Insurance Seminar on Catastrophic Injury Claims

@mhclawyers

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Chairperson,
Mason Hayes & Curran
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The Impact of PPO’s
The Problem with Lump Sums

Over/Under Compensation

“The one virtual certainty about a lump sum award to pay for future care is that the wrong amount will be awarded. That is inescapable”

- Working Group Report
History of PPOs

Globally

- Late 1800s: Primitive form of PPO introduced in Germany
- 1966: Australia
- 1996: UK Damages Act
- 2003: UK Courts Act (including non-consensual PPOs)

Ireland

- 1972: Committee of Inquiry into Insurance Industry
- 1982: Inquiry into Cost and Method of Providing Motor Insurance
- 2010: Working Group on Medical Negligence and Periodic Payments
- 2015 (May): Heads of Bill published
Current status of the Legislation

• Heads of Bill published in May 2015

• Joint Oireachtas Committee on Justice, Defence and Equality took submissions over Summer

• In Legislative programme (Civil Liability (Amendment) Bill) ‘for publication in first quarter of 2016’
  ➢ Enactment in 2016???

• Heads now agreed

• ‘Currently with parliamentary drafters’
De facto PPOs

- Lump sum (to cover general damages, past loss and loss of earnings) plus interim payments for 2/3 years

- Assumption that PPO legislation would be in place when cases came back to court
  - SCA: approx. 34 cases
  - MDU: 1 case
Key Provisions of Draft Legislation

- Apply to catastrophic injuries
- Non consensual PPOs; ‘best interests’ test applies.
- On consent PPOs (subject to court approval)
- Encompass the costs of future care, assistive technology, aids and appliances.
- May include future loss of earnings only if parties consent.
- Provision for ‘stepped PPO’ but must be specific.
- Will apply to PIAB awards.
‘Controversial’ Provisions

- Indexation
- No Variation Orders
- Security of Payments
Indexation

Proposal
- Irish Harmonised Index of Consumer Price to be used, initially
- No judicial discretion to apply a different index
- Review within 5 years and then 5 yearly thereafter
  - To consider whether uplift needed for any additional wage growth
  - Ministerial Regulations can then be made ‘to ensure that the indexation used … adequately measures … changes in costs arising for Plaintiffs’

Criticism
- HICP measures prices of consumer goods, won’t accurately reflect carers salaries/medical services
- Is that fair?
  - HICP measures goods and services, including health & medical services
  - Application of UK ASHE-type index would not have benefitted Plaintiff in recent years
No Variation Orders

- Variation Orders not in draft legislation

  - Had been recommended by Working Group (only if Plaintiff seriously deteriorated/improved, and must be specified in initial PPO)
  - Added complexity and uncertainty for all parties
Security of Payments

• PPO only if continuity of payment is ‘reasonably secure’

• Proposal for non-State and private defendants
  
   ➢ If PPO is eligible for payment from the Insurance Compensation Fund (applies to all Irish regulated insurers)
   
   or
   
   ➢ Evidence defendant can guarantee security “by some other means”.
Real Rate of Return Judgment (Gill Russell v HSE)

- Traditional approach: 3% \((Boyne v Dublin Bus)\)
  - Investment in mixed fund (prudent investor)

- **Russell v HSE**
  - Mixed fund is an unacceptable risk in light of:
    - Economic instability
    - Alternative investment products available (ILGS)
    - Risk averse plaintiff
  - This Plaintiff entitled to assumption that his investment will be as safe as possible
    - Calculated as 1%
Real Rate of Return Judgment (Gill Russell v HSE)

- Limits of the Judgment
  - Under appeal
    - UK position: 2.5%
    - Disregard of how, in fact, Plaintiff’s fund was and will be managed; actual return achieved by the Courts Service is 3%
  - Specific to this particular plaintiff
    - “It is impossible to imagine any individual more risk averse than this Plaintiff”
    - “Should GR not have the money available to pay for his carers then he is likely to suffer the most severe adverse consequences including an early death. It is as simple as that.”
    - Doesn’t that apply to all catastrophically injured plaintiffs?
  - Extent of relevance depends on PPO legislation
Take Homes

• PPOs
  ➢ Will be introduced (soon)
  ➢ Significant impact on how claims are paid
  ➢ Indexation rate is the major variable as to how successful they will be

• Real rate of return
  ➢ Appeal Judgment expected in early October
  ➢ Massive impact on lump sums (if judgment upheld)
  ➢ Wider application of PPOs will significantly reduce that impact
Mr Jim Luby, Partner
McStay Luby

Financial Aspects of Large Loss Catastrophic Claims
Jim Luby

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Comparison between Once Off Lump Sum and Lump Sum Award and Stepped PPO

- Male, catastrophically injured
- Aged 10
- Life expectancy 70 years of age
- Once-off lump sum of €5m
**PPO OPTION - Lump Sum for Losses to Date**

<table>
<thead>
<tr>
<th>Description</th>
<th>€'000</th>
</tr>
</thead>
<tbody>
<tr>
<td>General damages</td>
<td>460</td>
</tr>
<tr>
<td>Retrospective care costs</td>
<td>160</td>
</tr>
<tr>
<td>Loss of earnings</td>
<td>280</td>
</tr>
<tr>
<td>Special damages to date</td>
<td>120</td>
</tr>
<tr>
<td>Accommodation</td>
<td>280</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>1,300</td>
</tr>
</tbody>
</table>
Stepped PPO

Annual payments for future care, future medical and assistive technology, aids and appliances:

<table>
<thead>
<tr>
<th>Age Range</th>
<th>Payment (€'000)</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>To age 18</td>
<td>100</td>
<td>p.a.</td>
</tr>
<tr>
<td>18-23</td>
<td>120</td>
<td>p.a.</td>
</tr>
<tr>
<td>24-40</td>
<td>130</td>
<td>p.a.</td>
</tr>
<tr>
<td>40-70</td>
<td>140</td>
<td>p.a.</td>
</tr>
</tbody>
</table>
## Discounted Cost of Stepped PPO

<table>
<thead>
<tr>
<th>Period</th>
<th>Duration @ Cost</th>
<th>Undiscounted Cost</th>
<th>Discounted Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>10-18</td>
<td>8 years @ 100,000</td>
<td>800</td>
<td>800</td>
</tr>
<tr>
<td>18-23</td>
<td>5 years @ 120,000</td>
<td>600</td>
<td>600</td>
</tr>
<tr>
<td>24-40</td>
<td>17 years @ 130,000</td>
<td>2,210</td>
<td>2,210</td>
</tr>
<tr>
<td>40-70</td>
<td>30 years @ 140,000</td>
<td>4,200</td>
<td>4,200</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>7,810</strong></td>
<td><strong>4,383</strong></td>
</tr>
</tbody>
</table>

*Note: Discount rate of 2% used*
<table>
<thead>
<tr>
<th>Plaintiff survives to age:</th>
<th>Discounted cost €'000</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>2,033</td>
</tr>
<tr>
<td>40</td>
<td>3,952</td>
</tr>
<tr>
<td>50</td>
<td>4,660</td>
</tr>
<tr>
<td>60</td>
<td>5,215</td>
</tr>
<tr>
<td>70</td>
<td>5,683</td>
</tr>
</tbody>
</table>
Impact of Alternative Discount Rates on a Once Off Lump Sum Payment

- Male, Cerebral Palsy, Age 20, Life expectancy 71 years of age

<table>
<thead>
<tr>
<th>Category</th>
<th>3%</th>
<th>2%</th>
<th>1%</th>
<th>0.50%</th>
<th>0%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Care</td>
<td>€'000</td>
<td>€'000</td>
<td>€'000</td>
<td>€'000</td>
<td>€'000</td>
</tr>
<tr>
<td>Aids, appliances and equipment</td>
<td>6,213</td>
<td>7,612</td>
<td>9,574</td>
<td>10,849</td>
<td>12,387</td>
</tr>
<tr>
<td>Assistive technology</td>
<td>1,766</td>
<td>2,147</td>
<td>2,679</td>
<td>3,026</td>
<td>3,444</td>
</tr>
<tr>
<td>Other</td>
<td>426</td>
<td>516</td>
<td>641</td>
<td>723</td>
<td>822</td>
</tr>
<tr>
<td>TOTAL</td>
<td>8,715</td>
<td>10,616</td>
<td>13,278</td>
<td>15,039</td>
<td>17,150</td>
</tr>
</tbody>
</table>
PPO issues for insurers

- Reserving + Solvency 11 requirements
- Indices vs CPI for claim elements
- Reserving discount rate
- Interim payments at early stage
- Timing of payments-long term cost
- Reinsurance-consultation
- Long term reinsurer recoveries/solvency
Interim settlement review experiences

- How money spent
- Next 3 years-review intervals
- Level of proof/effort/cost
- Quantifying care experts reports
- Forum for review
- New-protocols/exchange of evidence
- Better road map-needs major changes
Case 1  Artist

• Difficulties with proofs
• No sales records
• No details of Form 11 earnings vs bank
• Would have sold x works at €20k?
• Unsubstantiated assumptions carried into actuary’s report-sister hired
Case 2  Hi-Tech entrepreneur

• Joint founders-one died
• Comparative career paths and earnings
• Super-bonuses
• Acquired and sold
• Don’t need 2 MDs
Case 3  Legal

- Fall off in earnings
- Conveyancing/probate/litigation breakdown
- House completions/Stamp Duty receipts
- Recession/PIAB/Taxing Master
- Professional negligence-Revenue-removal of insured
Case 4  Loss of earnings over protracted period

- Estimated working life vs circumstances
- Historical female manufacturing earnings %
- Never worked in manufacturing
- Lack of historical stats
- Research – elapse of time, and proofs
- Skews interest calcs over long period
Jim Luby

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Email: rescue@mcstayluby.ie
Gerry McAlinden, QC
Queen’s Counsel and Chair of the NI Bar Council

PPOs: The UK/NI experience
Q&A
Contact Details

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Guest Speakers and topics

Dr. Kevin Power, Partner
Dispute Resolution Team, Mason Hayes & Curran
Topic – The Impact of PPO’s

Jim Luby, Partner McStay Luby
Topic - Financial Aspects of Large Loss Catastrophic Claims

Gerry McAlinden, QC
Queen’s Counsel and Chair of the NI Bar Council
Topic - PPOs: The UK/NI experience

Chaired by Emer Gilvarry
Chairperson, Mason Hayes & Curran