2020 Insurance Claims Management Webinar Series

8th December 2020
Recent Judgments in Personal Injury Claims
Event starts at 1.00pm
A commentary on recent Court decisions focusing on:

• Calculation of General Damages
• Psychiatric Injury and Nervous Shock claims
• Costs Differential Orders
• The obligations and value of Affidavits of Verification
The Irish Times

Maria Bailey and the swing: Just because we can doesn't mean we should

Laura Kennedy: TD's case against hotel which she has now dropped raises issue of personal responsibility

Many personal injury awards being reduced or dismissed

Government is hoping key rulings on settlements will alleviate the insurance crisis

Irish Examiner

Man suing for injuries has case thrown out after taking part in 10km obstacle course

No use suing over spilt milk as court throws out Lidl shopper's personal injury claim

Irish Independent

'People are far too litigious' – GAA welcomes 'landmark' decision after judge dismisses injury claim brought over fall at game

Breaking News.ie

Man loses €60,000 rear-ending damages claim over lies, judge rules
CALCULATION OF GENERAL DAMAGES
Until recently, the so-called cap on general damages stood at approximately €450,000 by virtue of the judgment of High Court in 2009 in *Yun v. MIBI & Tao [2009]* IEHC 318.

That cap was recently revisited by the Supreme Court in *Morrissey & Anor v HSE & Ors [2020]* IESC 6 where the Court revised it upwards to €500,000 to reflect the passage of time since it was last judicially fixed.

In *McKeown v Crosby & Anor, [2020]* IECA 242 Noonan J noted that although the Supreme Court has recalibrated the upper limit by an approximately 11% uplift, it does not mean that the value of all other injuries should increase by a similar percentage. Rather it is a recognition that for the most serious categories of injury, the passage of more than a decade since the earlier cap was fixed meant that it was no longer a fair and just figure for such injuries.
Court of Appeal has now for a number of years been consistently reducing the awards granted previously granted by the High Court:

- **Fogarty v Cox** [2017] IECA 309 an award of general damages reduced from €115,000 to €62,500.
- **Gore v Walsh** [2017] IECA 278 an award of general damages reduced from €50,000 to €25,000.
- **Nolan v Wirenski** [2016] IECA 56 an award for general damages reduced from €120,000 to €60,000.
- **Shannon v O’ Sullivan** [2016] IECA 93 both awards of general damages reduced from €130,000 and €90,000 to €65,000 and €40,000 respectively.
- **Payne v Nugent** [2015] IECA 268 an award of general damages reduced from €65,000 to €35,000.
O’ Connell v Martin; Ali v Martin [2019] IEHC 571

- Circuit Court awarded €17,500 in respect of whiplash/soft tissue injury sustained by the Plaintiff.
- On appeal, the High Court awarded a sum of €3,000.
- Twomey J. noted that the Book of Quantum is not binding on the Courts in assessing level of award for general damages.
- Courts are bound by the principles derived from decisions of the Court of Appeal and the Supreme Court.
- Twomey J. set out a number of principles.
Binding Principles

1. The damages awarded must be fair to the plaintiff/applicant and defendant/respondent;

2. Modest damages should be awarded for minor injuries, moderate damages for middling injuries and severe injuries should attract damages which are distinguishable from catastrophic injuries;

3. Damages awarded should be proportionate to the cap for general damages in order to avoid the concertina effect;

4. The award of damages is to be reasonable in light of general after-tax incomes [in the region of €35K as per CSO statistic];

5. Appropriate skepticism should be applied to litigants' claims;

6. Common sense should be applied to the parties' claims;

7. Caution should be taken by the Court when relying on expert reports.
McCormack v Minister for Public Expenditure and Reform [2019] IEHC 906

• The Plaintiff, Garda McCormack, sustained a fracture to his dominant right wrist and cuts to his lips during an arrest of an intoxicated suspect, the suspect was also caused to fall on the Plaintiff’s right wrist in the struggle to arrest.
• The Plaintiff spent 6 weeks in a plaster cast and splint and attended one physio session leading to a 9-week period of leave from work.
• The Principles set down by the Court of Appeal and Supreme Court in other rulings bound the Court in the assessment of damages for Garda McCormack.
• McCormack was awarded €20,000
Simpson v Governor of Mountjoy Prison

• McCormack was awarded €20,000 taking into account the recent Supreme Court case of Simpson v Governor of Mountjoy Prison [2019] IESC 81.

• Simpson was one of the few cases handed down by the Supreme Court which considered the appropriate amount of compensation for a person who cannot be said to have ‘sustained significant injuries’.

• The Supreme Court applied, inter alia, the same restitutionary principles of seeking to put a claimant in the same position as before the incident, as apply in personal injury cases.

• On this basis, the Supreme Court determined that €7,500 was appropriate compensation for a prisoner who was forced to slop out for seven and a half months.

• MacMenamin J. described the sum of €7,500 as ‘moderate compensatory damages’ for a prisoner who felt ‘deeply humiliated, alienated from support and denigrated’ as a result of his exposure to conditions which were ‘distressing, humiliating and fell far below acceptable standards’.
McKeown v Crosby & Anor, [2020] IECA 242

General Damages: Proportionality, Consistency and Predictability

• Proportionality in awards of damages for personal injuries falls to be considered in two particular respects:
  1. Against the yardstick of the cap for the most serious injuries; and
  2. where in the hierarchy of damages the injury under consideration fits.

• The award must be considered in the light of awards given by courts for comparable injuries.

• Fundamental to this and to fairness in the operation of any system of monetary compensation for personal injuries is consistency and predictability.
Personal Injury Litigation should not be a lottery

- “Personal injury litigation should not be a lottery and plaintiffs and defendants alike are entitled to reasonable consistency and predictability.”

- Noonan J acknowledged that some judges were viewed as more generous or parsimonious in their awards than others. The value of a case should not depend on the identity of the trial judge.
Book of Quantum

- Noonan J described the Book of Quantum as an “aid” to ensuring proportionality, consistency and predictability of awards.
- Courts are mandated to have regard to the Book
- Most suited to relatively straightforward cases where the injury falls more clearly into one or more of the defined categories
- Where Book is relevant, it would assist the court’s considerations to hear submissions from parties about how it should be applied, or perhaps whether it should be applied at all.
Robin Leidig v. Ian O’Neill
[2020] IECA 296

• This was an appeal against the quantum of an award of damages made by the High Court (Eager J.) sitting in Kilkenny on 6th June, 2019.

• On the 20th August 2015, when the plaintiff was driving his motorcycle when he was involved in a relatively low speed accident. The defendant admitted liability and the case proceeded as an assessment of damages.

• Plaintiff suffered a fracture of the scaphoid (diagnosed over a month post-accident) and a laceration over his eye.

• Plaintiff in splint initially for a month and then plaster cast for almost 3 months.

• A CT scan 7 months post-accident showed fracture was persisting and Plaintiff ultimately underwent surgery on 02/09/2016.
Robin Leidig v. Ian O’Neill  
[2020] IECA 296

• Plaintiff had just graduated with degree in mechanical engineering.
• His ability to carry out mechanical work and fabrication on motor vehicles was affected.
• Commenced a desk job in January 2018.
• Court was invited by counsel for the plaintiff to award damages based on a loss of opportunity to pursue his career of choice.
• Eagar J awarded the Plaintiff a total of €155,000 for General Damages made up of €70,000 pain and suffering to date, €30,000 for future pain and suffering, €15,000 for loss of hobbies and €40,000 for loss of opportunity. There was an additional sum of €8,574 for special damages which was not in controversy.
Robin Leidig v. Ian O’Neill
[2020] IECA 296

- **This judgement is particularly interesting in the following respects:**
  - It references yet again that the award of damages must be proportionate and referenced the Court’s own recent judgment in McKeown v Crosby.
  - The discussion on the Book of Quantum, and in particular that the trial judge had erred in the categorisation of the wrist injury as “severe and permanent” rather than “moderately severe.”
  - The judge erred in apparently taking the view that Book of Quantum values were for past pain and suffering only. This judgement confirms that the figures provided for in the BoQ encompass the entirety of the damages appropriate to a particular injury.
Robin Leidig v. Ian O’Neill
[2020] IECA 296

• The judge erred in awarding damages separately for “loss of hobbies” as this is clearly to be encompassed within the range of damages for pain and suffering.

• Confirms decision in Supreme Court case of Rossiter that loss of opportunity can be awarded even where it had not been clearly established that the Plaintiff’s future income may not be adversely affected. This should be considered as an element of the general damages.

• The Court of Appeal reduced the general damages to €90,000 made up as to €50,000 for pain and suffering to date, €15,000 for future pain and suffering, and €25,000 for loss of opportunity. The High Court award totalling €163,574 was thus reduced to €98,574, an overall reduction of €65,000.
PSYCHIATRIC INJURY AND NERVOUS SHOCK CLAIMS
Nervous Shock

• Nervous Shock has been defined as “a legal term used to connote a mental as opposed to physical injury to a person”.
• Denham J, Kelly v. Hennessy (1995) 3IR253
• It has been accepted since the late 19th century in Ireland that such an injury can be the subject of damages.
• There are two leading Irish cases in this area, namely:
  • Mullally v Bus Eireann (1992)
  • Kelly v Hennessy (1995)
In *Kelly v Hennessy*, Hamilton C.J. identified 5 requirements for a successful claim for Nervous Shock:

- The Plaintiff must establish that he or she suffered a recognisable psychiatric illness;
- That the psychiatric illness was shock induced;
- That the shock (and hence the consequent psychiatric illness) were caused by the negligence of the Defendant;
- The nervous shock must have been by reason of actual or apprehended physical injury to the Plaintiff or a person other than the Plaintiff; and
- The Plaintiff must show that the Defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock. It is not enough to show that there was a reasonably foreseeable risk of personal injury generally.
Duty of Care

Glencar Exploration plc v. Mayo County Council (No 2) [2002] 1 IR 84

Keane CJ –

“There is, in my view, no reason why courts determining whether a duty of care arises should consider themselves obliged to hold that it does in every case where injury or damage to property was reasonably foreseeable and the notoriously difficult and elusive test of “proximity” or “neighbourhood” can be said to have been met, unless very powerful public policy considerations dictate otherwise. It seems to me that no injustice will be done if they are required to take the further step of considering whether, in all the circumstances, it is just and reasonable that the law should impose a duty of a given scope on the defendant for the benefit of the plaintiff.”
Curran v Cadbury (2000)

This decision is an excellent summary of the position in Ireland.

• It again confirms that to recover for this type of injury in Ireland, the claimant must comply with the five conditions laid down by Hamilton CJ. in Kelly v Hennessy.

• McMahon also noted that Hamilton CJ. had held that to recover in Ireland for nervous shock, the Defendant had to foresee nervous shock and not merely personal injury in general.

• It is also useful because McMahon J. clearly indicates that the distinction between the primary and secondary victims is not one which does anything to assist the development of legal principles that should guide the courts in this complex area of the law.
Employment Liability cases

The 2002 case of Knowles v The Minister for Defence preserves the legal principle that an employer who knowingly places an employee in a situation where they might develop PTSD is under a positive duty to be aware of that risk and to detect, diagnose and treat any “obvious” symptoms of it, even where the employee does not expressly bring those symptoms to the employer’s attention.
The definition of “recognisable psychiatric illness”

- In order to determine what is to be considered an actionable psychiatric injury, it is easier to confirm what is not an actionable injury rather than what is.
- Denham J. clearly outlined that “grief and sorrow are not a basis upon which to recover damages” in her decision in *Devlin v National Maternity Hospital* [2007] IESC 50.
- This position was supported by Ryan J. in the 2016 decision of *Paul Hegarty v Mercy University Hospital Cork Ltd* [2016] IECA 24, where it was confirmed that “high levels of stress and anxiety” did not give rise to actionable damages.
The definition of “recognisable psychiatric illness”

• Keane CJ in *Fletcher v Commissioner of Public Works* (2003) set out that the law in this jurisdiction should not be extended to allow the recovery for psychiatric injuries resulting from irrational fear of contracting a disease and this has been strongly confirmed by Irvine J. in the 2010 case of *Carey & Ors. V Minister for Finance*.

• Clark J. in *David Larkin v. Dublin City Council* (2007) held that “upset, humiliation, sensitivity, distress and disappointment” did not constitute a recognisable psychiatric condition as no treatment or medical intervention was required. The Plaintiff in this case had been diagnosed with having an acute stress reaction by his GP and had attended a counsellor on a number of occasions.
**Katarzyna Plonka v Ainars Norvaiss (2016)**

In this case the Court discussed the psychological reaction known as “catastrophisation”.

- Cross J. accepted that the medical description of catastrophisation was the most probable explanation for the plaintiff’s symptoms.
- The Judge felt that the Plaintiff has predicted a negative outcome and interpreted everything that had occurred since the accident as a catastrophe.
- Cross J. utilised a variation of the “egg shell skull” rule in finding that the Plaintiff in this case was someone who was affected far more by this injury than anybody else.
- This position was accepted despite the fact that no medical evidence had been proffered by a psychologist or psychiatrist on behalf of the Plaintiff or the Defendant to confirm whether “catastrophisation” is a medical recognised disease in itself.
- Cross J. awarded €50,000 in general damages.
- This decision highlights the highly subjective approach in the assessment of these cases.
The definition of “recognisable psychiatric illness”

• Interesting to note, it is recognisable and not recognised.
• It is fair to say that in the absence of direct guidelines, the judiciary are very much reliant on the evidence of medical experts in the course of proceedings. Ultimately, it appears to fall upon the judiciary to assess the methods medical experts use in their diagnosis, particularly where experts fundamentally differ in their conclusions.
• What is worrying is the emergence of cases like Plonka whereby Cross J. was satisfied to come to conclusions about the Plaintiff’s mental health where no evidence in relation to same had been given.
• It is therefore clear that the lack of guidelines is causing inconsistencies across judgments in the area.
Duty to Mitigate Loss

W v Minister for Health and Children & Ors. [2016] IEHC 692

- Hanna J. said the father had suffered from moderate post-traumatic stress following his son’s death.
- Hanna J. ruled the father was entitled to €125,000 compensation but reduced the award by €15,000 due to the man’s failure to undergo therapy.
- While the failure was understandable, there was an obligation to mitigate loss.
Sharon Wallace v King’s Island Community Crèche (2019)

• Limerick Circuit Court
• The Plaintiff’s son, aged 14 months, received a burn to his neck from a cigarette dropped by a member of staff of the crèche.
• The Plaintiff alleged an adjustment disorder in response to hearing that her son had been injured by a cigarette burn whilst at crèche, and on witnessing his injuries thereafter.
• A sum of €17,000 was awarded to the minor for the primary injury.
• A sum of €7,500 was awarded to Sharon Wallace in respect of her claim for Nervous Shock, plus costs on the District Court scale.
Lisa Sheehan v Bus Eireann and Vincent Dower [2020] IEHC 160

High Court: The plaintiff was seeking damages for the psychiatric injury that resulted from her presence at the scene of a RTA. The defendants are the persons responsible for each of the two vehicles directly involved in the collision.

Issues raised:

• What is the nature and scope of the duty of care not to cause a reasonably foreseeable psychiatric injury to a person who is not directly involved in the accident caused by that breach of duty?

• Does the law recognise a right of recovery for the psychiatric consequences of witnessing an accident, if the primary victim is the tortfeasor rather than a blameless third party?
Lisa Sheehan v Bus Eireann and Vincent Dower [2020] IEHC 160

Decision of Keane J:
“[t]he test for liability for negligently inflicted psychiatric injury is that set out by Hamilton CJ in Kelly. The test for the existence of a duty of care, the fifth requirement of the test in Kelly, is that articulated by Keane CJ in Glencar Exploration plc. A rigid primary/secondary victim distinction, entailing an inflexible adherence to the Alcock control mechanisms, has no role to play in the application of either.”
Lisa Sheehan v Bus Eireann and Vincent Dower [2020] IEHC 160

Keane J. rejected the argument that “for the plaintiff to succeed in her claim as a rescuer there is a threshold requirement that she objectively exposed herself to danger or reasonably believed that she was doing so, or – differently put – that it is necessary for her to establish that she came within the range of foreseeable physical injury in giving assistance at the scene of the accident”
The position of the plaintiff as a rescuer

Lisa Sheehan v Bus Eireann and Vincent Dower [2020] IEHC 160

Keane J rejected the principle advanced by the English High Court that, not to exclude liability for psychiatric injury caused to a plaintiff who witnesses a defendant’s self-inflicted physical injury, is to impose, in effect, a duty upon individuals to look after themselves, thereby placing an undesirably restrictive burden on the right to self-determination.

Keane J found:

“the constitutional strictures under which our courts necessarily and properly operate would only permit [such an exclusion of liability] to occur as the result of the relevant rights-balancing exercise, rather than as the result of the application of an inflexible, one-sided rule.”
What to reserve?

• There seems to be an unofficial cap of €85,000 for nervous shock claims albeit that in recent cases this figure seems to have increased.

• Cases involving medical negligence claims do appear to be getting higher awards.

• Traditionally nervous shock claims were worth approximately €40,000.

• Since change in jurisdiction, this has increased to between €40,000 and €60,000.

• A personal injury case that leads to psychiatric injury has a higher value to a pure nervous shock claim.

• Generally all nervous shock claims are issued in the High Court.

• If issued in the Circuit Court they generally have a €25,000 - €40,000 value, provided the claim is genuine and once 5 criteria are established.

• Even if the criteria are not established, Circuit Court Judges are slow to make some level of an award, often at District Court level, given the trauma the person has undergone.
COST DIFFERENTIAL ORDERS
Limitation of Plaintiff Costs


Where the damages that are awarded to a successful plaintiff are within the jurisdiction of a lower court, a trial judge may order the plaintiff to pay to the defendant the difference between the costs actually incurred by the defendant and those that would have been incurred had the proceedings been commenced and determined in the appropriate court.
Moin v Sicika & O’ Malley v McEvoy [2018] IECA 240

Peart J: “In my view it is incumbent upon a trial judge in circumstances where an award is significantly within the jurisdiction of a lower court to make a differential order unless there are good reasons for not doing so. The trial judge must have regard to the clear legislative purpose and have regard to all the circumstances of the case at hand which are relevant to the exercise of his/her discretion.”

- Warning letters;
- Onus on the Plaintiff;
- Where the question of damages is borderline.
Warning letters

- A trial judge is obliged to have regard to warning letters;
- Plaintiff ought to at least engage with the issue and consider whether it would be wise and appropriate to bring an application to have the case remitted to appropriate Court.
- Notwithstanding, there is no obligation on a defendant to issue a warning letter. It is up to the plaintiff to make the move in relation to remitting to a lower court.
Onus on the plaintiff

- The plaintiff has carriage of the proceedings.
- The onus is on the plaintiff to ensure that the proceedings are conducted in the lowest court that has jurisdiction to make an award in an amount that it is reasonable to expect.
Onus on the plaintiff

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Where the question of damages is borderline

- Section 20 of the Courts of Justice Act, 1936 (as substituted by s. 16 of the Courts and Civil Law (Miscellaneous Provisions) Act 2013).
- Circuit Court has jurisdiction to award damages in excess of the relevant monetary limitation of the Circuit Court.
- Plaintiff loses nothing by acting on a precautionary basis rather than take the risk warned of in the defendant’s letter, or even where no such warning letter is written by the defendant.
Section 17 in operation

OPTION A

- A trial judge may measure a sum which he/she considers to be the difference between the costs actually incurred and those that would have been incurred had the proceedings been commenced and determined in the appropriate court.

OPTION B

- Taxing Master taxes the costs actually incurred in the higher court proceedings in which the award was made, and also taxes the costs on a hypothetical basis that the proceedings had been commenced in the lower court.
Taxing Costs
Option B

HIGH COURT:
Any bill heard by and certified by Taxing Master (Legal Costs Adjudicator) will incur stamp duty of 8% per €100.
Notice to tax: €275
Certificate of taxation €68

CIRCUIT COURT:
Any bill heard by and certified by the County Registrar will incur stamp duty of 8% per €100.
Summons to tax: €70
Certificate of taxation: €70
Section 169 (1) states that “a party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including:

- conduct before and during the proceedings;
- whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings;
- the manner in which the parties conducted all or any part of their cases;
- whether a successful party exaggerated his or her claim;
- whether a party made a payment into court and the date of that payment;
- whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer; and
- where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.”
THE OBLIGATION AND VALUE OF AFFIDAVITS OF VERIFICATION
Section 14 Civil Liability and Courts Act 2004

14(1) Where the plaintiff in a personal injuries action-
   a) Serves on the defendant any pleading containing assertions or allegations, or
   b) Provides further information to the defendant
The plaintiff (or in the case of a personal injuries action brought on behalf of an infant or person of unsound mind by a next friend or a committee of the infant or person, the next friend or committee) shall swear an affidavit verifying those assertions or allegations or further information.

14(2) Where the defendant or a third party in a personal injuries action serves on another party to an action any pleadings containing assertions or allegations, the defendant or third party, as the case may be, shall swear an affidavit verifying those assertions or allegations.

14(5) If a person makes a statement in an affidavit under this section-
   a) that is false or misleading in any material respect and,
   b) that he or she knows to be false or misleading he or she shall be guilty of an offence.
Section 14 Civil Liability and Courts Act 2004

The Plaintiff must swear an Affidavit verifying any assertions or allegations which are served on the Defendant in pleadings.

This provision provides for a mechanism in ensuring details furnished are accurate and, where appropriate, complete.

In addition to verifying all pleadings, Plaintiff is obliged to swear an Affidavit in relation to the Schedule of Special Damages furnished.

The Court of Appeal in case of Platt v OBH Luxury Accommodation Limited & Anor [2017] IECA 221, specified that the 2004 Act was designed to ensure that incorrect or deceptive declarations, accusations or evidence would “not lightly be tolerated”.

Onus on the Defendant?

Must not forget that there is a requirement for the Defendant to also provide an Affidavit of Verification for any assertions and/or allegations in any pleadings made on behalf of the Defendant.

Lisa McDonagh Stokes v Aleskejs Bebins 2020:

• Minimal impact plea was included in the Defence following consultation with Insured and in light of evidence of Garda and Motor Assessors.

• A minimal impact defence was filed.

• The Defendant was not contactable despite best efforts, so no Affidavit of Verification was filed.

• Objection made to Motor Assessor or Garda swearing Affidavit.

• As no Affidavit filed in Court, O’ Malley Costello J. refused to allow LVI defence and case proceeded by way of assessment.
Questions?

Louise Smith
Partner
Ronan Daly Jermyn
E. louise.smith@rdj.ie
T. +353 21 4802710

Claire Murray
Partner
Ronan Daly Jermyn
E. claire.murray@rdj.ie
T. +353 91 895320
2020 Insurance Claims Management Webinar Series

16th December 2020 Discussion on Psychiatric Claims

Dr Finian Kelly
Consultant Psychiatrist

Register at rdjevents@rdj.ie