

## The Reduction in Damages

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### 1. *Bridget Delaney v The Personal Injuries Assessment Board, The Judicial Council, Ireland and the Attorney General* [2024] IESC 10

The decision of the Supreme Court in *Delaney* confirmed that the Personal Injuries Guidelines must be applied by any Judge hearing a claim for damages for personal injuries.

The Court had concluded that the power which had been given to the Judicial Council to make Guidelines contained in Section 7(2)(9) of the Judicial Council Act, 2019 was “*unconstitutional in its present form*”.

However, a majority of the Court found that the Guidelines were valid because they had been affirmed in the Family Leave and Miscellaneous Provisions Act, 2021.

One significant consequence of the *Delaney* decision is that any revision to the Guidelines will have to be by way of legislative intervention. [Section 18, Subsection 5]

In assessing damages a Court is obliged to:

- a) have regard to the Personal Injury Guidelines, and,
- b) where the Court departs from the Personal Injuries Guidelines, to state the reasons for such departure.

In *Delaney*, three members of the Supreme Court stated that the Guidelines should only be departed from where there was no “*reasonable proportion*” between the Guidelines and the award which should otherwise have been made. This sets a high threshold for departure from the guidelines.

## 2. The Guidelines

The introduction of the Judicial Guidelines has had significant consequences in terms of the practice of personal injuries in the High Court. There is a perception that any proposed proceedings involving what are classified as “*moderate*” injury to the neck or back should not be brought in the High Court because of the value bands provided.

It is the comprehensive nature of the description of the injuries contained within the categories which demand caution from practitioners. An example is provided by the category of “*Moderate back injuries*”. The guidelines split “*moderate*” injuries into two subcategories.

The first subcategory applies to what are described as:

- I. “A wide variety of injuries where the claimant will have **residual disability**, albeit of less severity than in the higher brackets. Examples include:
  - A **compression/crush factor of the lumbar vertebrae** with a substantial risk of osteoarthritis and a significant level of ongoing pain and discomfort;
  - **Traumatic spondylolisthesis** with continuous pain and a probability that spinal fusion will be necessary;
  - **Prolapsed intervertebral disc requiring surgery**;
  - **Damage to an intervertebral disc with nerve root irritation and reduced mobility.**”

The classification of such injuries as “*Moderate*” is significant. These are injuries which constitute what would previously have been considered by practitioners to fall within the category of “*serious*” injury thus requiring High Court proceedings.

The Book of Quantum (2016) defines a “*severe and permanent*” injury to the back as follows:

*“The most severe category. These injuries will have also affected the structure of the back and the discs, resulting in serious limitation of movement and the requirement for surgery. Little or no movement regained on a permanent basis*

*resulting in ongoing pain and stiffness with a necessity to wear a back brace/support for long periods in the day.”*

The value band attributed to such injury by the Book of Quantum is between €52,300 and €92,000.

Now, if an injury does come within the categorization of the more serious of the “*Moderate back injuries*” the value band for such damages is only €35,000 to €55,000.

The Guidelines second subcategory is as follows:

- II. *“Injuries to the back less severe than those included in the higher brackets. These will include injuries causing disturbance of ligaments and muscles causing pain and discomfort, soft tissue injuries resulting in a prolonged acceleration and/or exacerbation of a pre-existing back condition, usually by five years or more.”*

The Book of Quantum (2016) provided that “*Moderately severe*” back injuries were as follows:

*“These injuries involve the soft tissue or wrenching type injury of the more severe type resulting in serious limitation of movement, recurrent pain, stiffness and discomfort and the possible need for surgery or increased vulnerability to further trauma. This would also include injuries which may have accelerated and/or exacerbated a pre-existing condition over a prolonged period of time, usually more than five years resulting in ongoing pain and stiffness.”*

The bracket for damages for “*Moderately severe*” back injuries under the Book of Quantum was €32,100 to €55,700.

Now the bracket for damages in the second category of “*Moderate*” is between €20,000 and €35,000.

The net effect of this re-categorisation of injuries is that most injuries of a soft tissue nature are likely to be viewed as coming within the “*moderate*” category provided in the Guidelines. Such a categorisation should lead to proceedings being instituted in the Circuit Court. If brought in the High Court it is likely that a Circuit Court award will follow with inevitable application for penalty costs orders.

### 3. How to Assess the Injuries

The approach to the assessment of damages is set out in the Guidelines:

1. At the conclusion of every case it is the task of each party to:

*“Identify, by reference to the **dominant** injury sustained the relevant damages in the Guidelines which most closely matches that supported by the evidence.”*

2. The Guidelines continue:

*“Brief submissions should also be made as to where, within the relevant bracket of damages the claimant’s injury should be **located** in terms of severity i.e., top, middle or bottom, having regard to the evidence, the presence or absence of other lesser injuries and all relevant considerations.”*

3. Insofar as **multiple injuries** are concerned, in addition to the requirement to identify the dominant injury its bracket and its location within the bracket, the Guidelines provide:

*“The assessment of general damages in cases involving multiple injuries gives rise to special difficulty given that in these Guidelines each injury is valued separately. The principal difficulties stem from the fact that there will usually be a temporal overlap in the injuries sustained such that if each injury was to be valued separately the claimant would be overcompensated to the point that the award would be unjust to the defendant and disproportionate when compared to other awards commonly made for other greater or lesser injuries”.*

The Guidelines continue:

*“In a case of multiple injuries, the appropriate approach for the trial judge is, where possible, to identify the injury and the bracket of damages within the Guidelines that best resembles the most significant of the claimant’s injuries. The trial judge should then value that injury and thereafter **uplift** the value to ensure that the claimant is fairly and justly compensated for all of the additional pain, discomfort and limitations arising from a lesser injury/injuries”.*

The Guidelines continue:

*“It is of the utmost importance that the overall award of damages made in the case involving multiple injuries should be proportionate and just when considered in light of the severity of other injuries which attract an equivalent award under the Guidelines.”*

#### 4. The Approach of the Court of Appeal in Cases involving Multiple Injuries

The Court of Appeal has considered the issue of multiple injuries on a number of occasions. One such case is the decision of the Court in the case of *Agnieszka Zaganczyk v John Pettitt Wexford Unlimited Company and CM Delaney Limited* [2023] IECA 223.

In *Zaganczyk*, the Court of Appeal reduced an award of €90,000 to €65,000, the defendant having successfully contended that the award of general damages of €90,000 was excessive and had been arrived at erroneously by a misapplication of the Guidelines.

The plaintiff was a chef in a delicatessen owned by Supervalu in Wexford and had been involved in an accident at her place of work on the 12th of January 2020. She had been engulfed in flames when the gas oven that she went to turn on exploded. The plaintiff suffered burn injuries to the left side of her face and the neck, ear and left hand/arm, but also suffered psychiatric injuries.

Liability was conceded and the case proceeded as an assessment of damages. It is clear from the judgment that the psychiatric injuries suffered by the plaintiff were of some significance because she had contemplated suicide and had suffered flashbacks, insomnia, and nightmares. She had also begun to drink to excess, a problem which had continued for between four and six months.

She had been diagnosed as suffering from PTSD, but she had recovered by the time of her examination by Dr Cryan some 26 months after the accident. It appears to have been common case that the physical injuries had recovered within a period of four weeks.

In assessing general damages at €90,000 the trial judge said as follows:

*“Turning to the plaintiff’s psychiatric injuries she suffered mental injury in the form of diagnosed post-traumatic stress disorder and, in addition to this, she also suffered separately identified and diagnosed psychological injury in the form of basically an alcohol abuse disorder and depression.”*

The approach of the trial judge was to identify the most significant (or dominant injury.) He classified this as the PTSD. He accepted that the evidence established that the injuries should clear up within a period of about 30 months.

He found as a consequence that the post-traumatic stress disorder injury was at the lower end of the serious category (value band €35,000 to €80,000) and determined that a figure of €45,000 was appropriate by way of damages.

He then added a further sum of €20,000 in respect of what he found to be a separate injury in respect of drink and depression. Finally, the trial judge added the sum of €25,000 in respect of burns and scarring stating that he didn't regard these as serious.

Thus, there were three separate elements to the award; a) PTSD, b) alcohol disorder and depression and c) burns and scarring.

The trial judge looked at the overall figure and determined that €90,000 was a fair and reasonable award and was proportionate. Thus, he made no reduction for the fact that there were multiple injuries and carried out a simple mathematical exercise.

The Court of Appeal identified a number of errors in the approach. Mr Justice Noonan delivering the judgement of the Court said as follows (at paragraph 34):

*"First, it is questionable, in principle, if there is any objective justification for ascribing figures to first, the plaintiff's PTSD and secondly, her alcohol abuse disorder and depression. The Guidelines define PTSD as including mood disorder and undoubtedly depression is a mood disorder."*

The Court noted that *"the genesis of the differentiation"* by the trial judge had come from Dr Cryan's report in which she had suggested that the plaintiff fulfilled the criteria for a diagnosis of alcohol use disorder persisting for approximately nine months. The Court noted that *"on one view of matters"* Dr Cryan had identified three different psychiatric conditions namely PTSD, alcohol-use disorder and depression.

The Court of Appeal determined that the trial judge had been wrong to proceed as if there were three separate categories of injuries (the Court noted that this was one of the dangers associated with the agreeing of medical reports in litigation). There were only two.

The second error was the determination that the PTSD should be considered *"serious"*. The Court of Appeal found that it could not be considered serious for two reasons:

Firstly, both plaintiff and defendant counsel had conceded in submissions that it was moderate and:

*“Counsel for the plaintiff very fairly accepted this at the hearing of the appeal and conceded that the judge had erred in placing the PTSD in the serious categories.”*

Secondly, *“and quite apart from that”*, to qualify for the serious category, the Court would have to be satisfied that the effects of the PTSD were still likely to cause significant disability for the foreseeable future. The Court noted that

*“...there was absolutely no evidence to sustain such a finding and indeed the evidence was to the opposite effect, in particular, that the plaintiff no longer satisfied the criteria for PTSD by the time her case came to trial in Court”.*

Therefore, the Courts concluded that the trial judge had erred in finding that the injury was within the serious category and concluded that the maximum award which should have been made in the High Court was €35,000 (value bracket; €10,000 - €35,000).

The Court next found that there was:

*“...no basis established in the evidence for the award of a further sum on top of the €45,000 incorrectly assessed for the PTSD. A cumulative award for psychiatric injury in this case of €65,000 clearly offends the doctrine of proportionality.”*

The Court then considered the type of injuries which the Guidelines indicate should attract damages of €90,000. The Court noted, in particular, the fact that the loss of one eye is valued at between €80,000 and €120,000. Thus, the Court substituted an award of €60,000.

This case is notable for the following:

- a) The necessity to correctly identify the bracket of damages into which an injury fits;
- b) The necessity to then satisfy the Court as to where within that category the injury should be located;
- c) The necessity to consider and reference any other categories of injuries which are of relevance provided for in the Guidelines;
- d) The necessity to consider and reference other Court awards for similar injuries.



A more recent decision is that of the Court of Appeal in *Courtney Collins v Steffan Parm and Others* 2024 IECA 150 in which the Court reduced an award of €90,000 to €55,000 a reduction of 35% essentially because the Judge had failed to correctly categorise the psychiatric injury. The Judge had failed to categorise it as a “*moderate*” psychiatric injury and also failed to apply a reduction to the cumulative value of the non-dominant injuries to take account of the overlap. In *Collins* the Court discounted the non-dominant injuries by 33.3% to “*fairly reflect the temporal overlap*” of such injuries.

## 5. The Decision of Mr Justice Coffey in *Keogh v Byrne*

A case which exemplifies the correct approach to dealing with multiple injuries is the decision of Mr Justice Coffey in *Keogh v Byrne* [2024] IEHC 19.

The plaintiff was a member of An Garda Síochána and he was born on the 13th of May 1984. He had suffered multiple injuries as a result of a road traffic accident which had occurred on the 18th of September 2021 when the defendant drove across his path when he was on a Garda motorcycle causing a collision. Liability was not in issue.

The injuries sustained were as follows:

- a) A severely displaced and angulated fracture to the shaft of the radius and ulna of his non-dominant left forearm;
- b) A severe articular fracture dislocation of the wrist of his dominant right hand;
- c) Testicular Bruising from hitting the motorcycle; and,
- d) Minor soft tissue injuries including bruising to his thighs, chest and ribs.

The plaintiff required “*major orthopaedic reconstructive surgery*”. He made, however, what the trial judge noted had been described by his treating orthopaedic surgeon as a “*remarkable recovery*” from a “*potential life-changing injury*”.

The evidence established that at the time of a medical review in April 2023 the plaintiff’s position was that he had the following:

- a) A residual and permanent feeling of weakness in both arms together with intermittent pain, stiffness and a loss of motion;
- b) A risk of developing post-traumatic arthritis in his right wrist, and;
- c) An unsightly soft tissue mass on his left arm.

Coffey J. confirmed that the case fell to be decided upon under the Personal Injuries Guidelines and he explained as follows (see paragraph eight):

*“At their core, these principles require the trial judge to arrive at an award that is fair to all parties and proportionate. The principle of fairness requires that the*

*Court must take full account of the impact of the relevant injury on the plaintiff but only to the extent to which they're suffering is properly attributable to the wrongdoing of the defendant."*

Coffey J. then explained the principle of proportionality stating that it:

*"...requires that the award must be proportionate to the maximum and equivalent awards available under the Guidelines and to awards made by the Courts where directly comparable."*

Coffey J. considered the terms of the Guidelines themselves and two decisions of the Court of Appeal namely:

- *Meehan v Shawcross* [2022] IECA 208, and,
- *Zaganczyk v John Pettitt Wexford Unlimited Company* [2023] IECA 223

The judge stated as follows at paragraph 12:

*"It is evident from the foregoing that in the case where a Court is required to assess general damages for multiple injuries having regard to the Guidelines, the trial judge should follow a **two-stage process** in order to ensure that the overall award is fair to all parties and proportionate."*

He explained that the "**two-stage process**" required the following:

*"First, the Court must ensure that the plaintiff is compensated for all their pain and suffering which results from their injuries. This requires the trial judge to consider the relevant guidelines for each injury and to apply the principles of fairness and proportionality in order to assign a value to each injury that is fair to all parties and proportionate."*

He explained that the second part of the "**two-stage process**" was;

*"...Secondly, whether it is possible to do so by reference to the plaintiff's 'most significant injury' or not, the Court is obliged to ensure that **the overall award** is itself fair to all parties and proportionate."*

This second part requires the trial judge to step back from the individual injuries and their corresponding assigned values in order to "*holistically evaluate cumulative*

*effects*” of all of the injuries on the plaintiff and to adjust the ultimate award in order to avoid over or under-compensation.

He then identified how a Court might arrive at a discount and noted that it might involve a deduction from the value assigned to the lesser injuries or from the initial aggregate amount or might indeed be expressed as a percentage or a specified sum.

Coffey J. assessed the “*severely displaced and angulated fracture to the shaft of the radius and ulna*” as the dominant injury and classified this as being at the lower end of the second tier of the severe category. He assigned to this injury a value of €55,000 (he included in this assessment the permanent of substantial cosmetic disfigurement of the forearm by unsightly scars and a very noticeable soft tissue mass).

He next considered the injury to the right wrist as straddling the divide between moderate and serious categories and he assigned a value of €42,000 to this injury. He then assigned a value of €3,000 to the other relatively minor but painful injuries (including the bruising of the testicles).

The totality of the awards (if added together as mathematical exercise) would have resulted in an award of €100,000. Instead applying the doctrine of proportionality to take account of the overlap of injuries Mr Justice Coffey allowed a discount of €15,000 to the lesser injuries giving an overall award of €85,000.

## 6. **Conclusions**

- A. Injuries of a soft tissue nature are likely to warrant proceedings being instituted in the Circuit Court
- B. Legal Practitioners must assist the Court in firstly identifying the **dominant** injury and secondly in identifying the **location** of that dominant injury within the category of relevance.
- C. In a case involving multiple injuries the Court should, having assessed the dominant injury, then look at the other injuries and apply a value to each.

However rather than carrying out a mathematical exercise at the end of that procedure, the Court should apply the principle of proportionality so as to ensure that there is an award which is fair and reasonable to all parties. This is likely to result in a reduction in the value to be attributed to the non-dominant injuries.

**Jeremy Maher SC**

**December 2024**