Association of Personal Injury Lawyers Northern Ireland Group

5th Edition of the Green Book

Guidelines to the Assessment of General Damages

A judicial perspective

Judge Philip Gilpin

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Speaking Note

Introduction

For most of this month I've had the somewhat different experience of sitting in the criminal courts. It's good this afternoon to return, albeit it briefly, to the more familiar territory of civil law and particularly to the issue of damages in light of the publication of the 5th edition of the Green Book at the end of last year.

When Maurece asked me to speak this afternoon she wanted me to direct my thoughts to the new Green Book given that I had been one of the members of the Committee chaired by Stephens LJ who were responsible for its production.

Before I come to the matter of the guidelines for general damages for personal injuries and the new edition of the Green Book in particular I want to stand back for a moment and think more broadly on the issue of damages before narrowing our focus to this new Green Book.

Damages in general

By damages of course we mean an award of money to a party who has suffered a civil wrong. I suspect this is uncontroversial.

If I had stood here a few years ago and said that, in this jurisdiction, if a party had suffered a civil wrong and damages should be paid I suspect that would have been equally uncontroversial.

However, in these ever changing times, we have seen things that might once have been assumed to be well settled now placed under scrutiny.

Let me give but one example. Many of you may have read Lord Sumption's lecture to the Personal Injuries Bar Association in London given in November 2017 entitled *"Abolishing Personal Injuries Law - A project"* in which he questioned the system of distributing liability according to fault and suggesting that this principle will be eroded in the coming years.

In the course of his address Lord Sumption said these words:

> *"Personally, I would question whether there really is a moral case for imposing liability in damages on the ground of negligence."*

Now all of that debate is perhaps for another day. At present in this jurisdiction we continue to adhere to the general principle that if you suffer a civil wrong you can receive damages.

Let's remind ourselves, for a moment, as to the purpose of damages. What, if you suffer a civil wrong, are damages aimed at achieving?

Well, aside from the discrete issue of exemplary damages (which exist to punish the wrongdoer), damages are commonly understood to exist to compensate the plaintiff for the harm suffered.

Hopefully this much is uncontroversial – damages are compensatory in nature.

General Damages

We will of course be familiar with the traditional distinction drawn between General Damages and Special Damages.

1. In terms of liability, General Damages arise in the normal course of events. Special Damages cover special circumstances beyond the anticipation of the parties.

2. In terms of proof, General Damages are given on the basis of the assessment arrived at by the Judge based on experience and as we shall see shortly, guidelines. Whereas Special Damages are awarded on the basis of the consequences that flow from the wrongdoing.

3. And finally in terms of pleadings General Damages can be pleaded that the Plaintiff has simply suffered damage leaving it to the Judge

to quantify these. Special Damages must be pleaded and thereafter proved if an award is to be made.

Today of course our focus is solely on General Damages and in particular those that result from the plaintiff having sustained a Personal Injury.

General Damages in this field are commonly expressed as being damages to address the "pain & suffering" occasioned to a Plaintiff.

The term "pain and suffering" has perhaps entered the legal lexicon as a term of art. We all know what we mean when we say it. There is perhaps little to be gained by trying to dissect its two parts. However, for what it's worth some suggest "pain" refers to the immediate harm arising at the time of the wrongdoing while "suffering" is the ongoing aspect until resolution.

Aside from the issue of pain and suffering, we must not overlook that General Damages for personal injury may also encompass such additional matters as

1. Loss of amenity – here the focus is on what way has the plaintiff's enjoyment of life been curtailed by the wrongdoing. Often such issues will focus around those activities the Plaintiff pursued before the incident and the extent to which these are curtailed because of it.

2. Loss of congenial employment – here the focus is on compensating the plaintiff for not being able because of the incident, to return to their former type of employment.

Well now that we've reminded ourselves:-

- That damages are still paid in this jurisdiction
- Of the distinction between General and Special Damages and
- What comprises General Damages for personal injuries

let's narrow our focus and consider - the Green Book and in particular its latest edition.

History of the Green Book in NI

When I started in practice 25 years ago there were no published guidelines in this jurisdiction as to the level of damages certain injuries might expect to attract.

That said, I do recall many years ago seeing a document Judge Rodgers used to maintain for his own use in which he tried to record levels of damages that he was aware courts were making and settlements the judges might get to know of (presumably when being asked to approve settlements for those under a disability).

I suppose this might be a good point to consider if there actually a need for guidelines – what purpose do they serve? I think their purpose is twofold in that they

1. assist practitioners to value cases and
2. assist judges to assess damages

Given that in cases of serious personal injury no amount of money can properly compensate an injured person, it seems to me that the exercise to be embarked upon when assessing damages is to determine what might be considered, in the particular jurisdiction in question, a fair sum.

In West v Sheppard [1964] AC 326 at 357 Lord Devlin suggested the exercise is to determine what sum of money would allow the wrongdoer to

> *"hold his head among his neighbours and say with their approval that he has done the fair thing."*

In England & Wales the first attempt to provide some formal guidance on what, as Lord Devlin stated in West is "the fair thing," was in the form of the Judicial Studies Board's 1992 publication of 'Guidelines for the Assessment of Damages in Personal Injury Cases.' This publication, now simply known as The Guidelines, is now in its 14th edition (i.e. a new edition is produced on average about every other year).

In Northern Ireland, in the 1990s consideration was given as to whether there was a need and merit in publishing a similar type of publication here.

Of course the level of damages awarded for similar injuries can vary markedly between jurisdictions.

Let me give but one example (and I must stress the description of the injuries do not exactly match but they do make the general point) – a moderate/minor injury to the elbow

- England & Wales up to £10,040
- Northern Ireland up to £17,000
- Republic of Ireland (The Book of Quantum) up to €34,700 or approximately £31,000

So it seems in valuing personal injuries there is little by way of international agreed norms. Each jurisdiction, if it is going to issue guidelines, must embark on its own exercise in determining, again to repeat Lord Devlin, "the fair thing."

One of the reasons damages in Northern Ireland have traditionally been higher than those in England and Wales is that it was only since 1987 that judges and not juries took responsibility for assessing damages in the High Court here whereas judges took this responsibility in England & Wales some 53 years before that in 1934.

In Simpson v Harland & Wolff [1988] NI 432 (out of interest in which Lord Kerr and Horner J appeared for the plaintiff) the then Lord Chief Justice, Lord Lowry, offered his thoughts on why jury awards tended to be higher than an award by a judge.

> *"When personal injury and fatal accident cases began to be tried by judges without a jury, the standard must initially have been the general level of jury verdicts in the recent past. This must have applied in England in 1934, just as it applied in Northern Ireland in 1987. It should be recognised that, while juries were in general use, the level of their verdicts rose steadily as the value of money declined. This process would no doubt have continued in England between 1934 and the present day, had juries continued to assess personal injury damages, as the process has continued up to 1987 in both jurisdictions in Ireland.*
>
> *But in England what started in 1934 as the general level of jury awards has gradually but inevitably been transformed into the general level of*

judges' awards and the level of awards of general damages in England and Wales has tended to fall behind the level of awards of general damages here. This tendency is inevitable, since the age of judges ranges from middle-aged to elderly and, as objective people, (including, I believe, most High Court judges) will readily concede, elderly people (particularly men), if they are not in business or constantly dealing with pecuniary transactions of some kind, become less adaptable and less receptive to changing values, even though at the same time they may remain intellectually able and alert."

Having offered his explanation as to why awards in Northern Ireland differ from those in England & Wales, Lord Lowry then went on to defend the legitimacy of that position:

"Accordingly, I would reject the suggestion that our calculations of general damages are "wrong" if they do not conform to standards observed in other jurisdictions since Northern Ireland, like Scotland and the Republic of Ireland, constitutes a separate legal jurisdiction with its own judicial and social outlook. The courts have their own standards of, for example, sentencing in criminal and damages in civil causes, and those are the standards established or approved by the people whom the courts in this jurisdiction exist to serve."

So we've seen the usefulness of published guidelines and in particular the need for Northern Ireland to have its own version.

Thus in 1994 the then Lord Chief Justice, Lord Hutton invited MacDermott LJ to chair a Committee with a view to publishing guidelines for Northern Ireland. The first edition was published in October 1996 and its verdant colour soon saw it referred to imaginatively as The Green Book.

Since the first edition four more have been published:

- 2nd edition in 2002 under the chairmanship of McCollum LJ
- 3rd edition in 2008 under the chairmanship of Higgins LJ
- 4th edition in 2013 under the chairmanship of Girvan LJ
- And then the current version, the 5th edition in 2018 under the chairmanship of Stephens LJ

How the 5th edition was compiled

Like all of its predecessors the 5th edition was the product of a Committee.

It was comprised of serving judges (both from a Bar and Solicitors background), who brought to the table their assessment of some cases, and practising Counsel and Solicitors whose particular experience was in knowing how cases which never appear before a judge are settling.

Finally the Committee was assisted by both a Judicial (Maguire J) and Technical Consultant (David Reid BL) who were able to stand a little distance from the cut and thrust of debate in committee and offer a slightly more detached input.

The Committee did not of course begin its work with a blank canvas. Rather it very much sought to build on the work done previously.

Thus, by way of process, the Committee was provided with tables showing what figures from both the 1996 1st edition and the 2013 4th edition would look like when uplifted to take account of RPI .

The Committee also noted any decisions on damages since the 4th edition. I'll make mention of one of these later.

The Committee further took cognisance of the position in other jurisdictions and thus considered for example

- the then Judicial College Guidelines covering England & Wales
- the Kearns Report 2017 which addressed issues of damages in the Republic of Ireland
- the Quebec Task Force and in particular its discussion of Whiplash Associated Disorder Scale based on severity of symptoms and associated physical signs e.g.

    Grade 0 – no neck pain, stiffness, or any physical signs are noticed

    Grade 1 – neck complaints of pain, stiffness/tenderness but no physical signs

Grade 2 – neck complaints and decreased range of motion and local tenderness in the neck

Grade 3 – neck complaints plus neurological signs

Grade 4 – neck complaints and fracture, dislocation, or injury to the spinal cord

Important as looking further afield is, for the reasons outlined by Lord Lowry, the essential task of the Committee was to look at the various categories of injury and do its best to determine what Lord Devlin termed "the fair thing" is in this jurisdiction. To a degree this is a somewhat subjective exercise.

The product of our labours was the 5th edition which was published in 2018 and, to the delight of many, unlike its immediate predecessor appeared again in hard copy.

Let me mention two issues which I understand have generated some discussion.

Firstly, the issue of where in the editions expected lifespan do you pitch inflation. Should it be at start of publication's life, the end of it or a mid-point? If the 6th edition follows the general frequency of previous editions, the mid-point for the 5th edition will be mid-2021. In the end the Committee decided to settle on a mid-point.

Alison Cassidy of BLM solicitors in her article in the Irish Legal News of 27 Feb 2019 suggests

> *"many will be concerned that this will produce over-compensation in the first half of the five years and under-compensation in the second half."*

Secondly, if you carry out a comparative exercise between the Green Book and the English & Welsh Guidelines relating to cases of scarring to the face (page 46 of the Green Book) you'll note that in Northern Ireland we continue to maintain a distinction based on gender. However in England & Wales a different approach is taken where The Guidelines state "*As explained earlier, it is doubtful that gender alone can justify different levels of award.*"

Reflections

No doubt the 5th edition brought significant changes:

- Cassidy claims figures for most injuries increased by 20%. This seems to me to be largely in line with an increase in the rate of inflation (RPI) from the previous edition in March 2013 to the midpoint of June 2021 used by the Committee.
- Certain awards for injuries have been altered to take account of specific cases e.g. Mesothelioma as a result of decision in McDowell v Fisons Limited (2017) adjusted upwards from range £70k-£130k to £77k-£140k.
- Some very significant increases e.g. Chronic Bronchitis top of scale from £28k to £50k i.e. 79% and some new categories e.g. pleural plaques

And yet in some ways there is no change:

- Minor neck bottom bracket top line stays at £3k
- Perhaps most importantly the Guidelines remain, as they have always been, just guidelines

  In his forward Stephen LJ says of them

  "they are guidelines not to be applied mechanistically but rather with close attention to the characteristics and circumstances of the particular individual involved."

  He went on to note that

  "assessing the appropriate level of damages remains the responsibility of the Judge who is not constrained by any range identified in these Guidelines which are persuasive but not obligatory it being a matter for the Judge as to whether to adopt any suggested range."

  Oliver Wendell Holmes, as so often is the case put it rather well in "The Common Law" [1881] :

  "The life of the law has not been logic: it has been experience … it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."