

## **Budget 2013 - The case for periodic instead of lump sum payments for damages arising out of alleged medical negligence.**

### **Key Point**

We should move right away from lump sum to periodic payments in the case of medical negligence cases in Ireland. And this should happen before Budget 2013 is presented to the Oireachtas (Parliament) in December 2012. An excellent report explaining why this should happen, and how it should be done, was presented to the then Minister for Justice almost 2 years ago. Inaction will have many costs, not least that the Minister for Finance will have to find up to about €50 million right away that he (and we) can all ill afford.

### **Introduction**

At present, when damages are awarded in Ireland to a person who suffers serious impairment of health as a result of alleged medical negligence, it is in the form of a once off lump sum, to enable him/her to pay for a lifetime of care. At the time of the award, a decision must be made based on assumptions which include: life expectancy of the plaintiff, prospects of further deterioration, costs over time of medical care and treatment, loss of earnings, rates of inflation and of return when lump sum is invested. The Working Group on Medical Negligence and Periodic Payments was established in February 2010 under the leadership of then Justice of the High Court John Quirke (and currently President of the Law Reform Commission) to:

- Examine the present system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify any shortcomings within that system.
- Make such recommendations to the President as may be necessary in order to improve the system and eliminate the shortcomings.
- Consider whether certain categories of damages for catastrophic injuries can or should be awarded by way of Periodic Payments Orders.

### **Analysis and Conclusions of the Group**

The Group concluded that the current system of awarding damages for future pecuniary losses - the lump sum award - is inadequate and inappropriate, and that it should be replaced by periodic payments. The report was presented to the then Minister for Justice Dermot Ahern on November 15, 2010, and is available at: [http://courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/5CEEA19C4A5959BC802577DC0055C9F4/\\$FILE/Medical%20Negligence%201.pdf](http://courts.ie/Courts.ie/library3.nsf/(WebFiles)/5CEEA19C4A5959BC802577DC0055C9F4/$FILE/Medical%20Negligence%201.pdf).

Most of what follows is drawn from this report.

The disadvantages of the lump sum approach are many, and include:

- No recourse for the injured victim who exhausts the fund by exceeding his/her life expectancy. In practice, the State *de facto* ends up - with varying degrees of success - providing or funding the gap in care arising in such circumstances.
- Catastrophically injured persons who are intellectually capacitated are entitled to manage their own resources after a lump sum award of damages. Some may be youthful or inexperienced or both. Many invest unsuccessfully notwithstanding professional advice. Recent economic events illustrate the difficulties facing investors who need specific long term return on investments.
- A defendant has no recourse if a large lump sum is paid to a plaintiff who succumbs to his injuries earlier than expected. The next of kin of some deceased plaintiffs have received unintended multi-million euro windfalls. Ironically, some have been those whose negligence originally caused or contributed to the catastrophic injury.

The only advantage is finality for both parties –one knows how much must be paid, the other knows how much he or she will receive.

The current system is in a sense designed to fail. It fails the State, because it becomes in any event the residuary legatee of support in cases where the lump sum is poorly invested, and/or the individual lives longer than anticipated. It fails the individual, because he or she and their family must deal with risks of investment, mortality and inflation, and general stress in situations where what is needed is inadequate, or family tensions and frictions where a windfall gain is a possibility.

The Working Group examined alternatives to lump sum payments as implemented in Germany, Belgium, Italy, Sweden, Australia, the US, Canada, and the UK. It concluded that (p. 25)

“The English system of compensation by periodic payments orders represents the most modern and effective model for payment of ongoing care and associated costs in personal injuries actions”.

Specifically (pp. 7-9), the Group’s principal recommendations are as follows:

**(i)** Legislation should be enacted to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payments orders (PPOs) to compensate injured victims in cases of catastrophic injury where long term permanent care will be required, for the costs of (a) future treatment (b) future care and (c) the future provision of medical and assistive aids and Appliances. The revolutionary aspect of PPOs will be the fact that the Orders may be made by the Court in the absence of consent between the parties.

**(ii)** Periodic payments orders may only be made in circumstances where the court is satisfied that continuity of payment under the periodic payments order is reasonably secure;

**(iii)** The State, through the agency of the NTMA, should be empowered to provide injured victims with the necessary security for periodic payments

**(iv)** The Group recommends the introduction of earnings and costs-related indices which will allow periodic payments to be index-linked to the levels of earnings of treatment and care personnel and to changes in costs of medical and assistive aids and appliances, prepared under the aegis of the Central Statistics Office. This will ensure that plaintiffs will be able to afford the cost of treatment and care into the future.

**(v)** Variation of periodic payments orders should be permitted where it has been determined that the plaintiff’s condition will seriously deteriorate or significantly improve.

(vi) A person entitled to receive periodic payments under a court order should not be entitled to assign or charge that right without the approval of the court which made the order.

(vii) Periodic payments orders made to compensate for the costs of a plaintiff's care, treatment and medical and assistive aids and appliances should not extend to dependents of a plaintiff after the plaintiff's death.

(viii) Exemption from income tax for such payments

### **Budget Implications**

It is now close to 2 years since the Group issued its recommendations. Delay in acting on its proposals has potentially extremely negative budgetary implications, for the following reason. There is now a substantial backlog of cases (11) awaiting action. If lump sum settlements are made rather than being spread out over the lifetimes of those injured, the amount required now will be of the order of €50 million, and could be much more. The relevant care costs must be paid from public resources in the long term either directly, by the State or indirectly, via insurance premiums.

The main immediate financial advantage for the State is that the care costs will be paid over a lengthy period and not immediately during a time when the State is "cash strapped". Also, when the Court orders insurers to purchase the annuities (i.e. the PPOs), from the NTMA by lump sum payments, the State is again receiving significant cash payments (albeit from premium payers). And the State will be entitled to keep the cash in the event of the death of the injured person; if the injured person exceeds life expectancy the State will have to bear the additional costs anyway.

Under the terms of Ireland's Stability Programme (the Troika agreement), we must cut the government's expenditure by €2.25 billion (1.70 billion current, 0.55 billion capital) in 2013, and by a further €2 billion in 2014. It will be an extraordinary missed opportunity if we allow ourselves to drift into gratuitously deepening the fiscal chasm that we must bridge by sticking with the lump sum payments model. And of course it will also continue to sustain all of the uncertainties, inefficiencies, unfairness and costs that the current scheme engenders.

On Wednesday, 16 May 2012 Minister for State Dinny McGinley, TD, responding in the Senate on behalf of the Minister for Justice and Equality to a question from Senator Colm Burke, pointed out that:

"The National Treasury Management Agency (NTMA) is conducting an actuarial review to examine the feasibility and cost-effectiveness of periodic payment orders as an alternative to lump sum payments or other options. The review will examine in particular the feasibility of the State acting as an annuity provider to insurers and indemnity providers in personal injury actions to enable compliance with the security of payments principle. The outcome of the review will inform the development of proposals under way in the Department of Justice and Equality to meet the Government's commitment to legislate in this area. The review is expected to be completed in June 2012".

<http://debates.oireachtas.ie/seanad/2012/05/16/00013.asp>

**The time for action is now.**

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