

Appendix 9 - Proposal re Compensation Recovery Unit

It had been intended that recovery of health and social care costs would be included in the Department of Justice and Equality Civil Liability (Amendment) Act, which put in place legislation to empower the courts, as an alternative to lump sum awards of damages, to make consensual and non-consensual periodic payment orders (PPOs) to compensate injured persons in cases of catastrophic injury where long term permanent care would be required.

PPOs will be applied in dealing with birth injury claims managed by the State Claims Agency. The Bill has a broader application, for example, in an award covering the future care costs to a person who has suffered a brain injury in a car accident, or an award to a claimant who has suffered a spinal injury in the work place resulting in a catastrophic injury.

The Department of Justice and Equality requested the Department to draft and support a provision in the Bill to address the issue of recovery of costs for health and social services provided by or on behalf of the HSE from the PPO award. This would include but not be limited to recovery of costs for medical card, long term illness card, hospital inpatient charges, home care packages, physiotherapy, occupational therapy etc.

Recovery of costs by the State for services provided by the HSE is a sound principle and was recommended by the *Working Group on Medical Negligence Litigation and Periodic Payments in 2010*. The principle has been applied successfully by the Department of Social Protection in recovering the costs of social welfare benefits from court awards.

Recovery of costs is also applied successfully by private health insurers for health services provided privately.

Clinical Indemnity Unit had been working on draft Heads to provide for recovery of costs from PPO awards. However, a number of issues arose in the drafting of the Heads.

1. Equity - To limit recovery of health and personal social services costs to periodic payment awards was inequitable, unless lump sum awards and other personal injury awards are also subject to the same statutory recovery of costs. The scale of the inequity is demonstrated when it is taken into account that the SCA indicated that the cost of a medical card over the lifetime of a catastrophically injured person would range from €350,000 to €500,000 at a minimum. The value of medical cards and other services are quantifiable by the PCRS in the HSE. A block of work would need to be done by the HSE to assess a fair cost for each element of recoverable costs.

2. Perverse Incentive - Providing for statutory recovery of health and personal social service costs in a PPO award and not in a lump sum award, would provide a perverse incentive for insurers and particularly private insurers to opt for a lump sum award. This is in circumstances where the Real Rate of Return is currently incentivising plaintiffs to opt for a lump sum. To prevent this double recoverability should apply to all payments.

3. Broader Context The HSE has indicated to the Department that the State is incurring a significant loss of income under the Health Amendment Act 1986, which allowed for the recovery of charges for in-patient treatment by the HSE following RTAs. Under this legislation an award is made to the Plaintiff and the HSE must then pursue the person for in-patient hospital costs. This legislation will need to be amended and aligned with the current proposed recovery of costs legislation from the paying party/compensator.

4. Consultation with Stakeholders and Government Approval

Consultation would be necessary with a number of stakeholders e.g. Department of Finance (SCA), the insurance industry, Department of Justice and Equality, Department of Jobs (Injuries Board) and the HSE. Since the Department of Social Protection already recovers costs it would make a valuable contribution. The proposal to set up an agency for the purpose of recovering all costs would be worth further consideration.

The State Claims Agency has indicated that while legislation would considerably strengthen their position to recover costs, the absence of legislative provisions in relation to PPOs and lump sum does not preclude the Agency from including these costs in their settlement negotiations with the plaintiffs' legal advisors. However, amounts to be recovered in the case of lump sum awards are decided on a very arbitrary basis at present.

5. Conclusion

The Civil Liability (Amendment) Act did not make provision for recovery of costs. However, for the reasons above and for the potential recovery to the State of health and social care costs the proposal to examine the merits of establishing a Compensation Recovery Unit and the legislation for this purpose should be considered further.