An Bille um Dhliteanas Sibhialta (Leasú), 2017
Civil Liability (Amendment) Bill 2017

Meabhrán Mínitheach agus Airgeadais
Explanatory and Financial Memorandum

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EXPLANATORY AND FINANCIAL MEMORANDUM

Purpose of Bill

The purpose of the Civil Liability (Amendment) Bill is to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payments orders (PPOs) to compensate injured victims in cases of catastrophic injury where long term permanent care would be required. The Bill:

- gives the courts power to award damages by way of periodic payments orders;
- sets out principles regarding the security of payments of PPOs;
- provides that PPOs shall be subject to annual indexation;
- amends the Insurance Act 1964 to provide that the limits specified in section 3(4) of that Act shall not apply to PPOs;
- amends various provisions of the Bankruptcy Act 1988 to protect a claimant's periodic payment award in the event of the claimant's bankruptcy;
- amends the Taxes Consolidation Act 1997 to provide an exemption from income tax in respect of payments made to persons under a PPO; and
- amends the Civil Liability and Courts Act 2004 to make clear the matters the court must consider in awarding costs in cases involving PPOs.

Main Provisions of Bill

Preliminary and General

Section 1 of the Bill is a standard provision dealing with the short title, collective citation and commencement.

Insertion of new Part in Civil Liability Act 1961

Section 2 of the Bill inserts a new part (Part IVB) into the Civil Liability Act 1961 which contains the main provisions dealing with periodic payments orders. In effect it inserts a suite of new sections (sections 51H to 51O) into the 1961 Act.

Section 51H is an interpretation section for the new Part. Of particular interest is the definition of "catastrophic injury", which is defined as meaning "a personal injury which is of such severity that it results in a permanent disability requiring the person to receive life-long care and assistance in all activities of daily living or a substantial part thereof". The section also provides a definition of "activities of daily living" as including activities such as dressing, eating, walking, washing and bathing.

Section 51I is a very important provision relating to the power of the court to award damages by way of periodic payments orders. *Subsection (1)* provides that where a court is awarding damages to a catastrophically injured person it may order that all or part of the damages for future medical treatment, future care of the plaintiff and the provision of assistive technology be paid by way of a periodic payments order. In addition, where all parties are in agreement, damages in respect of future loss of earnings may also be paid by periodic payments order.

Subsection (2) sets out the issues which the court should consider in deciding whether to make a periodic payments order. The court must have regard to the best interests of the plaintiff. The court must also take account of the nature of the injuries suffered by the plaintiff and the preferences of all the parties regarding the form of award which would best meet the needs of the plaintiff.

Subsection (3) relates to a situation where the parties agree to the payment of damages by way of periodic payments. In such circumstances the parties may apply to the court for a PPO in accordance with the terms of the agreement and the court may make a PPO on the agreed terms, refuse the application for a PPO or refuse the application and make a PPO under *subsection (1)*.

Subsections (4) and (5) deal with the issue of what is termed a "stepped payment". The subsections seek to anticipate possible changes in the plaintiff's circumstances during his or her life. *Subsection (4)* provides that a court may make provision that a PPO may increase or decrease from a specified date by a specified amount to cater for anticipated changes in the plaintiff's needs. *Subsection (5)* lists the changes in circumstances which may form the basis of a stepped payment including entry into primary, secondary or third level education, reaching the age of 18 years or changes to the care needs of the patient including transfer to residential care.

Subsection (6) outlines the matters which must be included in a PPO made by the court the annual amount awarded to the plaintiff, the frequency of payments, a breakdown of the damages between the matters referred to in *subparagraphs (a)* to *(d)* of *subsection (1),* the method of payment, indexation of the payment and provisions relating to any stepped payment.

Subsections (7) to (9) relate to the procedures to be followed where a PPO contains a stepped payment and the anticipated change in the plaintiff's circumstances does not occur.

Section 51J deals with the vitally important issue of security of periodic payment orders. The section provides, in essence, that a court may only make a PPO where it is satisfied that the continuity of payments under the PPO are reasonably secure (*subsection (1)*).

Subsection (2) sets out the matters which the court shall have regard to when considering whether the continuity of payments is reasonably secure. Subparagraph (a) relates to State defendants, particularly State Authorities which are covered by the State Claims Agency under either the Clinical Indemnity Scheme or the General Indemnity Scheme. Subparagraph (b) is intended to cover those State Authorities which are not indemnified by the State Claims Agency but by separate insurance policies and also private defendants covered by insurance companies which have signed up to the Insurance Compensation Fund. Subparagraph (c) concerns all other cases i.e. where the defendant is not covered under either subparagraph (a) or (b), and the defendant puts forward a PPO which is guaranteed by some other means.

Subsection (3) provides that in cases covered by *subsection (2)(c)* the court must have regard to whether the means of guaranteeing the payments in a PPO will last for the lifetime of the plaintiff and can be indexed in accordance with section 51L.

Section 51K provides that a paying party must make application to the court where it proposes to alter the method of payment of a PPO. Such application shall be on notice to the plaintiff. The court may make an alteration to the method of payment as proposed by a paying party if the plaintiff consents to the alteration and where the court is satisfied that continuity of payments is secure and the altered method of payment is capable of indexation in accordance with section 51L.

Section 51L deals with the issue of indexation of payments. Essentially the section provides for the adjustment on an annual basis of a payment under a PPO in line with the prevailing rate under the Harmonised Index of Consumer Prices. The section provides also for a review of the application of the index after a 5-year period to determine the HICP's suitability for use in PPOs. Where, following the review, an alternative index is considered to be more suitable for the purposes of PPOs, the Minister may, by regulation and with the consent of the Minister for Finance, specify an alternative index for use in determining the adjustments of a PPO.

Section 51M relates to the assignment, commutation or charging of a right to periodic payments. While a plaintiff may apply to the court for approval to assign, commute or charge the right to a PPO, the PPO may not be assigned, commuted or charged without the approval of the court. Any assignment, commutation or charging done without the approval of the court shall be void. The section also outlines the matters the court must consider when determining if an application by the plaintiff shall be approved.

Section 51N provides that a plaintiff or a defendant may appeal a decision of the High Court under section 51I, 51J or 51M to the Court of Appeal on a point of law.

Section 51O deals with the application of the new Part IV. The Part will apply to proceedings that are brought on or after the commencement of the Part, or in respect of which no final decision has been made on the date of such commencement.

Amendment of Insurance Act 1964

Section 3 of the Bill amends section 3 of the Insurance Act 1964. Section 3 of the Insurance Act 1964 (as amended) deals with payments from the Insurance Compensation Fund where an insurance company goes into liquidation. Subsection 3(4) deals with the maximum amounts that may be paid from the Fund in the event of a liquidation of an insurance company. It provides that the total amount that may be paid out of the Fund under subsection (1) in respect of any sum due to a person under a policy shall not exceed (whether as one payment or as the total of a series of payments) 65 per cent of that sum, or €825,000, whichever is the less. *Section 3* of the Bill provides that the limits specified in section 3(4) of the Insurance Act 1964 shall not apply where the court has made a Periodic Payments Order under Part IVB of the 1961 Act.

Amendment of Bankruptcy Act 1988

Section 4 of the Bill makes a number of technical amendments to the Bankruptcy Act 1988. The purpose of the amendments is to protect a claimant's periodic payment award in the event of the claimant's bankruptcy so that a claimant will continue to have the possibility of receiving the resources needed to cover necessary long-term care and medical attention and that such resources would not be available for distribution to creditors by the Official Assignee.

Amendment of Taxes Consolidation Act 1997

Section 5 of the Bill inserts a new section 189B in the Taxes Consolidation Act 1997. The purpose of the new section is to provide an exemption from income tax in respect of payments made to persons under a periodic payments order. The exemption shall apply to PPOs made in this jurisdiction and to similar orders made in other jurisdictions. In this way, PPOs will have the same tax exempt status as exists for payments for damages under a lump sum arrangement.

Amendment of Civil Liability and Courts Act 2004

Section 6 of the Bill relates to the issue of costs in personal injury cases. Section 17 of the Civil Liability and Courts Act 2004 provides that all parties in a personal injuries action shall make a formal offer of settlement prior to the commencement of a trial in the action and that the offer must be lodged in court. On the conclusion of the case, the court may, in making a decision on costs, have regard to the terms of the formal offers and the reasonableness of the conduct of the parties in making the offer.

Section 6 of the Bill inserts two new subsections into section 17 of the 2004 Act:

- new subsection (2A) provides that in a catastrophic injury case involving a PPO, any offer made in a bid to settle the case must include the amount of the offer attributable to future pecuniary loss and the relevant portions of that amount attributable to medical care, treatment, etc.; and
- new subsection (5A) specifies the matters the court must have regard to in determining the making of orders for costs in a catastrophic injury case involving a PPO.

Financial Implications

It is anticipated that the legislation will be beneficial to the Exchequer in the short and medium term as it will remove the possibility that the State would be obliged to make lump sum payments in respect of cases which are currently the subject of interim periodic payment orders.

An Roinn Dlí agus Cirt agus Comhionannais,

Eanáir, 2017.

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