Policy Content, Objectives and Options

The Civil Liability (Amendment) Bill 2016, will give effect to the recommendations of the High Court Working Group on Medical Negligence Litigation and Periodic Payments. The aim of the proposed legislation is to give much-needed financial security to those who have been catastrophically injured and who require lifelong care and assistance.

Background

In 2010, the President of the High Court established a Working Group on Medical Negligence and Periodic Payments to examine the case for legislation to provide for periodic payments in personal injury cases. Its report recommended that legislation should be enacted to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payment orders (PPOs) to compensate injured victims in cases of catastrophic injury where long term permanent care would be required.

Damages awarded to compensate for personal injuries are intended to put the injured party in the same position as they would have been if they had not sustained the wrong for which they are now receiving compensation. Damages are assessed at a certain point in time and a lump sum is awarded which is intended to compensate for all past and future losses including the cost of care, medication, medical and assistive aids, and treatment. The lump sum is intended to represent the capital value of future loss.

The principal recommendation made in the Working Group report, on the basis that single lump sum awards are inadequate and inappropriate in cases where the plaintiff has been catastrophically injured, was to amend the Civil Liability Acts to give the courts discretion to impose, with or without the consent of parties, periodic payments orders (PPOs). The PPO should be calculated to meet the cost of permanent and long-term care and treatment and should be index-linked.

Advantages and disadvantages of PPOs

Advantages

- Inadequate compensation avoided as payments are tied to actual rather than to expected cost of care and treatment.
- Inappropriate compensation avoided as payments are linked to actual rather than expected duration of life.
In view of the rising cost of care and low returns on capital investment, enormous lump sum payments avoided.

**Disadvantages**

- Additional cost of funding and administering periodic payments.
- The feasibility of periodic payments where there is a finding of contributory negligence.
- The absence of a means of securing a PPO made against a non-State defendant.

For the past number of years, the NTMA (through the State Claims Agency) has settled catastrophic injury claims against the State on a reduced lump sum and interim 2-year future care basis, pending enactment of legislation on periodic payments orders. The High Court has made critical comment on the delay in reform of the law and is becoming increasingly reluctant to continue deferral of final settlements in claims against the State.

The Government decided in January 2015 that legislation should be drafted to provide for periodic payments in cases of catastrophic injury involving State defendants. The Government also agreed that the question of extending periodic payments orders to cases involving non-State defendants should be examined by the Department of Justice and Equality in cooperation with the Department of Finance.

**Why does the issue require attention?**

At present, damages for catastrophic injury can only be made by way of lump sum payments. It has been shown in a number of cases that a lump sum payment may not cover the whole of the injured party’s lifetime. Where this occurs the care and medical treatment of the injured party becomes the responsibility of the State.

In addition, the judiciary have consistently called, over the past number of years, for the facility to award damages by way of periodic payments orders which will last for the injured party’s life time. They consider that a PPO can, in certain circumstances, be more suitable to meet the needs of the injured party.

It is estimated that the introduction of a statutory PPO scheme could, generate considerable savings on an annual basis into the future. These savings would be achieved through the settlement of approximately 10/12 catastrophic injury cases per annum by way of PPO payments rather than lump sum, full and final, payments.

**Objectives of Legislation**

The components of the proposed legislation are as follows:
• **Possibility for court to make periodic payments orders:** The court would have the possibility to make periodic payments orders for catastrophically injured plaintiffs who require life-long care and assistance;

• **Court’s discretion:** The decision to make a periodic payments order would be at the court’s discretion, following consultation with the parties and having considered the needs of the plaintiff;

• **Payments indexed:** Payments would be indexed to the Irish Harmonised Index of Consumer Prices;

• **Changes to PPO:** The PPOs could be changed at specified pre-determined times to accommodate changes in the plaintiff’s circumstances (such as the move into full-time education);

• **Security Provided via Insurance Compensation Fund mechanism:** The existing limits in the Insurance Compensation Fund would not apply in cases of PPOs. Consequently, where an insurance company became insolvent, the full amount due to a PPO plaintiff would be paid in full from the Insurance Compensation Fund;

**Options**

Three options have been identified.

1. **Do nothing.** Not acting would mean that the existing system would continue in place i.e. damages would continue to be awarded by way of lump sum payments.

2. **Introduce PPO scheme for State defendants only.** Introduction of such a scheme would mean that the injured party in a non-State defendant case could only receive a lump sum payment.

3. **Introduce a PPO scheme for all defendants.** This is the option recommended by the Working Group on Medical Negligence and Periodic Payments.

**Identification of Costs, Benefits & Impacts**

Option 1 - There are no benefits associated with Option 1. However, the State Claims Agency estimates that, without the introduction of a PPO Scheme, the costs to the State of catastrophic injury cases will rise considerably in 2017 as against 2016.
Option 2 - Introduction of a PPO covering State defendants only could generate considerable savings on an annual basis into the future. These savings would be achieved through the settlement of approximately 10/12 catastrophic injury cases per annum by way of PPO payments rather than lump sum, full and final, payments. However, the exclusion on non-State defendants from the PPO scheme could be seen as discriminating against that category of defendants.

Option 3 - Introduction of a PPO scheme for all defendants. This is the preferred option. Again this approach could generate considerable savings on an annual basis into the future. These savings would be achieved through the settlement of approximately 10/12 catastrophic injury cases per annum by way of PPO payments rather than lump sum, full and final, payments. It was considered, however, that it would be prudent to introduce legislation which would allow for periodic payment orders to be made in cases which involve State defendants and for cases involving private non-State defendants.

**Costs of option 3**

It is not envisaged that any direct costs would be incurred by the State other than in the administration of the legislation.

Some concerns have been expressed, based on the experience of the introduction of PPOs in the UK, that the introduction of PPOs may give rise to an increase in insurance premiums. However, the restriction of PPOs to catastrophically injured persons should limit the number of claimants potentially benefitting from them. Similarly, the restriction on changes to PPOs after they are made (i.e. the limited provision for stepped payments rather than for variation) should limit potential cost increases.

**Benefits of option 3**

The introduction of a PPO scheme to cover all defendants will:

- reduce the annual costs of servicing the indemnity schemes operated by the State Claims Agency;

- allow the courts to make provision for a catastrophically injured person by way of a periodic payments order thus reducing the possibility of that person running out of funds to sustain himself or herself whether due to longevity or advances in medical care.

- reduce the possibility of awarding inappropriate compensation as payments will be linked to actual rather than expected duration of life.

**Impacts**
The Bill is not expected to have any appreciable impact on north-south and east-west relations, employment, gender equality, persons experiencing or at risk of poverty or social exclusion or rural communities.

It is anticipated that the introduction of this legislation will have a positive impact on persons with disabilities as it will enable persons with catastrophic injuries who require long-term care to have security with regard to the costs of care for their lifetimes.

**Consultation**

The draft Bill will implement the recommendations of the Working Group on Medical Negligence and Periodic Payments.

The Government decided in January 2015 that legislation should be drafted to provide for periodic payments in cases of catastrophic injury involving State defendants. The Government also agreed that the question of extending periodic payment orders to cases involving non-State defendants should be examined by the Department of Justice and Equality in cooperation with the Department of Finance.

The Department of Justice and Equality prepared a draft General Scheme that was forwarded to the Department of Finance for consideration, following which the Department of Finance requested the State Claims Agency to commission research into the feasibility of developing a scheme that would include non-State defendants. The State Claims Agency commissioned Towers Watson to undertake this exercise. Towers Watson, having examined international models and consulted the insurance industry in Ireland, concluded that it would be feasible to develop legislation encompassing State and non-State defendants. It made a series of recommendations aimed at mitigating the potential negative impact on the insurance industry and on premia.

The Department of Justice and Equality subsequently established an inter-departmental Working Group on Legislation on Periodic Payment Orders to examine the technical aspects of this issue and to look at the implications of Towers Watson’s findings for the proposed legislation. The Working Group’s report made a number of recommendations as to how the legislation might be framed to address the needs of catastrophically injured claimants while avoiding undue burdens on the State and on the insurance industry.

In May 2015, the Government approved the drafting of a Civil Liability (Amendment) Bill following the submission of the General Scheme of the Bill to the Joint Committee on Justice and Defence for pre-legislative scrutiny. The Joint Committee invited interested parties to submit comments on the General Scheme and a number of submissions were received.

**Enforcement and Compliance**

Not applicable.

**Review**
It is not possible at this stage of the process to comment on review of the operation of the Bill.
What are the policy objectives being pursued?

1. To introduce legislation is to give much-needed financial security to those who have been catastrophically injured and who require lifelong care and assistance.

What policy options have been considered?
*Please summarise the costs, benefits and impacts relating to each below and indicate whether a preferred option has been identified.*

1. Do Nothing.
2. Introduce a scheme of Periodic Payments Orders for State defendants only
3. Insert a new Part in the Civil Liability Act 1961 to give the courts discretion to impose, with or without the consent of parties, periodic payment orders (PPOs) which are to be calculated to meet the cost of permanent and long-term care and treatment and which would be index-linked. The scheme would apply to all defendants.

Preferred Option:

Option 3 above is the preferred option, as it will meet the recommendations of the Working Group on Medical Negligence and Periodic Payments, provide cost savings to the State Claims Agency and provide certainty to catastrophically injured persons regarding expenditure on care and assistance.
1. Doing nothing will lead to increased costs to the State through the continued payment of lump sum awards in the case of catastrophic injury. None. To exclude non-State defendants from the PPO scheme could be seen as discriminating against that category of defendants.

2. It is not envisaged that any direct costs would be incurred by the State other than in the administration of the legislation. However, concerns have been expressed that the introduction of PPOs may give rise to an increase in insurance premiums. Introduction of a PPO covering State defendants only could generate considerable savings on an annual basis into the future. This approach could generate considerable savings on an annual basis into the future. These savings would be achieved through the settlement of approximately 10/12 catastrophic injury cases per annum by way of PPO payments rather than lump sum, full and final, payments.

3. It is not envisaged that any direct costs would be incurred by the State other than in the administration of the legislation. However, concerns have been expressed that the introduction of PPOs may give rise to an increase in insurance premiums. It would be prudent to introduce legislation which would allow for periodic payment orders to be made in cases which involve State defendants and for cases involving private non-State defendants. It is anticipated that the introduction of this legislation will have a positive impact on persons with disabilities as it will enable persons with catastrophic injuries who require long-term care to have security with regard to the costs of care for their lifetimes. Some concerns have been expressed that the introduction of PPOs may give rise to an increase in insurance premiums. However, the restriction of PPOs to catastrophically injured persons should limit the number of claimants potentially benefitting from them. Similarly, the restriction on changes to PPOs after they are made (i.e. the limited provision.
### OPTIONS

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