviser was quicker off the mark than another, or a medical expert provided a report at an earlier date. This may lead to argument that it would be fairer for all claims to be assessed on the same basis, i.e., the old and more generous regime (or defendants may argue that both should be assessed under the new regime).

Counsel warned that the position and attitude of defendants and how the “compensator” approaches cases or deals with cases is now most relevant; even the attitude of the defendant and its correspondence and now submissions at PIAB stage will be of relevance in a court. Attention was drawn to the case of *Doyle v Donovan [2020] IEHC 119*, where the conduct of the defence from the very inception of the case (which now under the guidelines will include the interaction at the PIAB stage and submissions presented there) resulting in the defendant insurer being penalised on Costs.

Other cases to be considered include *Morgan V ESB [2021] IECA 29*, *Naghten v Cool Running [2021] IECA 17* and *McGeoghan V Kelly & Ors. [2021] IECA 123*.

Then one has the “opposite” conclusion in the aggravated damages case *Ward v McDonagh [2021] IEHC 239*.

Careful attention to the content of Submissions, even at the PIAB stage is now most necessary. This will require early investigation, and expenditure, and consultations, and the attention to the content of advices and the resultant Submissions; a perilous task, when the knock-on effects are considered. (and barely touched upon above).

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