

SECOND AND FINAL REPORT OF THE

Personal Injuries Commission

JULY 2018



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Foreword

Foreword



On behalf of the Members of the Personal Injuries Commission (PIC), I present the second and final report to the Minister for Business, Enterprise and Innovation, Ms Heather Humphreys T.D. and to the Minister of State with Special Responsibility for Financial Services and Insurance, Mr Michael D’Arcy T.D.

The cost of insurance and the personal injury claims environment in Ireland continues to attract significant attention from all sectors of society. The PIC was established in January of 2017, and since then has been engaged in delivering on its terms of reference with a challenging 18-month work programme. The PIC has undertaken extensive research and stakeholder engagement publishing its first report in December of 2017. This Final Report represents an amalgamation of the second and third phases of the PIC’s scheduled work, and deals in the main with the benchmarking of Irish personal injury award levels, never previously undertaken to such an extent, and an examination of alternative compensation and resolution models in other countries and jurisdictions. The report also includes an update on the implementation of recommendations and related agreed third-party action points from the PIC’s first report.

As revealed by the benchmarking exercise undertaken by the PIC, the level of general damages for soft-tissue (‘whiplash’) injuries in this jurisdiction runs at a multiple of 4.4 times to that of our nearest neighbours England and Wales. While damages for personal injury in Ireland have historically been greater than those in the UK, the multiple which has now emerged, following an independent verification process by KPMG of data supplied to PIC by Insurance Ireland, is such as to confirm publicly expressed concerns about such levels of award and the effect they may be having on motorists and businesses who require insurance cover. Representations made to the PIC since its inception, by business representatives, small firms associations and other entities, suggest that the level of awards is causing severe difficulties for them, not least in the form of high premiums, but also in having to devote resources to defend the high volume of claims they face.

First and foremost, the PIC acknowledges the need to ensure that all genuinely injured claimants receive adequate compensation. The PIC also recognises the negative impact of high insurance premiums on consumers. Individual consumers can face huge difficulties as they struggle to afford to pay their annual premium. High motor insurance premiums can make driving prohibitively expensive for certain groups of consumers, such as younger or older drivers or returning emigrants. In addition to negatively affecting consumers, high motor insurance premiums can also impact businesses and in turn undermine overall competitiveness.

These concerns have been detailed more fully in the various reports of the Cost of Insurance Working Group (CIWG), and in the First Report of the Personal Injuries Commission. Insurance Ireland representatives on the PIC have repeatedly stated that, as award levels and associated costs account for the bulk of the cost of insurance, if claims costs come down and are maintained at a consistent and predictable level then premiums will also reduce accordingly.

It is beyond the scope of this report to analyse in detail why Irish payments and awards are higher than those in the UK, however, it is acknowledged that this has historically been the case, and the scale of the difference is now evidenced for the first time. Verification of UK data has been provided for the Ministry of Justice in the UK, for a number of years, by the data analytics company Verisk, and the PIC believes this verification has a high level of reliability.

The PIC, under its terms of reference, sought and obtained information of value from sources in other jurisdictions regarding levels of personal injury compensation to compare with Ireland. This information, including where ‘thresholds’ apply, is detailed throughout this report. The PIC has neither the resources nor the facilities to apply the same level of scrutiny or verification to which Irish data has been subjected, to other European information. Independent consultants confirmed that the European information supplied was not of a sufficiently granular level to enable a meaningful comparison and consequently it did not form part of the PIC’s benchmarking exercise.

It goes without saying, that a primary aim of Government policy is to ensure that Ireland is and remains a good environment in which business can establish and operate. Such considerations underpinned the establishment of the Commercial Court in 2004, the success of which is widely acknowledged. It is important for businesses to believe that they can operate in a market which is untrammelled by distortions or anomalies which are inimical to their interests and survival. Excessively high awards and fraudulent injury claims clearly fall into the category of distortions or anomalies.

The multiple which has emerged from the benchmarking exercise is of such a magnitude, that the PIC is satisfied that it calls for a response that is effective and achievable in the shortest possible time. It is a response which, in the form of a key recommendation arrived at in this report, follows the example of judicial intervention which has occurred in Northern Ireland and in the UK, namely the introduction of Judicial Guidelines for judges. The history of such guidelines goes back to 1992 in the UK where they are now in their 14th iteration and to 1996 in Northern Ireland where the 4th edition of Judicial Guidelines appeared in 2013.

The PIC believes that the imminent statutory establishment of the Irish Judicial Council provides a unique opportunity to seek and obtain such guidance for judges in measuring general damages for personal injury, ranging from the least to the most serious. Recent decisions in both the Court of Appeal and the High Court indicate that there is no reluctance on the part of judges to reconsider the spectrum of damages for different kinds of personal injury and indeed a recent decision of the High Court¹ is notable for its express attempts at 'recalibrating' general damages in the light of guidance provided by the Court of Appeal. The PIC believes that the powers and functions being granted in the legislation to the Judicial Council clearly enable it to perform such a role.

Judicial Guidelines should lead to greatly increased levels of consistency in awards, increase the frequency of early resolution of claims, reduce costs and generally provide a much better informed PIAB process, given that PIAB compiles and reviews the Book of Quantum by reference to awards in the courts. Representatives from both the Law Society and the Bar Council have made it clear to the PIC that this recommendation will have the full support of both branches, to ensure that trial judges are briefed by advocates on guideline figures in particular cases. The PIC believes strongly that the legislation to establish the Judicial Council should be given priority and that adequate funding and resources are provided to enable it discharge its various functions.

At the time of finalising this report, the PIC understands that it is the intention of the Minister for Justice and Equality that the legislation to establish the Judicial Council will be enacted by the end of the year. In the event of any delay to the establishment of the Judicial Council, the PIC believes that as a contingency arrangement, the Executive should establish a formal framework to enable the judiciary to complete guidelines in advance of the renewal deadlines for the Book of Quantum.

The PIC also considered but rejected the idea, at this point, of seeking the advice of the Attorney General as to the feasibility of introducing legislation to regulate levels of compensation for soft-tissue ('whiplash') injuries. In this regard, the PIC has noted that at Para 8.8 of its 2nd Report, the CIWG expresses the view that legislation to cap damages is a matter "which would benefit from examination by the Law Reform Commission" and has requested that body to undertake a detailed analysis of the possibility of developing constitutionally sound legislation to delimit or cap the amount of damages which a court may award – at least in respect of some or all categories of personal injuries. That referral having been made, the PIC believes the Law Reform Commission is best positioned and best resourced to advise further in this regard. Any precipitate rush into legislation in response to this report, at this juncture, would almost inevitably result in court challenges to such legislation, resulting in further and possibly indefinite delay. The role of the Judiciary in providing guidance regarding appropriate award levels is of utmost importance, and the output of this exercise is required as a matter of urgency. The PIC has recognised that improving consistency and certainty in awards of general damages is of paramount importance in improving the overall claims environment, reducing claims costs and exerting downward pressure on insurance premium levels. The PIC acknowledges that the judiciary are the correct source of guidance on the appropriate levels of damages and are empowered in reaching their decisions to take into account factors such as Court of Appeal decisions and the output of this report.

In considering its recommendations, the PIC has examined the personal injury claims environment in a holistic manner. One of the recommendations in the PIC's first report was the adoption by medical professionals of a standardised approach to the examination of soft-tissue ('whiplash') injuries and the use of a standardised reporting template to bring more consistency to medical reporting and diagnosis. During the PIC's research and consultation with members of the medical profession, the case was made, and is supported by international evidence, that early medical intervention and appropriate treatment for claimants who sustain soft-tissue injuries can reduce the duration of an injury and the level of impairment. In order to enable claimants to obtain better injury outcomes and reduce costs in the overall system, the PIC has recommended the introduction of standard treatment plans for those who sustain soft-tissue ('whiplash') injuries. The PIC also recognises the value of medical research in the prevention and management of accidents and injuries and endorses the insurance industry providing funding to enable research and advancements in this area. The PIC is satisfied that it is not possible to replace cash entirely with care, however

1 Jedruch -v- Tesco Ireland Ltd. [2018] IEHC 205

Foreword (continued)

the emphasis on care and the importance of accessing same, can be increased by measures such as those outlined.

The work of the PIC has highlighted a lack of award level consistency and certainty as a key source of difficulties within the claims environment. Alongside recommendations for the formulation of consistent compensation levels, the PIC has recommended the standardisation of medical assessment and treatment plans for claimants. Analysis undertaken as part of the benchmarking study has shown a lack of consistency in the recording and coding of injury related data within the insurance industry and the PIC believes improvements in this area would enhance monitoring as regards the frequency of and outcomes for injuries.

The PIC acknowledges that claimants injured in motor accidents often sustain serious injuries and losses and the object of this report is not to recommend the elimination of a claimant's right to be compensated for pain and suffering. However, the PIC has been presented with validated evidence that Irish award levels for relatively minor injuries particularly soft-tissue ('whiplash') injuries are a stark multiple of awards in the UK for similar type injuries. Indeed, it is noted that legislation currently being introduced in the UK will seek to further reduce damages for soft-tissue ('whiplash') injuries.

The PIC sees value in a requirement that where an injured person intends to pursue a claim for compensation, that person should give prompt notification of any intended claim by means of a Claim Notification Form to the proposed defendant or insurer to include the name of the claimant's treating medical specialist. This provides a protection for both sides and may permit the early and less costly disposal of the case. Indeed early notification of a potential claim is essential if a defendant is to have a realistic opportunity of undertaking an investigation of circumstances surrounding the claim and is particularly important in the context of soft-tissue ('whiplash') type injuries. The PIC also recognises the importance of full co-operation with the PIAB process as a means of ensuring the prompt resolution of cases. In this regard the PIC supports any new measures or legislative changes which will improve the expeditious handling of claims by PIAB.

The PIC, during the course of its work, received many accounts from business sources to suggest that Ireland's present system of personal injury compensation permits, not merely the bringing of claims in the hope of large payments for small injuries, but also the resorting to fraud, the exaggeration of minor injuries, and collusion in putting forward fraudulent claims. The case was put repeatedly to PIC that where awards are large, the investigation of claims is poor and where little risk of prosecution follows even when fraud is exposed, a perfect climate for abuse of the system comes increasingly into play. The net result is more claims and more cost.

By its very nature, fraud and exaggeration in this area are difficult to measure or quantify and it is simply not possible to produce hard evidence as to its extent. Further, PIC is aware of increased sophistication in the bringing of such claims by both individuals and groups, some of whom are drawn to this jurisdiction by the high rewards on offer. This phenomenon, increasingly revealed in accounts of court cases in recent years, will increase in a technological age, unless effective counter-measures are adopted and implemented by both the State, An Garda Síochána and insurers themselves.

Defensive technologies, such as telematics (effectively the fitting of a 'black box' in a motor vehicle – further information is contained in appendices) and the introduction of more nuanced forms of insurance cover to provide for 'black box' cover, require detailed consideration from insurers. Increased use of such technology, along with the development of other strategies, including the recruitment of additional staff to investigate and expose fraud, may help turn the tide on this problem. The PIC has also recommended as stated already that a claimant who brings a claim must give early notification thereof to a defendant or insurer, so as to permit fair and proper investigation of a claim once made. Valuable CCTV evidence may be lost when delays of many months occur before a claim is notified.

In implementing telematics solutions obvious regard should be had to Data Protection requirements and the privacy rights of individuals. Additionally, such solutions should not act as a constraint on the ability of consumers to switch insurance providers when renewing policies.

Irish society is presented now with an important opportunity to consider an appropriate rebalancing and recalibration of Irish awards, both in the context of their relative values to each other and comparatively to other jurisdictions. This is an opportunity to improve the situation for consumers, business owners and society without disproportionately restricting recourse to compensation for genuine and seriously injured claimants.

In conclusion I would like to express my sincere thanks to the Members of the PIC, the Secretariat and to all those who have contributed to the work of the Commission. The introduction of some real reform in the areas under examination in this report is now an overarching concern. With that requirement in mind, the PIC has put forward straightforward Recommendations which are capable of being acted upon in a very short time frame. The best interests of our society require that there be no delay in carrying them into effect.

A handwritten signature in black ink, reading "Nicholas J. Kearns". The signature is written in a cursive style with a large initial 'N'.

Nicholas J. Kearns
Chairperson

July 2018

Recommendations

Recommendations

1. The PIC recommends that the Judicial Council should, when established, be requested by the Minister for Justice and Equality to compile guidelines for appropriate general damages for various types of personal injury. The PIC believes that the Judicial Council will, in compiling the guidelines, take account of the jurisprudence of the Court of Appeal, the results of the PIC benchmarking exercise, the WAD (Whiplash Associated Disorder scale as established by the Quebec Task Force) scale and any other factors it considers relevant. The Judicial Council, in the production of the new guidelines, may avail of assistance, as appropriate, from the Personal Injuries Assessment Board (PIAB) and other relevant stakeholders. The PIC recommends review of the guidelines at regular intervals, for example, every three years. As a starting point the PIC recommends a judicial recalibration of the existing Book of Quantum guidelines.

As a consequence of this recommendation, subsequent legislative amendments to the Personal Injuries Assessment Board Act 2003 will be required in relation to the removal of PIAB's statutory responsibility to compile the Book of Quantum and also to the provision in the Civil Liability and Courts Act 2004 which should be amended to state that 'the court shall, in assessing damages in a personal injuries action, have regard to the guidelines produced by the Judicial Council'.

The PIC believes this overall approach will achieve in early course a greater level of consistency in Ireland in the assessment of general damages.

In the event of any delay to the establishment of the Judicial Council the PIC believes that as a contingency arrangement the Executive should establish a formal framework, inclusive of PIAB, to enable the judiciary to complete guidelines in advance of the renewal deadlines for the next Book of Quantum.
2. The PIC recommends that the Judicial Council Bill 2017, establishing the Judicial Council, be progressed through the Houses of the Oireachtas as a matter of urgency.
3. The PIC notes that the Law Reform Commission has been requested to undertake a detailed analysis of the possibility of developing constitutionally sound legislation to delimit or cap the amount of damages which a court may award and believes it is the appropriate body best equipped and resourced to undertake this study. The PIC recommends that this analysis is informed and assisted by the PIC's findings.
4. The PIC is satisfied that a 'care not cash' system of compensation for soft tissue injuries is incompatible with EU Law. Having regard to the decision of the CJEU in *Petillo and Petillo v Unipol Assicurazioni* [2014] Case C – 371/12, it is not possible to replace cash compensation awards entirely with care. Possible schemes combining care and cash awards would appear to add additional costs and difficulties to the claims environment, and accordingly, the PIC is recommending such a system is inappropriate in an Irish context. However, in respect of evidence heard by the PIC of the beneficial effects of early medical intervention and treatment where soft tissue injuries are sustained, the PIC recommends that any person who sustains a soft tissue injury receive timely, appropriate and effective treatment as part of a standardised treatment plan. Timely and effective treatment will improve patient outcomes and lead to downward pressure on costs associated with soft tissue injuries. In furtherance of this aim, the PIC recommends the development and roll out, in all relevant locations, of best practice 'standard treatment plans' that focus on recovery, alongside awareness and promotion of best treatment practices.
5. The PIC recommends that in cases where an insurer deals directly with a claimant, no offer in settlement or payment of a personal injury claim should be made unless and until a medical report has been obtained. The medical report should detail the nature, extent and prognosis of the injury. The PIC believes this to be a prudent measure to protect the interests of injured parties.
6. Claimants, for their part, must give prompt notification of any potential injury claim so that a proper investigation of the accident circumstances may be undertaken by a defendant.

Recommendations (continued)

7. The PIC recognises that exaggerated and fraudulent claims have an adverse impact on overall claims costs which in turn impact insurance premium costs. The PIC believes this issue needs to be addressed by the development and deployment of suitable strategies, including technological strategies, to prevent and detect such activity. Fraudulent activities currently carry a low risk of detection and an even lower risk of prosecution and these are factors which tend to foster and encourage the continuance of the problem. The PIC has worked conjointly with the Cost of Insurance Working Group established by the Department of Finance on this issue, as fraud and exaggeration overlap the work of each group. The PIC supports recommendation 26 of the Cost of Insurance Working Group Report on the Cost of Motor Insurance, regarding the potential for further cooperation between the Insurance Sector and An Garda Síochána in relation to insurance fraud investigation. The PIC recommends the establishment of an Irish Garda Fraud Investigation Bureau along the lines of the Insurance Fraud Enforcement Department (IFED) in the UK, without further delay.
8. The PIC recommends that insurers step up their anti-fraud capacity through the recruitment of suitably trained personnel and the development of various technological means of combating fraud. Wherever possible, insurers should provide timely information in relation to suspected fraud to An Garda Síochána so that such cases can be investigated by An Garda Síochána and where appropriate be the subject of criminal prosecutions.
9. Research carried out by the PIC and independent consultants has highlighted a lack of consistent and detailed industry-wide coding of injury data. Accordingly, the PIC recommends that insurers and other relevant parties consider adopting the same internationally recognised injury coding system. It is suggested that the appropriate system to be used is the World Health Organisation's ICD-10 system. ICD is the international standard for reporting diseases and health conditions and the diagnostic classification standard for all clinical and research purposes.
10. The PIC recommends that the insurance industry establish a national medical research study on the prevention and management of soft-tissue ('whiplash') injuries. This research should be published as a means of facilitating evidence based improvements in approaches to treatment, informing policy and delivering benefits to consumers, business and wider society.

CHAPTER 1

**Introduction and
Terms of Reference**

Chapter 1: Introduction and Terms of Reference

1.1 Introduction

The terms of reference for Phase Two and Phase Three of the Personal Injuries Commission are outlined below.

Phase Two (report due end Q1 2018)

- Establish a high-level benchmarking of international awards for personal injury claims with domestic ones as referred to in the Book of Quantum;
- Analyse and report on international compensation levels and compensation mechanisms;
- Analyse and report on alternative compensation and resolution models internationally, focusing on common law systems while taking account of social welfare, healthcare and related factors associated with each jurisdiction;
- Report on 'care not cash' models and variations in place internationally.

A summary report should be made to the Minister for Business, Enterprise and Innovation and the Minister of State for Financial Services which will:

- Assess the various systems in place and indicate the feasibility or otherwise for the possible development of such systems in Ireland;
- Indicate the timeframe for, benefits of, and risk associated with the implementation of the above recommendations.

Phase Three (report due end Q2 2018)

The Third report from the Commission with a list of recommendations and timelines should be delivered in Q2 2018.

In line with the PIC's terms of reference this second and final PIC report is an amalgamation of the second and third reports of the PIC as referenced above. The report contains a foreword and a second set of key recommendations.

The second chapter contains the results of the benchmarking of international awards for personal injury claims with domestic ones as referred to in the Book of Quantum as completed by Independent consultants on behalf of the PIC. This chapter benchmarks Irish awards for soft-tissue ('whiplash') injuries against those of the UK.

The third chapter of the report examines alternative compensation and resolution models internationally, focusing on common law systems but also considering the systems in other European Union countries. The fourth chapter is a report on 'care not cash' models and variations in place internationally.

The report concludes with various appendices, including an update on the implementation of the recommendations from the first PIC report.

In addition to establishing the PIC, the Cost of Insurance Working Group Report made a number of recommendations in relation to strengthening the PIAB. The Personal Injuries Assessment Board (Amendment) (No.2) Bill 2018 addresses the recommendations in the Cost on Insurance Working Group Report relating to cases of non-cooperation, such as non-attendance at medicals and refusal to provide details of special damages.

| Action Point No. | Action Point | Deadline | Relevant Bodies | Lead/Owner |
|------------------|---|----------|---|---|
| 30 | Establish a Personal Injuries Commission (PIC) | Q1 2017 | | |
| 31 | PIC to investigate and make recommendations on processes in other jurisdictions which could enhance the claims process in Ireland | Q4 2017 | Department of Business, Enterprise and Innovation, PIAB, Department of Justice and Equality | Department of Business, Enterprise and Innovation |
| 32 | PIC to benchmark international PI awards with those in Ireland and report on alternative compensation and resolution models | Q1 2018 | | |
| 33 | PIC to deliver their third report | Q2 2018 | | |

1.2 Soft-Tissue ('Whiplash') Injury

As this report predominantly deals with soft-tissue ('whiplash') injuries, it is important to outline the interpretation of this injury by the PIC. The definition of a 'whiplash' injury was referred to in the First Report of the Personal Injuries Commission. As 'whiplash' is a slang or colloquial term there is no official legal or medical definition. For example, in France the slang term is 'coup du lapin' which translates literally as rabbit's punch or the medical term is 'les cervicalgies communes' which translates as common neck pain. In Germany the colloquial term is 'Schleudertrauma' but the medical term used is HWS-Distorsion (Halswirbelsaule-Distorsion), translating as cervical spine distortion injury.

The Quebec Task Force adopted the following definition of 'whiplash'; "an acceleration-deceleration mechanism of energy transfer to the neck. It may result from motor vehicle accidents. The impact may result in bony or soft tissue injuries – whiplash injury, which in turn may lead to a variety of clinical manifestations – whiplash associated disorders".

This definition is widely used internationally. The 'South Australian Clinical Guidelines for best practice management to acute and chronic whiplash-associated disorders'² referred to in the first PIC report adopted the definition provided by the QTF; "Whiplash-associated disorders (WAD) are caused by an acceleration-deceleration mechanism of energy transfer to the neck."

MedCo is a new system in the UK to facilitate the sourcing of medical reports in soft-tissue injury claims brought under the Ministry of Justice UK's new Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. MedCo's terms of reference advise they handle claims – 'brought by an occupant of a motor vehicle where the significant physical injury caused is a soft tissue injury and includes claims where there is a minor psychological injury secondary in significance to the physical injury'. Although MedCo is frequently referred to as handling 'whiplash' claims, the remit of claims handled by MedCo UK is broader than those termed 'whiplash' claims using the definition provided by the QTF and in other jurisdictions. The definition of 'whiplash' injuries to be used when applying tariffs has yet to be agreed in the UK parliament in their current debates on the Civil Liability Bill.

For clarification, the injury being discussed by PIC when referring to soft-tissue ('whiplash') injuries in the report is the majority international consensus and that used by the QTF, i.e. a hyperextension flexion injury of the cervical spine.

It is recognised that it is very common for this type of neck injury to co-occur with upper back or shoulder soft tissue injuries. When reference is made to soft-tissue ('whiplash') claims in this report they will include both claims where the neck is the sole injury and claims where the neck is the predominant injury but other injuries are also present.

The medical template recommended in the first PIC report can be used for all injury cases including cases where a neck injury is present in isolation or where additional soft-tissue injuries are also present.

² Clinical Guidelines for the best practice management of acute and chronic whiplash associated disorders: Clinical Resource Guide. TRACsa: Trauma and Injury recovery South Australia, Adelaide 2008

CHAPTER 2

**Benchmarking of
International Awards For
Personal Injury Claims**

Chapter 2: Benchmarking of International Awards For Personal Injury Claims

2.1 Introduction

As part of its terms of reference the PIC was required to establish a high-level benchmarking of international awards for personal injury claims with domestic ones as referred to in the Book of Quantum.

The PIC wrote to a number of bodies and agencies to obtain the data required to complete this exercise. Correspondence was issued and received from Insurance Ireland, various Irish embassies abroad, International law societies, the Motor Insurers Bureau of Ireland, Enterprise Rent-A-Car (ERAC), the Ministry of Justice in the United Kingdom and the Association of British Insurers among others. Unfortunately, the majority of those contacted were unable to provide data of a suitable level of granularity to complete the benchmarking exercise. However, Insurance Ireland and the Ministry of Justice in the UK, both supplied data of the standard required to enable further analysis (a full list of contacts is included at Appendix 2).

The Department of Business, Enterprise & Innovation, on behalf of the PIC engaged independent consultants for the Provision of Statistical and Actuarial Services to undertake a Data Analysis Exercise to Benchmark International Personal Injury Awards with those in Ireland.

The independent consultants were tasked with carrying out a review and validation of an analysis of Irish motor insurance bodily injury claims data provided to the PIC by Insurance Ireland, and to undertake a comparative analysis of this data against UK and potentially international data provided to the PIC by the UK's Ministry of Justice and Insurance Ireland respectively.

This is the first time that an exercise of this nature has been completed and independently validated. The PIC determined that it was appropriate to cap the claims included in the analysis at €50,000. The PIC reached this decision as the report showed that depending on the company, between 92% and 98% of all claims settle for less than €50,000. When capped at this figure the results indicate that soft tissue injury claim costs are approximately 4.4 times that of the UK cost (the claims in the data set are inclusive of psychological injury).

The report of the independent consultants engaged (KPMG) follows.

Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

2.2 KPMG Benchmarking Report

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1 Processes and procedures

1.1 Background

In November 2017 Insurance Ireland sent a data request to the eight largest motor insurers operating in the country. Insurance Ireland requested summary information on both soft tissue and non-soft tissue claims for all motor exposure for years 2015 to 2017. Claims cost information requested was for general damages only i.e. legal costs and special damages are excluded.

The data request included a form to be completed, where the information could be summarised by age of claim, settlement year and payment band.

Insurance Ireland reviewed data submitted and determined that two of the companies should be excluded from the analysis, on the basis that these companies were unable to provide data sufficiently in line with the requested split. The remaining data represented 81% of the Insurance Ireland motor market in 2016 GWP terms.

Insurance Ireland provided results, on an aggregated basis, to the Personal Injuries Commission (PIC) by settlement year, settlement band and claims duration.

1.2 Our Scope

We have been engaged by the Department of Business, Enterprise and Innovation, on behalf of the PIC to review the data provided by Insurance Ireland and carry out a benchmarking exercise against UK soft tissues claims experience.

The scope of our engagement was as follows.

- Review and validate Irish soft tissue motor insurance personal injury claims data provided to the PIC by Insurance Ireland;
- Review the data format to confirm that the data is fit for the purpose of the exercise;

- Confirm that data supplied by Insurance Ireland is in a similar and standardised format and that it has been interpreted the same way by each company;
- Confirm that data supplied has been certified appropriately for each company i.e. certification process meets appropriate industry standards;
- Review any caveats placed on the data by any of the companies and if required clarify these limitations directly with the companies concerned;
- If considered appropriate, carry out a consistency test between the data supplied by each of the companies (if access can be provided and is required to the raw data). In view of the commercial sensitivity of the data supplied by each company to Insurance Ireland the PIC is in receipt of aggregated data only and this is what will ultimately be published. Discussions will be required with Insurance Ireland to gain access to individual company data for the purposes of the validation exercise only. If the data cannot be accessed the Tenderer is required to notify the Department of Business, Enterprise and Innovation.
- Undertake a comparative analysis of this data against similar UK motor insurance personal injury claims data provided to the PIC by the UK's Ministry of Justice.

1.3 Our Process

- We reviewed all Irish and international data provided to us by the PIC. The European data was supplied by one individual insurer and aggregated by claim size band. We concluded that we would not be able to make any meaningful comparisons to the European data (excluding UK) as this information was not provided or available at a sufficiently granular level. Furthermore, we did not consider it appropriate to include the European data in our benchmarking exercise as it would be based on one single insurer only.
- We requested and received the individual company claims data underlying the aggregated data provided by Insurance Ireland to the PIC.
- We carried out a desk-top review of data provided to us to identify consistency between companies and across settlement years and claims duration. This allowed us to identify outliers and focus our discussions on data provided by individual companies.

- We discussed data provided and the process for extracting this data with each individual company. These discussions included but were not limited to the following topics:
 - Injury definitions used to split the claims between soft tissue and non-soft tissue;
 - Claim settlement dates used;
 - Whether the payment amount covered general damages only or if it also included any special awards;
 - Whether the amounts were at claimant or claim level;
 - Whether all motor exposure was included in the data;
 - Any cohorts of the claims excluded from the extract; and
 - The process carried out by the company to validate the claims information submitted to Insurance Ireland.
- We met with Insurance Ireland to discuss their process used to aggregate the claims data and reasons for any exclusions.

1.4 Validation

- Distribution of claims was reviewed for consistency between companies. We checked for consistency at an overall level and by duration to settlement.
 - Company D had a higher proportion of smaller claims, particularly as the time to settlement increased. Based on our conversation with company D we understand that this company extracted minor soft tissue injury claims. Other companies did not filter claims provided to us based on the severity of the injury. Following a discussion with the Company D, they provided a revised data set which did not restrict the data based on severity of claim and therefore we have included it in our analysis.
 - Company C had a higher proportion of smaller claims for all claims settled within one year. This company was unable to identify injury type and data provided includes all injury types i.e. soft issue and non-soft tissue. We have excluded this company from our analysis.
- We compared claims distributions against the data provided by the Personal Injuries Assessment Board (PIAB). While the PIAB data covers all motor awards we believe it provides a useful sense check on the industry claims distribution.

- For each company we compared claims volume to market share based on their motor Gross Written Premium from the Insurance Ireland fact files for 2014, 2015 and 2016. There were two outliers where the number of claims submitted was noticeably different to market share. Company E does not record claims at a claimant level and claims involving more than one claimant were excluded from data submitted to Insurance Ireland. Company G claims volumes are higher than we would expect. We have discussed this issue with Company G and they were unable to explain why the volume of claims was higher than expected, other than to note that it may be due to the inconsistencies in definition of a soft tissue injury. Excluding Company G from our analysis would increase the average from €19,862 to €20,730. The distribution of claims is broadly consistent with peers and therefore we have decided to keep Company G in our analysis.
- Where the companies provided both soft tissue and non-soft tissue claims information, we have compared proportion of soft tissue claims as a portion of the total injury claims by company. For four companies where this information was available soft tissue claims made up on average 77% of the total injury claims. For company G the soft tissue claims made up 93% of claims submitted, which is higher than we would have expected.

1.5 Our exclusions and data adjustments

- While Company B validation checks did not identify any issues with data provided we note that claims definition used included 'unknown' claim types some of which we identified as being non-injury type claims. We have excluded this company from our analysis.
- Three companies included in the benchmarking exercise were unable to split special damages from general damages. We adjusted for this potential overstatement by reducing soft tissue claims cost. The adjustment was based on the proportion of the total payments attributed to special damages provided by PIAB. This adjustment is made by claim size i.e. the average portion of the claims attributable to special damages is 3% for losses of between €5k and €10k, increasing to 11% where the losses are between €40k and €50k.
- We have limited our analysis to claims between €1k and €100k, on the basis that some of the insurance companies had already excluded payments outside of this range. In addition, any particularly large claims could distort the results.

Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

2 Summary Findings

2.1 Summary of Results

In this section we present our results and the impact of various assumptions on the average soft tissue injury claim cost. One of the key assumptions in our analysis is the upper bound on claims to be included in calculating the average claims cost. The starting point for our analysis includes all claims between €1,000 and €100,000. The appropriateness of all assumptions was discussed at a PIC workshop. We note that following the workshop the membership of the PIC determined that it would be more appropriate to cap the claims included in the analysis at €50,000, as set out in section 2.2.1 below.

Our results, at a high level, indicate that soft tissue injury claim costs in Ireland are approximately 5.0 times that of the UK cost (including psychological injury). Note that this comparison is based on Irish claims data capped at €100,000 per claimant. The PIC determined that it would be more appropriate to cap the claims included in the analysis at €50,000, when capped at this figure, the results indicate, that soft tissue injury claim costs are approximately 4.4 times that of the UK cost (including psychological injury).

| Average between €1k and €100k | | | | | | |
|-------------------------------|---------------|------------------|---------------|---------------|---------------|---------------|
| Company | All Claims | Less than 1 year | 1 - 2 years | 2 - 3 years | 3 - 4 years | 4+ years |
| A | 20,608 | 12,234 | 19,002 | 24,020 | 27,889 | 29,846 |
| B | 16,840 | 11,273 | 17,451 | 22,658 | 23,573 | 35,294 |
| C | 18,520 | 9,445 | 17,813 | 22,049 | 25,770 | 24,880 |
| D | 20,701 | 10,666 | 17,322 | 21,209 | 26,576 | 33,876 |
| E | 18,033 | 10,486 | 17,078 | 21,819 | 22,646 | 29,394 |
| F | 23,189 | 11,538 | 19,230 | 25,396 | 31,388 | 37,899 |
| G | 18,613 | 11,037 | 17,229 | 21,731 | 25,164 | 30,692 |
| H | 18,893 | 12,872 | 21,326 | 26,118 | 32,382 | 29,300 |
| Total | 19,427 | 11,173 | 18,359 | 22,892 | 26,823 | 30,086 |
| Total (ex B & C) | 19,862 | 11,635 | 18,560 | 23,110 | 27,237 | 32,795 |

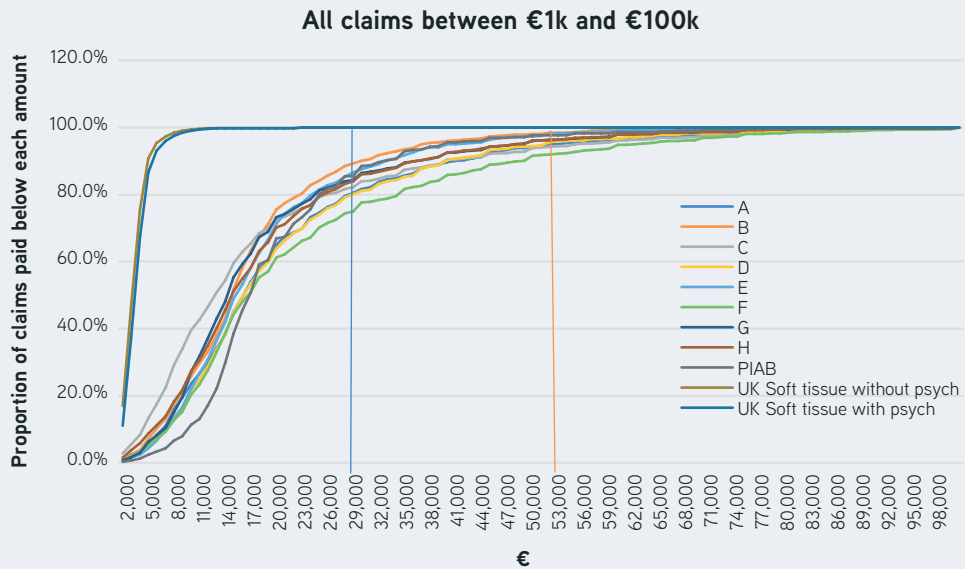
The table shows the average claim cost at an overall and company level by claims duration and all durations combined.

These averages are based on data provided by individual companies adjusted by KPMG, where necessary, to remove Special Damages and remove claims of less than €1,000 and greater than €100,000.

The total average claims severity amounts are shown including all companies and excluding particular companies where we consider data to be unsuitable for benchmarking purposes.

| Average between €1k and €100k | |
|--|---------------|
| Year | All Claims |
| 2015 | 18,973 |
| 2016 | 19,904 |
| 2017 | 20,826 |
| Overall Average (Ireland) | 19,862 |
| UK (with psych) (adj for inflation) | 3,984 |
| UK (without psych) (adj for inflation) | 3,612 |
| Overall Average (UK) | 3,798 |

The table shows the average settlement amounts in the UK which are based on analysis carried out by Verisk in 2016 for the UK Ministry of Justice. This table also includes average claim cost by settlement year for Ireland.



The chart shows the distribution, for all durations combined, by company. Data underlying the chart is consistent with that used to calculate averages in above tables. We also show distribution of UK claims and PIAB settlement costs.

The red line at the €50,000 mark shows that, depending on the company, between 92% and 98% of all claims settle for less than €50,000. The light blue line shows that between 72% and 83% of all claims settle for less than €25,000.

2.2 Details of the assumptions, reliances, limitations and sensitivities.

Our analysis shows that the average soft tissue claims cost in Ireland is €19,862, based on claims paid in 2015, 2016 and 2017.

The average soft tissue injury claims severity in the UK for the period January 2012 to December 2015 was €3,589 and €3,254 with and without psychological damages respectively before adjustment for inflation. These figures are based on the analyses performed by Verisk during 2016 for the UK Ministry of Justice converted at exchange rate of 1 GBP = 1.22 EURO. Adjusting the UK data for the difference in settlement dates increased the average soft tissue injury claims severity in the UK to €3,984 and €3,612 with and without psychological damages.

Our results therefore indicate that at a high level soft tissue injury claim costs in Ireland are approximately 5.0 times that of the UK costs (incl. psych) however, this is based on Irish claims data capped at €100,000 per claimant. The PIC determined that it would be more appropriate to cap the claims included in the analysis at €50,000, when capped at this figure, the results indicate, that soft tissue injury claim costs are approximately 4.4 times that of the UK cost (incl. psych).

We have identified and quantified the key limitations and assumptions impacting this benchmarking exercise including:

2.2.1 Maximum and minimum soft tissue injury severity

Our results are based on general damage amounts of between €1k and €100k. We have excluded payments outside of this range: some company data is limited to this range; claims outside this range are unlikely to be in respect of soft tissue injury; and to ensure results are not distorted by a few excessively large payments.

Reducing the upper range of soft tissue injury claims cost to €50k and €25k reduced our overall average amounts to €17,338 and €13,336 respectively. The overall comparisons in these scenarios are claim costs in Ireland of approximately 4.4 and 3.3 times that of the UK costs (incl. psych).

2.2.2 Consistency of settlement periods and soft tissue injury claims severity inflation

We have not adjusted the Irish payment data for inflation. However, we note that the average claims severity increased from €18,973 in 2015 to €19,904 in 2016, and again to €20,826 in 2017 implying an annual inflation rate of approximately 4%.

Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

The mid-point of settlement periods for the Irish and UK studies are approximately June 2016 and December 2013 respectively. The average claim settled through the UK claims portal increased by 11% between December 2013 and June 2016. We have used this inflation rate to adjust the UK claims data for the difference in average settlement date. This increased the average soft tissue injury claims severity in the UK to €3,984 and €3,612 with and without psychological damages.

2.2.3 Our adjustment for special damages

We applied our judgement to adjust claims cost downwards for two companies that were unable to split special damages from general damages payments provided to us. This adjustment is informed by data provided by PIAB and varies by claim size³.

This adjustment has not materially impacted our results. Increasing the adjustment additively by 5% and 10% results in multiples of UK costs (incl. psych) of 4.92 and 4.85 respectively.

2.2.4 Exchange rates

Exchange rates varied significantly over the investigation period 2015-2017 and we used a simple average of year-end 2015, 2016 and 2017 exchange rates. The level of Irish claims versus UK varies from 4.5 to 5.4 using 31 December 2015 and 31 December 2017 exchange rates respectively.

³ PIAB data was used to calculate typical ratios between General Damages and Special Damages for different award level bands. Data from over 20,000 PIAB awards, incorporating all motor cases assessed over the period 2015-2017, each of which list General Damages and Special Damages separately, was used as an indicator of the approximate numerical relationship between the two sets of damages.

3 Limitations and assumptions

3.1 Reliances and Limitations

We have made use of the best data currently available, assessed consistency between data of Irish companies, included/excluded data and attempted to quantify any limitations that we have identified.

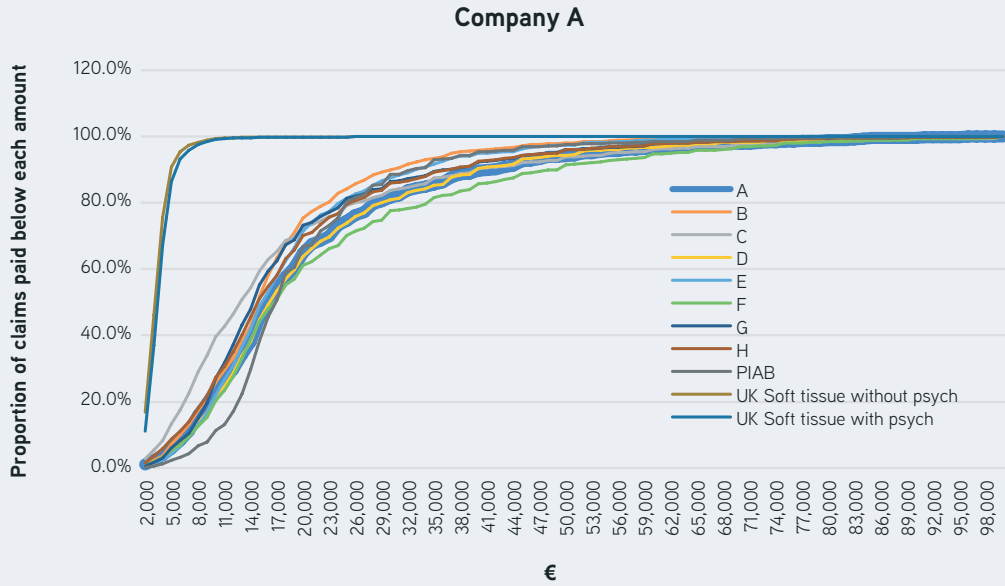
We do note that the definition of soft tissue injury ('whiplash') losses is constantly developing and is not consistent between Irish companies, between Ireland and the UK jurisdiction and between successive UK soft tissue analyses. We recommend that the Irish analyses and benchmarking exercise be repeated at regular intervals as definitions are refined and underlying claims experience evolves.

- Our validation process relies on a desk top review of data provided and enquiry based approach with each individual company.
- As the claims data relates to only a subset of claims, we have not been able to check that the claim payments reconcile back to audited financial statements or regulatory returns.
- For each company an injury code is allocated to claims based on the most dominant or severe injury and is generally set when the claim is first reported. Where a claimant has multiple injuries, the data includes the payment made for all injuries rather than just the soft tissue injury element. This may result in average costs of soft tissue injury being overstated.
- The data is based on the payment made by each insurer. Where an insurer is only partially liable the data for that insurer will only include the portion of the payment paid by that insurer. This may result in the average cost of soft tissue injury being understated.
- The injury code is subject to human error as it is manually set by the claims handler.
- General damages provided to us include psychological damages, where present. Companies were however not able to identify which claims had a psychological damage element or, where present, the cost of these awards.
- In some cases, the data includes particularly large payment amounts. Based on our discussions with the insurance companies we understand that these may be due to a combination of factors, such as incorrect injury code, multiple injuries where soft tissue damage is just one component, a soft tissue claim which has deteriorated or a large special damages award. Some companies have capped the individual claims at €100k as it is unlikely that a soft tissue injury would lead to such a high award and could distort the benchmarking exercise.
- We have also discussed the particularly low value claims in the data, such as those less than €1000. These may be due to cases where the claimant was paid a nominal amount for damages but may have been paid a larger amount for vehicle damage. The payment could also have been misclassified as general damages instead of legal expenses or the injury code could be incorrect.
- The UK soft tissue injury claims data covers settlements between January 2012 and December 2015 and is therefore inconsistent with settlement period of Irish data. We have adjusted the UK data for claims inflation using the movement in average claim settled through the UK claims portal between December 2013 (average UK settlement date) and June 2016 (average Irish settlement date).

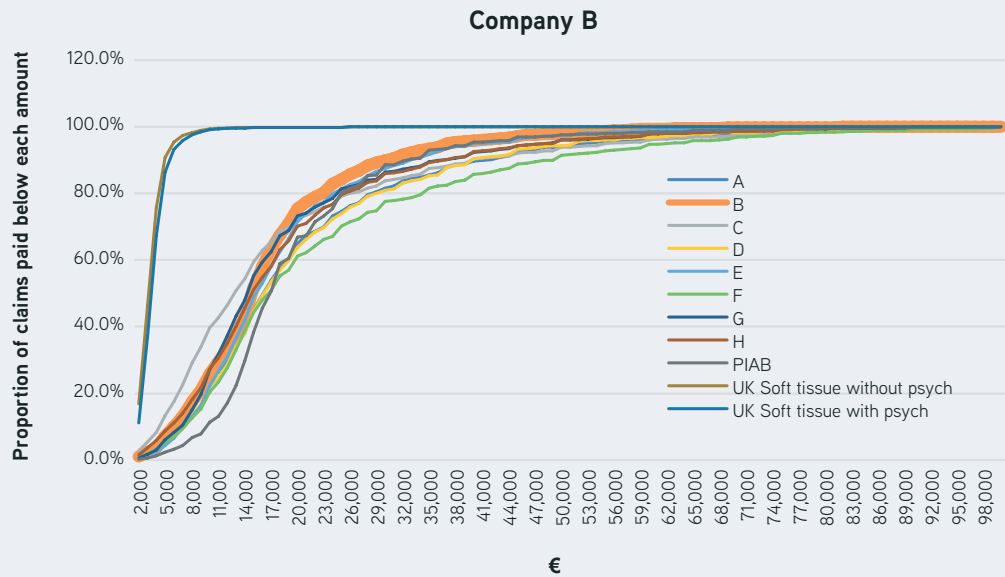
Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

4 Results by Company

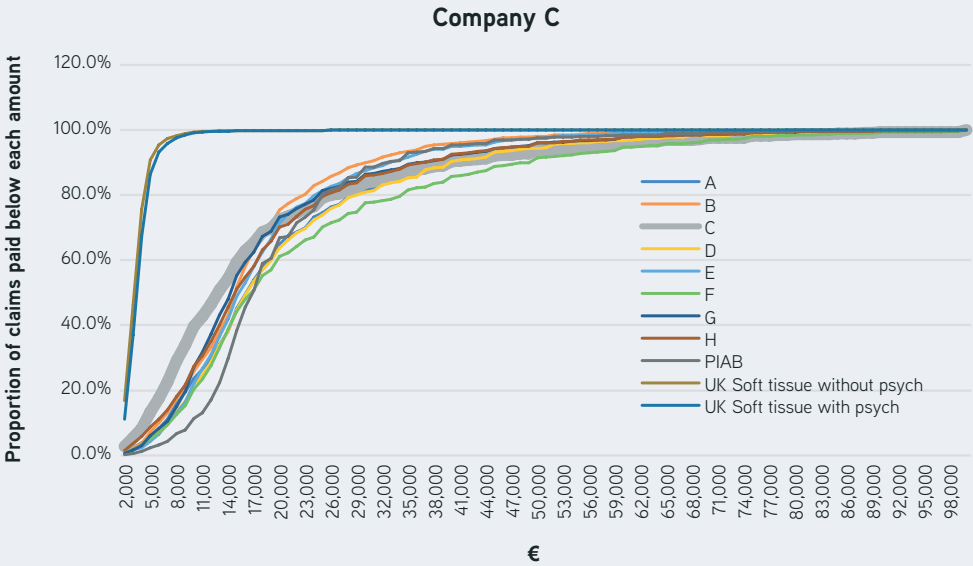
4.1 Company A



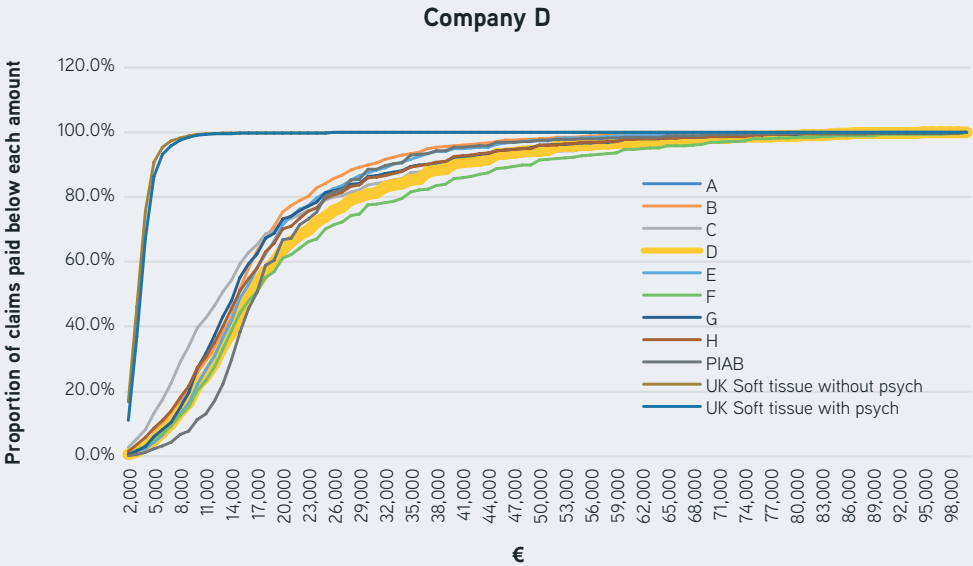
4.2 Company B



4.3 Company C

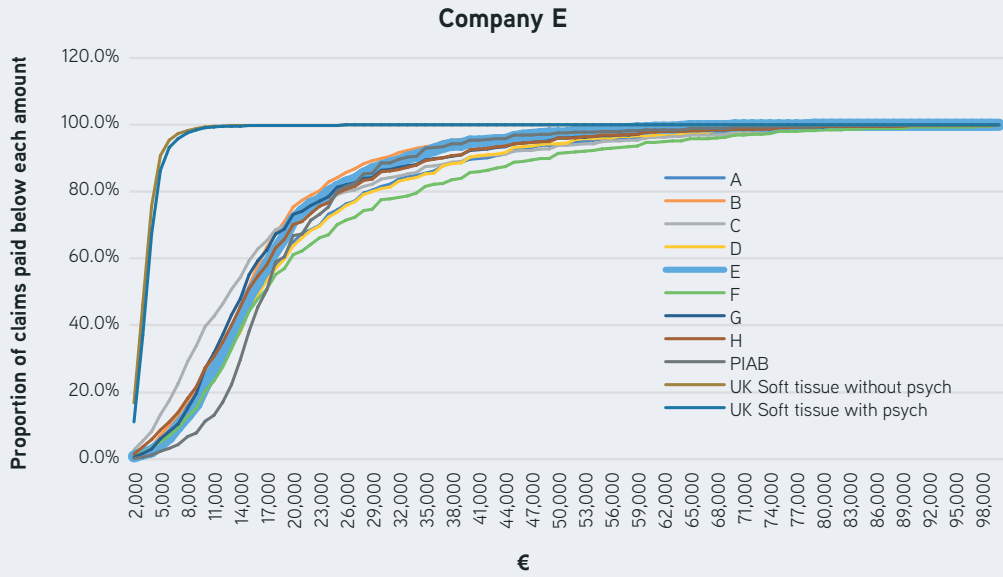


4.4 Company D

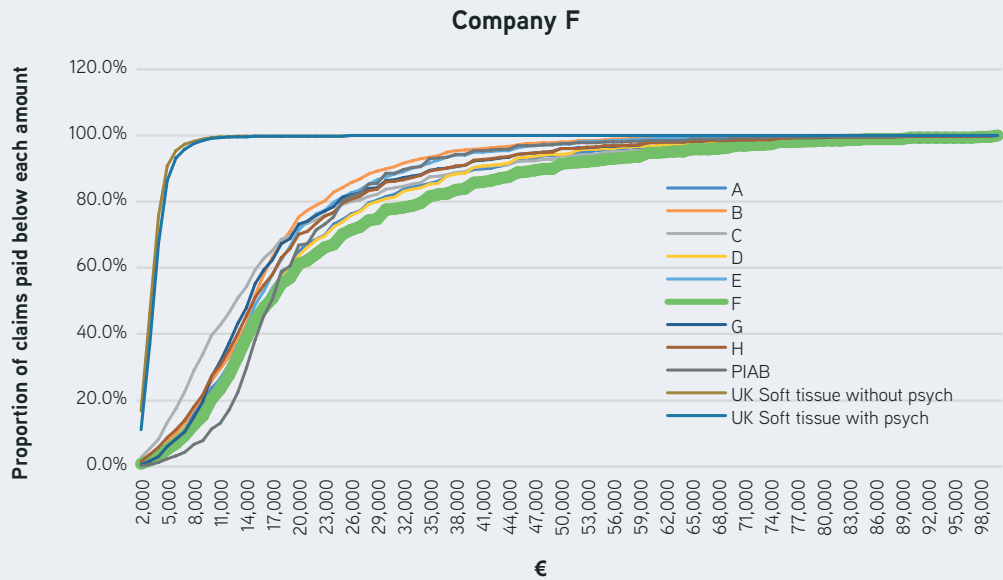


Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

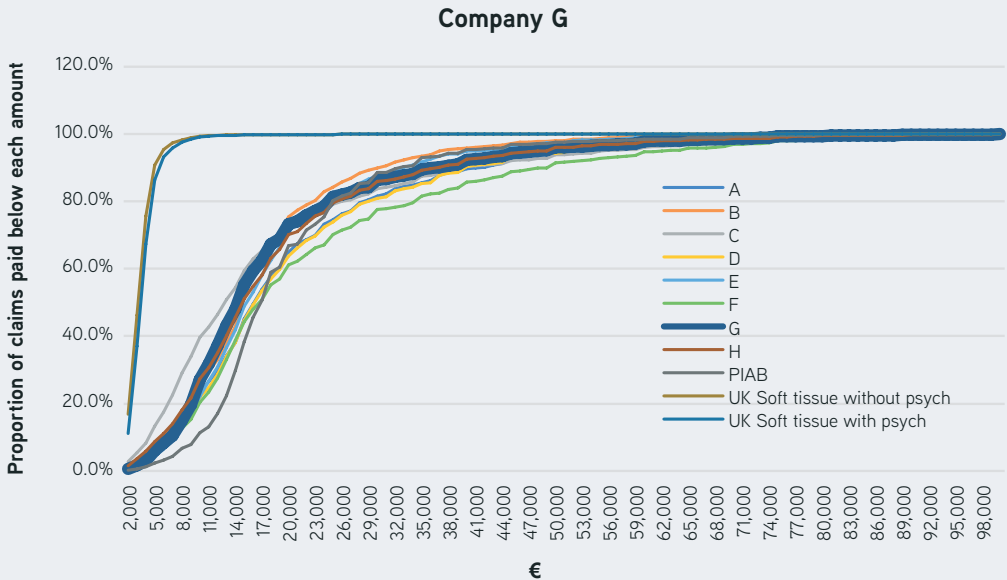
4.5 Company E



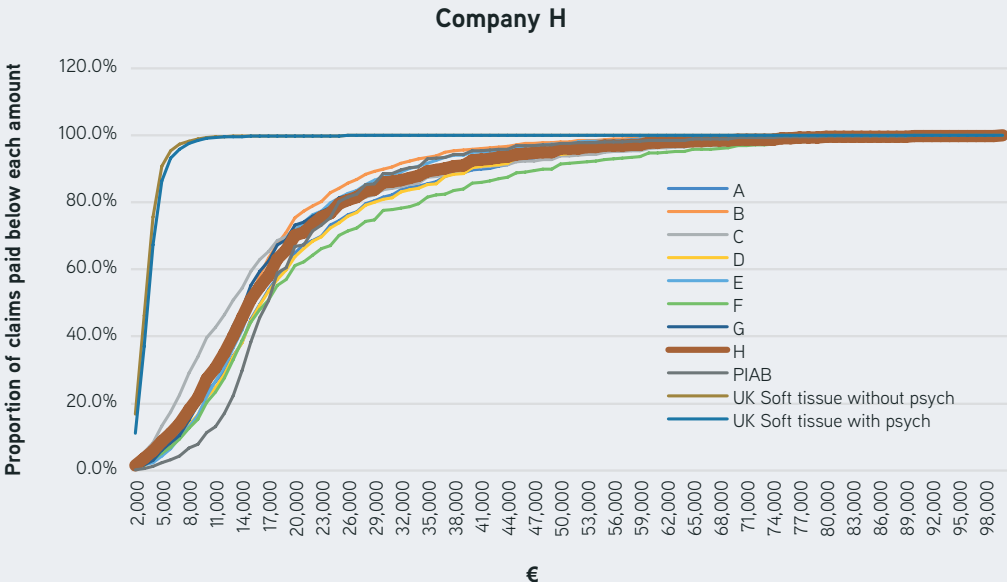
4.6 Company F



4.7 Company G



4.8 Company H



6 Data by Company

6.1 Company A

| Company A | |
|-----------------------------|--|
| Claims settlement dates | 1 January 2015 - 22 November 2017 |
| Injury definition | The data includes all soft tissue claims. |
| Heads of damage included | General damages & special damages |
| Claimant level information? | Yes |
| Motor class included | All motor classes |
| Exclusions based on amount | Nil claims excluded. |
| Completeness | No cohorts of claims were excluded. |
| Checks completed | A sample of claims was compared back to the front end system to ensure the data had been extracted properly. |

6.2 Company B

| Company B | |
|-----------------------------|--|
| Claims settlement dates | 1 January 2015 – 17 November 2017 |
| Injury definition | The data includes all claims where the anatomy description is neck, the claim type is soft tissue or the claim type is unknown with a payment amount between €100 and €100k. |
| Heads of damage included | General damages & special damages |
| Claimant level information? | Yes |
| Motor class included | All motor classes. |
| Exclusions based on amount | “Unknown” claims capped at €100k, nil claims excluded. |
| Completeness | |
| Checks completed | Checked that payments in claims system reconciled with financial system and found that 98% of data reconciliated. There was also a high level review done by the claims manager. |

6.3 Company C

| Company C | |
|-----------------------------|---|
| Claims settlement dates | |
| Injury definition | The data includes all injury claims. |
| Heads of damage included | General damages only |
| Claimant level information? | Yes |
| Motor class included | All motor classes. |
| Exclusions based on amount | |
| Completeness | |
| Checks completed | A sample of claims for each cohort was checked back against the core financial system. Reasonableness checks were also carried out. |

Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

6.4 Company D

| Company D | |
|-----------------------------|--|
| Claims settlement dates | |
| Injury definition | The claims are based on a number of different back, neck and soft tissue injury codes. There is no restriction on the severity of the claim. |
| Heads of damage included | General damages & special damages |
| Claimant level information? | Yes |
| Motor class included | All motor classes included |
| Exclusions based on amount | Nil claims were excluded |
| Completeness | Circa 16% of the total Motor claimants from 2015 to 2017 were tagged with an unknown injury code as these are handled by a delegated authority |
| Checks completed | Validation and accuracy of the data sense checked with the data owner and internal management. This included issue resolution for areas such as recoveries, RBAs, proxy settlement dates. Internal sign-off of submission. No reconciliation was required as the data utilized for the submission was directly extracted from the operating system that houses all payments/reserves for claim files, and reconciliations occur at a company level on this system. |

6.5 Company E

| Company E | |
|-----------------------------|--|
| Claims settlement dates | 1 January 2015 – 27 September 2017 |
| Injury definition | The data includes all claims where the injury is coded as “Neck/Whiplash” as an approximation for soft tissue injury as this injury code is not recorded. The awards were capped at €100k. |
| Heads of damage included | General damages & special damages |
| Claimant level information? | Yes |
| Motor class included | All motor classes. |
| Exclusions based on amount | Only includes claims with total payment greater than €10 and where less than €100k was incurred. |
| Completeness | Excludes any MIBI related claims. Only includes single claimant claims. In cases where there were multiple claimants, the settlements cannot be split by claimant. |
| Checks completed | The data was checked at a high level with reasonableness checks by actuarial and the CFO. There were also sense checks carried out on any particularly large claims. |

6.6 Company F

| Company F | |
|-----------------------------|--|
| Claims settlement dates | 1 January 2015 - 31 October 2017 |
| Injury definition | All claims where the injury code was soft tissue. Body part impacted is not recorded on the system. |
| Heads of damage included | General damages only |
| Claimant level information? | Yes |
| Motor class included | |
| Exclusions based on amount | Nil claims were excluded. |
| Completeness | |
| Checks completed | The data was extracted by the MI team. Sample of around 150 claims reviewed by operations team to ensure it was correct. |

6.7 Company G

| Company G | |
|----------------------------|---|
| Claims settlement dates | 1 January 2015 – 31 October 2017 |
| Injury definition | The data includes all claims coded as whiplash or soft tissue (not specific to any body part). |
| Heads of damage included | General damages only |
| Claimant level information | Yes |
| Motor class included | All motor classes included |
| Exclusions based on amount | Included all claimant entries where a payment was made. If the claim opened and closed at nil, then the claim was excluded. |
| Completeness | No claims were excluded. |
| Checks completed | |

6.8 Company H

| Company H | |
|-----------------------------|---|
| Claims settlement dates | 1 January 2015 - 31 October 2017 |
| Injury definition | Injury codes are based on Book of Quantum. Data includes any claims coded as “whiplash” and “other soft tissue injuries to neck and back”. |
| Heads of damage included | General damages only |
| Claimant level information? | Yes |
| Motor class included | All motor classes |
| Exclusions based on amount | |
| Completeness | Claims were extracted from a separate database than the financial database used for reserving. Only 70% of claims reconciled with the financial database. |
| Checks completed | Ongoing |

Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

7 Sensitivity

7.1 Impact of varying the range of claims included

- We have limited the claims included in our analysis to those with a payment between €1k and €100k, as some companies excluded claims outside of this range. We also believe that soft tissue claim payments outside of this range are relatively rare. In order to assess the impact of this upper bound on our overall findings, we have tested the impact on the average claim payment of reducing the cap to €50k and €25k.
- The results below show that the upper bound on soft tissue claims included in the analysis has a material impact on the average claim payment. When we reduce the upper bound to €50k, the average claim payment reduces from €19,862 to €17,338. This is a 13% reduction in the average claim payment. Reducing the cap from €100k to €50k reduces the number of claims included in the analysis by 5%.
- When we reduce the upper bound to €25k, the average claim payment reduces from €19,862 to €13,336. This is a 33% reduction in the average claim payment. Reducing the cap from €100k to €25k reduces the number of claims included in the analysis by 22%.

| Impact of capping claims | | | |
|--|---|-----------------------------|-----------------------------|
| Company | Original - all claims between €1k and €100k | Claims between €1k and €50k | Claims between €1k and €25k |
| A | 20,608 | 17,762 | 13,363 |
| B | 16,840 | 15,978 | 13,186 |
| C | 18,520 | 15,165 | 11,294 |
| D | 20,701 | 18,071 | 13,553 |
| E | 18,033 | 16,913 | 13,677 |
| F | 23,189 | 18,932 | 13,770 |
| G | 18,613 | 16,619 | 13,161 |
| H | 18,893 | 16,922 | 13,177 |
| Total | 19,427 | 16,834 | 12,919 |
| Total (ex B & C) | 19,862 | 17,338 | 13,336 |
| Reduction in average payment vs. original | | -13% | -33% |
| Reduction in claim count vs. original | | -5% | -22% |

| Impact of capping claims | | | |
|--|---|-----------------------------|-----------------------------|
| Year | Original - all claims between €1k and €100k | Claims between €1k and €50k | Claims between €1k and €25k |
| 2015 | 18,973 | 16,679 | 12,917 |
| 2016 | 19,904 | 17,452 | 13,438 |
| 2017 | 20,826 | 17,965 | 13,716 |
| Overall Average (Ireland) | 19,862 | 17,338 | 13,336 |
| UK (with psych) (adj for inflation) | 3,984 | 3,984 | 3,984 |
| UK (without psych) (adj for inflation) | 3,612 | 3,612 | 3,612 |
| Overall Average (UK) | 3,798 | 3,798 | 3,798 |
| Ireland: UK (with psych) | 4.99 | 4.35 | 3.35 |

7.2 Adjustment for special damages

- Company A, Company B, Company D and Company E record the claim payments for general damages and special damages together. Therefore we used the motor claims data provided by the Personal Injuries Assessment Board to adjust the individual claims data to exclude the portion attributable to special damages. We varied the adjustment by the size of the claim, in order to allow for the fact that the proportion of the claim payment which relates to special awards generally increases with the size of the claim.

| Special award as % of general damages and special award combined | |
|--|-----|
| €1,001 - €5,000 | 4% |
| €5,001 - €10,000 | 3% |
| €10,001 - €15,000 | 3% |
| €15,001 - €20,000 | 5% |
| €20,001 - €30,000 | 7% |
| €30,001 - €40,000 | 9% |
| €40,001 - €50,000 | 11% |
| €50,001 - €75,000 | 13% |
| €75,001 - €100,000 | 15% |

Source: Personal Injuries Assessment Board - Motor Claims

- We have excluded Company B from our analysis. Company A, Company D and Company E combined account for less than 30% of the claims in our analysis. Therefore the impact of this adjustment is relatively small. We have run a sensitivity test to show the impact of increasing the percentage of these claims attributable to special awards by increasing the percentage by 5% and 10%. The table below shows that increasing the special awards proportion by 5% reduces the average claim payment from €19,862 to €19,581. It also shows that increasing the special awards proportion by 10% reduces the average claim payment from €19,862 to €19,325. Therefore we do not consider this adjustment to be material.

| Average between €1k and €100k | | | |
|--|--------------------------|---------------------------|----------------------------|
| Year | Original PIAB Adjustment | 5% increase in adjustment | 10% increase in adjustment |
| 2015 | 18,973 | 18,739 | 18,521 |
| 2016 | 19,904 | 19,597 | 19,312 |
| 2017 | 20,826 | 20,522 | 20,255 |
| Overall Average (Ireland) | 19,862 | 19,581 | 19,325 |
| UK (with psych) (adj for inflation) | 3,984 | 3,984 | 3,984 |
| UK (without psych) (adj for inflation) | 3,612 | 3,612 | 3,612 |
| Overall Average (UK) | 3,798 | 3,798 | 3,798 |
| Ireland:UK (with psych) | 4.99 | 4.92 | 4.85 |

Chapter 2: Benchmarking of International Awards For Personal Injury Claims (continued)

7. 3 Impact of varying the exchange rate

- We have used the average of the GBP to EUR exchange rate as at year end 2015, year end 2016 and year end 2017. This gives an average rate of £1 = €1.22. In order to test the impact of this exchange rate on our findings we have tested the impact of converting the UK average claim payment using the exchange rate as at year end 2015, year end 2016 and year end 2017. As Sterling was stronger in 2015, using the year end 2015 exchange rate reduces the gap between the average payment in the UK and Ireland.

| Average between €1k and €100k | | | | |
|--|---------------|---------------|---------------|---------------|
| Year | All Claims | 2015 FX rate | 2016 FX rate | 2017 FX rate |
| 2015 | 18,973 | 18,973 | 18,973 | 18,973 |
| 2016 | 19,904 | 19,904 | 19,904 | 19,904 |
| 2017 | 20,826 | 20,826 | 20,826 | 20,826 |
| Overall Average (Ireland) | 19,862 | 19,862 | 19,862 | 19,862 |
| UK (with psych) (adj for inflation) | 3,984 | 4,435 | 3,834 | 3,683 |
| UK (without psych) (adj for inflation) | 3,612 | 4,020 | 3,476 | 3,339 |
| Overall Average (UK) | 3,798 | 4,227 | 3,655 | 3,511 |
| Ireland:UK (with psych) | 4.99 | 4.5 | 5.2 | 5.4 |
| FX rate | 1.22 | 1.36 | 1.17 | 1.13 |

CHAPTER 3

**Report on Alternative
Compensation and
Resolution Models**

Chapter 3: Report on Alternative Compensation and Resolution Models

3.1 Introduction

The experience of other jurisdictions in dealing with the compensation of soft-tissue ('whiplash') injuries was initially explored in the First Report of the Personal Injuries Commission, particularly in the context of medical treatment and reporting.

The terms of reference of the Personal Injuries Commission required the analysis and reporting on international compensation levels and compensation mechanisms; and the analysis of alternative compensation and resolution models internationally, focusing on common law systems while taking account of social welfare, healthcare and related factors associated with each jurisdiction.

Alongside desk based research, the Commission has engaged with Irish embassies, the Motor Insurance Bureau of Ireland (MIBI) and the Legal and Insurance representative and regulatory bodies in several jurisdictions to obtain information about comparative models of compensation internationally and, in particular, the international experience of soft-tissue ('whiplash') injuries.

In selecting the particular countries or jurisdictions to report on PIC selected some countries which were referenced in the First Report of the Personal Injuries Commission and which merited further examination, a selection of common law and civil law jurisdictions, some European countries, particularly our closest neighbours, and other countries. Publicly available reference material was utilised along with information obtained from corresponding with various entities, as outlined earlier.

Canada and Australia were referenced in the First Report, specifically the Quebec Task Force WAD scale and South Australian Guidelines. In the Canadian context, this report focuses on the province of Ontario and the recent recommendations of the report 'Fair Benefits Fairly Delivered - A Review of the Auto Insurance System in Ontario'⁴. The compensation system in South Australia has also been explored in further detail. A brief analysis of the United States and its multiple compensation systems has been included. New Zealand's Accident Compensation Corporation⁵ is explored as a notable example of a no-fault system. Although this scheme is more than 40 years old, it has not been replicated in any other common law jurisdiction. However, a number of states and provinces in Canada, the United States and Australia operate no-fault and partial no-fault schemes.

Various European Union countries are also discussed: the UK, France, Germany, Sweden, the Netherlands, Italy and Spain. It should be noted that unlike Canada, Australia and the United States, these countries (with the exception of the UK) operate civil law systems rather than common law systems, so this limits the comparative value from a legal perspective, however, useful information has been obtained regarding best practices in other areas of the compensation, particularly the successful operation of agreements between insurers and claimants or legal representatives. Spain and Italy operate complex systems of tables. While this is not an ultimate recommendation of the PIC, it is useful to illustrate the importance of certainty in the personal injury claims environment.

Where possible, an indication of a typical award for a soft-tissue ('whiplash') injury is provided, however the requisite level of data for a verified comparison was not generally available, and these figures are intended for illustrative purposes only. OECD statistics for the Consumer Price Index and Gross Domestic Product for Ireland and each country outlined are contained in the appendices at the end of the report.

3.2 United Kingdom

Background

The UK is a common law jurisdiction. When assessing damages in England and Wales there should be reference to the Judicial College Guidelines (JCG, formerly the Judicial Studies Board Guidelines), which set out financial brackets for common types of injury. The JCG are used as a guideline in addition to past case law or a court decision on the case. In Northern Ireland a similar publication is produced called 'Guidelines for the Assessment of General Damages in Personal Injury Cases'. This is a separate publication otherwise known as the 'Green Book'.⁶ Compensation awarded is subjective using the JCG as a guideline. Other aspects which may be considered when determining non-pecuniary damages include age, sex, occupation, nature of injury, degree of recovery and secondary factors such as anxiety. The Judicial College Guidelines set out recommended damages in brackets for injury types broken down by severity and similar to the format in which the Book of Quantum is produced in Ireland. The brackets contained in the guidelines list a range of values. The JCG guidelines are revised regularly and each subsequent edition of the Guidelines reflects inflationary changes, any new decisions on quantum and any changes in policy. It is important to note that the guidelines are not law and they can be departed from if

⁴ <https://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html>

⁵ <https://www.acc.co.nz/>

⁶ <https://www.judiciary-ni.gov.uk/publications/green-book-guidelines-assessment-general-damages-personal-injury-cases-northern-ireland>

the circumstances of the case so require. For example, in *Cameron v Vinters Defence Systems Ltd*⁷ Holland J noted that the starting point is the guidelines, but that they can be departed from with justification.

The Judicial Studies Guidelines have been in operation since 1992. The aim, as outlined by Lord Donaldson in the original edition is to use “the amount of damages awarded in reported cases as guidelines or markers” and “to distil the conventional wisdom contained in the reported cases”.

Following the publication of the original guidelines, the Law Commission in its Report on ‘Damages for Personal Injury: Non-Pecuniary Loss’ recommended changes to the guidelines and court of appeal decisions altered the levels of damages. In a series of test cases, the lead one being *Heil v Rankin*⁸ the Court of Appeal, in a landmark decision, reviewed award levels. The Court of Appeal considered it appropriate to increase damages in certain cases but not to the extent recommended by the Law Commission. The Court decided it was not appropriate to increase damages for modest injuries and injuries receiving less than £10,000 should not be adjusted, however the court adjusted the awards at the highest level, for catastrophic injuries by one third.

In 2012, a package of reforms appearing in the Jackson Report on Civil Litigation Costs was recommended. This report, and the subsequent decision of the Court of Appeal in *Simmons v Castle*, decided that a 10 per cent increase would apply to all heads of non-pecuniary damage in civil claims. The 10 per cent uplift together with inflation related increases are taken into account in editions of the guidelines published since 2013.

In addition to this revision, reforms to reduce the costs associated with civil litigation were introduced in April 2013 through the Legal Aid, Sentencing and Punishment of Offenders Act 2013. Further measures, to tackle fraud and fix the cost of initial ‘whiplash’ medical reports and to improve both the independence and quality of medical evidence, were introduced between October 2014 and June 2015. Following the 2013 Act the Ministry of Justice portal⁹ was extended for use in all personal injury claims valued between £1,000 and £25,000. The aim of the portal is to reduce the costs and lifecycles of low value claims as there are set timeframes for responding and set fixed costs. The origins and operation of this portal are discussed in detail below.

UK Claims Portal

In the UK, significant changes have been made in recent years to the Personal Injury environment. In 2010, Lord Justice Jackson published a final report looking at the cost of taking legal action and the implications for access to justice. The report looked in detail at such issues as the use of expert witnesses, the treatment of settlement offers, case management, alternative dispute resolution and pre-action protocols. The main findings and recommendations included that:

- The costs system should be based on legal expenses that reflect the nature/complexity of the case;
- Success fees and after the event insurance premiums should not be recoverable in ‘no win, no fee’ cases;
- General damages awards for personal injuries and other civil wrongs should be increased by 10%;
- Referral fees should be scrapped;
- Claimants should only make a small contribution to defendant costs if a claim is unsuccessful (if they have behaved reasonably);
- There should be fixed costs for ‘fast track’ cases (with a claim up to £25,000);
- A Costs Council should be established to annually review fixed costs and lawyers’ hourly rates;
- Lawyers should be allowed to enter into Contingency Fee Agreements and
- ‘Before the event’ legal insurance should be promoted.

In 2010, the UK Claims Portal was established as a mechanism to improve the process for settling personal injury claims, and to minimise the need for uncontested cases to proceed to court. The establishment of the Claims Portal was particularly relevant to lower value personal injury cases where settlement can be negotiated directly between the parties. Initially, it was designed for motor accident cases and for cases estimated to be greater than £1,000 and lower than £10,000 in value.

On April 1st, 2013, the *Legal Aid, Sentencing and Punishment of Offenders Act* (LASPO) came into effect with the broad aim of making justice work more efficiently. It was met with mixed reactions from the legal community. The LASPO legislation encapsulated many of the ideas espoused in Lord Jackson’s report, including recommendations impacting on the now established Claims Portal. Under LASPO, the Portal’s remit was widened to include Public and Employer Liability claims and claims with a maximum estimated value of £25,000, with the lower limit still set at £1,000.

⁷ *Cameron v Vinters Defence Systems Ltd* [2007] EWHC 2267 (QB)

⁸ *Heil v Rankin* [2000] EWCA Civ 187 (13 June 2000)

⁹ <https://www.claimsportal.org.uk/>

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The Claims Portal is a not-for-profit company with its Board of Directors being balanced to represent claimant and compensator communities equally. It operates as a stakeholder solution designed to meet the needs of users by providing them with a safe and secure electronic means of communication. Using the Claims Portal provides users with several benefits:

- Information can be transferred between parties in a secure and efficient way;
- Decisions can be communicated quickly and easily;
- The cost of communications is reduced;
- By including some basic validation checks, the Portal helps to avoid inconsistent, incomplete or incorrect information being exchanged and
- The volume and median for settlement amounts is published each month

The Portal's workings and process are underpinned by the *Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents* published in July 2013¹⁰. The process for the Portal is summarised as follows:

Stage 1

The Claimant completes and sends a Claims Notification Form (CNF) to the defendant. The CNF includes details of the claimant, the accident and other items such as information on rehabilitation undertaken. The CNF also contains a 'statement of truth' which must be signed by the claimant. The CNF must be acknowledged by the respondent within one working day and subsequent completion by the Respondent of an 'insurer response' must occur within 15 days.

Stage 2

The claimant obtains a medical report (if not already obtained). For soft tissue injuries, the medical report should be obtained from an accredited expert selected for the claim via MedCo¹¹. The MedCo portal was established in 2015 and is a portal system to facilitate the sourcing of independent medical reports for soft tissue injury claims. MedCo was brought about under the Ministry of Justice's *Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents* and avoids the need for multiple medical experts representing each side. The medical report forms part of a 'settlement pack' issued to the defendant. This 'settlement pack' also includes details of any of the claimant's special damages such as out-of-

pocket expenses. Upon receipt of the 'settlement pack', the respondent has 35 days to consider its contents (including a settlement offer from the claimant), make a counter offer and negotiate a settlement. The claimant then either accepts the offer or makes a counter-offer. Where the parties cannot reach agreement, the claimant then sends the defendant a 'Court Proceedings Pack' which includes the settlement pack and details of settlement offers.

Stage 3

In cases where the parties have not been able to settle the claim via the Claims Portal, proceedings are issued and the case is heard in court (if not agreed in the interim).

Impact of the UK Portal System

Whilst the fundamental objectives of pursuing a claim remain the same, substantial differences by virtue of operation of the Portal have been realised. These differences relate specifically to the speed and cost of processing claims over and above the older system which is akin to the environment in Ireland prior to the introduction of the Personal Injuries Assessment Board. Aspects of the new system have encountered difficulties, for example where users, in limited numbers, have attempted to frustrate or restrict the MedCo process whereby an independent medical examiner is selected. Overall, however, the benefits of operating the Portal in the UK appear to outweigh the negatives.

The PIAB process, to an extent, mirrors the MedCo portal system in how information is gathered and how the process can facilitate settlements. The substantial difference is PIAB's setting of an award figure independent of both parties and based on a medical report obtained from an expert not procured by either the claimant or the respondent.

UK Civil Liability Bill

More recently, the UK Government, as part of its whiplash reform programme, issued a consultation paper on the soft tissue Injury ('whiplash') claims process. The current Civil Liability Bill is progressing through the UK Houses of Parliament. The consultation paper and impact assessment 'Reforming the Soft Tissue Injury ('whiplash') Claims Process' were published on 17 November 2016.

The consultation invited comments on a package of measures designed to reform the personal injury claims process and disincentivise minor, exaggerated and fraudulent road traffic accident (RTA) related soft tissue injury claims, commonly known as 'whiplash' claims. In the Government's response to the consultation, the Lord Chancellor and Secretary of State for Justice stated "The

¹⁰ <https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-low-value-personal-injury-employers-liability-and-public-liability-claims>

¹¹ <http://www.medco.org.uk/>

continuing high number and cost of these claims contribute significantly to the price of motor insurance premiums paid by motorists. There are currently substantial financial incentives for claimants to bring cases regarding relatively minor injury, or to exaggerate the severity of their injury, and government intervention is required to tackle this issue. The reform programme included in the consultation document will build on previous government reforms in this area to address the ongoing issue of the number and cost of these claims. They are targeted in particular at road traffic accident (RTA) whiplash claims, where it has become culturally acceptable for claims to be made for very low-level injuries. The level of compensation and costs paid as a result of the high number of soft tissue injury claims has a wider cost to motorists through increased motor insurance premiums. Since motor insurance is compulsory, this has an impact on all motorists in England and Wales. It is right for the Government to take firm action to control costs and benefit consumers. “

The Consultation outlined two possible options, it was stated in the consultation that both options would control costs by providing more certainty to claimants and defendants alike as to the value of the claim; “Option 1: Removal of compensation for PSLA (Pain, suffering and loss of amenity) for all minor RTA related soft tissue claims – this option would remove compensation from low level ‘whiplash’ claims, although all claimants would retain the right to claim for monetary losses such as rehabilitation costs and loss of earnings; and Option 2: Introduction of a fixed sum of compensation for minor RTA related soft tissue injury claims – the government recognised that whilst the amount of compensation paid to claimants for low level claims is still too high, there may be a case that those with genuine injuries (albeit minor ones) should receive some compensation for PSLA. “

Following this consultation, The Civil Liability Bill currently being debated in the UK proposes the use of fixed tariffs on soft tissue claims. The legislation also includes changes to the way the personal injury discount rate is calculated. The Government has outlined the intention behind this bill, of bringing certainty and transparency to the system, and savings for the NHS. There are proposals to ban the practice of seeking or offering to settle soft tissue injury (‘whiplash’) claims without medical evidence. The Bill was welcomed by the Association of British Insurers (ABI), with insurance firms including Aviva and Liverpool Victoria pledging to pass 100% of savings onto motorists.

Healthcare

Health care in the United Kingdom is a devolved matter, with England, Northern Ireland, Scotland and Wales each

having their own systems of publicly funded healthcare, funded by and accountable to separate governments and parliaments. Healthcare treatment is free at the point of delivery for most people, i.e. those ordinarily resident in the UK.

In the UK, there is a scheme to recover money for the NHS for treatment received by patients who later successfully claim compensation. The NHS is entitled to recover an amount to cover the cost of the claimant’s hospital treatment from the compensator when a claimant is successful in claiming compensation as a result of a road traffic accident.

British health law enables the government to recover the cost of treatment people receive through the NHS when they have received payment of compensation, such as following motor vehicle accidents or in workplace accidents.

The NHS Injury Cost Recovery Scheme, which became health law on January 29th, 2007, replaced the previously-existing Road Traffic Act scheme, which only paid out in road traffic accidents in which personal injury compensation is received by the victim and allows the NHS to recover the expense of caring and treating injured people in all instances in which the patient receives personal injury compensation. This scheme was extended to also cover hospital treatment costs incurred in employer, public and product liability claims.

NHS costs are recovered only where personal injury compensation is paid. Funds recovered come primarily from a third-party compensator/insurer. The scheme includes the recovery of ambulance journey costs.

Conclusion

It is currently not easy to envisage how the Court of Appeal could undertake a role such as that undertaken by the Court of Appeal in the UK in *Heil v Rankin* (2000) when eight appeals were heard together to provide guidelines for appropriate levels of compensation in response to the recommendations contained in the UK Law Commission’s Report (No 257)¹². The PIC is aware that some recent decisions of the Court of Appeal in this jurisdiction have sought to give guidance as to appropriate levels of general damages for certain categories of injury. However, the kind of injury with which this report is concerned is not usually before the Court of Appeal and is more likely to be before the District or Circuit Court. It is unlikely to come within the purview of the Court of Appeal other than by reference on a point of law from the Circuit Court.

¹² http://www.lawcom.gov.uk/app/uploads/2015/03/lc257_Damages_Personal_Injury_Non-pecuniary_Loss.pdf

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However, following the establishment of the Judicial Council, it is hoped that new guidelines can be produced that can provide guidance on appropriate levels of general damages for personal injuries. This would enable the jurisprudence of the Court of Appeal, the output of the PIC's benchmarking report and any other factors considered relevant to be taken into account and guidance to be provided on the appropriate level of compensation for these injuries. It is anticipated that this aspect of any review of awards can be undertaken with support from PIAB and other relevant stakeholders.

3.3 Canada

Overview of Canada and Motor Accident Claims

Canada is a common law legal system. Generally, there are three varying types of motor insurance cover available in Canada. British Columbia is the only province in Canada with a purely litigation-based insurance model.

Accident benefits (AB) cover pays for medical care, rehabilitation, income replacement and other benefits to aid the recovery of collision victims, passengers, pedestrians and drivers. Third-party liability (TPL) cover protects the insured driver and/or owner of the vehicle if the use of the motor vehicle injures or kills someone or damages someone's property through the fault of the driver. Uninsured motor coverage protects an insured person if he or she is injured through the fault of a driver who does not have insurance or is unidentified.

The concept of 'no-fault' insurance developed over time with the aim of reducing the legal and administrative costs associated with having to prove fault in accidents involving vehicle collisions. In a pure 'no-fault' car insurance system, if a person is injured or his or her car is damaged in a collision, the person deals directly with his or her own insurance company, regardless of who is at fault.

Every Canadian province and territory offers some degree of 'no-fault' insurance. Manitoba and Quebec have pure 'no-fault' systems, with no right to sue in respect of bodily injury or death. Other provinces have a mix of 'no-fault' and tort-based systems.

In Canada, almost all aspects of motor insurance are regulated by provincial governments. In most provinces and territories, the person who did not cause the collision also has the right to sue the at-fault party for damages. In some provinces this is only the case if the injuries being claimed for meet a prescribed threshold. Some provinces specify accident benefit limits and the right to sue for additional compensation under certain specified situations,

such as when injuries are determined to be permanent and serious.

Ontario: A Case Study

Motor insurance in Ontario is mandatory and comprises of two parts; a 'no-fault' part, (also called the accident benefits or AB) where benefits are provided regardless of whether a driver is at fault; and recourse to sue an at-fault driver for damages through a court action (also called the tort or bodily injury part). The insurance premium charged reflects the total cost of both insurance parts.

The heads in respect of the recovery of damages are pain and suffering, loss of expectation in life, and loss of amenity. In 1990 Ontario imposed limits on either the right to sue for non-pecuniary loss, or a restriction on the amounts recoverable for certain types of non-pecuniary losses arising from motor accidents. Compensation for pain and suffering is administered if the injury sustained meets a severity test (known as a 'threshold'). Legal action is only allowed in fatality cases or where a claimant has sustained permanent and serious disfigurement and impairment of important physical, mental or psychological function in accordance with section 267.5 of the Insurance Act, R.S.O. 1990. Compensation awards in Ontario are also subject to a 'statutory deductible' amount. The Government applies a deductible to claims that meet the threshold and reduces the value of the claim by this amount. This deductible amount originally began at CAD\$30,000 and has increased annually with inflation since 2015. To recover damages, such claims must be assessed at a higher amount than the deductible amount.

The claimant has the onus of establishing, on the balance of probabilities, that their injuries reach the required threshold. The three-part test established in the case of *Meyer v. Bright*¹³, remains the leading authority on interpreting the application of the threshold. The questions set out in this case were as follows:

- Has the injured person sustained a permanent impairment of a physical, mental or psychological function?
- Is the function which is permanently impaired an important one?
- Is the impairment of the important function serious?

It can also be important for a plaintiff to produce evidence that they have been seeking ongoing treatment in relation to their injuries when claiming to suffer from a permanent and serious impairment. Case law indicates that Ontario courts, are reluctant to find that a claimant's alleged injuries meet the threshold and that they have suffered a

¹³ *Meyer v. Bright*, 1993 CANLII 3389.

permanent serious impairment in the absence of evidence of ongoing treatment¹⁴.

Professor of Law, Jeff Berryman, who has advised both the New Zealand Ministry of Justice and the Ontario Law Reform Commission, has advised that the level of damages awarded for non-pecuniary loss puts Canada in the range of similar damages by comparative common law jurisdictions such as England and Australia¹⁵. These levels are above the amounts of the 'no-fault' system in New Zealand but below the amounts awarded in the United States.

Healthcare System

The health care system in Canada is determined by the Canadian Constitution. Responsibilities are divided between the federal, and provincial and territorial governments. The majority of health and social services are administered by provincial and territorial governments.

Publicly funded health care is financed through general revenue raised by federal and provincial and territorial taxation such as personal and corporate taxes, sales taxes, payroll levies and other tax revenue. Provinces may also charge a health premium but cannot limit access to medically necessary health services in the event of non-payment. The federal government also provides equalisation payments to poorer provinces.

All health insurance plans are expected to meet national principles set out under the Canada Health Act. Each provincial and territorial health insurance plan covers medically necessary hospital and doctors' services without direct charges at the point of service. Canadian primary health care services are increasingly comprehensive and may include prevention and treatment of common diseases and injuries, basic emergency services, referrals to and coordination with other levels of care such as hospital and specialist care, primary mental health care and rehabilitation services.

The provincial system in Ontario is known as the Ontario Health Insurance Plan (OHIP). OHIP pays for basic medical and emergency services and is funded by tax contributions from Ontario residents and businesses. If a person is injured in an accident caused by someone else's negligence or wrongdoing and makes a claim for damages or initiates a lawsuit, the Ministry of Health and Long-Term Care can recover its costs for health care and treatment through the insurance principle of subrogation. Subrogation in this context is the recovery, from a third

party, of medical costs that were originally paid by a benefits plan, i.e. OHIP can recover the costs of insured health services which have already been provided at the time of the settlement or judgment from the liable insurer. OHIP can also recover the costs of any future health care services that an individual might need.

When a person is injured in a motor vehicle accident, the Statutory Accident Benefit Schedule in Ontario requires the motor insurer to pay for non-professional health care services (such as personal support and homemaking services, attendant care services, and community support services). The Ministry of Health and Long-Term Care is the Government of Ontario ministry responsible for administering the health care system (OHIP) in the province of Ontario.

The health system, operates 'care pathways' which are designed in accordance with a number of structured guidelines. An example is soft-tissue ('whiplash') injuries, where doctors are advised to refer to 'Guideline for the Clinical Management of Neck Pain And Its Associated Disorders' and 'Guideline for the Clinical Management of Soft Tissue Disorders of The Upper Extremity'.¹⁶ The most recent review of the Ontario personal injury environment conducted by David Marshall on behalf of the provincial government recommended the introduction of standardised treatment plans for all people who have been involved in a motor collision.

Reforms

In Ontario, motor insurance premiums are considered comparatively high relative to the rest of the country and consequently there have been several reviews of the system with reforms proposed. A 'compensation culture' has not been prominent in Canadian tort law discourse, however reforms that have been introduced are motivated by concerns similar to those in other jurisdictions, namely controlling the costs of insurance premiums and litigation, overcoming delay in claims processing and reducing the level of fraud. The provincial government attempted to reduce fees charged for Independent Medical Reports (IME)'s by capping the amounts doctor and assessment companies can charge. Ontario's Auditor General believes there are "unnecessarily high pay-outs" and that a lack of measures in place to combat fraud is contributing to problems.¹⁷

It has been suggested by Canadian law professor and academic Jeff Berryman, that the most significant development preventing the rise of a 'compensation

¹⁴ see *Smith v. Declute et al.*, 2012 ONSC 3308 (CanLII) *Dahrouj v. Aduvala*, 2012 ONSC 4090 (CanLII)

¹⁵ *Non-Pecuniary Damages for Personal Injury: A Reflection on the Canadian Experience* – Jeff Berryman

¹⁶ The Ontario Protocol for Traffic Injury Management (OPTIMA)

¹⁷ <http://www.auditor.on.ca/en/content/annualreports/arreports/en11/301en11.pdf>

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culture' in Canada was a group of cases known as the 'Supreme Court trilogy' which focused on a new direction in the quantification of non-pecuniary loss arising from personal injury, which he states was "driven by a fear of replicating developments and cost levels witnessed in the United States". While in Ontario the cost of motor insurance increased significantly up to the introduction of reforms in 2010, The Fraser Institute¹⁸ think tank believes that Ontario's legal framework is a direct contributor to its high insurance costs. They claim that 'regulatory severity' has failed to prevent insurance fraud, and has instead encouraged it and led to runaway costs.

Since 2010 in Ontario, common traffic injuries with a favourable natural history have been legislatively classified as minor injuries. The Minor Injury Guideline (MIG)¹⁹ is part of the Statutory Accident Benefit Schedule. In the current MIG, a minor injury is defined as a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and any clinically associated sequelae. It limits the payment for injuries such as sprains, strains and whiplash associated disorder to \$CAD 3,500. The Canadian Insurance organisation, the IBC, feels that the MIG introduced in Ontario in 2010 has had an important impact on award levels in the province.

In 2014 the Ontario government passed Bill 15 – the Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014. The Financial Services Commission of Ontario (FSCO) and the Superintendent of Financial Services recently prepared a draft of a new Common Traffic Impairment (CTI) Guideline.

The most recent review of the Ontario system was a report by David Marshall in 2017, titled 'Fair Benefits Fairly Delivered, A Review of the Auto Insurance System in Ontario'²⁰. The author was appointed as a Special Adviser to the Minister of Finance to review and make recommendations as to improvements in the system of auto insurance in the Province of Ontario.

Ontario is now, following consultation on the proposals contained in Mr. Marshall's report, implementing the following initiatives:

- The province intends to introduce 'Standard Treatment Plans' focused on ensuring that people with the most common injuries arising from motor accidents receive timely, appropriate and effective treatment. To achieve this, Ontario intends to develop and implement standard treatment plans that focus on recovery. It is anticipated that this initiative will reduce costs in the system by shifting the emphasis from cash payouts to ensuring early and appropriate care for victims;
- The province will *create independent examination centres* to provide assessments of more serious motor accident injuries. This will include developing standards for assessors ensuring that the opinions of neutral assessments are respected;
- A *Serious Fraud Office (SFO)* will be established in Ontario with representatives from the Ontario Provincial Police and the Ministry of the Attorney General, to combat systemic motor insurance fraud;
- The province has directed the Financial Services Authority of Ontario to complete a Risk Factor Review and examine the risk factors used by insurers to calculate motorists' insurance premiums;
- Working with the Law Society of Upper Canada, the province will ensure that people who need the services of lawyers and paralegals are protected and understand the agreements that they are signing, particularly those in vulnerable positions, such as accident victims. The report of Mr. Marshall recommended establishing a "Strong, Independent Regulator". It has been proposed to provide the Financial Services Regulatory Authority of Ontario with rule-making authority enabling it to promptly and effectively respond to insurance market trends, facilitating industry innovation to benefit of consumers
- Ontario intends to establish an expert panel of up to five members to advise the government on enactment of the reforms contained in the Fair Auto Insurance Plan and to engage with drivers, insurers, health service providers and legal service providers.

Conclusions

While Canada is a common law country like Ireland and the UK, many of its civil trials are jury trials, depending on the province and the cause of action. Jury trials are considered to be less predictable in terms of awarding damages, however it is considered that introducing more predictability and consistency into the Irish system would be a desirable outcome. The use of thresholds and deductibles are intended to eliminate low value and minor injuries from the court system, however, the counter

18 <https://www.fraserinstitute.org/>

19 <https://www.fSCO.gov.on.ca/en/auto/autobulletins/2014/Documents/a-01-14-1.pdf>

20 <https://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html>

argument for their introduction is that they are effectively creating a 'target' to beat and there is an incentive to exaggerate a claimant's injuries to ensure they receive compensation.

The Canadian system however is notable in its ongoing research and improvements in the areas of minor personal injury. The original Quebec Task Force introducing the WAD scale is a notable example. The Fair Auto plan in Ontario is too recent to fully assess its impact however the province intends to develop and implement standard treatment plans that focus on recovery for claimants. In his report David Marshall states "Soft tissue injuries should not normally develop into permanent impairments if they are treated properly to begin with. The rate of impairment in the auto insurance system is a warning sign that medical care is not being properly handled. Appropriate medical treatment has been shown to reduce or prevent the development of permanent impairments from soft tissue injuries by as much as 80 per cent." And where there is a lack of emphasis on appropriate and prompt treatment, "paradoxically, the outcomes are not only more expensive but worse for injured parties." The early delivery of appropriate medical treatment could be adopted in an Irish context to increase access to appropriate care and physiotherapy through the public system as referenced later in the report.

The Fair Auto plan also commits to establishing a panel of up to five experts to provide the government with guidance on enacting reforms contained in the Fair Auto Insurance Plan and to engage with drivers, insurers, health service providers and legal service providers. While the impact of this arrangement has yet to be seen it is also a model that could be introduced in an Irish context to ensure agreed reforms and improvements to the claims environment are enacted effectively.

Figures

Minor Injuries such as sprains, strains and soft-tissue injuries ('whiplash') tend to attract damages of **\$CAD 3,500** which is approximately **€2,327**.

The 'deductible' amount in personal injury cases which have passed the verbal threshold (the claimant must state they have suffered permanent and serious disfigurement and impairment of important physical, mental or psychological function) **\$CAD 30,000 – €19,950** in 2015 increasing annually with inflation. This means a personal injury claim must achieve an award of in excess of **\$CAD 30,000** to be successful and this amount is deducted from the award.

3.4 Australia

Overview of Australia and Motor Claims

Australia is a common law country with a similar legal system to Ireland, the UK and Canada. While there have been extensive statutory reforms to the Tort law system in Australia (in response to price hikes in Insurance premiums) they are not as broad-reaching as the New Zealand overhaul which established a comprehensive accident compensation scheme. It is worth noting that, although the New Zealand 'no fault' scheme is now more than 40 years old, it has not been replicated in any other common law jurisdiction.

In 2002 the Federal, State and Territory Governments commissioned the Negligence Review Panel to recommend changes to personal injury laws for the primary purpose of reducing the numbers of litigated claims and the size of court awarded injured claimant compensation payments²¹.

While there have been several amendments to Australian statutes in recent years which have affected the personal injury system there, they have not been uniform across the country. The key features of recent amendments have been the introduction of caps and thresholds. Caps are ceilings on recoverable damages. Thresholds are barriers that prevent damages from being awarded unless the claimant suffers a minimum standard of loss or injury. Most Australian States have introduced a cap on the amount of loss of earnings that can be awarded. For example, in the State of New South Wales, a cap prevents a claimant receiving a loss of earnings award that is over three times their average weekly earnings. Rules have also been introduced on fixed reductions– i.e. when a judge makes a finding of contributory negligence, their discretion regarding the reduction of damages accordingly has been limited.

The aim of the introduction of thresholds is to eliminate low value claims by making it more difficult to claim successfully. Low value claims tend to form the bulk of compensation claims in most jurisdictions. There can however be difficulties in the formulation of thresholds and they can be perceived as unfair as they can fail to consider subjective circumstances.

South Australia: A Case Study

South Australia operates a system of compulsory third party insurance (CTP)²². The system is managed by the

21 https://static.treasury.gov.au/uploads/sites/1/2017/06/R2002-001_Law_Neg_Final.pdf

22 <http://www.ctp.sa.gov.au/>

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Motor Accident Commission (MAC)²³. The MAC was originally government owned however, CTP in South Australia was privatised on 1 July 2016. Consumers can select from several specified private insurers to obtain insurance cover. The MAC now functions as the State's Nominal Defendant, acting as an 'insurer of last resort' similar to the Motor Insurers Bureau of Ireland. This means that claimants who are injured by an uninsured or unidentified vehicle can still receive compensation.

The South Australian CTP scheme has experienced major reforms in recent years. The most notable reform introduced was changing the way that injuries are assessed using a new measure of injury severity known as 'Injury Scale Value (ISV)'. The ISV system (ISV) was introduced in 2014. The ISV aims to promote consistency between assessments of general damages for similar injuries as well as between different injuries which have a similar level of assessment. Under the ISV system, injuries are assigned a point value between zero and 100. Zero represents an injury insufficiently serious to merit an award of general damages and 100 represents the most severe injury. The ISV Table comprises 157 ISV item numbers. There are a range of potential ISVs for each injury. A minor cervical spine injury attracts values between zero and four. This means that it is unlikely a minor cervical spine injury will qualify for compensation.

An extract from the ISV table is attached below;

Extract from ISV Guidelines: Schedule 1, Civil Liabilities Regulations, 2013 Page 25

| Item No | Injury | Range |
|---|-----------------------------|-------|
| 84 | Minor cervical spine injury | 0 4 |
| Comment | | |
| <ul style="list-style-type: none"> Injuries within this item include a whiplash injury with minor ongoing symptoms, and/or dysfunction including symptoms, remaining for more or expected to remain more than 18 months after the injury is caused; and There are no objective signs of a neurological impairment (for example, a radiculopathy) at the time of assessment. | | |
| Comment about appropriate level of ISV | | |
| <ul style="list-style-type: none"> A low range ISV under this item will be applicable if the injury will resolve within months after the injury is caused; and A high range ISV under this item will be applicable if, the injury causes persistent headaches, significant neck stiffness and some ongoing pain and/or dysfunction | | |

In tandem with the introduction of thresholds using the ISV scale, the scheme made new provision for catastrophically injured claimants. The reformed scheme known as the 'Lifetime Support Scheme'²⁴ provides lifetime treatment, care and support to catastrophically injured claimants on a 'no-fault' basis. Prior to 1 July 2014, there was no provision in the scheme to provide compensation or care for claimants seriously injured in road traffic accidents when no other vehicle was at fault. For example, someone who was rendered quadriplegic after hitting a tree or in a single vehicle accident would not have qualified for compensation.

In South Australia a specific accreditation scheme called the Motor Accident Injury Assessment Scheme (MAIAS)²⁵ has been established to accredit Health Professionals who undertake ISV Medical Assessments. The motor accident injury assessment scheme accredits medical practitioners to undertake medical assessments that evaluate whole person impairment (WPI) and provide an opinion on which is the most appropriate Item Number from the 'Ranges of Injury Scale Values' table in Schedule 1 of the *Civil Liability Regulations 2013* (ISV Table). An injured person's entitlement to certain types of compensation is subject to a threshold for the injuries sustained and based on the Injury Scale Value (ISV).

²³ <https://www.mac.sa.gov.au/>

²⁴ <http://lifetimesupport.sa.gov.au/>

²⁵ <http://maias.sa.gov.au/>

The ISV Medical Assessment Report is an independent medical assessment conducted by a medical practitioner accredited under the scheme. It comprises a whole person impairment assessment, using the American Medical Association Guide (AMA 5)²⁶ where appropriate, or GEPIC (Guide to the Evaluation of Psychiatric Impairment for Clinicians) for the assessment of Pure Mental Harm. There are separate templates provided by the MAIAS to accredited medical practitioners for physical harm or mental harm.

Various 'heads of damage' must achieve different thresholds to qualify. To qualify for Future Economic Loss, for example, an ISV of more than 7 is required: to obtain damages for Loss of Consortium the ISV must be more than 10. Medical expenses and past economic loss however do not require an ISV threshold to be reached. Accredited Medical Assessors are asked to provide their opinion as to the appropriate *ISV Item Number only* for each referred injury (each number containing a range of values). It is important to note that these accredited medical assessors do not assign a monetary value to the injuries.

The most notable use of the ISV scale is in circumstances where, in order to qualify for damages for pain and suffering in South Australia, the claimant must have an ISV of more than 10.

As a general rule, an injured person will not be able to finalise an injury claim until her or his injuries have stabilised. Regulation 5 of the Civil Liability Regulations 2013²⁷ states that if the independent medical assessor is of the opinion that the person's injury has not yet stabilised, the ISV is not able to be determined and the medical assessor must report this.

Once a claim has been settled, the insurance company will obtain a signed *Deed of Release* from the injured person which will preclude any further action. The injured person must be guided by medical and legal advisers before settling a claim or signing a *Deed of Release*.

There are several circumstances when an ISV Medical Assessment may not be required. These include if an agreement is made between the insurer and the injured person that an ISV Medical Assessment is not required, or if the court determines that such an assessment is not required. The value assigned to an injury on the ISV scale is linked to a prescribed amount of compensation. For

example, an injury with an ISV Scale value of 11 is currently valued at - AUS\$3,000 (approx. €1,917)

In circumstances where a person has sustained multiple injuries the dominant injury must exceed the threshold for compensation to be received. With multiple injuries, it is not automatically the case that the value of each separate injury is added together to achieve the total value.

Healthcare in South Australia

Health care in South Australia is largely provided by private medical practitioners or by private and government operated hospitals with the costs of medical services paid by private insurance or government agencies and the balance payable by the claimant.

Medicare is Australia's universal health care system and is the primary national health scheme that subsidises most medical costs in Australia for all Australian citizens and permanent residents. Medicare provides access to a range of medical services, lower cost prescriptions and free care as a public patient in a public hospital. Patients can choose whether to have Medicare cover only, or a combination of Medicare and private health insurance.

In addition to Medicare, there is a separate Pharmaceutical Benefits Scheme funded by the federal government which subsidises a range of prescription medications.

Medicare is financed by a Medicare levy which is compulsory and administered through the tax system. However, tax rebates are available to those who purchase additional private health insurance.

If a claimant has received Medicare benefits and is then subsequently awarded compensation in respect of a personal injury, they are obliged to repay the benefits received.

Conclusions

Like some states in Canada and the United States, South Australia imposes thresholds. However, in South Australia these are based on the use of a specific scale and medical report. The South Australian system places a large emphasis on the importance of medical reporting and a specific accreditation scheme (MAIAS) has been established in order to accredit Health Professionals for the purpose of undertaking ISV Medical Assessments. The First Report of the Personal Injuries Commission December 2017 has recommended training and accreditation for medical professionals completing injury reports and a collaborative education programme is being developed by the ICGP and RCSI with the support of PIAB.

²⁶ American Medical Association Guide to the Evaluation of Permanent Impairment, 5th Edition (AMA 5)

²⁷ <https://www.legislation.sa.gov.au/LZ/C/R/CIVIL%20LIABILITY%20REGULATIONS%202013/CURRENT/2013.165.UN.PDF>

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It could be considered that South Australia's approach of providing lifetime care to catastrophically injured claimants on a no-fault basis, while attempting to eliminate lower value claims from the system attempts to achieve a balance in the claims environment, ensuring those most at need are catered for without having to go through litigation. However, it could also be argued that such a system is harsher on those who have suffered more minor injuries. There have been many criticisms levelled at the ISV scale. These include that the AMA Guidelines (used to calculate whole body impairment) are not used uniformly even throughout America and many other states use different evaluation methods in workplace compensation schemes. It has also been claimed that the ISV is a blunt instrument which does not take into account subjective considerations such as any pre-existing conditions from which a person may suffer.

South Australia Figure for Injury Scale Value over 11 points (over threshold) starts at **AUS\$3,210 (Euro 2,106)** and 100 points is **AUS\$320,570 (Euro 207,739)** A minor cervical spine injury is between 0 and 4 points

3.5 New Zealand

Background

New Zealand has a common law legal system similar to Ireland and the UK but their motor insurance and personal injury system differs significantly. Motor vehicle insurance is not a legal requirement with at fault drivers personally liable for any damage they cause other vehicles if they are uninsured. Compensation for personal injuries has been removed from the legal system, with cases dealt with by a public body. This means that injured parties cannot sue at-fault parties except under exceptional circumstances.

New Zealand has a 'no fault' system of dealing with personal injury compensation. A compensation regime exists to ensure that any person suffering from a personal injury receives prompt medical care. The compensation system that is linked to personal injury basically pays 80% of a person's income when they are incapacitated due to personal injury. There are some one-off lump sum payments but these are not significant. The system is funded primarily by levies on businesses and employers.

All personal injury claims are processed by the Accident Compensation Corporation (ACC).²⁸ The corporation was founded as the Accident Compensation Commission on 1 April 1974 as a result of the Accident Compensation Act 1972. The ACC is responsible for administering the country's universal no-fault accidental injury scheme. The scheme provides financial compensation and support to

citizens, residents, and temporary visitors who have suffered personal injuries.

ACC is the sole and compulsory provider of accident insurance in New Zealand for all work and non-work injuries. The corporation administers the ACC Scheme on a no-fault basis, so that anyone – regardless of the way in which they incurred an injury – has coverage under the Scheme. Due to the scheme's no-fault basis, people who have suffered personal injury do not have the right to sue an at-fault party, except for exemplary damages.

The ACC is responsible for dealing with the entire personal injury process, determining the injured parties' cover and the recompense they require, as well as purchasing any treatment and rehabilitation services they need which can include medical treatments, rehabilitation, compensation, assistance care, childcare and travel to treatment.

The ACC scheme provides a range of entitlements to injured people, mainly for treatment costs. Other entitlements include weekly compensation for lost earnings (paid at a rate of 80% of a person's pre-injury earnings) and the cost of home or vehicle modifications for the seriously injured. The scheme offers entitlements subject to various eligibility criteria.

ACC is primarily funded through a combination of levies and government contributions. Income collected from each source goes into predetermined accounts based on the source. Costs relating to an injury are paid from one of these accounts based on the type and cause of the injury. The four main accounts are: Work, Earners, Non-Earners, and Motor Vehicle. There is also a fifth account, Treatment Injury (formerly Medical Misadventure) that draws on both the Earners and Non-Earners account.

The work account covers work-related injuries and is funded by levies collected from employers and self-employed people. The earners account covers Non-work injuries by income earners and is funded by levies collected in conjunction with tax deductions on income. These are paid by employees through PAYE, or by self-employed people directly. The non-earners account covers non-work injuries by non-income earners (e.g. children, elderly, unemployed and visitors) and is funded by Government contribution from the general taxation pool. The motor vehicle account covers Injuries relating to motor vehicles on public roads and is funded by levies included in the price of petrol (not diesel or LPG), and through motor vehicle license fees. Treatment injury account covers injuries arising as a result of medical treatment and is funded from the Earners and Non-Earners accounts, depending on the clients' employment status.

²⁸ www.acc.co.nz.

ACC 'Cover Plus Extra' provides cover for self-employed workers and business owners that would fail to otherwise be covered adequately by the standard ACC Cover Plus policy. It works by paying an agreed level of compensation, in the event of an injury resulting in time off from work. With ACC 'Cover Plus Extra', a self-employed contractor would get 100% of the pre-agreed compensation cover until fit for full-time work. A business owner would be able to get compensation under ACC 'Cover Plus Extra', even if the business continued to earn income whilst the business owner was off work injured. This would not be possible with the standard policy.

ACC initially had a 'pay-as-you-go' funding model which collected only enough levies during the year to cover the cost of claims for that particular year. In 1999 a 'fully funded' model was adopted whereby sufficient levies were collected to cover the lifetime cost of each injury – which might require compensation over a period of 30 years or more.

By 2009, ACC had posted massive losses with cost escalating believed to have been due to an increase in the number of claims, a widening of entitlements and increased costs of meeting the claims. By 2012, ACC had made substantial progress towards its 2019-goal (of being fully funded), and was \$4.5 billion short of matching liabilities (\$28.5b) with its assets (\$24b).

Another factor was physiotherapy services being made free at the point of delivery leading to over-servicing of clients. Eventually the 100% reimbursement scheme for physiotherapist services was ended and ACC levies on wages and motorists were increased.

In the 2013 budget, a \$1.3 billion cut in ACC levies over the next two years was announced – the Earners and Workers accounts were fully funded after ACC reduced the number of long term ACC claimants from 14,000 to less than 11,000. In 2015/16, ACC's outstanding claims liability (OCL) increased by \$6.4 billion, which led to a net deficit of \$3.4 billion. The OCL measures the future cost of all existing ACC claims. That year also saw 1.93 million claims accepted; a 5.2% increase from the previous year. \$3.5 billion was paid out to all new and existing claims.

While some maintain the benefits of the system include the removal of 3rd party legal costs and that there is no need to pursue a costly and lengthy litigation process the nature of the funding model means that increases in taxation or a reduction in benefits may be required to balance the books.

Conclusions

It is difficult to envisage a similar system being applied in Ireland in view of our current legal and constitutional framework. There may also be a European legislative dimension to this and it is noteworthy that no-fault systems tend to exist outside Europe only e.g. New Zealand, some Australian states, some US states, some Canadian provinces.

Such a model would have fundamental cost implications in terms of revenue raising in the form of direct or indirect taxation.

3.6 United States of America

Background

The United States is a federal country and due to its immense size and diversity the American personal injuries litigation system cannot be easily summarised. For any particular tort, states can differ on the causes of action, types and scope of remedies, statutes of limitations, and the levels of damages etc. For example, a limited number of states allow actions for psychological injury in the absence of physical injury to the claimant, but most do not. The US courts system is primarily split between federal and district courts. The differences between federal and district courts are defined mainly by jurisdiction, meaning the types of cases a court can decide. There are 94 US district or trial courts. There is at least one district court in each state, and the District of Columbia.

Each US state has individual insurance requirements for operating a motor vehicle. Currently 12 states and Puerto Rico have no-fault auto insurance laws. Florida, Michigan, New Jersey, New York and Pennsylvania have verbal thresholds. The 'verbal threshold' stems from a provision originally introduced in New Jersey which restricts a motorist's right to sue for injuries sustained in an accident in exchange for a lower insurance premium. The ability to sue is reserved for claimants who have suffered, permanent serious disfigurement, serious impairment of body function or death. Hawaii, Kansas, Kentucky, Massachusetts, Minnesota, North Dakota and Utah operate a monetary threshold in a no-fault auto insurance claim, a threshold based on a person's degree of injury (as measured by dollars of medical cost incurred) that must be reached before a suit can be brought against the negligent party. Three states have a 'choice no-fault' law. In New Jersey, Pennsylvania and Kentucky, motorists may reject the lawsuit threshold and retain the right to sue for any auto-related injury. There have been attempts to introduce a national 'no fault' auto insurance system in the United States Senate, most notably in more recent years

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the Auto Choice Reform Act, Senate Bill 2454²⁹ brought by Kentucky Senator Mitch McConnell, however this failed to achieve widespread support. The Rand corporation³⁰ has suggested that the decline of the popularity in no-fault systems in US tort law discourse is a result of its unexpectedly high claim costs in states where it has been in operation which it in turn attributes to very high medical costs.

US tort law has its origin in the British common law system but has developed through judicial decisions. Compensatory damages are generally divided into the following categories: economic; non-economic; and physical impairment or disfigurement. Economic damages are those damages that can be accurately calculated in monetary terms. Non-economic damages refer to the non-pecuniary losses incurred by a claimant, usually pain suffering and loss of amenity. However non-economic damages, as well as punitive damages, are often limited by statute due in large part to the widespread tort reform passed in state legislatures as a result of perceived excessive damage awards. Each State has its own laws and time limits applicable to claims for personal injury compensation. In most cases, it is necessary to bring an action for compensation in the State where the accident occurred. The vast majority of personal injury and wrongful death cases in the US are settled after a lawsuit has been filed but before a full trial has been conducted by the court. Cases under \$100,000 are usually settled outside of the jury system.

Legal costs come directly from compensation received and are usually at a level of one third of total compensation awarded. Most US personal injury lawyers will consequently only accept claims where there has been severe injury and where a high level of compensation can be recovered. Compensation payments consequently are generally higher than in other countries, however, a considerable proportion of personal injury claims will not in the first instance be accepted.

It has been suggested that with a 'No Win – No Fee' system in operation across the US, lawyers would not wish to take on cases where there was a risk of fraud as they would incur outlays and not receive payment. The contingency fee arrangement should in theory result in a self-limiting situation.

Lawyers are obliged to engage in investigation of the claims which they agreed to take on. There is a Federal

Court Rule 11³¹ which states a lawyer can be sanctioned for bringing a fraudulent case.

Rule 11 as used in Federal law refers to USCS Fed Rules Civ Proc R 11. It is a procedural rule requiring the attorney of record or the party, if not represented by an attorney, to sign all pleadings, motions, and other papers filed with the court. By signing, the attorney or party represents that the paper is filed in good faith after an inquiry that is reasonable under the circumstances. Further, the rule provides for the imposition of sanctions, upon a party's or the court's own motion, if an attorney or party violates the conditions stated in the rule.

There is no standardised approach or method of medical assessment within the United States. There are some state-based compensation schemes which contained schedules of damages or prescribed approaches for medical assessment but there are no nationally used tables or schedules. The AMA Guides, published by the American Medical Association, provide percentage measures of whole body impairment, sometimes referred to as WPI and are used both in the USA and internationally. There is no direct link with compensation payments between the percentages and compensation amounts. The use of the AMA Guides in compensation varies by state and they are not in use across all States. They are however referenced in individual state compensation schemes. The Abbreviated Injury Scale (AIS)³² is an anatomical-based coding system created by the Association for the Advancement of Automotive Medicine to classify and describe the severity of injuries. It represents the threat to life associated with the injury rather than the comprehensive assessment of the severity of the injury. The AIS is used by health organisations for clinical trauma management and outcome evaluation and by researchers for epidemiological studies and systems development. It is not used as a method of measuring injury severity as a basis for calculating compensation.

Pain and suffering in the US is usually valued in almost all types of personal injury cases by reference to a formula. The jury must agree with how the value was calculated. Valuation methodologies include;

- The multiplier method; (Medical bills, both past and future) x (multiplier) + (Total of Economic Damages, property damage, lost wages, etc.) = Reasonable Value of Case.
- The 'per diem' method; a certain dollar amount is paid for each day from the time of the accident until the patient reaches maximum medical improvement.

²⁹ <https://www.congress.gov/bill/105th-congress/senate-bill/2454>

³⁰ <https://www.rand.org/>

³¹ <https://www.congress.gov/bill/115th-congress/house-bill/720>
³² <https://www.aaam.org/abbreviated-injury-scale-ais/>

- Using a job description to determine amounts; this method entails writing the pain and suffering out as if it were a job description. What payment would this merit?

The US health system is a combination of a privatised system and a public system. In the US there are several different types of health insurance coverage and states often have their own health insurance regulations. There are federally run Medicare and Medicaid systems, which insure senior citizens and people whose earnings fall under the poverty line but there is no universal or publicly subsidised healthcare. Many Americans maintain private insurance policies or have these funded by their employer, however there remains a large amount of people who fall outside the scope of federal schemes but are unable to afford private insurance policies. The Affordable Health Care Act of 2010 attempted to include more people in the scope of the federal policies while also limiting the grounds on which a health insurer could refuse to indemnify a claimant, however there are still many Americans without any health insurance or who are considered 'under insured'. This can lead to situations where people often must sue to pay for necessary medical treatment, as a result of an accident, as they cannot afford to obtain it otherwise.

Conclusions

Due to the federal governance system, it is difficult to succinctly summarise the personal injuries system in the United States of America. Personal Injury awards are frequently made by juries and therefore cannot be predicted easily. There is no uniform approach to medical assessment, or national guidelines or tables or schedules of damages. There are workplace compensation programmes with fixed tariffs operating in certain states, but no schedules of damages in road traffic injuries. There are uses of verbal or monetary thresholds and 'no-fault' and partial 'no-fault' insurance systems in operation in various states.

Due to the lack of consensus and consistency in the United States regarding road traffic injuries, there is little that can be gleaned as an example. However, it should be noted that many reforms introduced in various states have failed to reduce policyholder's insurance premiums.

3.7 Netherlands

Overview of Legal System and Compensation Schemes

The Netherlands is a civil law system. The Netherlands is divided into 11 district courts, 4 courts of appeal and 1 Supreme Court. The majority of cases are heard at district

court level (including civil cases such as personal injury claims of up to €25,000).

In a Personal injury case under Dutch law there are no punitive damages. The plaintiff bears the burden of proof as regards liability, causation and damages. The Dutch Supreme Court has set out basic rules such as; a judge must take into consideration all the circumstances of a particular case and pay attention to previous case law. An overview of cases, published by the journal 'Verkeersrecht'³³, with previously awarded damages for pain and suffering serves as a guideline. Courts may also take into consideration amounts awarded in other countries for similar injuries. There is widespread use of the privately published 'Verkeersrecht' and the 'Smartengeldbundel' (by the Royal Dutch Touring Club - ANWB which are updated every three years and provide lists of index-linked awards) however, these serve purely as a guideline and are not legally binding. There is a wide margin of appreciation (or judicial discretion) allowed when quantifying the amount of non-pecuniary damage.

A report by the Comité Européen des Assurances (CEA) and the Association for the Study and Compensation of Bodily Injury (AREDOC) from 2004³⁴ indicates that a substantial rise in cervical spine injury claims in the Netherlands was noted in 1999. Case law indicates that Dutch courts are lenient with the standard of evidence of injury required from claimants and the absence of an objective medical explanation for the injuries has not prevented a successful claim. As is the case in Ireland, both the claimant and the respondent or their insurer will typically commission their own medical reports.

A 2014 case³⁵ increased the levels of personal injury damages on the basis that lottery prizes had been increased in the preceding decade and a lottery win indicated good luck. A personal injury was described by the judge as bad luck, and therefore on the basis that lottery wins had been increased, awards for personal injuries should also be increased.

When psychological injuries arise, in addition to or as a result of physical injuries, there are no specific requirements concerning the degree of seriousness of the mental injuries suffered. However, if there is an absence of physical injury and the claim is for psychological injury only, there is a higher threshold and the claimant must be diagnosed with a recognisable psychiatric illness to be eligible for compensation.

33 <https://www.verkeersrecht.nl/>

34 https://www.svv.ch/sites/default/files/2017-12/cea_hws-studie_franzoesisch.pdf

35 ECLI:NL:GHARL:2014:6223

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In cases where a claimant has suffered injuries as a result of a traffic accident, which could be considered as a violent crime, and cannot receive compensation by other means, they may have recourse to the Violent Offences Compensation Fund (Schadefonds Geweldsmisdrijven.) This is a fund financed by general taxation and provides a remedy of last resort. The fund does not pay full compensation but determines an amount on a 'fair and reasonable' basis. In practice, six fixed amounts varying from €1,000 to €35,000 are available depending on the severity of injuries.

National Healthcare System

The Netherlands, while small in area, is a densely populated country. It is a wealthy country with a world top 20 ranking in terms of GDP and is among the five wealthiest countries in the Eurozone. The Netherlands operates what is known as a 'Bismarckian' health insurance model; where the system is based on the principle of social solidarity, offers universal coverage and is jointly funded by employers and employees through payroll deductions. The Netherlands has operated a universal social health insurance system since 2006, when reforms replaced divisions between public and private insurance and introduced managed competition.

Although a complex cost-sharing system is in operation, The Netherlands has upheld the principle that primary medical care is free at the point of delivery. Administering and providing basic health insurance is delegated to private health insurers. The Dutch health system is among the most expensive in Europe, however, it also receives high satisfaction ratings from its users, in terms of quality. It is mandatory for everyone living in the Netherlands to purchase basic health insurance. Health insurers are obliged to offer basic health insurance at community-rated premium levels and cannot refuse any clients. In addition to such premiums, Dutch citizens pay an income-dependent contribution (which is compensated by their employer). The Dutch Healthcare Authority establishes maximum prices. The 'gatekeeping' principle is one of the main characteristics of the Dutch system, and means that hospital care and specialist care (with the exception of emergency care) are only accessible upon referral from a GP.

EU treaties give Member States the authority to design and organise their social security systems. Social protection in the Netherlands is not a part of the healthcare system and is regulated differently under different acts. A healthcare allowance funded from general taxation was created for lower-income groups. The basic benefits package includes GP care, maternity care, hospital care, home nursing care, pharmaceutical care and mental healthcare. The first €385 (in 2016) must

be paid out of one's own pocket, except in the cases of GP consultations, maternity care, home nursing care and care for children under the age of 18.

Tables

Compilations of all the known cases involving an award of non-pecuniary loss are bundled together in a book edited by various Dutch Insurance organisations such as the ANWB. The books are largely dedicated to cases dealt with by lower courts and the indexed amounts are related to the seriousness of injuries. A similar system operates in Germany. However, although the books are in widespread use and can be considered to offer a very useful source of comparable cases, it must be noted that their content is not binding in any way. In addition, there is no absolute limit on the amount of non-pecuniary damages that can be awarded in the Netherlands and there are no caps set by law.

The majority of personal injury cases are settled out of court. Court cases occur when there is a dispute between parties which cannot be resolved out of court. The Personal Injury Council (De Letselschade Raad)³⁶ which operates in the Netherlands, provides a code of conduct for ensuring a standardised process of settling personal injury claims. Most insurance companies and personal injury lawyers have subscribed to and work in accordance to this code of conduct known as the 'GBL'³⁷.

The Personal Injury Council is funded partly by the Dutch government and partly by the market and aims to increase consistency and provide clarity in handling personal injury claims. The code is organised according to the chronological order of the personal injury claim handling process and includes best practice approaches and references to case law. If either of the parties are experiencing difficulties or dissatisfaction in settling a personal injury case they can contact the Dispute Resolution Desk of the Personal Injury Council prior to issuing court proceedings. The Dispute Resolution process will endeavour to assist in achieving a settlement without the need to proceed through the courts.

The GBL enjoys broad support and is adhered to by most insurance companies and claimant's representatives in terms of negotiating out of court settlements. However, in certain cases a representative can depart from the GBL if they provide reasons for doing so. The GBL was originally drafted for settling traffic accidents only, however the Code of Conduct now applies to personal injuries of all types. It is nonetheless not always possible to use the

³⁶ <https://deletselschaderaad.nl/>

³⁷ <https://deletselschaderaad.nl/wp-content/uploads/GBL-Engels-2012-def.pdf>

protocol, for example where the personal injuries arise through medical negligence.

The GBL best practice guidelines recommend that once it has been established that a stabilised medical condition has been reached, the parties should consult on a final settlement of the claim. However, it is not compulsory to wait until a stabilised medical condition has been reached (as is the case in France and in South Australia) and parties can try to reach a final settlement earlier. The commencement of negotiations between an insurer and claimant has the effect of stopping the limitation period which applies and this is comparable to the Irish situation of submitting a claim to the Personal Injuries Assessment Board (PIAB).

The stabilisation of an injury is assessed by a doctor and reported on by means of a medical report. Usually both parties will instruct separate medical advisors however the option exists to jointly appoint one medical expert to assess the injuries. Doctors completing reports are BIG (Beroepen in de Individuele Gezondheidszorg) registered (the BIG register establishes qualifications and entitlement to practice). There is specialist training available for doctors in completing medical reports however, this training is not mandatory and it is sufficient for the doctor to have experience in completing reports to be considered as an expert.

Reforms

Since 1 January 2014, a pilot scheme has operated in the Netherlands which allows claimant solicitors to work under a form of 'no win, no fee' agreement. The scheme is to be trialled for a period of five years in cases where damages are being sought for personal injury or death. Every no win, no fee case taken in this period must be reported to the Dutch Bar Association's local Supervisory Council. In 2017 the FD Medigroep (a Dutch financial publisher) stated that since the start of the pilot scheme in 2014, only 64 cases had fallen under the no win, no fee arrangement suggesting there was a reluctance on the part of solicitors to undergo the risk of incurring fees.

In addition to the code of conduct the personal injuries council has also published several guidelines which can be used for specific heads of damages, such as travel expenses, care, housekeeping etc. These have also been used by the Dutch courts, however as with the compilations of previous awards, these guidelines are not binding. Legal costs are considered to form part of the claimant's economic losses and are reimbursed insofar as they are reasonable and reasonably made.

To enhance standardisation of the way in which medical advisers completed their report a questionnaire was

specifically developed and is known as the **IWMD Questionnaire**. The questionnaire has been specifically designed for experts' medical examinations in cases of accidents by the Interdisciplinary Working Group of Medical Experts of the VU University in Amsterdam (www.rechten.vu.nl).

Conclusions

Although the Dutch courts must have regard to 'Verkeersrecht' and the 'Smartengeldbundel', which is updated every three years and provides index-linked awards, there is a wide margin of appreciation deciding on the amount of non-pecuniary damage. Courts in the Netherlands have also more recently raised pain and suffering awards.³⁸

However, it is noted that the majority of personal injury cases in the Netherlands are settled out of court. This is attributed to the successful operation of the Code of Conduct for dealing with Personal Injury Cases or the GBL which most insurance companies and personal injury lawyers work in accordance to: This Code of Conduct consist of 10 basic principles and has been credited with greatly improving the settlement of personal injury cases in the Netherlands.

The following are guideline amounts provided by the Law Society of Netherlands, however as previously advised, there is a wide margin of appreciation afforded, cases are assessed on their individual circumstances and there has been a recent increase in awards.

- **A minor (substantially recovered) whiplash/soft tissue type injury: €1,250/€5,000**
- **A minor (full recovery expected) whiplash/soft tissue type injury: From €1,250**
- **A moderate whiplash/soft tissue type injury: €5,000/€7,500**
- **A moderately severe whiplash/soft tissue type injury: €7,500/€12,500**
- **A severe and permanent whiplash/soft tissue type injury: €12,500/€25,000**

3.8 Germany

Background

Germany has a traditional civil law system and has a written, codified federal constitution. All important legal issues are governed by comprehensive legislation in the

³⁸ Court of Appeal Arnhem-Leeuwarden 14 January 2014
ECLI:NL:GHARL:2014:181/183, VR 2014,86

Court of Appeal Arnhem-Leeuwarden, 5 August 2014
ECLI:NL:GHARL:2014:6223, RAV 2014,92.

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form of statutes, codes and regulations. As German laws are explicitly codified, case law plays a much smaller role (unlike common law countries such as Ireland and the UK).

Germany has a bicameral legislative structure and the judicial system comprises five jurisdictional branches: ordinary, administrative, social, labour and fiscal jurisdiction. Each jurisdictional branch (apart from the fiscal) is organised on two levels of courts which ascertain facts, and a third level of supreme courts, which decides only on points of law. As in other jurisdictions, the German law of tort uses compensatory damages as a means of restoring a claimant to their previous state ('restitutio in integrum'). German civil law does not award any punitive damages. With the exception of the District Court, it is obligatory for a claimant to instruct a solicitor when bringing a claim to court.

When a claimant goes to court, the German civil code requires them to engage initially in court based mediation (Schlichtungstermin). If the Mediation is unsuccessful in achieving a settlement, then the civil proceedings can continue. Where claims involve the guarantee fund (the national equivalent of the MIBI in Germany) the claimant must consult an arbitration committee before proceeding with their claim. The proof of the injury causality is mandated by law and the onus of proof is on the claimant. The claimant must provide both evidence of the injury and the link between the accident and the injury. Only when proof of the injury has been established, can the claim that the injury is related to the accident be examined.

German judges are trained as career judges, with no previous career of practising as a barrister or solicitor, as is the case in Ireland or the UK. After working for at least three years on probation, judges are usually appointed for life. A judge will be initially assigned to a certain court, but these assignments are not final.

Judges refer to precedents and specific pain and suffering guidelines extracted and compiled from German jurisdictions. Judges are assisted in their assessment by reference to case law compilations. In Germany, these compilations or tables are called the Schmerzengeldtabellen³⁹. As is the situation in the Netherlands, these are privately published tables, recording the material facts and amounts awarded in personal injury cases.

The tables, while not binding, are in widespread use in the courts and by claims handlers. German 'Schmerzengeld' also encompasses non-economic losses. Amounts are

awarded as a combined total in contrast with the French 'Nomenclature Dinthilac' which lists several heads of damages. The relevant assessment criteria of the compensation for pain and suffering are presented in detail (sorted according to types of injuries and amounts). In addition, there are also statements on the litigation, tax and social classification of the compensation. It also includes a collection of judgments of more than 3,700 awards for pain and suffering.

Judges are expected to consult these tables and award amounts comparable to similar cases, however use of the tables is not mandatory and Judges still enjoy a wide discretion once their reasons for departing from the guidelines are outlined.

Health System

Bismarck's Health Insurance Act of 1883 established the first social health insurance system based on solidarity in the world. This has evolved into the existing model which is best described as universal health coverage with a generous benefits package.

Statutory health insurance is provided by 113 competing, not-for-profit, self-governing sickness funds. Signing up to a sickness fund is compulsory for every German citizen. Citizens pay a premium calculated proportionate to their income: half of it is paid by the client, the other half by their employer. Low earners therefore pay a lower premium. Health Insurance for unemployed citizens is covered by the State. Individuals with a gross income that exceeds the threshold and people who are self-employed can keep statutory health insurance on a voluntary basis or purchase substitutive private health insurance. The majority of the German population receive their primary coverage through statutory health insurance.

Within the German health system, the operation of public healthcare is the responsibility of a network of public authorities at federal, state, and local levels.

As with statutory health insurance, long-term care insurance is financed by contributions that are levied on income. However, in contrast with statutory health insurance, benefits provided through long-term care insurance are only available by application and for persons who have contributed for at least 2 years.

The most significant difference between statutory health insurance and long-term care insurance is that long-term care insurance does not cover the full costs of care. As benefits usually cover only about 50% of institutional care costs, people are often advised to buy supplementary private long-term care insurance.

³⁹ Arbeitsstand: 11.05.2018 - dawr.de/schmerzengeldtabelle/pdf

Conclusion

As Germany is governed by a civil code and different legal system, there are few transferable examples that could be used in an Irish situation. In addition, the compilations of cases used by judges and insurers in determining awards are published privately. In the UK the Judicial College publishes the guidelines used by judges in determining awards, in Ireland the Book of Quantum which indicates the prevailing levels of compensation awards is published as a statutory function of the PIAB.

A 2018 publication of the Schmerzengeldtabellen lists the figures as - Schmerzensgeld wegen einer HWS-Distorsion (Schleudertrauma).

- **Cervical spine (soft-tissue injury ('whiplash') 'light' €313 to €1,125**
- **'middle' €5,384 to €13,687**

A case reference in the 'light' category was an injury with "Slight whiplash, pain in the back and shoulder girdle area, pressure pain in the neck and cervical spine, four days' incapacity for work".

3.9 France

Legal System

France is a civil law system meaning it places a greater emphasis on statutes as found within various codes rather than previous decisions. This is similar to many European jurisdictions such as Germany and Italy. There have been recent reforms to the constitution in 2008 that have altered the French law-making process, resulting in parliament having a stronger vote when passing laws.

France has a dual system in place regarding its laws. One branch is known as 'droit public' or Public Law and defines the principles of operation of the state and public bodies. The other branch, known as 'droit privé', or private law, applies to private individuals or bodies. Damages for personal injury claims are dealt with by French private law. The assessment of personal injuries is based on the 'Nomenclature Dintilhac' which was created in 2005 by a working group led by the President of the Second Civil Division of the Court of Cassation, M. Jean-Pierre Dintilhac⁴⁰. A methodology for the assessment of personal injury claims has been developed over the years by case law and judicial guidelines, based on the 'Nomenclature Dintilhac'.

In all personal injury claims in France, the burden of proof regarding the causation of any injury rests with a plaintiff.

Evidence from medical experts is used to identify injuries and, in the majority of cases, the medical report also establishes the proof and cause of injury.

As with comparable jurisdictions, there are two primary areas considered when damages are assessed. The pain and suffering aspect of the claim (préjudices non-économiques or préjudices personnels) and any economic losses (préjudices économiques). The 'Nomenclature Dintilhac' lists all heads of recoverable damages and details a strict method of valuation. The recoverable damages under French Law can also be split into temporary damages and permanent damages, the separation between both types being the date of 'consolidation' of the claimant's injuries.

The process of valuing the heads of claims relies heavily on medical reporting in conjunction with the Nomenclature. In the context of the judicial compensation procedure, a medical expert may be appointed by the Judge to carry out a medical examination. This expert doctor is instructed to be independent and to provide a definitive expert report to enable a judge to assess compensatory damages. However, the Judge has discretion and is not bound by the medical report.

In practice, the majority of personal injury cases in France involving road traffic accidents are resolved in out-of-court settlements. This is attributed to the success of the 'Bodily Injury in Motor Accident Convention', which is in widespread operation, and places an obligation on the insurance company to make an offer to a claimant to settle their claim within a specified period of time. This is known as the IRCA convention (Convention of Compensation and Remedies Corporal Automobile).

There is a separate convention in relation to claims for property only or material damage only. This agreement designates the claimant's own insurer as the mandated insurer, for minor injuries (impairment of the physical and psychological integrity of 0 to 5%). Personal injury damages claims resulting from a traffic accident are covered by a claimant's own insurance when their disability rate is assessed to be less than 5%. When the disability is assessed at more than 5% then the other party's insurer settles the claim for damages. Whilst it is possible for a claimant to proceed with a claim through the court system hoping to receive higher damages, claimants usually accept their own insurance claim settlement. This disability rate, also known as Permanent Functional Deficit (DFP), is usually determined by the expert physician during a medical report. This rate can only be calculated when the claimant's injuries have 'consolidated'.

⁴⁰ <http://www.justice.gouv.fr/publications-10047/rapports-thematiques-10049/elaboration-dune-nomenclature-des-prejudices-corporels-11945.html>

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In cases of physical and psychological integrity injury of more than 5% or death, the victim is compensated by the insurer of the third party (transfer of mandate).

The agreement relating to personal injury indicates that, following a notification of the claim, the insurer will contact the claimant for information and in accordance with article A.211-11 of the Insurance Code, may provide payment for medical treatment, offer to pay provisional compensation and make an offer of compensation within the designated time frame.

The typical process entails that within the designated time period and following the completion of a medical report by an expert doctor with a degree in personal injury assessment, the insurer sends the victim an offer of compensation. This offer covers all the elements of the bodily injury, as well as any material damages related to the bodily injury. This offer of compensation will also factor in issues such as contributory negligence on behalf of the claimant and any amounts paid or payable by third-party payers (social security payments, supplementary health insurers, pension funds.)

There is no deadline for the claimant to respond to the offer. However, following the acceptance of an insurer's offer, the claimant has only fifteen days to notify the insurance company of any change of mind. Once the claimant has accepted the offer the insurers must pay the compensation within a 45-day period or incur additional interest payments which increase with any delays. These strict timelines and their successful operation may explain why the majority of personal injury claims arising from motor collisions in France are settled quickly. In addition, before proceeding with a court case, the claimant also has an opportunity to request a new offer from the insurers.

Healthcare System and Benefits

The French health-care system was rated the best in the world by WHO in 2000. It provides universal coverage and combines public and top-up private insurance for both hospital and ambulatory care. The overall social security system was created after World War 2.

The French system is based on the 'Bismarckian' model and provides statutory health insurance with the option of purchasing a complementary private health insurance package in addition to this coverage. The Universal Health Protection 'Protection Universelle Maladie (PUMA)' was created by Article 59 of the Social Security Finance Act for 2016. In practice, once persons are working and residing in France in a stable and regular manner, universal health coverage (Puma) guarantees you a right to cover your health costs. Prior to the introduction of

Puma, access to the health system was considered a right derived from having paid into the system, as an employee.

The introduction of PUMA also introduced a new social contribution for the financing of PUMA, Cotisation Subsidiaire Maladie. The contribution is imposed at the rate of 8% on passive source income and gains (e.g. dividends, interest, real estate income and capital gains) subject to limited exceptions.

An additional health insurance policy will typically cover benefits that are not reimbursed at all by the compulsory health insurance, such as osteopathy expenses, dental implants or certain vaccines. Since 1 January 2016, all companies in the private sector are obliged to provide complementary health insurance to their employees. Several types of complementary health insurance coverage may be offered within the same company, but all employees must be covered.

Tables

There is no use of specific tables, but damages are assessed under the heads listed in the 'Nomenclature Dinthilac'. For every head under the Nomenclature, damages are assessed on a scale of 1 to 7. For example, compensation for pain and suffering is assessed on a scale of 1 to 7 to reflect the level of severity. The Nomenclature is used by the courts and by insurers in the settlement of claims.

Conclusions

As is the case with Italy and Germany, France is a civil system which leaves less scope for comparison with Ireland, which operates a common law system. However, their early settlement system appears to work well, albeit contingent on the voluntary convention involving multiple insurance companies. The approach in terms of timelines and a structured method of settlement without admitting liability is already catered for in Ireland by the PIAB process.

A lesson which can be used as an example and has been referenced in the PIC's first report is the high standard required of doctors completing a medical report, including those completing a report for use by insurers in a structured settlement process. In France, all doctors completing reports must possess a specific medical qualification. A recommendation of the PIC's first report was the introduction of training and accreditation in an Irish context for doctors completing the agreed template and the RCSI and ICGP are developing a training module in an e-learning format.

3.10 Spain

Spanish Legal System

Spain is a civil law jurisdiction based on comprehensive legal codes and laws rooted in Roman Law. Civil law is applied throughout the entire territory of Spain, but there are autonomous communities that have their own civil law systems, which are applied in relation to certain legal issues (e.g. in Basque and Catalan regions). Jury trials are not available in civil cases.

Spain has established a specific legal scheme for assessing personal injury damages in road traffic accidents. This system of Personal Injuries compensation is commonly referred to as the 'Baremo'. The precedent for this scheme was a ministerial order introduced in 1991, which was followed by the introduction of a mandatory 'Baremo' in 1995. The 'Baremo' was most recently updated and published in Spain's Official State Gazette (Boletín Oficial del Estado) on 23 September 2015.⁴¹

When the use of the 'Baremo' became mandatory in 1995, it was important to ensure that judicial independence was maintained and for this reason it was decided to establish ranges between the maximum and minimum amounts to be paid and in respect of many of the heads of loss to be compensated. The new 'Baremo' is divided into three types of damages: basic personal damages, specific personal damages and material damages (which includes loss of earnings). Awards are calculated on the basis of a points system, where each type of injury attracts a certain number of points. Compensation for permanent injuries is stipulated by articles 93 to 133 and in corresponding tables.

Basic bodily compensation is listed in a medical 'Baremo' that contains an overview of different injuries. The medical 'Baremo' also includes the classification, description and assessment of individual injuries. The degree of disability is measured in points, with 100 representing the highest possible rating. A special section is included for aesthetic damage, which is rated in points from 0 to 50.

The latest 'Baremo' introduced the regulation of minor cervical spine or soft-tissue ('whiplash'). Article 135 has also introduced standards for establishing whether there is a genuine temporary injury eligible for compensation (evidence that the symptoms appeared with reasonable immediacy and that medical care was sought also with reasonable immediacy, and where there the mechanism of the accident matches the injury complained of).

The updated 'Baremo' also extended the scope of compensation in terms of both the range of people who can bring a claim and in terms of the heads of damage which can be claimed for. According to the preamble to the legal text, the new 'Baremo' is inspired by the basic principle of 'restitutio in integrum'. Although the 'Baremo' was primarily designed for use in motor accidents and is binding in such cases, in practice, it is used as a reference in most personal injury cases in Spain.

Healthcare System

Spain operates a combination of private and public health care, with public health care available on a contribution-based system, meaning that citizens pay into the social security system (Seguridad social) and receive access to free health care.

The Sistema Nacional de Salud (SNS) provides universal coverage (including to irregular immigrants) and is funded from taxes and predominantly operates within the public sector. Provision is free of charge at the point of delivery, with the exception of pharmaceuticals prescribed to people aged under 65, which entail a 40% co-payment, albeit with some exceptions. The primary care network is entirely public and most of the providers are salaried professionals within the public sector with a few exceptions described (private providers are contracted out to provide primary health care under different formulas in Valencia and Catalonia).

Conclusions

The 'Baremo' was initially introduced by the Spanish Government to remedy what they considered an 'award lottery' that was causing problems of excessive uncertainty and costs, thereby compromising the solvency of insurance companies. The new scale has introduced new categories of injured parties and new compensatory concepts which were not included in the original scale.

The preamble of the new 2015 'Baremo' emphasises, "the importance of a uniform interpretation of the rules of the system, which provides the injured party and the insurance entities with certainty with respect to the viability of their respective claims, guaranteeing an equal response to identical situations, and that contributes decisively to the rapid out-of-court settlement of conflicts and, in short, the balance of resources and the revitalisation of economic activity." The operation of the 'Baremo' is a deeply complex and yet prescriptive tariff scheme in which basic assessments are then corrected by reference to further criteria, arbitrary 'consolidation' dates are selected to distinguish temporary from permanent injuries, however the emphasis on achieving certainty in award levels through prescriptive awards is perhaps

⁴¹ BOLETÍN OFICIAL DEL ESTADO Núm. 228 Miércoles 23 de septiembre de 2015 Sec. I. Pág. 84473

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something that can be explored in an Irish context. Extracts from the new 'Baremo' tables are contained in the appendices.

3.11 Italy

Background

The Italian legal system is similar to other continental civil law systems grounded in statute law such as France, Germany and Spain. In Italy, it is mandatory for vehicles to be insured by authorised insurance companies.

The Italian personal injury system is grounded in Articles 2043 and 2054 of the Italian Civil Code. This Code uses the terms patrimonial damages and non-patrimonial damages in lieu of the terms economic/pecuniary and non-economic damages as referred to in other jurisdictions. Non-patrimonial damages are further categorised as biological damages, which relate to physical, mental and social damages, and moral damages which relate to a person's general well-being. Non-patrimonial damages are comparable to damages for pain and suffering or general damages in Ireland. Patrimonial damages relate to an economic loss sustained by the injured party directly. They can refer to consequential damages as a result of the accident, such as medical expenses or outlays or to monetary loss, e.g. loss of earnings or a future loss of earnings as a result of the injuries. Moral damages are awarded for moral harm, anxiety, distress and offence to a person's general wellbeing. The quantum of moral damages is calculated as a percentage of the biological damages allowed. This is in accordance with article 139 of Legislative Decree of 7 September 2005 n. 209 (Code of Insurances), which also provides the power to increase the sum of compensation. In November 2008, the Italian Supreme Court stated that all the non-pecuniary losses should be calculated as a unique amount and not 'poste par poste' or 'head by head'.⁴²

In Italy, losses in personal injury cases are divided into temporary and permanent damage to health (*danno alla salute* or *danno biologico*) and damages for moral suffering (*danno morale*). The calculation of these damages is facilitated using tables which indicate damages for each accruing invalidity point.

Every court possesses its own table which may result in different award amounts of compensation for comparable injuries in different Italian jurisdictions. There are, however, fixed uniform damages tables for the first nine percentage points of invalidity, leaving damages for more serious cases to be determined by the courts. The

calculation of awards for moral damages is also left to the discretion of the court.

In Italy the amount of compensation to be paid for non-material damage suffered by victims of road traffic accidents is calculated according to a specific scheme. That scheme lays down restrictions in comparison to the assessment criteria applied to damage arising from other types of accidents and limits the court's discretion to increase the amount of compensation in view of the circumstances of the case, restricting such an increase to one fifth of the amount provided for. In cases where a claimant in a road traffic accident incurs only material damages or their personal injuries are considered to be minor (a minor injury is considered to be an injury less than 9% of permanent invalidity), they can bring their claim through their own insurers under the 'direct compensation' procedure, an arrangement similar to that in France where the claimant's own insurer will settle a minor bodily injury claim directly, rather than the third party's insurer). The Private Insurance Code (derogating to the general principles of the Italian Civil Code), uses the parameters established by the uniform damages tables referred to above in making settlements.

A case challenging the Italian provisions⁴³ was brought to the European Court of Justice where it was held, in a Judgment on 23 January 2014, that national provisions establishing methods of calculation specific to road traffic accidents which are less favourable to victims than those provided for under the ordinary rules of civil liability were allowed. What this means is that Member States are not infringing EU law where they have in place limiting compensation schemes, providing that the schemes do not have a disproportionate effect.

Healthcare System

Italy's healthcare system is a regionally organised National Health Service (*Servizio Sanitario Nazionale*; SSN) that provides universal coverage, largely free of charge at the point of delivery. The Ministry of Health is the main institution responsible for public health at the national level. Regional and local authorities (*Aziende Sanitarie Locali*) deliver public health, community health services and primary care services.

GPs and paediatricians have a gatekeeping role. Gatekeeping in a healthcare system is a mechanism of care referral where the GP is the first point of contact in the patient's care path and is responsible for referring patients to specialists or for further levels of care. GPs are self-employed and independent doctors. The SSN offers treatments to patients which are covered and which

⁴² Cass, 11 November 2008, fns 26972-975 (2009) *Danno et Responsibilita* 19 ff

⁴³ Case C-371/12 *Petillo and Petillo v Unipol Assicurazioni SpA*

includes tests, medications, surgeries during hospitalisation, family doctor visits and medical assistance provided by paediatricians and other specialists.

Recent Developments in Italy

Italy is regarded as the world leader in the use of telematics technology and in devices known as 'black boxes'. This technology can provide information on driving styles or precise accident details in the event of an insurance claim. The progressive increase in the uptake of these devices in Italy has been attributed to the fact that drivers who install them can obtain significant price discounts on their premiums according to the Italian Insurance representative body ANIA.⁴⁴

The Osservatorio sulla Giustizia Civile⁴⁵ (translated as the monitoring group about civil justice) at the Tribunal of Milan has recently published the 2018 edition of 'Tables for the assessment of non-pecuniary damages arising out of personal injuries and loss of parental relationship'.

The Tables are widely referred to by Tribunals all around Italy for the assessment of non-pecuniary damages. Values mentioned in the 2014 edition have been increased by 1 to 2 %. The latest edition also published new Tables, to be used in assessing distinct types of non-pecuniary damages, including the introduction of tables to quantify damages suffered by a victim of fatal injuries, in cases where the death occurs, after a period of time, but as a result of an accident. This is known as 'terminal biological damage'.

The International Observatory on Personal Injuries Damages in Pisa conducts research which focuses on the implementation of a database which records published and unpublished decisions of lower courts on personal injury damages. Anonymised legal and medical data is recorded and can be searched and cross referenced by lawyers using different criteria i.e. head of damage, nature of injury etc.

Conclusions

Italy operates a civil law system and, like Spain and France, uses a method of cross referencing tables and particular heads of damages to determine the amount of compensation. ANIA have advised that the Italians have the highest penetration of black box or telematics technology in the world. Although there are privacy issues to be balanced, the use of such technology can be used as

an effective tool in tackling fraud and to assist efficient claims resolution.

A useful lesson from Italy is that the ECJ has held that schemes limiting the claimant's entitlement to compensation arising from a road accident can be permissible so long as they are not considered disproportionate.

Amounts for personal injuries vary throughout Italian States as do the points that an injury of soft-tissue ('whiplash') receives on an invalidity scale, which ranges from 2-6 to no points in certain States.

3.12 Sweden

Background

Under Swedish legislation, almost all motor vehicles are legally required to have motor insurance. Sweden awards compensation for both the financial and non-financial loss suffered by a claimant. Compensation for the non-financial or non-pecuniary loss in Sweden, with a few exceptions, is determined according to standardised tables. The tables factor in both the severity of the injury and the length of recovery time. This method of calculating compensation has been approved by the Swedish Supreme Court.

The headings for non-pecuniary loss include; pain and suffering, disadvantage, incapacity and specific inconvenience. The incapacity head of compensation is based on a Swedish determined degree of disability of 1 to 99 percent.

If the victim's disability is greater than 10% the file must be submitted to the Road Traffic Injury Commission (Trafikskadenämnden - TSN)⁴⁶. The TSN advises the parties on how to compensate for the personal injury and loss of income.

The Road Traffic Injury Commission (TSN) was established in Sweden in the 1930s under the Ministry for Justice. According to its regulations, the Commission's aim is to work for a uniform and fair settlement of claims within the field of traffic insurance. The TSN is an administrative mechanism which enables the speedy resolution of claims although claimants maintain the right to sue in court. The establishment of the TSN in Sweden has been credited with claims settlements occurring predominantly outside the courts process. The TSN accounts for a significant part of the practice formation in personal injuries in Sweden. The Commission's constitution is approved by the Swedish Government, which also appoints a legally trained Chairman. Deputy Chairmen, who are legal practitioners, also serve on the

44 <http://www.ania.it/export/sites/default/it/publicazioni/rapporti-annuali/Italian-Insurance-Statistical-appendix/Italian-Insurance/2015-2016/ANIA-Italian-Insurance-2015-16.pdf>

45 <http://milanosobservatorio.it/about-us/>

46 <https://www.tff.se/>

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Commission, as well as lay representatives of various stakeholder groups and of the insurance companies. The Commission also acts as an alternative dispute resolution body for disputes between policyholders and MTPL (Motor Third Party Liability) insurance companies. All motor insurance companies and Trafikförsäkringsföreningen (Swedish Motor Insurers Association) are required to maintain and fund the Commission.

As referenced previously when the degree of disability is above 10%, the case must be submitted to the TSN, however the majority of traffic accidents do not result in personal injuries leading to medical disability above the 10% threshold and are therefore settled directly by the insurance companies. The TSN can obtain additional medical information from independent doctors to reach its opinion on the appropriate amount of compensation to award a claimant. The Insurance company must include a proposal for compensation with their request to the Commission. The TSN gives an opinion on the level of compensation that should be paid to the claimant. The TSN's opinion or recommendation is not legally binding, however, it is unusual for the recommendation not to be accepted.

When claiming compensation, a claimant's injury symptoms must generally occur within 3-4 days of an accident and be reported promptly. A claim can still be submitted without being reported to doctor in this time frame, however it will be very difficult to prove.

Compensation for non-financial damage or loss divides into three categories – pain and suffering, disadvantage and other permanent incapacity and specific inconveniences. Compensation is assessed according to standardised tables produced annually by the Road Traffic Injuries Commission and Insurance Sweden. The tables are also used by courts and by Insurance Companies in settling claims. The tables use a classification of the severity of the injury and the length of recovery time. Payments can be increased because of treatment methods, such as repeated major surgery and time spent in intensive care units.

Compensation calculations consider the seriousness of the injuries and the length of treatment. Payment is often administered by way of diminishing monthly amounts.

Compensation is given for injury-related expenses incurred by the victim and considered necessary and reasonable. Almost all medical care costs are covered by the national social security system. Compensation for loss of income is based on the real loss of annual income that is attributable to the injury. All benefits from the social insurance (for instance sick pay, occupational injury compensation and other comparable social benefits) are

deducted from the compensation from the MTPL insurance. However unlike in an Irish context where there is a recovery of benefits and assistance scheme operated by the Department of Social Protection and Employment, the Swedish social insurance department has no right of recovery against the motor insurer.

Where legal fees are concerned, it is recognised that in complex cases a claimant will require legal advice and in a successful claim, the liable insurer bears the costs of 'necessary and reasonable' legal representation. Compensation of representation costs is reimbursed for reasonable time incurred, according to a specific maximum hourly rate applied in Sweden. The principle is that remuneration to the lawyer is not calculated as a percentage of the claimant's compensation award.

Healthcare in Sweden

In its report 'The State of Health in the EU, Sweden Health Profile 2017', the OECD advised that Sweden has the third highest health spending in the EU as a share of GDP (11.0% in 2015 compared to the EU average of 9.9%). Sweden's system of universal coverage is achieved through a decentralised national health service although there is a limited amount of private healthcare. The cost of healthcare is financed primarily through taxes levied by county councils and municipalities.

The role of the central Government is to establish principles and guidelines, and to set the political agenda for health and medical care. Central Government provides additional funding through general block grants, earmarked funding for outpatient pharmaceuticals and specific national programmes. After a patient has incurred an annual bill of 1100 SEK (currently approximately €110) in respect of health expenses, all further treatment is free.

In Sweden, the Whiplash Commission was formed between 2002 and 2005 to look at the rising levels of soft-tissue ('whiplash') claims. Its focus was on the correct diagnosis of soft-tissue ('whiplash') and the need for rehabilitation and treatment. In addition, the Commission made numerous other recommendations including in relation to road safety.⁴⁷

The Swedish Whiplash Commission and the Swedish Society of Medicine⁴⁸ have produced a comprehensive review on how to diagnose and treat soft-tissue ('whiplash') injuries. They defined 'whiplash' as 'indirect cervical spine trauma' and adapted the use of the QTF classification system. They focussed on the 1-3 grades within the 0-4 grades in the WAD scale. Grade 0 was

⁴⁷ The 2005 report of the Swedish Whiplash Commission

⁴⁸ The Swedish Society of Medicine and The Whiplash Commission Medical Task Force 2006

removed as it is the mildest grade. The removal of grade 0 stops the least severe of soft-tissue ('whiplash') claims from receiving compensation. Grade 4 is a fracture or dislocation.

Conclusions

Sweden tends to settle the majority of claims outside of the courts, by offering an independent opinion on the appropriate compensation awards through the TSN. The role that the TSN provides in offering an independent assessment of the appropriate award level and obtaining independent medical reports is already in operation in Ireland with the PIAB model. It is recommended that a claimant provide evidence of the prompt appearance of symptoms and seeking treatment when making a claim for compensation, similar to the situation in Norway. Sweden has completed extensive research on the diagnosis and successful treatment of soft-tissue injuries ('whiplash') through collaborative research projects involving the Swedish Whiplash Commission and the Swedish Society of Medicine, and there are potential benefits in the funding of specialised medical research into these types of injuries in an Irish context.

3.13 Conclusions

There are a myriad of approaches to personal injury compensation, internationally and within individual jurisdictions. It is clear however, despite the multiple approaches, there is no one example that can be provided as an example that PIC believes should be directly mirrored. It is also important to note the legal system in Ireland and constitutional constraints when considering the feasibility of implementing or replicating some of the schemes and systems discussed. The various themes that have emerged from the research are discussed below.

Early medical treatment and standard treatment plans – Ontario is in the process of introducing standard treatment plans to ensure that motor accident victims access timely and effective treatment. In Sweden, claimants must demonstrate they have sought early medical treatment in order to pursue a claim for compensation. In South Australia, standard guidelines for the medical treatment of soft-tissue ('whiplash') injuries have been published and are in widespread use.

Medical Assessment Scales – There is no universal scale of medical assessment in operation internationally. However, the Whiplash Associated Disorder scale, established by the Quebec Task Force, as discussed in the First Report of the PIC is internationally recognised and in widespread use, particularly in Canada, Australia and the United States. South Australia operates a unique numerical scale called the ISV scale, based on the

American Medical Association guidelines. Sweden operates a modified scale derived from the WAD scale. As noted in the First Report, there is no universal scale in operation.

Codes of Conduct – In a number of the European countries examined, there are standard processes and protocols for settling personal injury claims, which insurance companies and claimant representatives adhere to. This means that, although such adherence is essentially voluntary, and the right to access courts remains, the majority of claims for soft-tissue injuries ('whiplash') are settled within a defined time period outside of the courts. The Netherlands operates a specific settlement protocol between Insurers and lawyers. France operates a direct settlement convention between claimants directly and insurance companies. The Swedish model provides a recommendation from the National Road Traffic Commission, whose aim is to work for a uniform and fair settlement of claims. In Ireland the PIAB process provides independent assessments within defined timeframes and mirrors these structured processes, however greater certainty regarding award levels could ensure that there is more uniformity relating to award amounts and enable more claims to be settled within this process.

Thresholds and other conditions which claimants must meet – A number of jurisdictions have introduced specific criteria for qualifying for compensation with the intention of reducing low value injury claims, which typically form the majority of compensation claims. In Australia (New South Wales and South Australia) there are injury level thresholds – i.e. an injury must be medically assessed over a certain number to be considered for compensation. This is also the case in Italy. In both Sweden and Norway prompt evidence (3 to 4 days in Sweden and 72 hours in Norway) of accident related symptoms must be produced. In Ontario the Minor Injury Guidelines distinguish claims. A 'minor injury' is defined under the Regulations as "a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation" and funding for a 'minor injury' is capped at CAD\$3,500. A claimant in Ontario must obtain over CAD\$30,000 in damages to retain an award, and the award is subject to a deductible (a specific financial amount deducted from personal injury awards, meaning a claimant will receive no compensation if the award is less than this figure). While in theory, a threshold might seem an effective mechanism to eliminate low value claims, the operation of such thresholds can be fraught with difficulty. There are dangers of unfairness to claimants in the operation of injury level thresholds, as they fail to consider subjective aspects of the claim. In addition, there is a risk of artificial inflation of claims and exaggeration by claimants endeavouring to make sure

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their injuries qualify for the threshold and corresponding pressure on medical assessors to ensure that their report enables a claimant to access compensation

Telematics and Technology – Research on Italy has indicated a consistent increase in the use of telematic technology and this is mirrored in the UK. The use of telematic technology, incentivised by the insurance industry providing premium discounts for the use of same, is recognised as a useful tool in the elimination of fraudulent and exaggerated claims from the claims environment and this example can be replicated in an Irish context.

CHAPTER 4

**Report on 'Care Not
Cash' Models and
Variations in Place
Internationally**

Chapter 4: Report on 'Care Not Cash' Models and Variations in Place Internationally

4.1 Introduction

One of the terms of reference for the Personal Injuries Commission, as set out in the Cost of Insurance Working Group Report of January 2017, was that the Commission report on 'care not cash' models and variations in place internationally.

The etymology of the term 'care not cash' has its origins in policy making in homelessness where a local authority scheme was introduced by San Francisco County to replace monthly cash sums with housing, and access to counselling services and medical care. The term has evolved in recent literature and commentary to also include the concept of providing injured claimants with appropriate medical care rather than financial compensation in order to obtain 'restitutio in integrum' (restoration of their pre-accident status).

4.2 Consideration of the Introduction of a 'Care Not Cash' Compensation System

The Department of Transport, Tourism and Sport (DTTAS), who have responsibility for implementation of the motor insurance directives in Ireland, were asked to provide a view on the possible introduction of an alternative 'care not cash' compensation system for soft-tissue ('whiplash') injuries.

A case considered by the Court of Justice of the European Union (CJEU), Case C371/12 Petillo, is of relevance to the issue. In the Petillo case, the CJEU stated that the victim's right to compensation cannot be excluded or disproportionately limited.

The view given to the PIC was that the Motor Insurance Directives allow for the requirement to pay general damages to be mitigated in part, provided it does not disproportionately limit the victim's right to compensation. However, care **cannot be fully substituted for cash**.

While a combination of care and cash could be offered as part of a compensation plan, there are a range of practical difficulties with the operation of such a system including: who would provide the care; what level of care is appropriate; how the care is costed; who would regulate the level and quality of care to be provided and who would indemnify the providers of the care? Another issue arises as to whether an insurer could recover the cost of care already provided where a victim is ultimately found not to be entitled to compensation. Further issues also arise in relation to privacy issues and a claimant's entitlement to choose their medical treatment and personnel.

4.3 Comparative Systems

There are no examples available of countries that have entirely replaced or substituted monetary damages with healthcare. The ACC scheme in New Zealand has been referenced in commentary as an example of a 'care not cash' system, however the scheme provides a range of entitlements to injured people and does not solely provide the costs of medical treatment or care. Other entitlements include weekly compensation amounts for loss of earnings and the cost of home or vehicle modifications for those seriously injured. The jurisdictions we have examined in the report typically reimburse a claimant's medical expenses as part of their pecuniary damages claim. In countries or jurisdictions where there is a universal health care scheme in place, the state health insurance systems may seek the cost of the claimant's care to be reimbursed to them by the third party.

From a high-level overview, it would appear that in countries where healthcare is universal and readily accessible (e.g. France and Germany) there is less demand for monetary compensation when compared to countries where there are high healthcare costs such as the US.

In the report 'Fair Benefits Fairly Delivered'⁴⁹, David Marshall, Special Adviser to the Minister of Finance in Ontario, Canada, stated that the system there was focused on "cash not care". In the report, he notes that "Medical care drives all the other costs in the system. The longer an injury takes to resolve, the more likely it is to become chronic, the more medical care is needed and all the other costs – replacement of lost wages, attendant care, compensation for pain and suffering also go up. Worst of all, the injured person is not well served by extending their disability."

In order to refocus the system from cash rather than care, Mr Marshall recommended that medical and rehabilitation services should be delivered to accident victims in the most timely and efficient manner so as to encourage a return to health and, ultimately, reduce litigation costs.

In response to the recommendations and consultation on the report, Ontario is now implementing **Standard Treatment Plans**. The focus of these plans, as set out in the report, is on "Making sure people with the most common collision injuries receive timely, appropriate and effective treatment by developing and implementing standard treatment plans that focus on recovery, monitoring health outcomes and increasing awareness of best treatment practices, including an increased emphasis on making sure victims receive the care they need. The first of these standard treatment plans will be developed

⁴⁹ <https://www.fin.gov.on.ca/en/autoinsurance/fair-benefits.html>

by spring 2018. This is expected to reduce costs in the system by changing the emphasis from cash payouts to ensuring appropriate care for victims. “

In the UK, the Pre- Action Protocol for personal injury claims⁵⁰ contains a rehabilitation code, which, while not mandatory, is designed to ensure that the “claimant’s need for rehabilitation is assessed and addressed as a priority, and that the process of so doing is pursued on a collaborative basis by the claimant’s lawyer and the compensator.”

The Swedish Whiplash Commission’s⁵¹ final report, produced in 2005 in collaboration with the Swedish Society of Medicine, acknowledged the importance of timely medical intervention in cases of soft-tissue (‘whiplash’) injuries, while acknowledging the limitations of the public health service. In particular, the report states that “From a medical point of view it is important for the person injured to embark quickly on a constructive process of rehabilitation. But today the medical services cannot always offer encouragement for such a course. The risk is, therefore, that the person suffering a whiplash-related injury finds himself in a complicated invalid role, where it becomes more important to obtain acknowledgment of a claimed injury than to focus on recovery. The consequence of this may be that the symptoms become worse”. The Commission also notes that “The patient’s experience of reception by the medical services is also relevant to the likelihood of becoming free from symptoms. Quick and accurate assessment, with the patient’s symptoms being taken seriously and seen in a wider context, is a necessary part of the whole process that should follow a road accident”

As mentioned in the First Report of the Personal Injuries Commission published in December 2017, in 2008 South Australia produced “Clinical Guidelines: Best practice management of acute and chronic whiplash-associated disorders”⁵² developed by TRACsa, the South Australian Centre for Trauma and Injury Recovery Inc. and its Implementation Working Group for the Motor Accident Commission (MAC)⁵³. These guidelines recommended a standardised approach to the medical assessment and the treatment of soft-tissue injuries (‘whiplash’) incorporating the use of the QTF grading of WAD. The Guidelines also include best practice for doctors providing advice to patients and states that “Advice to stay active and live as normally as possible is the most important intervention in

the management of neck pain following whiplash. Effective education is necessary to manage expectations regarding recovery, and particularly to prevent the development of fear avoidance (“pain means I have re-injured my neck and I should therefore avoid activity”).

4.4 Early Intervention to Obtain Optimum Outcomes

It is also necessary to consider the claimant’s duty to mitigate their losses in the context of receiving medical care. The practical application of tort law in Ireland means that the claimant will not generally be adversely affected by their failure to mitigate their losses. The PIC considers that claimants should be obliged to mitigate their losses by receiving appropriate medical care and treatment where available. Both medical literature, recent guidelines and approaches taken in countries such as Ontario, South Australia, the UK and Sweden emphasise the importance of claimants receiving early and appropriate treatment to obtain the optimum outcome in relation to their injuries. It is also highly recommended by medical personnel that claimants receive appropriate advice in relation to the nature of their injury and the likely course of their recovery from the injury.

Seeking appropriate medical treatment, where possible, can also be considered in the context of a claimant’s duty to mitigate their losses. *Halsbury’s Laws of England*, Vol. 29 (2014) Para 378⁵⁴ states: “A personal injury claimant must mitigate his loss by obtaining proper medical treatment and not acting so as to retard his recovery, and he is not entitled to damages in respect of any pain, suffering, loss of amenities or loss of earnings consequent upon his failing to do so.”

4.5 Conclusions on the Introduction of a ‘Care Not Cash’ Compensation System

As EU and national law do not allow for cash awards to be replaced in full by care payments and the introduction of a partial model of care payments in addition to cash payments would create a myriad of issues, which would outweigh any financial benefits, the PIC do not consider that the introduction of an alternative ‘care not cash’ compensation system in Ireland would be appropriate at this point in time. However, the PIC is of the view, based on international evidence, that early and appropriate medical treatment will deliver optimum outcomes for the claimant.

50 http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic

51 <http://whiplashkommissionen.se/www.whiplashkommissionen.se/english/english.html>

52 http://implementationcentral.com/doc/Whiplash-Clinical-Guidelines_practitioner.pdf

53 <https://www.mac.sa.gov.au/>

54 *Halsbury’s Laws of England Fifth Edition Volume 29 2014 Crown and Crown Proceedings, Damages*

Chapter 4: Report on 'Care Not Cash' Models and Variations in Place Internationally (continued)

It was agreed by the PIC that the introduction of an early intervention standard treatment plan in a manner similar to the pre-existing Accident and Emergency protocols in operation in Tallaght hospital should be rolled out on a national basis, and funded through pre-existing charges.

4.6 Early Intervention and Rehabilitation

The system for resolution of personal injury claims to date, has had a greater emphasis on monetary compensation than on early therapeutic intervention to facilitate effective injury recovery solutions. There are also no national standards or guidelines for treatment of soft-tissue ('whiplash') injuries.

The 2004 Motor Insurance Advisory Board (MIAB) report recommended that insurers 'pursue a policy of seeking to assist in the rehabilitation of injured parties where such action is appropriate'.

Although various initiatives were commenced on foot of the MIAB recommendation, they gained little traction. One common argument put forward at the time against the sustained development of initiatives in this area, was that the scale of the (Irish) market and the profit margins available were too small to attract the required level of additional service providers.

As part of previous engagements by the PIC with medical professionals, the importance was highlighted, of the benefits of more widespread early intervention and rehabilitation specifically for soft-tissue ('whiplash') injuries. Numerous medical studies were referenced in terms of the benefits of this approach.

The enhanced adoption and promotion of early intervention and rehabilitation in respect of WAD injuries could be rolled out as a complementary measure within existing personal injury systems instead of the originally proposed overall alternative approach such as a 'care not cash' model. In that way the viable 'care, less cash' approach could be implemented and the benefits that a system with less focus on cash and more focus on injured party recovery needs, might still be realised.

4.7 Recent Canadian Developments

Ontario has recently introduced (December 2017) a 'Fair Auto Insurance Plan' to promote better care for victims and affordable rates for drivers:

"The plan includes significant reforms that will address fraud in the system, put victims first by providing better access to care for those injured in auto collisions and strengthen consumer protection.

An aspect of one of the highlights of the plan is the implementation of standard treatment plans for common collision injuries such as whiplash to help people in a timely fashion, receive the treatment they need after an accident. In Alberta and Nova Scotia, diagnostic treatment protocols, which are similar to programs of care, provide a structured model for the treatment of strains, sprains and whiplash injuries. The focus of these protocols is patient recovery. Reasonable and predictable costs have been negotiated with providers, patients are treated quickly and appropriately. Ontario has developed a Common Traffic Injury Guideline, which lays out very detailed, evidence-based treatment paths for common injuries."

4.8 Case Study: Tallaght Emergency Department Early Injury Rehabilitation Intervention Model

Tallaght Emergency Department (ED)'s approach was established as a local arrangement based on current international best practice considerations and procedures endorsed by the Royal College of Emergency Medicine (RCEM), rather than a specific HSE instruction. These include early treatment, physiotherapy, active rehabilitation and psychological support and reference to other international guidelines.

On admission to Tallaght Emergency Department, parties with a soft-tissue ('whiplash') injury are evaluated by an Emergency Department doctor with reference to the Canadian C-Spine rule (referenced in South Australia and New South Wales soft-tissue ('whiplash') assessment approach medical guidelines). The Emergency Department has immediate access to all diagnostic aids.

Patients are allocated a patient identification number on attending the Emergency Department. This facilitates tracking, transfer, discharge and follow up of patients electronically.

If there is no fracture or neurological injury found on presentation patients are prescribed appropriate analgesia and the treating Emergency doctor will transfer patients to the physiotherapy department for an appointment within a few days (3/4/5) of their initial attendance at the Emergency Department.

Physiotherapists from the hospital's Physiotherapy Department work closely with the Emergency Medicine staff and carry out treatment in the same Emergency Department where the patient is evaluated initially. This continuity of care simplifies matters and follow up attendances from the patient's perspective. The Physiotherapist has immediate access to a Senior Emergency Doctor should they feel the patient needs to be evaluated for an MRI or have a second medical consultation.

In the majority of cases, injured parties only require and attend for one follow up physiotherapy appointment. In problematic cases, the treating physiotherapists can refer patients back to the Emergency Department and the Emergency Department doctor will reassume responsibility for the patient. Tallaght Hospital operates this system as a best practice model approach to Whiplash Associated Disorder injuries.

Upon discharge from the Emergency Department, patients who have sustained soft-tissue ('whiplash') injuries are provided with a 'Patient Information' leaflet; Neck Sprain Advice. The content of the leaflet refers to the nature of neck sprain injuries, details on symptoms and appropriate pain relief measures including ice and heat therapy.

Funding

Physiotherapy costs are typically reimbursed as part of a claimant's special damages; however, a private patient will incur an outlay when undergoing treatment.

Hospitals receive €314 per Emergency Department visit and €1,545 per patient admission from the HSE.

The referrals for physiotherapy from the Emergency Department in Tallaght Hospital are funded entirely through the public system (specifically the Road Traffic Accident attendance fee budget line).

Considering the costs which can arise from Whiplash Associated Disorder injuries, assigning a small percentage of these funds to deliver early intervention and rehabilitation treatment and facilitate optimum patient recovery would seem worthwhile. This also would also enable claimants to return to work promptly. The roll out of swift publicly funded physiotherapy treatment for patients with soft-tissue ('whiplash') injuries is anticipated to deliver benefits to injured parties, the healthcare system and to society as a whole.

Appendices

Appendix 1: Membership and Secretariat of the PIC

| Members | Alternate Member | Organisation |
|--|---|---|
| Mr Justice Nicholas Kearns Chair | | |
| Jonathan Small (Kathryn McGuill from January-September 2017) | | Competition, Consumer Protection Commission |
| Eadaoin Collins (Colm Forde from January -September 2017) | Breda Power | Department of Business, Enterprise and Innovation |
| Conan McKenna | Tracy O'Keeffe | Department of Justice and Equality |
| Aidan Hanratty | Kerry McConnell Replaced by John Farrell in March 2018 | Insurance Ireland |
| Professor Michael Stephens | | Irish Hospital Consultants Association |
| Conor O'Brien | Helen Moran | Personal Injuries Assessment Board |
| Siobhan Hayes | Simon Watchorn | State Claims Agency |
| Sara Moorhead | Finbarr Fox | The Bar of Ireland |
| Stuart Gilhooly | Frances Twomey | The Law Society of Ireland |
| Secretariat | | |
| Derval Monahan Secretary | | Department of Business, Enterprise and Innovation |
| Eoghan Coyne | | |
| Etain Finn | | |
| Stephen Watkins | | Personal Injuries Assessment Board |

Appendix 2: Meetings and Stakeholder Engagement

Meetings

The business of the Commission was primarily conducted through monthly meetings. PIC had the ability to engage external expertise and through its work invited relevant parties to contribute, make presentations and attend some meetings.

Stakeholders the PIC engaged with included

| |
|--|
| Association of British Insurers (ABI) |
| American Association for Justice |
| Alliance for Insurance Reform |
| Department of Health |
| Dr Jean O'Sullivan |
| Enterprise Rent a Car |
| IBEC |
| Insurance Ireland |
| Irish Association of Emergency Medicine |
| Irish College of General Practitioners |
| Irish Hospital Consultants Association |
| Law Society of Ireland |
| Ministry of Justice UK |
| Motor Insurance Bureau of Ireland (MIBI) |
| Royal College of Surgeons in Ireland |
| Department of Transport, Tourism and Sport |

Appendix 3: Update on the implementation of recommendations of the First Report of the Personal Injuries Commission

Recommendations of the First Report of the Personal Injuries Commission

| | |
|--|---|
| Recommendation | A Standardised Approach to examination of and reporting on soft-tissue injuries should be adopted. |
| Suggested timeframe for implementation | To allow for the changeover in examination and reporting procedures it is suggested that a timeframe of by mid-2018 is appropriate |
| Action Points | <ol style="list-style-type: none"> 1. The Quebec Task Force (QTF) Whiplash Associated Disorder (WAD) grading should be used going forward by all medical professionals reporting on relevant injuries. 2. The Neck Disability Index (NDI) and Visual Analogue Scale (VAS) should be included going forward as part of personal injury medical reporting examinations. 3. Additional tests should be at the discretion of the examining medical professional. 4. The template form included in the appendix should be used by examining medical professionals in all relevant cases. <ol style="list-style-type: none"> 4(a) Insurers should ensure that all cases commissioned by them from medical examiners going forward are completed in line with the template form 4(b) PIAB should redesign their Form B going forward to reflect the recommended standardised template. 4(c) Court Rules changes should be considered which would require reports to be produced using the standardised format. 4(d) The Use of standardised Medical reports should be included in any pre-action protocol developed for personal injury claims. 5. Relevant medical professional bodies to publish, as soon as possible, guidelines in respect of training for use by medical professionals. |
| Recommendation | Training and Accreditation of medical professionals who complete personal injury medical reports should be promoted. This should become 'Best Practice' and training should be introduced at the CPD level. |
| Suggested timeframe for implementation | By end 2018 |
| Action Points | <ol style="list-style-type: none"> 1. All those involved in commissioning reports should ensure the use of accredited medical professionals for completion of their personal injury medical reports, when the relevant training and accreditation programmes are in place. 2. Members of the PIAB panel completing personal injury medical reports should in respect of completion of relevant injury medical reports, when the relevant training and accreditation programmes are in place, be accredited accordingly. 3. The Accreditation requirement should be included in any pre-action protocol developed for personal injury claims. 4. The quality of the training should be monitored from implementation in the same manner applicable to existing CPD programmes. 5. The CPD training could be delivered by individual medical professional bodies to their members or by independent training providers to medical professional bodies and medical practitioners. |

Appendix 3: Update on the implementation of recommendations of the First Report of the Personal Injuries Commission (continued)

| | |
|--|--|
| Recommendation | Link future publications of the Book of Quantum to the newly standardised examination and reporting injury categories i.e. 'whiplash' soft-tissue injuries / QTF WAD scales. The Cost of Insurance Working Group report of January 2017 recommends that the next review of the Book of Quantum should take account of the output of the work of the PIC. This recommendation highlights the output of the initial PIC report in terms of its potential impact on this next review. |
| Suggested timeframe for implementation | 2019 when the next Book of Quantum is due for publication |
| Action Points | 1. PIAB to consider in the context of the next Book of Quantum. |
| Recommendation | Relevant injury data should be collated and published by appropriate bodies |
| Suggested timeframe for implementation | By end 2018 |
| Action Points | <ol style="list-style-type: none"> 1. PIAB to produce information going forward relating to the incidence of 'whiplash' soft-tissue injuries. 2. Other relevant bodies to publish data relating to the incidence of 'whiplash' soft-tissue injuries. There may be merit that such data available from insurers, forms part of the National Claims Information Database which is being developed by the Central Bank of Ireland and which needs consideration by the relevant parties involved. |
| Suggested timeframe for implementation | By end 2018. |

Update on implementation

The PIC facilitated a meeting with medical stakeholders on the 20/03/2018 to review progress on the implementation of specific recommendations since the publication of the First Report of the Personal Injuries Commission. The purpose of the meeting was to provide a forum for the medical organisations to discuss and progress the implementation of the recommendations, regarding the standardised medical reporting form template and the promotion of training and accreditation of medical professionals who complete personal injury reports. It was agreed at the meeting that;

The RCSI and the ICGP would collaborate on a proposal for an education module for doctors which incorporates the recommendations and is based on enhancing the existing PIAB E-learning module.

Since this meeting, the following has occurred:

1. A preliminary proposal has been developed and the PIC secretariat is continuing to work with RCSI and the ICGP to progress the matter.
2. An updated and revised PIC medical report template was circulated to PIC members on 01/06/2018. The finalised version of the medical report template was developed with input from PIC members and agreed on following discussion at the PIC meeting on the 18/05/2018.
3. It is expected that it will take approximately six months to get the PIC template's use fully up and running in the Insurance Sector. The benefits to be realised from use of the standard medical report template will come from the consistent use of the template by all stakeholders.
4. PIAB is the process of rolling out the revised template for use by its independent medical panel.
5. The Courts are also considering the prescribing by rule of Court the use of the revised standardised medical template and the matter is currently under consideration by the respective Court Rules Committees agendas for discussion.

Medical Reporting Template for Soft-Tissue ('Whiplash') Injury

| | | |
|---|------------------------------|-----------------------------|
| Claimant Name | | |
| Address | | |
| | | |
| | | |
| Gender | | Marital Status |
| Date of Birth | | |
| Occupation | | |
| Currently at Work | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| Height | | Weight |
| R/L Hand Dominant | | |
| Date of Accident | | Examination Date |
| Previous examination information | | |
| Time elapsed since date of accident (accident date to examination date) | Years | Months |

Brief details of the accident/incident

Appendix 3: Update on the implementation of recommendations of the First Report of the Personal Injuries Commission (continued)

Injuries Sustained (including diagnostic information)

Details (include history of condition immediately after accident and in subsequent few days)

Summary Diagnostic Information

Date first Treatment Sought

From whom

Was patient hospitalised?

If yes, where?

Duration of inpatient stay?

Length of absence from Work

From

To

Number of GP visits

Number of Physiotherapy sessions

Number of Specialist/s visits

Identity of Specialists,
if known

Treatment/Investigations to date

Medications/dosage/changes in e.g. last six months

Please Complete Where Injury is Neck Pain or Whiplash Associated Disorder

| | | |
|--|----------------------------------|-----------------------------------|
| Assessment of cervical range of motion | <input type="checkbox"/> Normal | <input type="checkbox"/> Abnormal |
| Palpation for consistent tenderness | <input type="checkbox"/> Present | <input type="checkbox"/> Absent |
| Neurological Signs | <input type="checkbox"/> Present | <input type="checkbox"/> Absent |

Treatment/Investigations to date

The claimant should complete the attached NDI Questionnaire – Neck Disability Index

NDI Score = %

Following Assessment claimant should be classified to the Quebec Task Force (QTF) Classification of Grades

Indicate the WAD Grade

WAD 0 WAD I WAD II WAD III WAD IV

If the claimant’s WAD Grade has changed during the course of their recovery, please comment on same:

Indicate the degree to which you feel the claimant’s symptoms / disability have been caused by the accident / event which is the subject of this claim? Tick one box

Based on my assessment of the injury as described by the Claimant the accident/events accounts for

1. none of the symptoms / disability

2. a small proportion (≤ 25%) of the symptoms / disability

3. a moderate proportion (50%) of the symptoms / disability

4. most (≥ 75%) of the symptoms / disability

5. all of the symptoms / disability

Appendix 3: Update on the implementation of recommendations of the First Report of the Personal Injuries Commission (continued)

Relevant Medical History (including previous and subsequent accidents)

Nil relevant

Aggravation of pre-existing condition?

If yes, give nature of pre-existing condition

Give details of previous accident history, if any

Was pre-existing condition active/symptomatic before the accident?

Lifestyle Effects

Occupational

Recreational

Domestic/Personal

Present Complaints

Clinical Findings on Examination

Clinical Description of effects of Claimant's Illness/Accident/Disablement

| | Normal | Mild | Moderate | Severe | Profound |
|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| Mental Health | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Learning/Intelligence | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Consciousness/Seizure | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Balance/Co-ordination | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Vision | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Hearing | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Speech | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Continence | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Reaching | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Manual Dexterity | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Carrying | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Bending/Lifting/Stooping | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Sitting | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Standing | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Climbing Stairs | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| Walking | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

Anticipated treatment required into the future

Appendix 3: Update on the implementation of recommendations of the First Report of the Personal Injuries Commission (continued)

Opinion/Comment/Latest Prognosis

Indicate the degree to which you feel the claimant's symptoms/disability have been caused by the accident/event which is the subject of this claim? Tick one box

Based on my assessment of the injury as described by the Claimant the accident/events accounts for

1. none of the symptoms/disability
2. a small proportion ($\leq 25\%$) of the symptoms/disability
3. a moderate proportion (50%) of the symptoms/disability
4. most ($\geq 75\%$) of the symptoms/disability
5. all of the symptoms/disability

Are further investigations required? Yes No

Have all reasonable steps been taken to alleviate remaining symptoms/disability? Yes No
If no, please elaborate

Is a full recovery expected? Yes No

Estimated time period to full recovery

Are late complications expected? Yes No

Are further Specialist reports recommended? Yes No

General Comments and Observations

Completed by

(It is the duty of the completing expert to assist the Court as to matters within his or her field of expertise. This duty overrides any obligation to any party paying the fee of the expert).

| | |
|-----------------|--|
| Name | |
| Signature | |
| Address | |
| Qualifications | |
| Completion Date | |

Neck Disability Index

(NDI developed by: Vernon, H. & Mior, S. (1991). *The Neck Disability Index: A study of reliability and validity. Journal of Manipulative and Physiological Therapeutics*. 14, 409-415)

This questionnaire has been designed to give us information as to how your neck pain has affected your ability to manage in everyday life. Please answer every section and **mark in each section only the one box that applies to you**. We realise you may consider that two or more statements in any one section relate to you, but please just mark the box that most closely describes your problem.

Section 1: Pain Intensity

- I have no pain at the moment
- The pain is very mild at the moment
- The pain is moderate at the moment
- The pain is fairly severe at the moment
- The pain is very severe at the moment
- The pain is the worst imaginable at the moment

Section 2: Personal Care (Washing, Dressing, etc.)

- I can look after myself normally without causing extra pain
- I can look after myself normally but it causes extra pain
- It is painful to look after myself and I am slow and careful
- I need some help but can manage most of my personal care
- I need help every day in most aspects of self care
- I do not get dressed, I wash with difficulty and stay in bed

Section 3: Lifting

- I can lift heavy weights without extra pain
- I can lift heavy weights but it gives extra pain
- Pain prevents me lifting heavy weights off the floor, but I can manage if they are conveniently placed, for example on a table
- Pain prevents me from lifting heavy weights but I can manage light to medium weights if they are conveniently positioned
- I can only lift very light weights
- I cannot lift or carry anything

Section 4: Reading

- I can read as much as I want to with no pain in my neck
- I can read as much as I want to with slight pain in my neck
- I can read as much as I want with moderate pain in my neck
- I can't read as much as I want because of moderate pain in my neck
- I can hardly read at all because of severe pain in my neck
- I cannot read at all

Section 5: Headaches

- I have no headaches at all
- I have slight headaches, which come infrequently
- I have moderate headaches, which come infrequently
- I have moderate headaches, which come frequently
- I have severe headaches, which come frequently
- I have headaches almost all the time

Section 6: Concentration

- I can concentrate fully when I want to with no difficulty
- I can concentrate fully when I want to with slight difficulty
- I have a fair degree of difficulty in concentrating when I want to
- I have a lot of difficulty in concentrating when I want to
- I have a great deal of difficulty in concentrating when I want to
- I cannot concentrate at all

Appendix 3: Update on the implementation of recommendations of the First Report of the Personal Injuries Commission (continued)

Section 7: Work

- I can do as much work as I want to
- I can only do my usual work, but no more
- I can do most of my usual work, but no more
- I cannot do my usual work
- I can hardly do any work at all
- I can't do any work at all

Section 8: Driving

- I can drive my car without any neck pain
- I can drive my car as long as I want with slight pain in my neck
- I can drive my car as long as I want with moderate pain in my neck
- I can't drive my car as long as I want because of moderate pain in my neck
- I can hardly drive at all because of severe pain in my neck
- I can't drive my car at all

Section 9: Sleeping

- I have no trouble sleeping
- My sleep is slightly disturbed (less than 1 hr sleepless)
- My sleep is mildly disturbed (1-2 hrs sleepless)
- My sleep is moderately disturbed (2-3 hrs sleepless)
- My sleep is greatly disturbed (3-5 hrs sleepless)
- My sleep is completely disturbed (5-7 hrs sleepless)

Section 10: Recreation

- I am able to engage in all my recreation activities with no neck pain at all
- I am able to engage in all my recreation activities, with some pain in my neck
- I am able to engage in most, but not all of my usual recreation activities because of pain in my neck
- I am able to engage in a few of my usual recreation activities because of pain in my neck
- I can hardly do any recreation activities because of pain in my neck
- I can't do any recreation activities at all

Score: /50 Transform to percentage score $\times 100 = \%$ points

Scoring: For each section the total possible score is 5: if the first statement is marked the section score = 0, if the last statement is marked it = 5. If all ten sections are completed the score is calculated as follows: Example:16 (total scored)

50 (total possible score) $\times 100 = 32\%$

If one section is missed or not applicable the score is calculated: 16 (total scored)

45 (total possible score) $\times 100 = 35.5\%$

Minimum Detectable Change (90% confidence): 5 points or 10 %points

Visual Analogue Scale (VAS) for pain

The VAS for pain consists of a 10cm line with two end-points representing 'no pain' and 'pain as bad as it could possibly be'.

Patients with WAD are asked to rate their pain by placing a mark on the line corresponding to their current level of pain.

The distance along the line from the 'no pain' marker is then measured with a ruler giving a pain score out of 10.



Appendix 4: Extract from Addendum to the Report of the Cost of Insurance Working Group on the Cost of Motor Insurance on the subject of Telematics - January 2018

Introduction

The Report on the Cost of Motor Insurance (“Motor Report”) considered the use of telematics to benefit consumers from a road safety perspective with a particular focus on exploring its potential to make the motor insurance market more affordable to younger people. Insurance Ireland were asked to review the current use of telematics by industry and prepare a report for the Cost of Insurance Working Group (“Working Group”) by the end of 2017. As part of its implementation of the Motor Report, as well as the development of its Report on the Cost of Employer Liability and Public Liability insurance, the Working Group has engaged with the Personal Injuries Commission (“PIC”). One of the issues of common interest to the Working Group and the PIC has been how to tackle fraud and exaggeration within the personal injuries area. The fraud related recommendations in the Employer Liability and Public Liability Report are supported by the PIC. However, there was also a view expressed by the PIC that telematics could play a major role in combating personal injury fraud in a motor insurance context, and the Working Group concurred with this general idea. A more detailed perspective on the matter is set out below.

Use of Telematics to combat motor insurance fraud

It is hardly surprising that innovations in technology have an important role to play in bringing down the cost of insurance and the cost of motor insurance in particular. Like all information technology, what today seems novel and pioneering in the case of telematics may shortly be seen as essential in the effort to improve safer driving and combat fraud, thereby ensuring availability of motor insurance at more competitive prices. The Working Group and the PIC believe that telematics has the potential to play an important role by improving road safety, reducing fraudulent claims and by deterring the bringing of such claims. It is also an opportunity to identify risk before any serious incident has occurred and potentially deal with it.

Telematics may best be summarised as the use of devices from which real-time vehicle telemetry data can be transmitted to a central organisation where it can be harvested, speedily analysed and reliably interpreted. The technology is varied and will in broad terms give the ‘controller’ an opportunity to identify risk and, where an incident has occurred, provide the real tools to establish its authenticity. In simple terms the technology involves fitting into a motor vehicle a “black box” device which monitors and communicates data on the behaviour of the vehicle. The data includes information in respect of speed, positional and accelerometer measurements, locations visited, braking behaviour, multiple impacts, swerving and

a wide range of other information which permits driver safety standards to be improved and, in the case of motor accidents, provides an in-depth snapshot of what occurred. This can permit identification of fraud and collusion by one or more of parties involved in a road traffic incident. Telemetry data, when combined with predictive analytics, can allow insurers to more accurately determine claim values which should in turn improve their reserving methodology and assist with calculation of their liabilities. This in turn allows insurers to identify individual risk and price correctly.

In the UK market a 20% increase in policies providing “black box cover” was noted in the year 2016. A 2015 report from ABI Research in the UK suggested that the number of drivers monitored by telematics could reach 89 million globally by end 2017. The cost of installing such a device (which is separate from the vehicle’s own I.T. and electronics) is modest at around €100 – €150 but dependent on individual suppliers. In some cases, the initial cost can be a lot less than this with a monthly cost being attributed to the vehicle insurance policy that again accurately identifies individual risk and in turn individual pricing.

The technology is being actively pursued by a number of insurers in the Irish market at present. Efforts are directed in the main at younger drivers between the ages of 18 – 25 who, unless opting for a “black box policy”, may be unable to obtain insurance at an affordable rate. High-risk drivers outside of the younger driver age bracket who wish to demonstrate a reduced level of risk and the general low mileage driver who wishes for a properly priced policy should also be considered. Digital integration to provide a fuller offering, e.g. phone apps, should improve supply chain efficiencies and provide an appropriate digital channel for the insurer to communicate with their policyholder. Insurers should consider the potential benefits in terms of engaging with and retaining their customers. In turn the customer is given a readily accessible channel to liaise with their insurer throughout the life of the policy and not just at renewal.

If the use of telematics is significantly increased, insurers and consumers will then enjoy the sort of protection which CCTV provides on buildings and shop premises, both in terms of deterring dishonest behaviour and in uncovering it when it has occurred. It should result in the lowering of premiums for drivers who drive within the law and the terms of their motor policy. This is the obvious quid pro quo which will persuade the motorist to opt for “black box insurance” as a standard feature of their use of motor vehicles.

Appendix 4: Extract from Addendum to the Report of the Cost of Insurance Working Group on the Cost of Motor Insurance on the subject of Telematics - January 2018 (continued)

Insurance Ireland have not yet conducted any surveys on how marketable telematics may be in the Irish market but there has been a growing determination among some Irish member insurers to bring forward the use of the technology as a condition of insurance contracts. The Working Group and PIC believe that as a first step insurer should explore the potential of telematics further including educating road users about its benefits and at the same time ascertain what level of acceptance may be likely on a voluntary basis. The two groups believe that the primary burden of developing awareness and acceptance of the technology must rest with insurers who have the means to conduct market studies and surveys in terms of the likely response of Irish motorists to the benefits of the technology.

Privacy Concerns

While obvious concerns on privacy issues may arise from the deployment of telematics in motor vehicles, these may be addressed by tailoring any individual policy to the requirements and limitations demanded by the insured motorist when a policy is incepted. It is open to insurers to specifically provide a term or representation in any insurance policy that the use of information gleaned from telematics will be confined exclusively to such information as derives from an accident or claim and nothing more. Other motorists may prefer a condition which permits their insurer to access all information derived from telematics, particularly when they believe they are good and safe drivers whose record over a 12-month period may entitle them to be considered for a further reduction in premium. In short, a "stepped" or "gradualistic" introduction of the technology in co-operation with Irish road users may suggest itself as the preferred option in the short term.

Court Proceedings

Ultimately, should there be a significant increase in the uptake of telematics by policyholders, a significant educational programme for judges and practitioners unaware of telematics technology could be launched. For instance telematics has particular benefits which may assist the judiciary in the resolution of cases where fraud is in issue. For solicitors, the technology may help weed out the occasional fraudulent claim from the vast majority which are genuine. In summary, the use of telematics has the potential to create substantial savings in litigation costs if implemented to a sufficient level.

Recommendation

It is recommended that Insurance Ireland and the insurance industry prepare a report on what can be done to increase the use of telematics in the Irish market with a view to combatting fraud. As part of this exercise, they should research what is happening in other countries and extract what lessons can be learned for the Irish market.

This Report should be submitted to the Working Group by 1 September 2018.

Appendix 5: Overview of Data Sought and Received

Data received and requested

Insurance Ireland – In addition to Irish data, European data was requested by the PIC Secretariat from Insurance Ireland. This data was later discussed at a PIC meeting in order for the PIC to gain a better understanding of the exact nature of the data and the claims environment it dealt with. It was confirmed that the data received, was based on one company's experience. This company deals with 700,000 claims per annum. The information was received from claims handlers operating in eight European jurisdictions. The information was provided to the independent consultants (KPMG) engaged by the DBEI on behalf of the PIC, for analysis. However, they concluded that they would not be able to make any meaningful comparisons to the European data (excluding UK) as this information was not provided or available at a sufficiently granular level. Furthermore, they did not consider it appropriate to include the European data in the benchmarking exercise as it would be based on one single insurer only. Insurance Ireland also provided contact details and information from their sister federations in Canada and Australia, The Insurance Bureau of Canada and The Insurance Council of Australia.

The Law Society of Ireland – The Law Society provided contact details for their counterparts in a number of countries and states; the United States, Australia, Austria, Cyprus, New Zealand, Norway, Slovenia, Slovakia, Switzerland, Sweden, Denmark, Finland, Estonia, Lithuania, Victoria, Australia, New South Wales, Australia, Scotland, The Netherlands and Germany. The PIC Secretariat issued to all the contacts provided for these countries, a questionnaire regarding personal injury compensation payments and costs. Replies were received from the Law Societies in Sweden, Denmark, Austria, Finland, Netherlands and Slovenia. These Societies provided useful details regarding their national personal injury systems, however they were unable to provide statistical data.

The Motor Insurers Bureau of Ireland – The MIBI submitted the results of a questionnaire issued by them to their counterparts in 18 countries. This provided information on compensation systems in place in other jurisdictions but was not sufficiently granular for use in a benchmarking study. Responses were provided from the MIBI's sister guarantee funds in Belgium, Bulgaria, An anonymised Central European Country, Denmark, Estonia, Finland, France Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Slovak Republic, Sweden, UK, and Norway.

Enterprise Rent-a-Car – Enterprise Rent-a-Car (ERAC) offered to assist the PIC in May 2017 with data on European compensation awards. They met with the PIC Chairperson and submitted a two-page set of bar charts benchmarking Irish awards for 'whiplash'/soft tissue injury with European awards. No raw data to support the submission was supplied. The PIC Secretariat wrote to ERAC following the meeting, requesting more detailed data but ERAC advised that they were unable to provide this without the provision of any external funding to complete an exercise or analysis.

Irish embassies abroad – Correspondence was issued by the PIC Secretariat to Irish embassies in Italy, Spain, France, Germany, Sweden, Norway, Canada, New Zealand and Australia to seek contact details of the relevant national departments and agencies who deal with PI claims. Limited general information was received from a number of embassies. None of the embassies contacted were in a position to supply any data that could be used in the benchmarking exercise.

Publications – The Book of Quantum, the UK Judicial Studies Board Guidelines, and The Green Book - Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland, the Baremo, the Schmerzengeldtabelle, and local Italian tables were obtained and are referred to in this report.

Appendix 6: Extracts and Examples of Tables

The following are two extracts from Boletín Oficial Del Estado establishing the new Spanish Baremo. The horizontal line represents the injury's points on the invalidity scale, the vertical line represents the age of the claimant



| Edad del lesionado | | | | | | | | |
|--------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| PUNTOS | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 |
| 1 | 808,85 € | 805,70 € | 802,55 € | 799,39 € | 796,24 € | 793,09 € | 789,93 € | 786,78 € |
| 2 | 1.665,27 € | 1.658,59 € | 1.651,91 € | 1.645,23 € | 1.638,55 € | 1.631,86 € | 1.625,18 € | 1.618,50 € |
| 3 | 2.561,84 € | 2.551,31 € | 2.540,77 € | 2.530,23 € | 2.519,69 € | 2.509,16 € | 2.498,62 € | 2.488,08 € |
| 4 | 3.491,05 € | 3.476,37 € | 3.461,69 € | 3.447,01 € | 3.432,33 € | 3.417,64 € | 3.402,96 € | 3.388,28 € |
| 5 | 4.445,42 € | 4.426,36 € | 4.407,29 € | 4.388,22 € | 4.369,15 € | 4.350,09 € | 4.331,02 € | 4.311,95 € |
| 6 | 5.417,60 € | 5.393,95 € | 5.370,30 € | 5.346,65 € | 5.323,00 € | 5.299,34 € | 5.275,69 € | 5.252,04 € |
| 7 | 6.450,91 € | 6.422,30 € | 6.393,70 € | 6.365,09 € | 6.336,48 € | 6.307,87 € | 6.279,26 € | 6.250,65 € |
| 8 | 7.506,45 € | 7.472,70 € | 7.438,94 € | 7.405,18 € | 7.371,43 € | 7.337,67 € | 7.303,92 € | 7.270,16 € |
| 9 | 8.578,78 € | 8.539,69 € | 8.500,59 € | 8.461,49 € | 8.422,40 € | 8.383,30 € | 8.344,21 € | 8.305,11 € |
| 10 | 9.662,16 € | 9.617,59 € | 9.573,03 € | 9.528,46 € | 9.483,90 € | 9.439,33 € | 9.394,77 € | 9.350,20 € |
| 11 | 11.004,98 € | 10.954,55 € | 10.904,12 € | 10.853,70 € | 10.803,27 € | 10.752,84 € | 10.702,41 € | 10.651,98 € |
| 12 | 12.416,28 € | 12.359,73 € | 12.303,19 € | 12.246,64 € | 12.190,09 € | 12.133,54 € | 12.077,00 € | 12.020,45 € |
| 13 | 13.896,06 € | 13.833,13 € | 13.770,21 € | 13.707,29 € | 13.644,37 € | 13.581,44 € | 13.518,52 € | 13.455,60 € |
| 14 | 15.444,31 € | 15.374,75 € | 15.305,20 € | 15.235,65 € | 15.166,09 € | 15.096,54 € | 15.026,99 € | 14.957,43 € |
| 15 | 17.061,03 € | 16.984,59 € | 16.908,15 € | 16.831,71 € | 16.755,27 € | 16.678,83 € | 16.602,39 € | 16.525,95 € |
| 16 | 18.701,54 € | 18.618,13 € | 18.534,71 € | 18.451,30 € | 18.367,88 € | 18.284,46 € | 18.201,05 € | 18.117,63 € |
| 17 | 20.404,95 € | 20.314,32 € | 20.223,69 € | 20.133,07 € | 20.042,44 € | 19.951,81 € | 19.861,19 € | 19.770,56 € |
| 18 | 22.171,24 € | 22.073,17 € | 21.975,09 € | 21.877,02 € | 21.778,95 € | 21.680,87 € | 21.582,80 € | 21.484,73 € |
| 19 | 24.000,42 € | 23.894,67 € | 23.788,91 € | 23.683,16 € | 23.577,40 € | 23.471,65 € | 23.365,90 € | 23.260,14 € |
| 20 | 25.892,49 € | 25.778,82 € | 25.665,15 € | 25.551,48 € | 25.437,81 € | 25.324,14 € | 25.210,47 € | 25.096,80 € |
| 21 | 27.845,83 € | 27.723,99 € | 27.602,15 € | 27.480,31 € | 27.358,46 € | 27.236,62 € | 27.114,78 € | 26.992,94 € |
| 22 | 29.861,91 € | 29.731,66 € | 29.601,41 € | 29.471,16 € | 29.340,91 € | 29.210,65 € | 29.080,40 € | 28.950,15 € |
| 23 | 31.940,72 € | 31.801,82 € | 31.662,93 € | 31.524,03 € | 31.385,13 € | 31.246,24 € | 31.107,34 € | 30.968,44 € |
| 24 | 34.082,27 € | 33.934,49 € | 33.786,71 € | 33.638,93 € | 33.491,15 € | 33.343,37 € | 33.195,59 € | 33.047,81 € |
| 25 | 36.286,55 € | 36.129,65 € | 35.972,75 € | 35.815,85 € | 35.658,95 € | 35.502,05 € | 35.345,15 € | 35.188,25 € |
| 26 | 38.501,62 € | 38.335,57 € | 38.169,52 € | 38.003,47 € | 37.837,42 € | 37.671,37 € | 37.505,33 € | 37.339,28 € |
| 27 | 40.775,43 € | 40.600,01 € | 40.424,59 € | 40.249,17 € | 40.073,75 € | 39.898,33 € | 39.722,91 € | 39.547,49 € |
| 28 | 43.107,97 € | 42.922,96 € | 42.737,95 € | 42.552,94 € | 42.367,93 € | 42.182,92 € | 41.997,91 € | 41.812,90 € |
| 29 | 45.499,26 € | 45.304,44 € | 45.109,62 € | 44.914,79 € | 44.719,97 € | 44.525,15 € | 44.330,33 € | 44.135,51 € |
| 30 | 47.949,29 € | 47.744,43 € | 47.539,58 € | 47.334,72 € | 47.129,87 € | 46.925,01 € | 46.720,16 € | 46.515,30 € |
| 31 | 50.397,46 € | 50.182,58 € | 49.967,71 € | 49.752,83 € | 49.537,95 € | 49.323,08 € | 49.108,20 € | 48.893,32 € |
| 32 | 52.900,46 € | 52.675,36 € | 52.450,26 € | 52.225,15 € | 52.000,05 € | 51.774,94 € | 51.549,84 € | 51.324,74 € |
| 33 | 55.458,30 € | 55.222,76 € | 54.987,22 € | 54.751,69 € | 54.516,15 € | 54.280,61 € | 54.045,07 € | 53.809,54 € |
| 34 | 58.070,96 € | 57.824,79 € | 57.578,61 € | 57.332,43 € | 57.086,26 € | 56.840,08 € | 56.593,90 € | 56.347,72 € |
| 35 | 60.738,46 € | 60.481,44 € | 60.224,41 € | 59.967,39 € | 59.710,37 € | 59.453,35 € | 59.196,32 € | 58.939,30 € |

| PUNTOS | Edad del lesionado | | | | | | | |
|--------|--------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 |
| 1 | 877,78 € | 875,00 € | 872,49 € | 869,97 € | 867,46 € | 864,94 € | 862,43 € | 859,91 € |
| 2 | 1.809,72 € | 1.803,99 € | 1.798,81 € | 1.793,62 € | 1.788,44 € | 1.783,25 € | 1.778,07 € | 1.772,88 € |
| 3 | 2.787,52 € | 2.778,70 € | 2.770,71 € | 2.762,72 € | 2.754,74 € | 2.746,75 € | 2.738,76 € | 2.730,78 € |
| 4 | 3.802,92 € | 3.790,88 € | 3.779,98 € | 3.769,09 € | 3.758,19 € | 3.747,30 € | 3.736,40 € | 3.725,50 € |
| 5 | 4.847,53 € | 4.832,19 € | 4.818,30 € | 4.804,41 € | 4.790,52 € | 4.776,63 € | 4.762,75 € | 4.748,86 € |
| 6 | 5.913,22 € | 5.894,50 € | 5.877,56 € | 5.860,62 € | 5.843,68 € | 5.826,73 € | 5.809,79 € | 5.792,85 € |
| 7 | 7.047,04 € | 7.024,74 € | 7.004,55 € | 6.984,36 € | 6.964,17 € | 6.943,98 € | 6.923,79 € | 6.903,59 € |
| 8 | 8.206,38 € | 8.180,41 € | 8.156,90 € | 8.133,38 € | 8.109,87 € | 8.086,36 € | 8.062,84 € | 8.039,33 € |
| 9 | 9.385,65 € | 9.355,95 € | 9.329,05 € | 9.302,16 € | 9.275,27 € | 9.248,38 € | 9.221,49 € | 9.194,60 € |
| 10 | 10.578,06 € | 10.544,58 € | 10.514,27 € | 10.483,97 € | 10.453,66 € | 10.423,35 € | 10.393,04 € | 10.362,73 € |
| 11 | 12.043,74 € | 12.005,63 € | 11.971,12 € | 11.936,61 € | 11.902,10 € | 11.867,60 € | 11.833,09 € | 11.798,58 € |
| 12 | 13.583,58 € | 13.540,60 € | 13.501,68 € | 13.462,76 € | 13.423,84 € | 13.384,92 € | 13.346,00 € | 13.307,08 € |
| 13 | 15.197,58 € | 15.149,49 € | 15.105,95 € | 15.062,40 € | 15.018,86 € | 14.975,31 € | 14.931,77 € | 14.888,23 € |
| 14 | 16.885,74 € | 16.832,31 € | 16.783,93 € | 16.735,55 € | 16.687,17 € | 16.638,79 € | 16.590,40 € | 16.542,02 € |
| 15 | 18.648,07 € | 18.589,05 € | 18.535,62 € | 18.482,19 € | 18.428,76 € | 18.375,33 € | 18.321,90 € | 18.268,47 € |
| 16 | 20.436,16 € | 20.371,49 € | 20.312,93 € | 20.254,38 € | 20.195,83 € | 20.137,27 € | 20.078,72 € | 20.020,17 € |
| 17 | 22.292,36 € | 22.221,82 € | 22.157,94 € | 22.094,07 € | 22.030,20 € | 21.966,33 € | 21.902,46 € | 21.838,59 € |
| 18 | 24.216,68 € | 24.140,04 € | 24.070,66 € | 24.001,27 € | 23.931,89 € | 23.862,50 € | 23.793,11 € | 23.723,73 € |
| 19 | 26.209,10 € | 26.126,16 € | 26.051,07 € | 25.975,97 € | 25.900,88 € | 25.825,79 € | 25.750,69 € | 25.675,60 € |
| 20 | 28.269,64 € | 28.180,18 € | 28.099,18 € | 28.018,18 € | 27.937,19 € | 27.856,19 € | 27.775,19 € | 27.694,19 € |
| 21 | 30.396,90 € | 30.300,71 € | 30.213,61 € | 30.126,52 € | 30.039,43 € | 29.952,34 € | 29.865,24 € | 29.778,15 € |
| 22 | 32.592,14 € | 32.489,00 € | 32.395,62 € | 32.302,23 € | 32.208,85 € | 32.115,47 € | 32.022,09 € | 31.928,70 € |
| 23 | 34.855,36 € | 34.745,05 € | 34.645,19 € | 34.545,32 € | 34.445,45 € | 34.345,59 € | 34.245,72 € | 34.145,85 € |
| 24 | 37.186,55 € | 37.068,87 € | 36.962,33 € | 36.855,78 € | 36.749,23 € | 36.642,69 € | 36.536,14 € | 36.429,59 € |
| 25 | 39.585,73 € | 39.460,46 € | 39.347,04 € | 39.233,62 € | 39.120,19 € | 39.006,77 € | 38.893,35 € | 38.779,93 € |
| 26 | 41.996,43 € | 41.863,53 € | 41.743,21 € | 41.622,88 € | 41.502,55 € | 41.382,22 € | 41.261,89 € | 41.141,57 € |
| 27 | 44.470,78 € | 44.330,05 € | 44.202,63 € | 44.075,21 € | 43.947,79 € | 43.820,38 € | 43.692,96 € | 43.565,54 € |
| 28 | 47.008,76 € | 46.859,99 € | 46.725,31 € | 46.590,62 € | 46.455,93 € | 46.321,24 € | 46.186,55 € | 46.051,86 € |
| 29 | 49.610,37 € | 49.453,38 € | 49.311,23 € | 49.169,09 € | 49.026,95 € | 48.884,80 € | 48.742,66 € | 48.600,52 € |
| 30 | 52.275,63 € | 52.110,20 € | 51.960,42 € | 51.810,64 € | 51.660,86 € | 51.511,08 € | 51.361,30 € | 51.211,52 € |
| 31 | 54.938,81 € | 54.764,96 € | 54.607,55 € | 54.450,14 € | 54.292,72 € | 54.135,31 € | 53.977,90 € | 53.820,49 € |
| 32 | 57.661,40 € | 57.478,92 € | 57.313,71 € | 57.148,50 € | 56.983,29 € | 56.818,08 € | 56.652,87 € | 56.487,66 € |
| 33 | 60.443,38 € | 60.252,10 € | 60.078,92 € | 59.905,74 € | 59.732,56 € | 59.559,38 € | 59.386,19 € | 59.213,01 € |
| 34 | 63.284,76 € | 63.084,49 € | 62.903,17 € | 62.721,85 € | 62.540,52 € | 62.359,20 € | 62.177,88 € | 61.996,56 € |
| 35 | 66.185,54 € | 65.976,09 € | 65.786,46 € | 65.596,82 € | 65.407,19 € | 65.217,55 € | 65.027,92 € | 64.838,29 € |
| 36 | 69.071,72 € | 68.853,14 € | 68.655,24 € | 68.457,33 € | 68.259,43 € | 68.061,53 € | 67.863,62 € | 67.665,72 € |
| 37 | 72.013,19 € | 71.785,30 € | 71.578,97 € | 71.372,64 € | 71.166,31 € | 70.959,97 € | 70.753,64 € | 70.547,31 € |
| 38 | 75.009,95 € | 74.772,57 € | 74.557,66 € | 74.342,74 € | 74.127,82 € | 73.912,90 € | 73.697,98 € | 73.483,07 € |
| 39 | 78.061,99 € | 77.814,96 € | 77.591,30 € | 77.367,63 € | 77.143,97 € | 76.920,31 € | 76.696,65 € | 76.472,98 € |
| 40 | 81.169,32 € | 80.912,46 € | 80.679,89 € | 80.447,32 € | 80.214,76 € | 79.982,19 € | 79.749,63 € | 79.517,06 € |
| 41 | 84.249,53 € | 83.982,92 € | 83.741,53 € | 83.500,14 € | 83.258,74 € | 83.017,35 € | 82.775,96 € | 82.534,57 € |
| 42 | 87.381,01 € | 87.104,48 € | 86.854,12 € | 86.603,76 € | 86.353,39 € | 86.103,03 € | 85.852,67 € | 85.602,30 € |

Appendix 6: Extracts and Examples of Tables (continued)

The following is an extract from TABELLA DEL DANNO BIOLOGICO DI LIEVE ENTITA from Italy, issued in July 2016. The horizontal line represents the injury's points on the invalidity scale, the vertical line represents the age of the claimant

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
|-----------|--------|---------|---------|---------|---------|---------|----------|----------|----------|
| 1 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 2 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 3 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 4 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 5 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 6 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 7 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 8 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 9 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 10 | 790,35 | 1738,77 | 2845,26 | 4109,82 | 5927,63 | 8061,57 | 10511,66 | 13277,88 | 16360,25 |
| 11 | 786,40 | 1730,08 | 2831,03 | 4089,27 | 5897,99 | 8021,26 | 10459,10 | 13211,49 | 16278,44 |
| 12 | 782,45 | 1721,38 | 2816,81 | 4068,72 | 5868,35 | 7980,95 | 10406,54 | 13145,10 | 16196,64 |
| 13 | 778,49 | 1712,69 | 2802,58 | 4048,17 | 5838,71 | 7940,65 | 10353,98 | 13078,71 | 16114,84 |

The following is an extract from the most recent edition of the Schmerzensgeldtabelle, the German publication which provides examples of court decisions where awards for soft-tissue ('whiplash') injury claims were made.

Schmerzensgeld wegen einer HWS-Distorsion (Schleudertrauma)

HWS-Distorsion (Schleudertrauma)

leicht

HWS-Distorsion (Schleudertrauma) 313,- EUR bis 1.125,- EUR¹

Landgericht Bonn, Az. 15 O 83/08: Leichtes Schleudertrauma nach unverschuldeten Verkehrsunfall; Folgen: *zweiwöchige vollständige Arbeitsunfähigkeit*

Schmerzensgeld (2010): **1.000,- EUR** unverbindliche Hochrechnung¹ (2018): **1.125,- EUR**

Lesen Sie mehr zu dieser Entscheidung bei ...

Artikel bei [kostenlose-urteile.de](http://www.kostenlose-urteile.de) [<http://www.kostenlose-urteile.de/22635>]

Oberlandesgericht Saarbrücken, Az. 3 U 144/03: Leichtes Schleudertrauma nach unverschuldeten Verkehrsunfall; Folgen: *Schmerzen im Rücken- und Schultergürtelbereich, Druckschmerzen im Bereich des Nackens und der Halswirbelsäule, Arbeitsunfähigkeit von vier Tagen*

Schmerzensgeld (2003): **500,- EUR** unverbindliche Hochrechnung¹ (2018): **627,- EUR**

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Artikel bei [kostenlose-urteile.de](http://www.kostenlose-urteile.de) [<http://www.kostenlose-urteile.de/22734>]

Oberlandesgericht Koblenz, Az. 6 S 274/14: Leichtes bis mittelschweres Schleudertrauma nach Verkehrsunfall; Folgen: *Arbeitsunfähigkeit von vier Tagen*

Schmerzensgeld (2014): **500,- EUR** unverbindliche Hochrechnung¹ (2018): **526,- EUR**

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Artikel bei [kostenlose-urteile.de](http://www.kostenlose-urteile.de) [<http://www.kostenlose-urteile.de/23619>]

Oberlandesgericht München, Az. 10 U 824/14: Schleudertrauma nach Auffahrunfall

Schmerzensgeld (2015): **300,- EUR** unverbindliche Hochrechnung¹ (2018): **313,- EUR**

Lesen Sie mehr zu dieser Entscheidung bei ...

Artikel bei [kostenlose-urteile.de](http://www.kostenlose-urteile.de) [<http://www.kostenlose-urteile.de/24280>]

mittel

HWS-Distorsion (Schleudertrauma) 5.382,69 EUR bis 13.687,- EUR¹

Oberlandesgericht München, Az. 10 U 3341/13: Schleudertrauma 1. Grades nach Verkehrsunfall; Folgen: *chronische Nackenschmerzen, eingeschränkte Arbeitsfähigkeit, Trunkenheitsfahrt des Unfallverursachers wirkt sich schmerzensgelderhöhend aus*

Schmerzensgeld (2014): **13.000,- EUR** unverbindliche Hochrechnung¹ (2018): **13.687,- EUR**



Appendix 7: Comparative tables on OECD Statistics on Inflation (Consumer Price Index) and Gross Domestic Product (GDP) from countries referred to in Chapter 3 - Report on Alternative Compensation Systems and Resolution Models

<https://data.oecd.org/price/inflation-cpi.htm> - accessed 10/07/18

Inflation (CPI)

Total, Annual growth rate (%) Oct 2017 to Jun 2018

- Inflation (CPI)
- Total
- Annual growth rate (%)
- Oct 2017 – Jun 2018
- Source: Prices: Consumer prices - complete database

| Location ▼ | Oct-2017 | Nov-2017 | Dec-2017 | Jan-2018 | Feb-2018 | Mar-2018 | Apr-2018 | May-2018 | Jun-2018 |
|----------------|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| Canada | 1.39 | 2.10 | 1.87 | 1.70 | 2.16 | 2.31 | 2.22 | 2.22 | |
| France | 1.06 | 1.18 | 1.19 | 1.33 | 1.18 | 1.56 | 1.64 | 2.02 | |
| Ireland | 0.60 | 0.50 | 0.40 | 0.20 | 0.50 | 0.20 | -0.40 | 0.40 | |
| Italy | 1.00 | 0.90 | 0.90 | 0.89 | 0.50 | 0.79 | 0.49 | 0.99 | 1.38 |
| Netherlands | 1.33 | 1.50 | 1.25 | 1.46 | 1.21 | 1.02 | 1.11 | 1.74 | |
| OECD - Total | 2.19 | 2.37 | 2.32 | 2.17 | 2.21 | 2.26 | 2.26 | 2.58 | |
| Spain | 1.57 | 1.67 | 1.11 | 0.57 | 1.07 | 1.21 | 1.08 | 2.05 | |
| Sweden | 1.69 | 1.87 | 1.74 | 1.58 | 1.61 | 1.90 | 1.73 | 1.90 | |
| United Kingdom | 2.80 | 2.80 | 2.70 | 2.70 | 2.50 | 2.30 | 2.20 | 2.30 | |
| United States | 2.04 | 2.20 | 2.11 | 2.07 | 2.21 | 2.36 | 2.46 | 2.80 | |

<https://data.oecd.org/gdp/quarterly-gdp.htm#indicator-chart> – accessed 10/07/2018

Quarterly GDP

Total, Percentage change, previous period, 2010 – 2016

| Data table for: Quarterly GDP, Total, Percentage change, previous period, 2010 – 2016 | | | | | | | |
|---|--------|--------|--------|--------|--------|--------|--------|
| Location ▼ | ▼ 2010 | ▼ 2011 | ▼ 2012 | ▼ 2013 | ▼ 2014 | ▼ 2015 | ▼ 2016 |
| Australia | 2.47 | 2.67 | 3.93 | 2.22 | 2.54 | 2.51 | 2.57 |
| Canada | 3.08 | 3.14 | 1.75 | 2.48 | 2.86 | 1.00 | 1.41 |
| France | 1.95 | 2.19 | 0.31 | 0.58 | 0.96 | 1.11 | 1.17 |
| Germany | 4.09 | 3.65 | 0.50 | 0.48 | 1.93 | 1.75 | 1.94 |
| Ireland | 1.80 | 2.98 | 0.04 | 1.64 | 8.33 | 25.56 | 5.14 |
| Netherlands | 1.34 | 1.55 | -1.03 | -0.13 | 1.42 | 1.96 | 2.19 |
| New Zealand | 1.67 | 1.90 | 2.56 | 2.23 | 3.57 | 3.55 | 3.98 |
| OECD - Total | 2.98 | 2.03 | 1.35 | 1.49 | 2.19 | 2.56 | 1.80 |
| Spain | 0.01 | -1.00 | -2.93 | -1.71 | 1.38 | 3.43 | 3.27 |
| Sweden | 5.99 | 2.66 | -0.29 | 1.24 | 2.60 | 4.52 | 3.23 |
| United Kingdom | 1.71 | 1.64 | 1.45 | 2.05 | 2.95 | 2.35 | 1.79 |
| United States | 2.53 | 1.60 | 2.22 | 1.68 | 2.57 | 2.86 | 1.49 |

Personal Injuries Commission

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