17 Kildare Street,
Dublin 2.
3rd November 2021

Ms Helen McEntee TD,
Minister for Justice and Equality,
Dept of Justice and Equality,
51 St. Stephen's Green,
Dublin 2.

Dear Ms McEntee,

On behalf of our National Council, may I welcome you back to the Department after your maternity leave and congratulate you on the birth of your son.

I wrote to Minister Humphreys on 13th August concerning commencement of Section 30[1] of the Civil Liability and Courts Act 2004. I am aware that some work is being carried out in your Department on the matter, and ISME would appreciate an update upon it, as it is an issue of significant importance in the avoidance of exaggerated and false claims, as well as providing a level, fair and transparent playing field to potential entrants to the Irish insurance market.

The purpose of today's note is to register our deep concern at the import of a recent High Court judgment. Acknowledging of course that neither you nor your Department can comment on an individual (or any) judgment, we alert you to it on the basis that we believe your Department must consider the policy implications inherent in it.

Judgment was delivered in McGroarty V Kilcullen[2] on 28th October. The first issue of concern in this case was the manner by which the Court decided that the plaintiff was not a member of the defendant club. Notwithstanding the (short) deliberations of the trial judge on the matter, the fact is that all clubs are now exposed to the doubly appalling vista that they can be sued by members availing of the very simple expedient of not paying their membership subscription, or making only a partial payment. The implications of this ruling are self-evident therefore I will not labour them.

The second issue of concern is that in reaching a decision on quantum, the judge made no mention of, nor referred to, the very recently adopted Personal Injuries Guidelines published by the Judicial Council on 6th March last.

Notwithstanding the fact that the plaintiff sustained a very unpleasant amputation of an index finger, the reference quantum for such an injury has been set a mere eight months ago. Perusal of the injury as described by the judge would indicate it fell into category "(e) Severe fractures to fingers" which sets quantum at €20,000-€50,000 and states:

[1] http://www.irishstatutebook.ie/eli/2004/act/31/section/30/enacted/en/html#sec30
[2] https://www.courts.ie/viewer/pdf/b6307282-5fa4-403f-b4c7-7a71e3e20d21/2021_IEHC_679.pdf/pdf#view=fitH

> *"The bracket will include injury resulting in partial amputations, resulting deformity, impairment of grip, reduced mechanical function, disturbed sensation and cosmetic disfigurement. The top of the range would be appropriate where there is loss of sensation, scarring, permanent disability and surgery has failed."*

However, the court award of €100,000 in general damages places this award at the top of category "(d) Serious hand injuries" which sets quantum at €50,000-€100,000 and states:

> *"This bracket will apply to injuries where the capacity of the hand has been severely reduced. Included would be cases where several fingers have been amputated but reattached leaving the hand clawed, clumsy and unsightly or where some fingers and perhaps part of the palm amputated resulting in gross diminution of grip and dexterity with cosmetic disfigurement."*

The 2016 Book of Quantum assessed the amputation of a full index finger at "*up to €61,200*."

The observations made by the judge do not appear to us to support such a categorisation of the injury in this case. There may be sound reasoning the judge's decision in coming to this figure, but it is not given. And its absence from a significant High Court ruling presents a very serious matter for the administration of civil law. In our view, this issue could be sufficiently serious as to amount to a matter which the defendant would consider be dealt with under Section 50[3] of the Judicial Council Act 2019, were that section currently commenced.

Of course, we do not know the defendant's intentions regarding an appeal; but to us that is an irrelevance. We should not be dependent upon a defendant to take a case before the Court of Appeal to arrive at a decision they have a legitimate expectation will be decided transparently and in line with the Judicial Council guidelines in the High Court.

These two issues reference reforms ISME has long sought of your Department. The duty of care provisions of the Occupiers Liability Act require urgent attention. The compounding effects of successive judgements in our courts mean that the duty of care is effectively "strict" in this country. This is unsustainable. You will be aware that while motor insurance premia are showing a moderate decline, the issues of public liability and employers' liability insurance are actually worsening for business. Premia are increasing, and in many cases quotations are not available for certain sectors. While as lobbyists ISME castigates insurers for an excessive eagerness to settle claims of dubious merit at excessive levels of quantum, those same insurers will point to cases such as McGroarty V Kilcullen in justification of those settlement decisions. We can no longer tolerate the "luck of the draw" in our superior courts.

The Australian Government faced exactly the same issues in addressing the cost of liability insurance in Australia in the early 2000's. The tort reforms adopted by Canberra[4] were reasonable and sensible, but attracted criticism from their own personal injuries industry. It

[3] https://www.irishstatutebook.ie/eli/2019/act/33/section/50/enacted/en/html#sec50
[4] https://www.aer.gov.au/system/files/Australian%20Government%20-%20Available%20and%20affordable%20-%20improvements%20in%20liability%20insurance%20following%20tort%20law%20reform%20in%20Australia%20-%20December%202006%20%28Appendix%2012.06%20to%20AAD%20revised%20proposal%29.pdf

is notable that the Australian legal lobby's objections to those tort reforms[5] are eerily similar to the misleading lobbying to which your Department has been subjected over the years: *tort reform is not the issue; reform of tort will not reduce the cost of liability insurance; premium increases are due to market cycles and poor investment returns*; All are familiar, all are empty, misleading spin. We need tort reform and amendment of the Occupiers' Liability Act here on a radically shortened timescale.

This case conclusively demonstrates that the issue of quantum, and how it is calculated, has not gone away. ISME has previously voiced its reservations on the judicial council approach as the State's "solution" to the quantum problem:

- General damages in personal injuries should be regulated by law since they are a matter of public policy. Damages are already regulated in primary legislation such as the Civil Liability Act 1961, the Unfair Dismissal Act 1977 and the Protected Disclosures Act 2014. Therefore, a legislative approach such as the Civil Liability (Capping of General Damages) Bill 2019[6] was the best approach to the issue. Despite the protestations of the legal lobby to the contrary, ISME's position that damages can be regulated by law consistent, with the Constitution, has been vindicated by the Law Reform Commission.
- In asking members of the judiciary to enter the policy-setting sphere by setting personal injuries guidelines, the Government has effectively required them to make laws, a matter which is constitutionally the sole prerogative of the Oireachtas under Article 15. This leaves the real possibility that the PIGC guidelines could at some future date be struck down as unconstitutional. Furthermore, the manner in which the Judicial Council adopted the guidelines involved almost every member of the judiciary, and there are very few judges who could hear a challenge to them (and none we understand, on the Court of Appeal or the Supreme Court.)
- The process[7] by which the Judicial Council arrived at the personal injuries guidelines lacked the methodological rigour and the external oversight employed by the Personal Injuries Commission[8] in their second and final report. By their own admission, the judges declared that their methodology considered only cases "*closed by court award*." This amounted to 318 cases of a total of 59,437, or 0.54% of total cases. This was somewhat bizarrely cited as a strength of their report. Furthermore, the PIGC in deciding its basis for study relied upon the advices of a personal injuries practitioner who recommended that "*Northern Ireland and England and Wales were of prime importance for comparison purposes, and it is on the awards of damages made in these countries that the Committee has placed most reliance.*" Notwithstanding that practitioner's eminence or expertise in the field of personal injuries, we do not believe they could be described as a disinterested party.
- On a far wider dataset and using a scientific process, the Personal Injuries Commission concluded Ireland's personal injuries awards were 4.4 time those in the UK, itself an outlier in terms of generosity at that time, although the UK has radically cut its minor

[5] http://classic.austlii.edu.au/au/journals/UNSWLawJl/2002/54.html
[6] https://www.oireachtas.ie/en/bills/bill/2019/20/
[7] https://judicialcouncil.ie/assets/uploads/documents/Personal%20Injuries%20Guidelines%20Report.pdf
[8] https://enterprise.gov.ie/en/Publications/Publication-files/Second-and-Final-Report-of-the-Personal-Injuries-Commission.pdf

injuries award levels since then. The Judicial Council adopted an arbitrary and unscientific methodology to conclude that the gap between awards was not as large. The result is a set of personal injuries award guidelines that are 40%-50% below the 2016 Book of Quantum levels, rather than the c.77% reduction suggested by the Personal Injuries Commission.

To now find, in November 2021, that not only are the March 2021 judicial guidelines on damages significantly higher than we had cause to expect after the Personal Injuries Commission recommendations, but that the High Court is happy to casually disregard them, is completely unacceptable.

In our view, the only way in which the persistent lack of consistency and certainty can be removed from personal injures awards is that an expert quasi-judicial body should be tasked with hearing applications and making awards at first instance. These awards would of course be appellable to the Courts, and ideally not straight to the High Court but to a court of appropriate jurisdiction for the award given. The outcome of the Zalewski case clears the way for a body such as PIAB to be tasked with this role, subject to the constraints set by the Justices of the Supreme court in that case. We would greatly appreciate your views on the issue as a matter of some urgency.

Yours sincerely,

Neil McDonnell
Chief Executive

CC Tánaiste Leo Varadkar TD, DETE
Minister of State Robert Troy TD, DETE
Ms Oonagh McPhillips, Secretary General, Department of Justice
Ms Oonagh Buckley, Deputy Secretary General, Department of Justice