Recovery of health charges in a personal injuries action

Larry McMahon (Solicitor)

A recent Supreme Court judgment has introduced significant changes for insurance companies in relation to the hospital charges they will have to pay for persons injured in road traffic accidents.

Those representing defendants in personal injuries actions will be familiar with the flat daily figure of €190.46 (£150) previously allowed for hospital in-patient charges arising out of road traffic accidents. Until recently this was the maximum figure that insurance companies had to pay, regardless of the amount charged by the hospital. In most circumstances the plaintiff would be responsible for paying the balance of charges but these costs were normally settled between the plaintiff and the hospital and the court proceedings against the defendant would be struck out by the making of a Kinlen Order (a procedure named after Kinlen J. in a case that set a maximum limit for hospital charges at €190.46 (£150) per day).

This procedure has now changed and insurers should review their positions in light of the Supreme Court decision in *Eastern Health Board v Derek Crilly and FBD Insurance Plc*.

Background to the case

Derek Crilly was severely injured in a road traffic accident in September 1989. He was a patient in a number of hospitals and underwent extensive treatment at Beaumont Hospital. He successfully sued the defendants for negligence and the High Court awarded damages in the sum of €2,116,752.60 (£1,667,078.20).

Since section 2 of the Health (Amendment) Act, 1986 applied to Mr Crilly, the Health Board made a charge pursuant to that section in respect of the treatment that he had received for his injuries. The charges made by the Health Board were recoverable from the defendants and ultimately the defendants' insurers; FBD Insurance Plc. Section 2 of the 1986 Act provides a distinct charging system for victims of road traffic accidents.

An issue arose as to the level of charge being imposed by the Health Board (known as the average daily costs charge) and, in particular, as to their manner of calculation. However, the High Court stated that it was unreasonable for the defendants to bear the costs of a special road traffic accident rate in hospital over and above the ordinary rate. Consequently, the High Court set the rate at €125.70 (£99) per day, but granted liberty to the hospital to explain why they considered it fair to charge this extra rate for road traffic accident victims to the defence.

The Supreme Court decision

The Eastern Health Board decided to appeal the issue as to the method of charging of the hospital bill to the Supreme Court. (While it had settled the case with the insurers it decided to go ahead with the test case to the Supreme Court). In its' decision the Supreme Court decided that:

- The injured party was now to be charged for the cost of a hospital stay based on the economic rate for that hospital
- The Health Board did not have to charge precisely according to the services given. However, the charge could not be arbitrary, unjust or partial.

The effect of the decision

The Supreme Court decision has introduced uncertainty for insurers as to their position on hospital charges. They no longer have the luxury of the certainty of the maximum daily hospital charge of €190.46 (£150).

In that regard, a plaintiff's solicitor will be conscious of the potential liability of his client to any charges not covered in a settlement meeting, and is now likely to insist on the entire hospital bill being paid.

Hospitals will now be able to recover the full costs of treating road accident victims from insurance companies as a result of this test case - a judgment that could benefit hospitals by

continued inside

orourke reid
LAWFIRM

LITIGATION NEWS

ISSUE **No. 2**
JANUARY 2002

orourke reid bookmark ...

In the last edition of Litigation News we featured an article on tackling bullying in the workplace. The Minister for Labour, Trade and Consumer Affairs has now formally launched the Dignity in the Workplace Charter and has encouraged all employers to adopt the Charter...

A member of the Travelling community has been awarded £5000 for refusal of access to employment. After her first day's work as a cleaner at the Plaza Hotel in Tallaght, the complainant was told that there would be no more work for her as it had been a trial day. A supervisor commented that the complainant "did not have the same concept of cleaning as other people but how could she be expected given the way they lived". The Equality Officer found that the hotel used trial days on a selective basis, the complainant's work had been satisfactory and the comment made by the supervisor amounted to discrimination under the Employment Equality Act, 1998...

New Regulations have been published that give certain consumer protection bodies the power to seek orders from the Circuit Court to prevent actions infringing national law designed to protect the interests of consumers. The bodies can seek orders requiring persons to cease acting against the collective interests of consumers in the areas of misleading advertising, package travel; contracts negotiated away from business premises; consumer credit; television broadcasting activities; advertising of medicinal products; unfair terms in consumer contracts; timeshare and distance contracts. The list of Irish authorities, which are qualified to seek orders from the Circuit Court, is not yet available.

ISSUE **No. 2**
JANUARY 2002

orourke reid
LAWFIRM

Please tear along perforated line & keep

Recovery of health charges in a personal injuries action

contd. from cover page

several million pounds. As the certainty in claims costs for insurers has been removed, insurers will now have to review all outstanding claims and, if necessary, adjust their reserves to meet this increased cost.

However, this does not mean that hospitals can charge what they like. Whilst the Supreme Court could not specify or suggest a charge they have stressed that any charge imposed under section 2 of the 1986 Act must be reasonable.

When the Crilly case came before the High Court the Eastern Health Board claimed that the average daily cost of in-care facilities in Beaumont was €276.80 (£218) in 1989 and €317.43 (£250) in 1990/91. These costs will have risen considerably since then and it is likely that hospitals will be able to charge the insurance companies more than twice as much today for treating injured persons for traffic accidents.

All acute hospitals will benefit from the ruling but Beaumont, Cork University Hospital and the Mater, which treat people injured in the worst road accidents in the State, stand to benefit particularly.

Changes in monetary jurisdiction

Gordon Murphy
(Senior Associate)

In the last edition of Litigation News we told you that changes in the monetary jurisdiction of the District and Circuit Courts were scheduled to come into force later this year.

A spokesperson for the Department of Justice has recently confirmed that these changes will not be formally enacted until mid-2002.

Proposed changes

The proposed changes are incorporated in the Court and Court Officers' Bill, 2001. The increases in jurisdiction mean that the District Court will handle cases with a monetary limit of €15,000 (more than doubling its' existing jurisdiction of €6348.69). The recommended change for the Circuit Court represents an even sharper increase, with the ceiling being raised from €38,092.14 to €100,000.

The Court and Court Officers' Bill, 2001 is currently awaiting its' Second Stage in the Dáil. It then has to go through the Report Stage and Final Stage. The process then has to be repeated in the Seanad before the legislation is legally enacted.

It was originally intended that the Bill would be enacted prior to Christmas 2001. It was also intended that the Bill would apply to court proceedings instituted on or after January 1, 2002, in line with the introduction of the Euro. The enactment of this legislation is likely to be delayed even further, given the extensive anti-terrorist legislation which has been given priority for Dáil time and which is hoped to be processed by January 2002.

continued on page 4

Dublin office
Pepper Canister House Mount Street Crescent Dublin 2 Telephone 00 353 1 240 1200
Facsimile 00 353 1 240 1210 DX number 109025 Email lex@orourkereid.com

Leeds office
5 Lisbon Square, Leeds, LS1 4LY, England Telephone 00 44 113 2457811
Facsimile 00 44 113 2457879 DX number 26450 Leeds Park Sq Email lex@orourkereid.co.uk

Calculation of costs - future loss and medical care

Larry McMahon (Solicitor)

A recent High Court case (*McEneaney v County Council of Monaghan and Coillte Teoranta*) sets out changes in the method of calculating the cost of future loss and medical care for serious injuries. These are the costs that will have to be included in the lump sum awarded to seriously injured persons so as to ensure that they have adequate resources to pay for future medical expenses and to compensate for future loss of income.

Background to the case

In this case, the plaintiff had sustained catastrophic injuries arising out of a road traffic accident in February 1994.

Until recently, a general discount rate of 4% has been used to calculate these costs. The plaintiff had argued that the 4% discount rate used by actuaries in computing future losses/costs to allow for real growth was excessively optimistic and resulted in the under-compensation of plaintiffs. They argued for a rate closer to 2%.

Ultimately, the Court accepted the principle, adopted in the House of Lords decision in *Wells v Wells*, that a plaintiff's damages should be calculated on the basis of minimum risk exposure.

Effect of the decision

The High Court reduced the rate to 2.5% in the case of general future loss. In relation to future costs for medical care, the High Court allowed calculation on the basis that these costs would increase over the plaintiff's expected lifetime at a rate of 3% over general inflation.

The effect of these changes will mean an increase in the actual multiplier and level of costs on all claims containing this element. All insurers will, therefore, need to revise their reserves accordingly.

However the following points should be borne in mind:

- It is suggested that the above decision would not apply across the board, and would only apply to catastrophic injuries.
- No economist was ever called by the defendant. There is a view that this issue will be revisited and challenged at a later date, as we understand that the McEneaney case will not be appealed. Interestingly enough, in a recent High Court case in Cork, Mr Justice O'Sullivan reportedly refused to follow his own judgment in McEneaney on the basis that the defendant had not tendered any evidence. However, the logic in *Wells v Wells* is persuasive and the financial analysis will be difficult to rebut.
- Another case (*Blanche v Midland Health Board & Others*) has already been heard, in part, by Mr Justice O'Neill in the High Court. This is a medical negligence case, and we understand that the court will revisit the discount rate issue when it resumes next year.

In its' judgment, the High Court also referred to the case of *Reddy v Bates* (1984) where the Supreme Court had directed that, in calculating future loss of earnings, account should be taken of the fact that at the time of the assessment of the award there was a high rate of unemployment, not only in Ireland but also in Great Britain and in most member states of the EEC.

In the McEneaney case, the High Court also indicated that, in appropriate cases, a reduction might be allowed under the general principles established in *Reddy v Bates* in respect of the costs of future care or other future outlay if there was appropriate evidence tendered. However, none was tendered in the McEneaney case.

Office news

Litigation partner, Mary Purtill, has recently completed a sponsored walk in Thailand on behalf of the Multiple Sclerosis Society of Ireland. She walked 200 miles over 10 days and raised over €7618 in sponsorship. Many thanks to those of you who contributed.

Strange....but true

Old romantics!

Galway District Court Judge, John Garavan, has revealed his true colours as an old romantic. He was presiding over a case where a young man had bought his ex-girlfriend an old BMW as a gift and changed the ownership details to her name, thereby making a false declaration as to ownership. Despite the girl's protestations that she did not want anything from him, the young man left the car outside the object of his affection's front door. She woke up to find the car on her doorstep and promptly called the Gardaí. Judge Garavan said, "maybe I'm an old romantic but I just can't convict him" and commented that the young man might have had more luck if he had given her his last Rolo!

Source: The Irish Times

Personal Injury Compensation Tribunal

Gordon Murphy (Senior Associate)

The proposed Personal Injury Compensation Tribunal, in the legislative pipeline since the publication of the Second Report of the Special Working Group on Personal Injury Compensation in March, 2001, now looks unlikely to come into operation until the latter part of 2002.

A spokesperson for the Insurance section of the Department of Enterprise, Trade and Employment has confirmed that matters have not progressed much since the publication of the Second Report.

The Working Group is meeting on a monthly basis to work out the legal basis for establishment of the Tribunal. Given that these legalities are still under discussion, the publication of a Bill is a remote prospect at this stage. The Working Group will continue to consider the complexities of the proposed Tribunal well into the early part of this year.

Purpose of the Tribunal

In its' Report on the Personal Injury Compensation Tribunal, the Working Group recommended the establishment of a Personal Injuries Assessment Board ("PIAB"). Its' primary objective is to reduce the delivery cost of personal injury compensation.

The board was to "*work in an non adversarial and objective manner for the fair and consistent settlement of personal injury claims*". Research into court awards on general damages for particular categories of injury is to be undertaken by independent experts engaged by the PIAB. It is proposed that a database will be established, based on this information, to enable the PIAB to develop detailed guidelines on appropriate levels of compensation.

Defendants and their insurers will have to notify the PIAB of all claims for compensation by a person who has suffered bodily injury in a road traffic accident or in the course of employment. It is proposed that the parties are given a prescribed period of time in which to reach a settlement and, where an agreement cannot be reached, that the PIAB would then make an independent assessment of compensation.

The assessment by the PIAB would not, it is stated, preclude the claimant from exercising his constitutional right to go to court. It is also stated that the PIAB would have discretion not to make an assessment in complex cases or where liability is totally rejected by the defendant.

Reaction to the proposals

Members of the legal profession have highlighted the shortcomings of the Working Group's recommendations, in particular, the Director General of the Law Society, Mr Ken Murphy, who said:

"*the Society is fundamentally opposed to this proposal on public interest grounds. There are two major objections. The first is the inherent anti-claimant bias of both the composition and proposed method of operations of the board. The second, is the economic nonsense whereby, ironically the establishment of a Personal Injuries Assessment Board would introduce a new layer of bureaucracy, cost and delay where none exists at present*".

The insurance industry, on the other hand, has expressed greater optimism on the proposed implementation of the Working Group's recommendations.

It remains to be seen how these proposals are brought forward but it seems certain that the implementation of the Working Group's recommendations is likely to be fraught with difficulty and controversy.

Changes in monetary jurisdiction

continued from page 2

Effect of proposed changes

As the Bill has not been enacted yet, the EU legislation has simply converted the jurisdictions into their Euro equivalents with effect from 1 January, 2002 ie District Court - €6348.69 (£5000) and Circuit Court - €38,092.14 (£30,000).

The increases in jurisdictions are ultimately expected to lead to increased awards for damages in personal injury actions. Indeed, some believe that recent generous awards in the Circuit Court are an indication of judges flexing their judicial muscles in preparation for the change.

Some commentators believe that the changes will lead to administrative difficulties, culminating in significant delays in matters being processed to Hearing.

In the recent Annual Report of the Law Society, Director General Mr. Ken Murphy opined that "*unless adequate resources are put in place within the courts system to handle the extra work load which these increases in jurisdictions will cause, there are grounds for deep concern that completely unacceptable levels of delay will once again become a feature of our courts*".