



ISME,  
17 Kildare Street,  
Dublin 2.  
22<sup>nd</sup> November 2019

Minister Heather Humphreys TD.,  
Department of Jobs, Enterprise and Innovation,  
Kildare St.,  
Dublin 2.

### **INSURANCE REFORM & THE CONSTITUTION**

Dear Minister Humphreys,

Thank you again for meeting with Ross McCarthy and me on 6<sup>th</sup> November last. We managed to cover most of the issues raised in our paper in the short time available, but I indicated to you I would respond to you separately on the issue of the necessity or otherwise of constitutional reform to reduce damages. This was in the context of your view that if the Judicial Council did not reduce quantum, a referendum might prove necessary.

This particular issue has been fraught with misinformation for some time. I am taking this opportunity to set out the reasons why it is apparent that this is not a constitutional issue, and why the mass of effort required on insurance reform is for the Oireachtas, not for the judiciary. As ISME has previously pointed out to the Minister for Justice:

1. The Civil Liability Act 1961 caps damages for fatalities and has survived 58 years without constitutional challenge.
2. Justice Kearns's first recommendation of the Personal Injuries Commission (PIC) was to introduce a legislative cap on damages. This recommendation was redacted from the final PIC

report. He further set out the broad parameters within which he suggested that a bill to cap damages would survive constitutional challenge at this year's PIAB conference.<sup>1</sup>

3. The Constitution confers rights of access to the courts, not to given levels of quantum.
4. The award of general damages was only assigned to judges in 1989, it rested with juries before that. However, damages are not reserved to the courts, and expert agencies like the your Department's WRC can award damages in the hundreds of thousands of euro consistent with labour law.
5. The Chief Justice, in his letter to the Minister for Justice of 27th February makes clear that any reduction in general damages below the 'going rate' reflected in the Book of Quantum would require legislative change.
6. The Chief Justice also suggests in the same letter that assigning responsibility to the judiciary for recalibrating damages could expose them to the challenge that they were involved in the 'discharge of the statutory function of an executive agency' which might subsequently be 'subject to scrutiny by the courts,' an effective breach of the separation of powers. Further, by asking them to enter the policy-setting sphere, the Government is asking them to make laws, a matter which is constitutionally the sole prerogative of the Oireachtas under Article 15.
7. If Government had genuine doubts about the constitutionality of capping damages via legislation, it would have asked the Attorney General for an opinion on the matter. It has not done so.

While the Government has set out its position that the Judicial Council is the agency that will recalibrate general damages, it is explicitly clear it can only do so in the context of grounding legislation. We cannot over-emphasise the importance of the guidance set in the Chief Justice's letter in this regard. His summation at the end, stating that '*any new guidelines regime*' should be '*fully articulated in statute*' is an unambiguous assertion of the need for primary legislation to give effect to the guidelines the Judicial Council generate.

It is not at all clear that Section 90 of the Judicial Council Act 2019 and the output of the Personal Injuries Guidelines Committee (PIGC) fulfil the criteria set out above by the Chief Justice. You will understand, therefore, why we are perplexed by the Government's decision to refer Senator Anthony

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<sup>1</sup> <http://isme.ie/wp-content/uploads/2019/05/ADDRESS-TO-CLAIMS-MANAGEMENT-CONFERENCE-2019-3.pdf>

Lawlor's bill capping general damages to the Law Reform Commission. If it is not your intention to use this bill as the vehicle to execute the recommendations of the PIGC, then legislation that looks a lot like it will almost certainly prove necessary. If we place all our eggs in the PIGC basket (without further legislation) as the answer to insurance reform, a number of potential permutations arise:

1. The PIGC generates guidelines for general damages which are 40%-50% (or more) of the range values for personal injuries currently set out in the Book of Quantum. In this case, personal injuries awards will remain far above what they are in other jurisdictions, and litigation will continue at the levels we are experiencing now.
2. The PIGC generates guidelines for general damages which reflect the findings of the PIC, and are substantially below the 'going rate' as currently set out in the Book of Quantum. However, the legal status of these guidelines means that judges feel free to merely 'have regard' for them as they do the Book of Quantum, they ignore them, and general damages do not fall.
3. The PIGC generates guidelines for general damages which vary substantially from the 'going rate' as currently set out in the Book of Quantum, and which are strictly observed by the courts. They are subsequently challenged, from either the 'defendant' side for generosity, or the 'plaintiff' side for parsimony, and are struck down by the Supreme Court for breach of the separation of powers under Article 15.

ISME is well aware that the Government is being intensively lobbied by the legal profession regarding the reduction of general damages. We are also aware the Government has been threatened with constitutional challenge on any reduction in general damages. But since, as I have set out above, legal challenge to the output of the PIGC is absolutely inevitable from some quarter, it defies logic to postpone that challenge for the months or years we will wait for the outcome of the PIGC's deliberations, especially if they eventually prove to be unconstitutional.

We view as highly problematic for Government credibility the fact that the Justice Minister appears to lay responsibility for the cost of insurance issue solely at the door of the insurers for making excessive profits. ISME members know to their cost that the insurers bear material responsibility for some of the issue, and we have made our concerns in this regard known to the CCPC and to the EU Commission. However:

- The Justice Minister, as a practicing provincial solicitor, suffers a deficit of impartiality when it comes to personal injuries litigation.

- Insurers are required by law to be profitable. Unless the Minister for Justice is willing to define the degree of profitability that is consistent with the law, it ill-behoves him to criticise them for it.
- ISME is concerned that the advent of Solvency II regulation has increased the profitability of insurers, by requiring more onerous reserving policies. The fact that the annual report of an Irish underwriter this year noted a reserves write-back of €27m suggests that this may be the case.
- If insurers were solely to blame for the high cost of insurance, insureds underwritten by captive or mutual insurers would not be suffering in the current crisis. They are. Many of our members are insured by captives or mutuals, as is Dublin City Council; and are suffering dramatic increases in public liability and employer liability costs.

Suggestions from some Government quarters that insurance cost reductions might not follow reform are mendacious. I must remind you that the last time there was meaningful reform of the insurance sector was in 2003, with the formation of PIAB. The cost of motor insurance fell 46% in the following five years, without reduction in the quantum paid to injury victims. From 2008 on, lawyers managed to insinuate their way back into the process, and costs surged. If this does not convince you of the impact of legal costs on insurance, I am at a complete loss to know what will.

As a general comment, ISME also finds discreditable the commentary from some members of Government suggesting that the judiciary are the source of the problem. Although a minority of judges insist on bringing their profession into disrepute in personal injuries litigation, the profession as a whole is not to blame. As one of our legal advisors pithily put it to us: 'the judiciary have filled with common law the hole created by want of statute.'

We are not ignorant of the fact that the Constitution is occasionally amended for reasons that are political rather than legal. The eighth and twenty-ninth amendments to the constitution have been legitimately criticised as unnecessary, in that they did not address any issue which did not have a recourse in simple primary legislation. However, if the Government sincerely believed that reduction in general damages required constitutional amendment, it would surely move to amend the constitution now. We fear, however, that the 'constitutional' word is being used disingenuously: when ISME campaigned on the elimination of upward-only rent reviews, we were advised that any change to rental agreements would represent an unconstitutional diminution of property rights. This canard maintained

the status quo for a long time. However, when Government had to introduce rent pressure-zones, the 'constitutional' issues disappeared with the enactment of the Planning and Development (Housing) and Residential Tenancies Act 2016.

Lastly, can I appeal to you as someone who has spoken eloquently in the Dáil on the matter to recognise how toxic this issue has become on a societal level. Even if insurance reform did not yield a single cent in reduced costs, it would be worth it just to halt the farcical charade of dishonesty we witness daily in our courts. The slightest slip, trip, fall or misfortune today is enough to send people to the solicitor's office to sue another, or to sue their neighbour. We are rewarding the deceitful, the duplicitous, the unscrupulous, lazy and shifty with tens of thousands of euro for (quite literally) the mildest of sprains or scratches. We are an international laughingstock for our continued toleration of this nonsense. We are forming a society that believes citizens bear no personal responsibility for their actions if they take place on the premises of another. Why should we wait a moment longer to tackle it when it must be tackled now?

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Neil McDonnell', with a long horizontal flourish extending to the right.

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**Neil McDonnell**

**Chief Executive**