

ISSUES PAPER

**CAPPING DAMAGES IN
PERSONAL INJURIES
ACTIONS**

(LRC IP 17 – 2019)

Issues Paper

Capping Damages in Personal Injuries Actions

(LRC IP 17-2019)

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The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular, by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 200 documents (Working Papers, Consultation Papers, Issues Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have contributed in a significant way to the development and enactment of reforming legislation.

The Commission's role is carried out primarily under a Programme of Law Reform. The *Fifth Programme of Law Reform* was prepared by the Commission following broad consultation and discussion. In accordance with the 1975 Act, it was approved by the Government in March 2019 and placed before both Houses of the Oireachtas. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act.

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Seeking your views on the questions raised in the Issues Paper

An Issues Paper contains an analysis of issues that the Commission considers arise in a particular law reform project, together with a series of questions intended to assist consultees. An Issues Paper does not usually contain any settled view of the Commission. It is therefore intended to provide consultees with an opportunity to express their views and to make any related submissions on the questions that arise in the Issues Paper.

Consultees need not answer all questions and are also invited to add any additional comments they consider relevant.

Consultees should note that submissions are, in principle, subject to the possibility of disclosure under the *Freedom of Information Act 2014*. Any person may make a submission saying that it is made on a confidential basis, especially if it contains personal information, and we would then treat it as confidential as far as possible. In the event that we receive a request for any material to be disclosed under FOI, we will, before releasing the information, contact the persons concerned for their views.

Submissions can be sent in either of the following ways:

(a) You can email your submission – in whichever format is most convenient to you – to the Commission at **p5p9@lawreform.ie**.

or

(b) You can post your submission to:

Law Reform Commission,
Styne House,
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We would like to receive submissions on this Issues Paper no later than close of business on **Friday 31 January 2020** if possible.

CHAPTER 1 CONTEXT AND OVERVIEW

- [1.1] This Issues Paper is on a project which forms part of the Commission's *Fifth Programme of Law Reform*.¹ The project involves an examination of whether it would be constitutionally permissible, or otherwise desirable, to provide for a statutory regime that would place a cap or tariff on some or all categories of damages in personal injuries cases. The project thus has an unusual aspect in that it specifically requires the Commission to examine whether a possible legislative scheme, or schemes, for capping damages would be constitutionally permissible. In the course of many projects, the Commission has examined whether a particular statutory regime would be consistent with constitutional requirements² or with international human rights standards.³
- [1.2] In Chapter 3 of this Issues Paper, the Commission examines the relevant constitutional provisions that are engaged in the context of possible statutory models for capping damages, and in Chapter 4 examines to what extent those constitutional provisions are relevant to 4 possible legislative models, and the Commission then invites consultees to express their views on possible models without prejudice to any other models or approach they might suggest. The Commission will, in accordance with its invariable practice, consider the views of consultees and will then prepare and publish its Report, which will contain the Commission's final conclusions and recommendations. It is important to emphasise that the Commission is a statutory advisory body, so that the

¹ *Report on Fifth Programme of Law Reform* (LRC 120-2019), Project 9.

² In its *Report on Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019), at para 3.1-3.32, the Commission concluded that, in its view, a primarily objective test of reasonable belief concerning consent in rape law was compatible with the Constitution. In its *Report on Regulatory Powers and Corporate Offences* (LRC 119-2018), at para 3.23-3.33, the Commission concluded that, in its view, a particular form of power for economic regulators to impose administrative financial sanctions was compatible with the Constitution.

³ In Chapter 1 of its *Report on Harmful Communications and Digital Safety* (LRC 116-2016), the Commission examined the need to ensure that its proposals for reform of the criminal law concerning harmful communications, and of related regulatory arrangements, achieved an appropriate balance between the right to privacy and the right to freedom of expression, as protected under both the Constitution and the Council of Europe Convention on Human Rights and Fundamental Freedoms. In Chapter 1 of its *Report on Children and the Law: Medical Treatment* (LRC 103-2011), the Commission discussed the impact of the right of a child to express his or her own views according to his or her age and maturity under Article 12 of the 1989 UN Convention on the Rights of the Child in recommending that legislation should provide that children aged 16 and 17 should be presumed to have capacity to consent to medical treatment.

ultimate task of reforming the law, including in terms of assessing the relevant constitutional provisions, is a matter entirely for the Government and the Oireachtas.

- [1.3] The Commission is conscious of the need to describe, in general terms, what is meant by legislation that would involve “capping damages” in some or all categories of personal injuries cases. In practice, this could cover a wide range of possible legislative models. One type of such a capping model could be to provide for a maximum upper limit that could be awarded for the most catastrophic type of injury, say €500,000 (which could be subject to future index linking), and that all other awards for less serious injuries would be in proportion to that upper limit. Another possible capping model could be to provide for a maximum amount for a specific type of injury, for example, a broken leg, or a psychological-type injury, or a soft tissue neck injury (“whiplash”). Another possible model could be to provide for a more comprehensive approach, in which virtually all types of injuries and their related maximum awards could be specified, including the ranges of awards for specific types of injuries – for example “from €10,000 up to €15,000”. In addition, these various capping models could be mandatory (under which the figures specified must be applied, with no exceptions), or presumptive (under which again the figures specified must usually be applied, subject to some specified exceptions) or take the form of strong statutory guidelines (under which again the figures are ones to which decision-makers must “have regard to” but could depart from for specified reasons). In fact, in a number of jurisdictions, some or all of these models for capping damages have been enacted.
- [1.4] In Ireland, the courts have, through case law since 1984, developed a maximum cap on general damages of €500,000 for the most catastrophic type of injury. The courts have also, since 2015, begun to set down indicative guideline amounts for a range of personal injury types. Complementing this case law on general damages, since 2003 legislation has provided for the publication of wide-ranging guidelines for the award of general damages, called the Book of Quantum (the most recent edition dating from 2016), which will be replaced by Guidelines to be published under the auspices of a Committee of the Judicial Council being established under the *Judicial Council Act 2019*. These developments in the current law are discussed in Chapter 2.
- [1.5] In other jurisdictions, such as Australia and England and Wales, where comparable principles concerning the award of general damages have been developed by the courts, these have been supplemented by legislative provisions that include the types of legislative models discussed above. In Chapter 4, the Commission discusses these enacted models, as well as possible variations that could be considered against the background of the constitutional principles discussed in Chapter 3.
- [1.6] The project and this Issues Paper comes against the background of considerable public discussion and debate concerning the cost of motor insurance, and of employer

and public liability insurance. In the past 10 years, the cost of such insurance has fluctuated between periods of low premiums followed by periods of sharp increases. While there has been, in general, recent decreases in motor insurance, in respect of some areas of public liability sharp increases have caused a difficulty in obtaining cover in some service sectors such as pre-school and leisure-related sectors. This has been accompanied by considerable debate about the causes of this fluctuation in insurance cost, including whether it involved some insurers offering unsustainably low premiums which required later correction. It has also involved discussion as to whether these fluctuations have been affected by the level of personal injury awards in the courts. While these awards represent only a small percentage of total claims, they are the basis for associated settlements by insurers and guidance documents such as the Book of Quantum. They are also likely to influence guidelines to be published under the *Judicial Council Act 2019*.

- [1.7] In order to address these concerns on the cost of insurance, in 2016 the Department of Finance established the Cost of Insurance Working Group (the CIWG), which has examined the factors contributing to the cost of insurance, and has also identified a range of further statutory reforms in two Reports published in 2017 and 2018, which are discussed below. Arising from the first CIWG Report, the Department of Finance established the Personal injuries Commission (PIC), which published two Reports that analysed international clinical standards for measuring personal injuries, including soft tissue or whiplash injuries – the most commonly litigated type of injury – as well as the levels of awards for such injuries in other jurisdictions.
- [1.8] As noted below, both the CIWG and the PIC recommended that the Commission should examine whether some form of statutory cap on damages would be constitutionally permissible or otherwise desirable. The Commission emphasises that the vast majority of the many issues that the CIWG and PIC have discussed concerning the cost of insurance are outside the scope of this project. This project involves a narrow series of issues concerning the constitutionality of possible legislative models on capping damages. At the same time, as will become clear in this Issues Paper, a number of matters recommended by the CIWG and the PIC are also relevant to this project. As a result, the Commission has examined the issues raised in this project against the background of any relevant wider developments that have emerged to date (November 2019) from the work of the CIWG and the PIC.

1. Reforms from 2002 MIAB Report: PIAB, Book of Quantum and reform of court procedures

- [1.9] It is worth noting that the current debate on the cost of insurance has followed previous debates on this issue, and that reforms have emerged from those previous

debates.⁴ Prior to the recent work of the CIWG and the PIC, the 2002 *Report of the Motor Insurance Advisory Board* (the 2002 MIAB Report)⁵ made a series of recommendations to address the cost of motor insurance and the related issue of the law and practice of personal injuries claims. This resulted in a range of important statutory reforms, which also applied to employer and public liability insurance.

- [1.10] The *Personal Injuries Assessment Board Act 2003* (2003 Act) established the Personal Injuries Assessment Board (PIAB), whose function is to provide a relatively straightforward and timely process for offering injured persons an assessment and award of damages for personal injuries in cases where liability is admitted, the amount being comparable to what would be awarded if the case proceeded to court.

(a) Book of Quantum, based on Judicial Guidelines from England and Wales, and Northern Ireland

- [1.11] The 2003 Act also provided for the publication by PIAB of a Book of Quantum, which sets out in some detail guideline ranges of awards for general damages in personal injuries cases, derived from the levels awarded in the courts. The first Book of Quantum was published in 2004. This was replaced in 2016 by a significantly revised and more detailed Book of Quantum.⁶ The guideline ranges of awards in the 2016 Book of Quantum were based on an examination of representative samples from over 51,000 closed personal injuries claims from 2013 and 2014 based on actual figures from court cases, insurance company settlements, State Claims Agency cases and PIAB data.⁷
- [1.12] The concept of a Book of Quantum (as its longer title, *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims*, indicates) was based on the comparable *Guidelines for the Assessment of General Damages in Personal Injury Cases* published in England and Wales since 1992 by its Judicial College

⁴ Reforms in the 20th century included: the abolition by the *Courts Act 1988* of juries in High Court personal injuries actions (intended to address the perceived inability to predict likely levels of awards); and provision in section 45 of the *Courts and Court Officers Act 1995* for the pre-trial exchange of expert reports in High Court personal injuries actions (intended to address the “trial by ambush” where both sides declined to reveal to each other until a court hearing, for example, engineering or medical reports that might disclose the true strength or otherwise of their case).

⁵ *Report of the Motor Insurance Advisory Board* (2002), available at www.oireactas.ie (in the digitised library of documents laid before the Houses of the Oireachtas).

⁶ *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum*, available at <https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>

⁷ *Ibid*, at p.5 (Foreword).

(formerly, its Judicial Studies Board),⁸ and in Northern Ireland since 1996 by its Judicial Studies Board.⁹

- [1.13] As noted in Chapter 2 below, an important reform enacted in the *Judicial Council Act 2019* is that the Book of Quantum will be replaced by statutory Guidelines on Personal Injuries Awards which will be published under the 2019 Act under the auspices of the Judicial Council, thus reflecting even more closely the position in England and Wales, and in Northern Ireland.

(b) Three point scale in Book of Quantum, Judicial Guidelines and case law

- [1.14] A notable common feature of the entries in the Book of Quantum, and of the comparable entries in the Judicial Guidelines published in England and Wales and in Northern Ireland, is that they set out a range of general damages awards for each category of personal injury, rather than a single amount. This is for the simple reason that they point out that each category of injury can involve a range of impact, from minor, through medium, to serious, that is, from a short-term effect that has resolved itself, to a medium term effect that may have consequential effects (such as arthritis), to long-term (including sometimes irreversible) effects.
- [1.15] It is notable that this three-point scale within categories of injuries has, since 2015,¹⁰ also been adopted by the Court of Appeal in a series of test cases that have provided important guidance on personal injuries awards, which are also discussed in Chapter 2 below. It would seem reasonable to assume that since this three-point scale has been applied by the Court of Appeal since 2015, it is likely to be influential in the development of the Personal Injuries Guidelines to be published under the *Judicial Council Act 2019*. This would also be consistent with the proportionality test which, as

⁸ The 15th edition of these Guidelines was published in 2019: Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* 15th edn (Oxford, 2019). The English Guidelines are published on a commercial basis, unlike the equivalent Northern Ireland Guidelines, discussed immediately below, which are available free on the website of the Northern Ireland judiciary.

⁹ The 5th edition of these Guidelines (known as the “Green Book”) was published in 2019: Judicial Studies Board for Northern Ireland, *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 5th edition (2019), available at <https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>.

¹⁰ As noted above, while the Book of Quantum was published in 2016, its contents were based on an examination of claims decided or settled in 2013 and 2014. In any event, the three-point scale has been a feature of the Judicial Guidelines published since the 1990s in England and Wales, and in Northern Ireland.

also noted in Chapter 2, the Supreme Court has held should underpin awards for damages in personal injuries cases.

(c) Reform of court practice and procedure

[1.16] Another legislative outcome of the 2002 MIAB Report was the enactment of the *Civil Liability and Courts Act 2004*. The 2004 Act included significant reforms to the practice and procedure concerning personal injuries cases, including:

- a requirement to verify on affidavit the facts underlying a personal injuries claim,
- that making a false or exaggerated claim could lead to a claim being dismissed or a criminal prosecution for, in effect, a form of perjury, and
- that the courts, in making an award in a personal injuries claim, must “have regard to” the guidelines in the Book of Quantum.

(d) Status of proposed Guidelines under *Judicial Council Act 2019*

[1.17] As also noted below, another important reform enacted in the *Judicial Council Act 2019* is that, in relation to the Guidelines on Personal Injuries Awards to be published under the auspices of the Judicial Council, and which will replace the Book of Quantum, the courts, in addition to being required to “have regard to” those Guidelines, will be required, if they depart from them, to give reasons for doing so. This additional requirement to “comply or explain” involves a significant strengthening of the status of the Guidelines to be issued under the 2019 Act, perhaps not surprising given that they will be issued under the authority of the Judicial Council, whose membership comprises all members of the judiciary.

2. Wide-ranging reforms proposed by CIWG and PIC Reports

[1.18] As noted above, in 2016, the Department of Finance established the Cost of Insurance Working Group (the CIWG), which has examined the factors contributing to the cost of insurance, and has also identified a range of further statutory reforms. In 2017, the CIWG published a *Report on the Cost of Motor Insurance*¹¹ and in 2018 a *Report on the Cost of Employer and Public Liability Insurance*,¹² which identified a number of key objectives and associated detailed recommendations concerning these three categories of insurance.

¹¹ Cost of Insurance Working Group, *Report on the Cost of Motor Insurance* (2017). Available at: <https://assets.gov.ie/6254/060219172049-067f7ed921f44343a7f41144ac3d4940.pdf>.

¹² Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018). Available at: <https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>

- [1.19] The objectives and recommendations in the two CIWG Reports involve complex matters that require whole-of-government engagement, statutory reform as well as actions by the insurance sector. For that reason, both Reports set out detailed Action Plans with associated timeframes to achieve the objectives and implement the recommendations. The Department of Finance has also published a series of Progress Updates, the most recent at the time of writing (November 2019) being the Ninth Progress Update published in July 2019, which sets out to what extent the objectives and recommendations have been implemented.
- [1.20] The CIWG *Report on the Cost of Motor Insurance* also recommended that a Personal Injuries Commission (PIC) should be established to examine the law and practice on personal injuries awards in comparable countries, including benchmarking the levels of awards in Ireland with those international comparators. The PIC was established in 2017, chaired by Mr Justice Nicholas Kearns, former President of the High Court, and it concluded its work by 2018 by publishing two Reports.
- [1.21] The *First Report of the Personal Injuries Commission* recommended that a standardised approach to the examination of and reporting of soft-tissue injuries should be implemented; that medical professionals who complete personal injury and medical reports should be trained and accredited; that future publications of the Book of Quantum – now to be superseded by the Personal Injuries Guidelines to be published under the *Judicial Council Act 2019* – should be linked to the proposed new standardised examination and reporting injury categories; and that relevant injury data should be collated and published by the appropriate bodies.¹³
- [1.22] The *Second and Final Report of the Personal Injuries Commission*¹⁴ recommended that the *Judicial Council Bill 2017* should be enacted, which has since occurred with the enactment of the *Judicial Council Act 2019* and which, as noted above and discussed further below, provides for the replacement of the Book of Quantum by Personal Injuries Guidelines to be published under the auspices of the Judicial Council.¹⁵ That

¹³ Personal Injuries Commission, *First Report of the Personal Injuries Commission* (2017), at p.22. Available at: <<https://dbei.gov.ie/en/Publications/Publication-files/First-Report-of-the-Personal-Injuries-Commission.pdf>>.

¹⁴ Personal Injuries Commission, *Second and Final Report of the Personal Injuries Commission* (2018). Available at: <<https://dbei.gov.ie/en/Publications/Publication-files/Second-and-Final-Report-of-the-Personal-Injuries-Commission.pdf>>.

¹⁵ At the time of writing (November 2019), the provisions of the 2019 Act concerning the interim Secretary of the Judicial Council and concerning the nomination by the Chief Justice of the members of the Personal Injuries Guidelines Committee (PIGC) have been commenced: *Judicial Council Act 2019 (Commencement) Order 2019* (S.I. No. 457 of 2019). On 28th November 2019, the Chief Justice announced the members-designate of the Personal Injuries Guidelines Committee (PIGC), to be chaired by Ms Justice Mary Irvine, judge of the Supreme Court: see

Report also recommended that suitable strategies should be developed to detect fraudulent and exaggerated personal injuries claims and that no claim should be settled until a medical report has been provided by the injured person.

3. CIWG and PIC Reports recommended Commission consider legislation on capping damages in Programme of Law Reform

- [1.23] It is clear from this brief summary of the work of the CIWG and the PIC that the issues raised by the cost of motor, employer and public liability insurance involve examining an enormously wide-ranging number of policy and legislative matters.
- [1.24] Within that wider reform context, both the CIWG and the PIC discussed in their Reports whether they could, or should, recommend the enactment of legislation that would set a cap on damages in categories of personal injuries claims. In the *CIWG Report on the Cost of Employer and Public Liability Insurance*, capping damages was discussed as part of the CIWG's Objective 2, which is to "review the level of damages in personal injury cases." The CIWG acknowledged that careful consideration would have to be given to framing legislation on capping damages, as it would constitute "a significant development in the law, because any legislation which restricts the rights of citizens must be carefully considered and justified to ensure it would withstand constitutional challenge." The CIWG went on to state that the main question for a court, if such a measure was challenged, would be whether such a restriction involved an appropriate restriction on the individual's constitutional rights in the interests of the common good, and it added that "the appropriate balance can only be struck once all appropriate factors have been taken into account by the Houses of the Oireachtas in considering the legislation."¹⁶
- [1.25] For that reason, the CIWG concluded that, given the complexity of the legal issues that such legislation raised, it would not make a specific recommendation on this matter. Instead, in the *CIWG Report on the Cost of Employer and Public Liability Insurance*,

<https://www.lawsociety.ie/gazette/top-stories/ms-justice-mary-irvine-to-chair-personal-injuries-guidelines-committee2/>. The Chief Justice noted that the PIGC was, under the 2019 Act, independent in the exercise of its statutory functions, subject to relevant guidance from the Judicial Council, and approval by the Council of the Guidelines when agreed by the PIGC. It was also announced that the members-designate of the PIGC would have their first preparatory meeting at the beginning of December 2019 in advance of the formal establishment of the PIGC under the 2019 Act. Thus, at the time of writing (November 2019), it appears that the PIGC, and the Judicial Council, may be formally established by the end of 2019.

¹⁶ Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018), at p.86. Available at: <https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>

Recommendation 5 (which forms part of the CIWG Objective 2 recommendations) stated that it would, through the Department of Justice and Equality, request this Commission to examine this specific issue in the context of the development of our *Fifth Programme of Law Reform*, on the content of which the Commission was engaged in public consultation at that time.

- [1.26] Recommendation 5 therefore recommended that the Commission be requested to consider including in its Fifth Programme a detailed analysis of the possibility of developing constitutionally sound legislation to delimit or cap the amount of damages which a court may award in respect of some or all categories of personal injuries.¹⁷
- [1.27] The *Second and Final Report of the Personal Injuries Commission* echoed this view by also recommending that this Commission should examine whether it would be constitutionally permissible to enact legislation that would set a cap on damages in personal injuries litigation.
- [1.28] The Commission duly considered these requests and, having applied the criteria for consideration of projects within the Fifth Programme,¹⁸ concluded that this project was suitable for inclusion. The Government subsequently approved the Commission's *Fifth Programme of Law Reform* in March 2019.
- [1.29] The CIWG *Ninth Progress Update* published in July 2019 stated that, as this project had been included in the Commission's Fifth Programme, Recommendation 5 had, in effect, been completed but that it would also follow developments as this project progresses towards completion by the Commission.¹⁹
- [1.30] In carrying out this project, the Commission will take fully into account the wider context of the work of the CIWG and PIC within which it is being carried out.²⁰ Of

¹⁷ Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018), at p.91. Available at: <https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>

¹⁸ As to these criteria, see *Report on Fifth Programme of Law Reform* (LRC 120-2019), Part 2.

¹⁹ Cost of Insurance Working Group, *Ninth Progress Update* (2019), at 32, available at: <https://assets.gov.ie/19322/8404160a5cc44b53b482c34ac1316f3b.pdf>.

²⁰ The Commission notes that its recommendations for reform of the law on insurance contracts in its 2015 *Report on Consumer Insurance Contracts* (LRC 113-2015) now form part of the ongoing reform work of the CIWG. The *Ninth Progress Update* of the CIWG (July 2019) referred to the relevance of the *Consumer Insurance Contracts Bill 2017* (a Private Member's Bill based on the draft Bill in the Commission's 2015 Report) to Recommendation 8 in the CIWG's *Report on the Cost of Motor Insurance*, which recommended that the insurer should consult in advance with the insured on any proposed settlement of a claim. As a result, on the initiative of the Minister of State in the Department of Finance with responsibility for the work of CIWG, such a duty was inserted into the 2017 Bill during the Dáil Éireann Committee Stage debates in July

particular relevance to this project is, as noted above, the establishment under the *Judicial Council Act 2019* of a Personal Injuries Guidelines Committee (PIGC) within the Judicial Council, which will develop Personal Injuries Guidelines to replace the Book of Quantum.

- [1.31] While the Commission will remain fully conscious of the wider context, it is nonetheless important to emphasise to consultees that this project is limited to a fairly narrow question: whether it would be constitutional, or otherwise desirable, to legislate for a cap on damages in personal injuries litigation. The Commission now turns to provide a brief overview of the remainder of this Issues Paper.

4. Overview of current law on damages

- [1.32] In **Chapter 2**, the Commission discusses the current law on the award of damages in personal injuries cases. In particular, there is discussion as to how the law has been developed in case law, including the general principle applied by the courts that the purpose of an award of damages is to put the injured person in the same position, so far as money can do so, as if the injury involved had not happened. In other words it is intended to provide restitution, to restore the injured person to his or her pre-accident state (so far as money can do). It is not intended as any kind of financial punishment of the person whose negligence or other breach of a legal duty has caused the injury.
- [1.33] In order to achieve this restitution through an award of damages, the law considers two aspects of the injuries that have occurred. The first is whether the person incurred a recognisable physical or non-physical (mental) injury, such as a broken neck, burns, scars, soft tissue injury, psychological or other non-physical injury, or for example loss of amenity such as inability to continue playing sport or inability to continue a full intimate relationship. Related to that is how extensive that injury or loss of amenity is, for example, is it temporary or permanent, as this will be relevant to the level of compensation. This part of an award is referred to as *general damages* or damages for “pain and suffering”.
- [1.34] The second aspect in determining the quantum of an award of damages is to ask whether the injuries have caused more specific loss. Examples are whether the plaintiff:
- has required care or will require care into the future;
 - has accrued medical costs, or will accrue medical costs into the future;

2019. On 13 November 2019, the 2017 Bill passed all Stages in Dáil Éireann and, at the time of writing (November 2019), is awaiting Second Stage debate in Seanad Éireann.

- was not able to work for a specific period of time as a result of the injury, and if so what is the income that has been lost to date and will be lost into the future.

- [1.35] If the injuries are severe, such as where the person is no longer able to walk without assistance, the award will also include a sum to pay for any medical equipment or care that the injured person requires, including any equipment needed for the rest of his or her life. This second category of damages is referred to as *special damages*, or “liquidated damages” because the amount involved can be calculated precisely, for example by an actuary.
- [1.36] This project, and therefore the discussion in Chapter 2, is concerned primarily with the award of general damages, because special damages are a separate issue that refers to actual loss of earnings and other clearly quantifiable loss that must be awarded in all cases. In relation to the law on general damages, the discussion in Chapter 2 involves 3 elements.
- [1.37] First, the courts have developed an upper limit “cap” on the amount of general damages that may be awarded in catastrophic injury cases such as quadriplegia, which in 1984 was set by the courts at £150,000, and which has since been adjusted by the courts to €500,000, which has taken account of both the inflationary effects of increases in the cost of living and the deflationary impact of recessions.
- [1.38] Second, in some instances, perhaps in particular where there is a high award of general damages combined with a high award of special damages, the courts consider that the combined total award should be subject to what is sometimes called a “totality rule”, that is, that although the separate sums assessed for general and special damages may be appropriate, the total award may be above what would be regarded as compensatory or restitutionary.
- [1.39] Third, in all cases the courts apply a proportionality test, in which the award of general damages must be fair to both parties and which has led the Court of Appeal to apply, since 2015, a three-point scale of injuries related to damages. The Court of Appeal has stated that: “minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories”.²¹ As already noted, and discussed further in Chapter 2, this three-point scale mirrors the approach already applied in the Book of Quantum and in the comparable Judicial Guidelines published since the 1990s in England and Wales, and in Northern Ireland.

²¹ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461, at para 42.

- [1.40] In summary, the effect of this is that the courts have already established an effective upper limit on the amount of general damages that can be awarded for the worst kind of catastrophic injuries, a limit that the courts have adjusted since the 1980s to reflect not only inflationary effects such as increases in the cost of living generally and of medical care in particular, but also the deflationary effects of economic recessions. This approach has allowed for an element of flexibility rather than rigidity. In addition, the courts have in recent years applied a general test of proportionality to awards. Since 2015, this has been refined by the Court of Appeal into a three-point scale.
- [1.41] This three-point scale approach to proportionality does not mean the courts impose a definite amount or absolute cap in a specific category of injuries, but it provides a range or bandwidth rather like the current Book of Quantum and comparable Guidelines published in England and Wales and Northern Ireland, which the Commission considers is likely to be a feature of the Personal Injuries Guidelines to be developed under the *Judicial Council Act 2019*.
- [1.42] As also discussed in Chapter 2, the three-point approach of the Court of Appeal has had the effect that in a number of instances it has reduced High Court awards in respect of what it regarded as minor injuries, in some instances reducing the award by 50%. In other instances, the Court of Appeal has increased awards where it considered that the injuries were at the more severe end of the scale. In summary, all these developments have emphasised the need for the test of proportionality to be applied.
- [1.43] The Commission concludes Chapter 2 by noting that *the Judicial Council Act 2019* provides that a court must: (a) not only “have regard” to the Personal Injuries Guidelines to be prepared under the 2019 Act, a test which mirrors the existing requirement to have regard to the guidance in the Book of Quantum, but (b) also, if it departs from those 2019 Act Guidelines, it must give reasons for doing so, which is a new requirement inserted into the *Civil Liability and Courts Act 2004* (2004 Act) by the 2019 Act. This new element inserted by the 2019 Act clearly strengthens the status of the 2019 Act Guidelines by comparison with the approach in the Book of Quantum.
- [1.44] The effect is that the courts must, in reality, apply the 2019 Act Guidelines or else explain why not, a form of “comply or explain” test that nonetheless has been careful to ensure that a court retains the ability to make an award that is consistent with the test of proportionality found in the case law discussed in Chapter 2. While this new test arguably imposes some limit to judicial discretion, it also retains a key element of judicial independence.

- [1.45] As noted in a speech delivered by the Chief Justice in November 2019,²² a second important feature of the Guidelines to be prepared under the 2019 Act is that the PIGC is empowered by the 2019 Act to depart from the current “going rate”, that is, the level of awards currently made in the courts. In contrast, the PIAB in preparing the Book of Quantum under the 2003 Act was required to mirror the “going rate” of awards in the courts.

5. Overview of constitutional issues

- [1.46] The Commission then turns in **Chapter 3** to discuss, in particular, proportionality and judicial independence against the background of the wide range of constitutional issues that various statutory models involving capping on damages would raise. The key constitutional rights identified in the Chapter are: (1) the right to bodily integrity (the right to be free from any law that would adversely affect a person’s health), (2) property rights (especially the right of access to courts and to an effective legal remedy where a person’s rights are affected), and (3) the right to equality before the law (which includes that a person will not be subject to any arbitrary or irrational treatment by the law). The Commission also notes in this respect that this project does not involve a single question as to whether a specific form of legislative cap on damages would, or would not, be constitutional. It is clear that a range of possible legislative approaches could be taken, and the Commission discusses these in general terms in Chapter 3.
- [1.47] Thus, if the proposed legislative model were to involve a mandatory limit on an award for a specific type of injury, such as a broken bone in a wrist, it could well be argued that this does not achieve proportionate justice for the individual. To take a hypothetical example, a mandatory limit of, say, €5,000 for a broken wrist could be perfectly appropriate where the medical evidence is that the injured person has fully recovered after, say, 6 months and will not have any future problems such as arthritis. However, if the medical evidence is that the injured person will be likely to be in pain in the future from injury-related arthritis, it is difficult to see how a mandatory cap could be consistent with the constitutional requirement of proportionality. For this reason, it would appear at first sight that a mandatory cap poses clear constitutional problems. However, as discussed in Chapter 3, a presumptive cap, one that would be applied in many situations but could be disapplied where required by specified (or exceptional) circumstances, would be less open to challenge. Similarly, the approach enacted in the *Judicial Council Act 2019*, in which courts must “have regard” to the Personal Injuries Guidelines issued under the 2019 Act and that if they depart from

²² Keynote speech delivered by the Chief Justice Mr Justice Frank Clarke at Insurance Ireland Conference, 19th November 2019. Available at <https://www.rte.ie/news/2019/1119/1092757-insurance-claims/>.

them they must give reasons, is another example of an approach that takes account of the proportionality principle.

- [1.48] If a legislative cap, whether mandatory or presumptive, were to involve delegating the level of the cap to, say, a Minister but does not provide the Minister with a set of guiding criteria, it is likely to be unconstitutional because it is not permissible for the Oireachtas to delegate its legislative policy-making role to any other body without providing policy guidance to that body (this is called the non-delegation doctrine). Separately, if the Oireachtas enacted legislation that entirely removes from the courts their current role of setting the levels of personal injuries awards – now to be supplemented by the provisions in the *Judicial Council Act 2019* – this would raise significant question marks over whether such a piece of legislation would be in conflict with the appropriate level of the separation of powers between the Oireachtas and the courts. In either legislative model, a crucial question is whether what is being proposed is a mandatory, fixed, amount or a more presumptive approach. If the model is presumptive in approach, this is likely to pose fewer constitutional problems because it may be possible to say that it is consistent with a proportionality test.

6. Possible statutory models for capping damages

- [1.49] Having described the key constitutional criteria that appear relevant to this project, in **Chapter 4** the Commission then outlines 4 possible legislative capping models that it has identified on which it seeks the views of consultees. These 4 models are, briefly, the following.
- [1.50] **Model 1** proposes a cap set by primary legislation that would take a similar form to how sentencing occurs in most criminal cases, in which the courts impose sentences using a proportionality test, on a scale from zero (an entirely suspended sentence) to the maximum permissible sentence for the particular offence. Model 1 is also clearly comparable to the three-point scale found in the case law on damages discussed in Chapter 2, the approach in the Book of Quantum and in comparable Guidelines published in England and Wales and Northern Ireland, and it can be assumed, the approach likely to be taken in the Personal Injuries Guidelines to be published under *the Judicial Council Act 2019*.
- [1.51] **Model 2** proposes, in effect, a presumptive cap scheme which involves elements based, in part, on the New South Wales *Civil Liability Act 2002* and, in part, on the England and Wales *Civil Liability Act 2018*. The New South Wales 2002 Act provides that general damages are capped and all awards for lesser injuries are indexed to the cap. Model 2 is similar to Model 1 in one respect, in that it allows the courts the discretion to determine the severity of the plaintiff's injuries and accordingly within which category those injuries should fall. If Model 2 was based entirely on the new

South Wales 2002 Act, it would differ in a significant respect from Model 1 because, once the court determines the severity of the plaintiff's injuries under the 2002 Act, it is bound to award the corresponding percentage of the cap. In this way, the 2002 Act is similar to a tariff style system, under which the court determines the level of injury, and Parliament provides a fixed sum for general damages that should accompany that level of injury.

- [1.52] Model 2 is, however, presumptive because it incorporates elements of the England and Wales *Civil Liability Act 2018*, which provides for Regulations to be made setting fixed general damages tariffs for whiplash injuries in road traffic cases. The Lord Chief Justice for England and Wales must be consulted before formulating the tariffs in such Regulations under the 2018 Act. The England and Wales 2018 Act differs from the New South Wales Civil Liability Act 2002 because the Regulations made under the 2018 Act provide for a "judicial uplift", that is, that the courts may in their discretion and subject to specified criteria award a sum for whiplash injuries greater than the tariff. Such a "judicial uplift" could meet constitutional requirements by allowing the courts to retain a certain level of discretion. However, this may conflict with the general purpose of a fixed tariff approach, in that there is the risk that uplifting may become the rule rather than the exception.
- [1.53] **Model 3** proposes that either Models 1 or 2 (or any other method of capping) be enacted, but in which the Act would delegate the details of the cap to, for example, a Minister or some other Regulation-making body. This is similar to the approach in the *Civil Liability (Capping of General Damages) Bill 2019*, a Private Member's Bill which passed Second Stage in Seanad Éireann in March 2019. The 2019 Bill bears some similarities to the England and Wales *Civil Liability Act 2018*, in that it provides for a delegated Regulation-making power rather than setting a specified amount in the Bill itself, but it has the advantage that it sets out some principles and policies on which the Minister for Justice and Equality is to determine the tariff for general damages in particular categories of injuries. On the other hand, it mirrors the New South Wales *Civil Liability Act 2002* and differs from the England and Wales *Civil Liability 2018* in that it appears to provide for a mandatory cap without any possibility of an exceptional "judicial uplift" and it does not contain any provision for any advance consultation with the judiciary.
- [1.54] **Model 4** could be described as involving an approach that is closest to the current position, in that it proposes that the courts should continue to determine the level of awards of general damages through case law, as supplemented by the significant new provisions for Personal Injuries Guidelines under the *Judicial Council Act 2019*.
- [1.55] The Commission concludes **Chapter 4** by inviting consultees to consider whether any other model or approach to address the issue in this project could be considered. In

this respect, the Commission is conscious that other developments in the law of damages may be relevant. By way of example, the Commission notes that Part IVB of the *Civil Liability Act 1961*, inserted by the *Civil Liability (Amendment) Act 2017*, provides for the making of Periodic Payments Orders (PPOs) in civil claims, in particular where the ongoing nature of the injuries involved (such as in certain clinical negligence claims) requires indefinite future care and where a lump sum award may not provide a sufficient capital sum for such care and treatment. The Commission does not express a view as to whether a periodic payment, as opposed to a lump sum, may be appropriate in cases other than those provided for under the 2017 Act, but invites consultees to consider whether an approach other than those set out in Models 1 to 4 could be considered relevant to the specific issue involved in this project.

- [1.56] The discussion in Chapter 4 is then followed by a number of questions in which the Commission seeks views of consultees.
- [1.57] As noted above, the Commission would like to receive submissions on the questions raised in this Issues Paper no later than close of business on **Friday 31 January 2020** if possible.

CHAPTER 2 CURRENT RELEVANT LAW ON DAMAGES FOR PERSONAL INJURIES

1. The purpose of damages

- [2.1] In Ireland, the purpose of an award of damages for personal injuries is to put the injured person in the same position, so far as money can do so, as if the injury involved had not happened. In other words it is intended to restore the injured person to his or her pre-accident state (so far as money can do). It is not intended as any kind of financial punishment of the person whose negligence or other breach of a legal duty has caused the injury. This approach to an award of damages is sometimes referred to using the Latin term *restitutio in integrum*: restoring the person to his or her “integral”, that is, “complete” self.
- [2.2] In order to achieve this restitution through an award of damages, the law considers two aspects of the injuries that have occurred. The first is whether the person incurred a recognisable physical or non-physical (mental) injury, such as a broken neck, burns, scars, soft tissue injury, psychological or other non-physical injury, or for example loss of amenity such as inability to continue playing sport or inability to continue a full intimate relationship. Related to that is how extensive that injury or loss of amenity is, for example, is it temporary or permanent, as this will be relevant to the level of compensation. This part of an award is referred to as *general damages* or damages for “pain and suffering”.
- [2.3] The second aspect in determining the amount or quantum of an award of damages is to ask whether the injuries have caused more specific loss that should be compensated, for example, did the injuries mean that the person was not able to work for a specific time? If so, the injured person will be awarded a sum identical to his or her loss of income, whether as an employee or self-employed. If the injuries are severe, such as where the person is no longer able to walk without assistance, the award will also include a sum to pay for any medical equipment or care that the injured person requires, including any equipment needed for the rest of his or her life. This second category of damages is referred to as *special damages*, or “liquidated damages” because the amount involved can be calculated precisely, for example by an actuary.
- [2.4] As discussed below, it is more difficult to achieve in practice the restorative or restitutionary intention behind an award of damages where the injuries involved are profound and irreversible. In those cases, an award of money can only be viewed as, at best, an approximation of what the law is intended to achieve. It is nonetheless important to bear in mind that, even in such cases, an award of

damages may provide for the injured party a level of care and treatment, and possibly peace of mind for his or her family, that might otherwise not be available.

2. Overview of the current judicially-derived upper limit on, and proportionality test for, awards of general damages

[2.5] In order to approach the core issue in this project, whether it would be constitutionally permissible to delimit or cap the amount of damages which a court may award in respect of some or all categories of personal injuries, it is important to first consider the current general position in Ireland. This includes in particular:

(a) that the courts have developed an upper limit “cap” on the amount of general damages that may be awarded in catastrophic injury cases such as quadriplegia, which in the 1980s was set at £150,000, and which has since been raised to €500,000, to take account of inflation and economic recessions;

(b) that, in some instances, perhaps in particular where there is a high award of general damages combined with a high award of special damages, the courts consider that the combined total award, should be subject to what is sometime called a “totality rule”, that is, that although the separate sums for general and special damages may be appropriate, the total award may be above what would be regarded as compensatory or restitutionary; and

(c) that in all cases the courts apply a proportionality test, in which the award must be fair to both parties and which has led the Court of Appeal to develop a three-point scale of injuries related to damages in which the Court has stated that “minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories”.¹

[2.6] As discussed in detail below, the courts have already developed an effective upper limit on the amount of general damages that can be awarded for the worst kind of catastrophic injuries, a limit that the courts have adjusted since the 1980s to reflect not only inflationary effects such as increases in the cost of living generally and of medical care in particular, but also the deflationary

¹ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 42.

effects of economic recessions. This approach has allowed for an element of flexibility rather than rigidity. In addition, the courts have in recent years applied a general test of proportionality to awards. Since 2015, this has been refined by the Court of Appeal into a three-point scale under which: minor injuries should attract modest damages, middling injuries moderate damages and more severe injuries awards that are clearly distinguishable from the other two categories. This three-point approach to proportionality does not mean the courts impose a definite amount or absolute cap in a specific category of injuries, but it provides a range of bandwidth rather like the current Book of Quantum and the comparable Guidelines published in England and Wales, and in Northern Ireland, which the Commission considers is likely to be a feature of the guidelines to be developed under the *Judicial Council Act 2019*.

- [2.7] As also discussed below, the three-point scale approach of the Court of Appeal has had the effect that in a number of instances it has reduced High Court awards in respect of what it regarded as minor injuries, in some instances reducing the award by 50%. In other instances, the Court of Appeal has increased awards where it considered that the injuries were at the more severe end of the scale. In summary, these developments have emphasised the importance of a proportionality test in the assessment of damages in personal injury cases.

3. An Upper Limit

- [2.8] The first time a formal upper limit on general damages in catastrophic cases was developed by the courts was in 1984 in the Supreme Court decision *Sinnott v Quinnsworth Ltd*.² The plaintiff in *Sinnott* had suffered catastrophic and profoundly life-altering injuries in a road traffic collision in which he was left quadriplegic and totally dependent on others but with full understanding of his position.
- [2.9] In the High Court, the plaintiff was awarded general damages of £800,000 and special damages of £680,000, making a total of £1,480,000. At that time, awards in High Court personal injuries actions were determined by juries, but this is no longer the case since 1988.³ On appeal in the *Sinnott* case, the Supreme Court

² [1984] ILRM 523.

³ The *Courts Act 1988* abolished the right to a jury trial in personal injuries cases in the High Court. In the Second Stage Debate on the *Courts Bill 1986* (which was enacted as the 1988 Act), the Minister for Justice referred to the £150,000 figure set down by the Supreme Court as a safeguard against disproportionate damages awards.

found that the award of £800,000 for general damages “lack[ed] all sense of reality”.

- [2.10] The Court gave some consideration to the purpose of general damages, stating that compensating an individual who has suffered a catastrophic injury such as the plaintiff in that case would be impossible. In light of this impossibility the Court feared that juries might make awards that would “constitute a punishment for the infliction of the injury rather than a reasonable, if imperfect, attempt to compensate the injured”.⁴ The Court feared that public policy would be endangered through the establishment of a precedent of high awards that constitute punishment of the defendant rather than compensation for the plaintiff. It was on this basis that the Court was of the view that a limit must exist with respect to damages for pain and suffering that is “fair and reasonable”.⁵ In terms of assessing where the limit should lie, the Court stated that regard must be had “to the facts of each case and the social conditions which obtain in our society... [to the] ordinary living standards in the country, to the general level of incomes, and to the things upon which the plaintiff might reasonably be expected to spend money”.⁶ With these principles in mind, the Court reduced the sum of general damages awarded by the jury from £800,000 to £150,000 and stated that “[u]nless there are particular circumstances which suggest otherwise, general damages, in a case of this nature, should not exceed a sum in the region of £150,000”.⁷
- [2.11] The figure of £150,000 has since been revised upwards on a number of occasions. In 2009, the High Court (Quirke J) in *Yun v Motor Insurance Bureau of Ireland*⁸ decided, having heard expert evidence of economic and social history between 1984 and 2009 and taking account of future social and economic outlooks, that the figure should be revised to €450,000. In 2016 the figure was revised up to €500,000.⁹
- [2.12] It is therefore clear that currently the courts have developed, in effect, a cap on general damages in catastrophic cases, which stood at £150,000 in 1984 and has been raised from time to time so that it currently (November 2019) stands at €500,000. This increase has been arrived at by taking account of the factors

⁴ [1984] ILRM 523, at p.532.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ [2009] IEHC 318.

⁹ *Woods v Tyrell* [2016] IEHC 355, [2016] 1 IR 349.

described by the Supreme Court in the *Sinnott* case, namely, prevailing social conditions, ordinary living standards in the country, the general level of incomes, and the things upon which the injured person might reasonably be expected to spend money.

4. The “totality rule”

- [2.13] It appears that, as a result of a number of Supreme Court decisions, of which the *Sinnott* case is one, in some instances, in particular where there is a high award of general damages combined with a high award of special damages, the courts consider that the combined total award should be subject to what is sometimes called a “totality rule”. This approach is that, although the separate sums for general and special damages may be appropriate, the total award may be above what would be regarded as compensatory or restitutionary.
- [2.14] While this “totality rule” appears to remain the current law for such cases where the amount of special damages is high, the courts have also emphasised that the totality rule should not be considered in all cases. The question as to whether damages are to be assessed in their totality or are to be assessed in terms of whether the general damages are suitable and, separately, whether the special damages are suitable is relevant to this project: should any proposed cap apply to the totality of the award, or should any proposed cap apply only to the damages awarded under a specific heading or headings?
- [2.15] The “totality rule” was first outlined as follows by the Supreme Court in 1983, in *Reddy v Bates*:

“The fact that a plaintiff has been awarded what is considered to be sufficient damages to cover all her prospective losses, to provide for all her bodily needs, and to enable her to live in comparative comfort (having due regard to her disabilities), should be reflected in the amount of general damages to be awarded... In a case such as this, where damages are to be assessed under several headings, when the jury has added the various sums awarded and arrived at a total for damages, they should then consider this total sum (as should this Court on any appeal) for the purpose of ascertaining whether the total sum awarded is, in the circumstances of the case, fair compensation for the plaintiff for the injuries suffered,

or whether it is out of all proportion to such circumstances".¹⁰

- [2.16] The Supreme Court took the opportunity in *Cooke v Walsh*¹¹ to further clarify this, saying that "it is the global sum for damages that is of importance". The Court went on to state that once "all the component items have been added together the total or global sum should then be reconsidered by the jury (or the trial judge as the case may be) to ascertain whether the global sum is, in all the circumstances of the particular case, fair and reasonable compensation to the plaintiff for the injury suffered".¹²
- [2.17] In the *Sinnott* case, the Supreme Court stated that, when assessing general damages "regard must be had to the fact that every single penny of monetary loss or expense which the plaintiff has been put to in the past or will be put to in the future has been provided for him and will be paid to him".¹³
- [2.18] Since the *Sinnott* case, there has been some doubt as to whether the totality rule applies in all cases. As noted below, the better view appears to be that it only applies where the award of general damages and the award of special damages are both very high.
- [2.19] In *Burke v Blanch*¹⁴ the 24 year old plaintiff had suffered what were described as "devastating injuries" in a car crash, which resulted in paraplegia. The High Court (Costello J) stated that:

"[t]here are clear legal guidelines laid down by the Supreme Court as to how the assessment of general damages in a case of this sort should be approached... and applying these and in particular bearing in mind that the plaintiff, apart from general damages, will be receiving half a million pounds approximately, I think a fair and

¹⁰ *Reddy v Bates* [1983] IR 141, at p.148.

¹¹ [1984] ILRM 208.

¹² *Ibid*, at p.220. As noted above, the *Courts Act 1988* abolished juries in High Court personal injuries actions.

¹³ *Sinnott v Quinnsworth Ltd* [1984] ILRM 523, at p.532.

¹⁴ High Court (Costello J), 28 July 1989.

reasonable sum for general damages is an additional sum of £100,000.”¹⁵

- [2.20] McMahon and Binchy observe that the *Burke v Blanch* approach has been supported in several subsequent cases.¹⁶ In *Kealy v Minister for Health*¹⁷ the High Court (Morris P) distinguished *Sinnott* on the basis that it concerned a substantial award of special damages whereas the case before the Court did not.¹⁸
- [2.21] The Supreme Court also endorsed this understanding in *Fitzgerald v Treacy*.¹⁹ In that case, the plaintiff had suffered back injuries and been awarded £180,000 in general damages and £10,000 in special damages. The Supreme Court found the figure of £180,000 to be excessive given that this was close to the maximum sum for personal injuries and that the plaintiff had received “significant elements of special damages” already.
- [2.22] In *Gough v Neary*²⁰ the Supreme Court referred to both *Kealy v Minister for Health* and *Fitzgerald v Treacy* as authority for the proposition that the *Sinnott* cap only applied where there was a high award for special damages:
- “[T]here is no compulsory “cap” if there is no “omnibus sum” or in other words, if the special damages are low. On the other hand that does not mean that the “cap” figure cannot be taken into account in a general way in assessing the appropriate general damages in a non-cap sense.”²¹
- [2.23] McMahon and Binchy note that this approach is unfair and potentially in conflict with Article 40.1 of the Constitution, as it implies that two plaintiffs can suffer

¹⁵ *Burke v Blanch*, High Court (Costello J), 28 July 1989 at 15. The guidance of the Supreme Court referred to was that in *Reddy v Bates* [1983] IR 141, *Cooke v Walsh* [1984] ILRM 208, *Sinnott v Quinnsword Ltd* [1984] ILRM 523 and *Griffith v Van Raaj* [1985] ILRM 582.

¹⁶ McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional, 2013) at para 44.240.

¹⁷ [1999] 2 IR 456.

¹⁸ *Ibid*, at p.458.

¹⁹ [2001] 4 IR 405.

²⁰ [2003] 3 IR 92.

²¹ *Ibid*, at p.134.

similar or identical catastrophic injuries, but receive different amounts of damages for pain and suffering because the amount of economic loss suffered by each will differ.²² The potential implications of inequality before the law are discussed in further detail in Chapter 3.

- [2.24] In recent cases the Court of Appeal has rejected the argument that the level of special damages should be a relevant factor in the calculation of general damages. In *Shannon v O'Sullivan*²³ the Court stated that that argument could not be correct in principle as "an injured person is entitled to be compensated in full for all losses flowing from the injuries he sustains".²⁴
- [2.25] Similarly, in *Nolan v Wirenski*²⁵ the Court of Appeal preferred the view that the *Sinnott* cap was a general cap on general damages and was not contingent on other factors on the basis this would be "unjust and even perhaps irrational".²⁶

5. A proportionality test: minor injuries, middling injuries and more severe injuries

- [2.26] Separately from the cap that emerged from *Sinnott* and the later cases discussed above, the courts have also applied a general proportionality test in assessing the level of general damages to be awarded in personal injuries cases.
- [2.27] In 2005, in *MN v SM*²⁷ the Supreme Court stated that an award of damages should be fair to both the plaintiff and the defendant, "should be proportionate to social conditions, bearing in mind the common good" and "should also be proportionate within the legal scheme of awards made for other personal injuries."²⁸

²² McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional, 2013), at para 44.239.

²³ [2016] IECA 93.

²⁴ *Ibid*, at para 37.

²⁵ [2016] IECA 56, [2016] 1 IR 461.

²⁶ *Ibid*, at para 34.

²⁷ [2005] IESC 17, [2005] 4 IR 461.

²⁸ *Ibid*, at para 38.

[2.28] In 2012, in *Kearney v McQuillan and North Eastern Health Board (No.2)*,²⁹ the Supreme Court reiterated this proportionality test by stating that an award should:

“logically be situated within the legal scheme of awards made for other personal injuries... The resources of society are finite. Each award of damages for personal injuries in the courts may be reflected in increased insurance costs, taxation, or, perhaps a reduction in some social service.”³⁰

[2.29] This proportionality test is important because it clearly identifies the two major competing interests involved in determining the appropriate level of damages to be awarded. On the one hand, there is the injured person’s interest in receiving an award that fully reflects his or her pecuniary loss as well as his or her pain and suffering. On the other hand, there are the interests of the person who must pay the award, but also the wider interests of society and the common good which fall to be considered because, as stated by the Supreme Court, inappropriately high awards can have an impact on insurance costs, taxation and social services.

[2.30] The Court of Appeal has applied this proportionality principle in a series of decisions since 2015. The Court has also developed a three-point scale that is summarised in the comment that “minor injuries attract appropriately modest damages, middling injuries moderate damages and more severe injuries damages of a level which are clearly distinguishable in terms of quantum from those that fall into the other lesser categories”.³¹ This three-point scale and the principle of proportionality have, in a series of cases, been applied by the Court of Appeal to reduce High Court awards in respect of minor injuries and, in some instances, to increase awards in respect of more serious injuries.³²

²⁹ [2012] IESC 43.

³⁰ *Ibid*, at para 28.

³¹ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461, at para 42.

³² There has been some debate as to whether the intention of the Court of Appeal has been to recalibrate awards downwards. See for example *Jedruch v Tesco (Irl) Ltd* [2018] IEHC 205 where the High Court (Barr J) stated at para 74 that “[i]n the light of these judgments [of the Court of Appeal], this Court has had to somewhat recalibrate its approach to the assessment of general damages in personal injury cases”. In contrast, the High Court (Barton J) in *BD v Minister for Health* [2019] IEHC 173 stated at para 14 that “[*Payne v Nugent and Nolan v Wirenski*] did not re-calibrate damages downwards... [t]hose decisions do no more than clarify the principles to be applied and the proper approach to be taken by a trial judge when making an award for damages for personal

- [2.31] The first Court of Appeal decision in this series was *Payne v Nugent*.³³ In this case, the plaintiff had incurred what were described as “modest shoulder, neck and back injuries” in a road traffic collision. In the High Court, she had been awarded €65,000 in general damages. The Court of Appeal reduced this figure by 45% to €35,000. In approaching its decision, the Court notably referred to the cap on general damages for catastrophic injuries (first set by the Supreme Court in the *Sinnott* case, discussed above), which at that time stood at somewhere between €400,000 and €450,000. The Court noted that the plaintiff’s injuries were modest, and were not worth, in effect, one sixth of the cap for catastrophic injuries. The Court concluded that the High Court award in this case had not been reasonable or proportionate adding that if modest injuries of this type were to result in awards of €65,000, it would drive up awards for more significant middle ranking injuries. The Court added that “modest injuries should attract moderate damages”.³⁴
- [2.32] In *Nolan v Wirenski*³⁵ the plaintiff had suffered shoulder and neck injuries as well as injuries to her hand as a result of a road traffic collision. In the High Court, the plaintiff had been awarded €120,000 in general damages. The Court of Appeal reduced this sum by 45% to €65,000. The Court considered that in assessing damages it is useful to establish where the plaintiff’s injuries sit on the “spectrum of awards” which ranges from the most minor injury to the most catastrophic. The Court of Appeal set out a broad three-point scale categorisation of damages, namely that “minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages which are likely to fall somewhere in the region of [the cap on general damages]”.³⁶ This statement has been cited in a number of subsequent decisions.
- [2.33] *Shannon v O’Sullivan*³⁷ concerned two plaintiffs, who had both suffered “modest”³⁸ neck injuries in a road traffic collision which caused each of them to

injuries so as to ensure that the award made is just, equitable and proportionate”. As the cases discussed below indicate, the Court of Appeal has in some cases reduced High Court awards and in others increased them.

³³ [2015] IECA 268.

³⁴ *Ibid*, at para 19.

³⁵ [2016] IECA 56, [2016] 1 IR 461.

³⁶ *Ibid*, at para 42.

³⁷ [2016] IECA 93.

³⁸ *Ibid*, at para 68.

develop adverse psychological effects. In the High Court, the first plaintiff had been awarded €90,000 and the second €130,000 in general damages. On appeal these figures were reduced by 55% to €40,000 and by 50% to €65,000 respectively. The Court of Appeal took the same approach as in *Nolan* and reiterated that in cases of personal injuries, “minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages which are likely to fall somewhere in the region of €450,000”.³⁹

- [2.34] In *Cronin v Stevenson*⁴⁰ the plaintiff had suffered severe soft tissue injuries to her cervical, left shoulder and lower back as a result of a road traffic accident. The High Court made a total award in general damages of €180,000. The Court of Appeal reduced this figure by 40% to €105,000. The Court made reference to the 2004 Book of Quantum which recommended an award of €300,000 in general damages for a catastrophically injured plaintiff. The Court noted that the limit for catastrophic injuries had increased to €450,000 since the publication of the 2004 Book of Quantum.⁴¹ Taking this into account, the Court nonetheless stated that “it is clear from the indicative figures provided by the Book of Quantum, even if updated by a crude 50% that the trial judge’s award of €180,000... is difficult to justify”.⁴²
- [2.35] The plaintiff in *Gore v Walsh*⁴³ was a 4 year old boy who had suffered a laceration to his head after falling from his bed and hitting his head against an uncovered spindle on a radiator. He sued the landlord of the property through his mother. The High Court had made an award of €50,000 which was reduced by the Court of Appeal by 50% to €25,000. The Court stated that, if modest lacerations such as in this case are to attract awards of €50,000, it is difficult to see how a court “could make a proportionate and fair award in respect of, for example, substantial third-degree burns to a large area of the body including the face which would not require an award of damages far beyond the level of damages commonly reserved for those who sustain the most extreme type of catastrophic injury such as severe brain damage or quadriplegia”.⁴⁴

³⁹ *Ibid*, at para 34.

⁴⁰ [2016] IECA 186.

⁴¹ *Ibid*, at para 76.

⁴² *Ibid*, at para 78.

⁴³ [2017] IECA 278.

⁴⁴ *Ibid*, at para 38.

- [2.36] *Fogarty v Cox*⁴⁵ was another case which concerned injuries sustained as a result of a road traffic collision. The High Court made an award of €115,000 in general damages. On appeal, the Court of Appeal found that the evidence demonstrated that the collision between the vehicles was “at the lowest end of the spectrum and is to be contrasted with the multitude of road traffic accidents which are extraordinarily frightening”.⁴⁶ The Court found that the injuries sustained by the plaintiff did not inhibit her ability to lead a relatively normal life, and the fact that she did not report her shoulder pain until 10 months post-accident indicated that her shoulder condition was relatively benign. On this basis the Court of Appeal reduced the general damages to €62,500, a 45% reduction on the High Court award.
- [2.37] In contrast to the cases discussed above where the injuries suffered by the plaintiffs were relatively modest, the plaintiff in *Murphy v County Galway Motor Club Ltd*⁴⁷ had suffered a more severe type of injury. The plaintiff in that case was 19 years of age when he was struck by a vehicle at a motor rally which resulted in an injury requiring the amputation of his leg. The High Court made a total award of €200,000 in general damages. On appeal, the Court of Appeal increased this to €275,000. The Court again applied the approach in the *Nolan* case and sought to locate where on the personal injury spectrum the plaintiff’s injuries fell. The Court viewed the plaintiff’s injury as “very serious” and had regard to the fact that the plaintiff was only 19 years of age when he sustained the injury and that his life would likely be “permanently and irreparably changed by reason of his injuries”.⁴⁸
- [2.38] *Rowley v Budget Travel Ltd*⁴⁹ is another example of a case where the Court of Appeal increased an award of damages made by the High Court. The plaintiff in that case had slipped while walking down a ramp at the entrance to a hotel fracturing her elbow. The High Court awarded her €20,000 in general damages to date and €5,000 for general damages into the future. On appeal, the Court of Appeal increased the award of general damages into the future to €15,000. The Court revised the award upwards on the basis that the medical evidence demonstrated that the plaintiff was suffering from permanent ongoing discomfort and impaired function in the wrist with an increased risk of arthritis.

⁴⁵ [2017] IECA 309.

⁴⁶ *Ibid*, at para 64.

⁴⁷ [2016] IECA 106.

⁴⁸ *Ibid*, at para 22.

⁴⁹ [2019] IECA 165.

Having regard to both *Nolan* and *Shannon* and the need for proportionality, as well as the Book of Quantum, the Court was satisfied that the award for pain and suffering into the future made by the High Court had been “disproportionately low”.⁵⁰

- [2.39] The approach taken in the decisions of the Court of Appeal in both *Murphy* and *Rowley* to increase awards is consistent with the other decisions of the Court of Appeal where damages were significantly reduced. The plaintiffs in both *Murphy* and *Rowley* had incurred injuries at the higher end of their respective types, and the Court of Appeal increased the High Court awards to reflect this. The cases in which damages were significantly reduced such as *Nolan*, *Shannon* and *Payne* involved injuries on the lower end of the personal injuries scale which were of a minor to moderate nature, generally involving soft-tissue injuries. A clear trend can be identified in all these cases, namely that general damages in cases of minor to middling injuries were significantly reduced, in some cases by as much as 50%.

6. Comparison with Book of Quantum and Judicial Guidelines

- [2.40] It is worth noting that the proportionality test applied by the Supreme Court and the three-point scale adopted by the Court of Appeal since 2015 broadly mirrors the approach taken in the 2016 Book of Quantum issued under the *Personal Injuries Assessment Board Act 2003*.⁵¹ The Book of Quantum (as its longer title, *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims*, indicates) was in turn modelled on the approach used in the *Guidelines for the Assessment of General Damages in Personal Injury Cases* published in England and Wales since 1992 by its Judicial

⁵⁰ *Ibid*, at para 20.

⁵¹ *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum*, available at <https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>. The Commission also notes that a limited set of guideline amounts (concerning historical abuse suffered in residential institutions) was developed for awards made under the *Residential Institutions Redress Act 2002*: see the *Residential Institutions Redress Act 2002 (Section 17) Regulations 2002 (S.I. No.646 of 2002)*.

College (formerly, its Judicial Studies Board),⁵² and in Northern Ireland since 1996 by its Judicial Studies Board,⁵³ both most recently updated in 2019.

- [2.41] Under the reforms enacted in the *Judicial Council Act 2019*, the Book of Quantum will be replaced by statutory Guidelines on Personal Injuries Awards which will be published under the 2019 Act under the auspices of the Judicial Council, thus reflecting even more closely the position in England and Wales, and in Northern Ireland.
- [2.42] The guideline ranges of awards in the 2016 Book of Quantum were based on an examination of representative samples from over 51,000 closed personal injuries claims from 2013 and 2014, and were derived from actual figures from court cases, insurance company settlements, State Claims Agency cases and PIAB data.⁵⁴ The data on which the 2016 Book of Quantum was based thus preceded the Court of Appeal case law from 2015 onwards, discussed above, that has used the three-point scale. In the general introduction to the 2016 Book of Quantum,⁵⁵ the authors suggest that, in approaching how PIAB can calculate an award, injuries can be categorised as follows:⁵⁶

- **Minor**

Injuries that have substantially recovered.

- **Moderate**

Includes injuries from which a claimant has substantially recovered but there are ongoing symptoms that interfere

⁵² The 15th edition of these Guidelines was published in 2019: Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* 15th edn (Oxford, 2019). The English Guidelines are published on a commercial basis, unlike the equivalent Northern Ireland Guidelines, discussed immediately below, which are available free on the website of the Northern Ireland Judiciary.

⁵³ The 5th edition of these Guidelines (known as the “Green Book”) was published in 2019: Judicial Studies Board for Northern Ireland, *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 5th edition (2019), available at <https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>.

⁵⁴ *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum*, at p.5. Available at: <https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>.

⁵⁵ *Ibid*, at p.9-11 (“How to Use the Book of Quantum”).

⁵⁶ *Ibid*, at p.10.

with carrying out full day to day activities. Recovery will be achieved from these types of injuries.

- **Moderately Severe**

Includes moderate injuries and in addition the injury has resulted in some permanent incapacity or limitation that impacts the body part which has been injured.

- **Severe and Permanent Conditions**

Will apply if the injury is severe and has caused major disruption to a claimant’s life in a number of areas or results in serious continuing pain and/or requires permanent medical attention.

[2.43] While this involves a four-point scale, it is likely that the fourth point, Severe and Permanent Conditions, will apply only in a small minority of cases and that, in effect, the other three points on the scale will apply in the majority of instances.

[2.44] In addressing, for example, whiplash injuries, one of the most commonly litigated injuries, the 2016 Book of Quantum provides the following guidance:⁵⁷

The most common type of neck injury is called a “whiplash” injury which is an over extension or sprain often suffered in a motor vehicle accident or high impact slip/trip/fall type of accidents.

Whiplash injuries can involve a very minor sprain that heals within days or weeks or they can in extreme cases cause long lasting pain and permanent disability. Sometimes a neck strain can irritate or aggravate a pre-existing condition that may or may not have been treated before the accident. These can include disc lesions, spondylosis, osteoarthritis, spondylolisthesis.

Minor – substantially recovered up to €15,700

Minor – a full recovery expected up to €19,400

⁵⁷ *Ibid*, at p.27.

These injuries are minor soft tissue, whiplash injuries. Whilst the duration of symptoms will be of importance, there are also other factors that need to be considered when calculating the assessment. Such factors would include the nature of the neck injury, the intensity of the pain and extent of the symptoms, the presence of additional symptoms in the back or shoulder areas, the impact of the injuries on the persons ability to work and/or the extent of the treatment.

Moderate €20,400 to €30,200

These injuries would be moderate soft tissue injuries where the period of recovery has been protracted and where there remains an increased vulnerability to further trauma. Also within this bracket would be injuries which may have accelerated or exacerbated a pre-existing condition over a period of time, usually no more than five years.

Moderately Severe €34,400 to €52,200

These injuries involve the soft tissue or wrenching type injury of the more severe type resulting in serious limitation of movement, recurring 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.

Severe and permanent €44,600 to €77,900

The most severe category. These injuries will have also affected the structure of the neck 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 the necessity to wear a collar for long periods in the day.

[2.45] The 2016 Book of Quantum suggests an award of “up to €15,700” for a minor whiplash injury where the claimant has “substantially recovered.” While the equivalent Northern Ireland 2019 Judicial Guidelines⁵⁸ adopt the same general three-point scale in approaching personal injuries, it is notable that their discussion of minor whiplash injuries is more detailed. Thus, the Northern Ireland 2019 Guidelines state:⁵⁹

<p>(g) Minor Neck Injuries</p> <p>This bracket includes minor soft tissue injuries. Whilst the duration of symptoms will always be important, the level of award will also be influenced by factors such as:</p> <ul style="list-style-type: none"> • the severity of the neck injury; • the intensity of pain experienced and the consistency of symptoms; • the presence of additional symptoms in the back and/or shoulder and/or referred headaches; • the impact of the symptoms on the injured person’s ability to function in everyday life and engage in social/recreational activities; • the impact of the injuries on the injured person’s ability to work; • the extent of any treatment required; • the need to take medication to control symptoms of pain and discomfort. 	
<p>(i) Where a full recovery takes place within a period of about one to two years. This</p>	<p>Up to £12,500⁶⁰</p>

⁵⁸ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland*, 5th edition (2019), available at <https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>.

⁵⁹ *Ibid*, at p.26-27.

⁶⁰ Approximately €14,663 at November 2019.

	bracket will also apply to short-term acceleration and/or exacerbation injuries, usually between one and two years.	
(ii)	Where a full recovery takes place within a period of several months and a year. This bracket will also apply to very short-term acceleration and/or exacerbation injuries, usually less than one year	Up to £5,000 ⁶¹
(iii)	Where a full recovery is made within a period of a few days, a few weeks or a few months	Up to £3,000 ⁶²

[2.46] Thus, the 2019 Northern Ireland Guidelines provide for a three-point scale within the category of minor soft tissue neck injuries that involves an upper guideline of £12,500, which is comparable to the equivalent upper guideline figure of €15,700 in the 2016 Book of Quantum. The Northern Ireland Guidelines also provide, however, for lower intermediate guideline figures, beginning with a figure of “up to £3,000”.

7. Discussion and Conclusion

- [2.47] When discussing any legislative model that provides for capping damages, whether in the form of an upper limit along the lines first set out by the Supreme Court in the *Sinnott* case in the 1980s, or in the form of three-point scales such as described in the Court of Appeal case law or the Guidelines (including the Book of Quantum) discussed above, a key issue is whether any such legislative model is mandatory or presumptive in nature. In the case of a mandatory model, the court is bound to apply the cap and would have no discretion to go above that cap in exceptional circumstances. In the case of a presumptive model, the court is expected to treat the cap as mandatory, but may opt not to apply the cap in specified circumstances.
- [2.48] The Court of Appeal in *Payne v Nugent*⁶³ stated that if modest injuries are to attract damages of €65,000, the effect of such an approach “must be to drive up awards of those in receipt of more significant middle ranking personal injury

⁶¹ Approximately €5,865 at November 2019.

⁶² Approximately €3,519 at November 2019.

⁶³ [2015] IECA 268.

claims".⁶⁴ Similarly, the Court of Appeal in *Shannon v O'Sullivan*⁶⁵ and *Nolan v Wirenski*⁶⁶ held that the principle of proportionality is to be applied in the assessment of damages in that the award must be "proportionate within the scheme of awards for personal injuries generally".⁶⁷ The Court in *Shannon* added: "[t]hat is not to say that €450,000 is a maximum or that there have not been cases where that sum has occasionally been exceeded."⁶⁸ This suggests that the *Sinnott* cap is presumptive, which is supported by the adjustments that have been made to it since the 1980s.

- [2.49] A presumptive approach in any legislative model for capping damages would arguably be less prone to constitutional challenge, (which the Commission discusses in detail in Chapter 3, below) than one that is mandatory, because it would allow a court a discretion to depart from any cap where it considered that justice so requires for the individual who has been injured.
- [2.50] Something similar to a presumptive cap can be seen in sentencing legislation. The *Misuse of Drugs Act 1977* as amended provides a useful example. When a person is convicted under that Act⁶⁹ of possession or the importation of drugs with a value of €13,000, the court may impose a sentence up to life imprisonment but must specify a term of "not less than 10 years".⁷⁰ However, the Act also provides that "exceptional and specific circumstances" can justify a lower penalty. Thus, although there is a strong presumption in favour of a minimum sentence of 10 years, the sentence is in fact presumptive as judicial discretion is retained through the provision for exceptional circumstances.⁷¹
- [2.51] Similarly, section 22 of the *Civil Liability and Courts Act 2004*, as significantly amended by section 99 of the *Judicial Council Act 2019*, provides that:

⁶⁴ *Ibid*, at para 18.

⁶⁵ [2016] IECA 93.

⁶⁶ [2016] IECA 56, [2016] 1 IR 461.

⁶⁷ *Shannon v O'Sullivan* [2016] IECA 93 at para 32. *Nolan v Wirenski* [2016] IECA 56, [2016] IECA 56, [2016] 1 IR 461, at para 31.

⁶⁸ [2016] IECA 93 at para 36.

⁶⁹ Sections 15A and 15B of the *Misuse of Drugs Act 1977* as amended.

⁷⁰ Section 27(3C) of the *Misuse of Drugs Act 1977* as amended.

⁷¹ See also para 4.52, below, referring to the discussion of the 1977 Act in the Commission's *Report on Mandatory Sentences* (LRC 108-2013).

- a. a court must have regard to the guidelines on damages to be produced by the Personal Injuries Guidelines Committee (PIGC) under the 2019 Act, which mirrors the existing text of section 22 of the 2004 Act requiring the courts to have regard to the guidance in the Book of Quantum; and
- b. if the court departs from the PIGC guidelines, it must give reasons for doing so, which is a new requirement inserted by the 2019 Act.

[2.52] In *McEvoy v Meath County Council*⁷² the High Court considered the meaning of the term “have regard to” in the context of the requirement in the *Planning and Development Act 2000* that a planning authority is required to “have regard to” planning guidelines issued under the 2000 Act. The High Court noted that the term “have regard to” appeared in a wide variety of statutory provisions, and had been considered by the courts in a number of cases.⁷³ The Court held that the effect of the case law was that the phrase “have regard to” means that the relevant decision-maker: must not ignore the guidelines and proceed as if they did not exist; must inform itself fully of and give reasonable consideration to such guidelines with a view to accommodating the objectives of such guidelines; but is not required rigidly or “slavishly” to comply with the guidelines and may depart from them for bona fide reasons. The Court held that this approach from the case law was consistent with the dictionary definition of “regard”, which was “permissive in nature, i.e. the action involves volition as opposed to taking an action or reaching a conclusion pursuant to prescription with no choice involved”.⁷⁴

[2.53] The new element inserted by the 2019 Act, by which the court must explain its departure from the PIGC guidelines, clearly strengthens the status of the PIGC guidelines by comparison with the approach to the Book of Quantum. The effect is that the courts must, in reality, apply the PIGC guidelines or else explain why not, a form of “comply or explain” test that nonetheless has been careful to ensure that a court retains the ability to make an award that is consistent with the test of proportionality found in the case law discussed above. While this new test arguably imposes some limit to judicial discretion, it also retains a key element of judicial independence.

⁷² [2003] IEHC 31, [2003] 1 IR 208.

⁷³ *Ibid*, at p.220-224.

⁷⁴ *Ibid*, at p.220.

- [2.54] As noted in a speech delivered by the Chief Justice in November 2019,⁷⁵ a second important feature of the Guidelines to be prepared under the 2019 Act is that the PIGC is empowered by the 2019 Act to depart from the current “going rate”, that is, the level of awards currently made in the courts. In contrast, the PIAB in preparing the Book of Quantum under the 2003 Act was required to mirror the “going rate” of awards in the courts. This second feature of the forthcoming PIGC Guidelines also underlines that they will originate from, essentially, a judicial source, and that this will facilitate reference to the manner in which the Court of Appeal has applied a three-point scale in its assessment of general damages in a range of personal injuries cases since 2015.
- [2.55] The Commission now turns in Chapter 3 to discuss proportionality and judicial independence against the background of the wide range of constitutional issues that various statutory models involving a cap on damages would raise.

⁷⁵ Keynote speech delivered by the Chief Justice Mr Justice Frank Clarke at Insurance Ireland Conference, 19th November 2019. Available at <https://www.rte.ie/news/2019/1119/1092757-insurance-claims/>.

CHAPTER 3 CONSTITUTIONAL ISSUES

- [3.1] A number of constitutional issues may be engaged by different models of capping legislation and it is useful to discuss these before considering the different methods that could be employed to cap damages.¹ Some models may raise more constitutional concerns than others and some constitutional concerns are common to each model.
- [3.2] Constitutional questions regarding a cap might be, at a very basic level, broken down into the following two general questions: (1) *what* does the cap require? and (2) *how* is the cap set, and *by whom*? The first of these questions concerns the substance of a cap, and the most relevant constitutional considerations to this set of questions will be whether the substance of some constitutional rights will conflict with the substance of the cap. The second question relates to the establishment of the cap. The most relevant considerations for this second set of questions will be the limitations the Constitution sets on governance and the exercise of legal powers by the State.
- [3.3] If the cap involves a mandatory limit on an award for a specific type of injury, such as a broken bone in a wrist, it could well be argued that this does not achieve proportionate justice for the individual. To take a hypothetical example, a mandatory limit of, say, €5,000 for whiplash or a broken wrist could be perfectly appropriate where the medical evidence is that the injured person has fully recovered after, say, 6 months and will not have any future problems such as arthritis. However, if the medical evidence is that the injured person will be likely to be in pain in the future from injury-related arthritis, it is very difficult to see how a mandatory cap could be consistent with the concept of proportionality. For this reason, it would appear at first sight that a mandatory cap poses clear constitutional problems. However, as discussed below, a presumptive cap, one that would be applied in many situations but could be disapplied where required by specified (or exceptional) circumstances, would be less open to challenge. Similarly, the approach enacted in the *Judicial Council Act 2019*, in which courts should have regard to the personal injuries guidelines issued under the 2019 Act but that, if they depart from them, they must give reasons, is another example of an approach that takes account of the concept of proportionality.
- [3.4] If a cap, whether mandatory or presumptive, is set out in legislation that delegates the fixing of the level of the cap to, say, a Minister but does not

¹ Models for capping damages are set out in Chapter 4 below.

provide the Minister with a set of guiding criteria, it is likely to be unconstitutional because it is not permissible for the Oireachtas to delegate its legislative policy-making role to any other body without providing policy guidance to that body (this is called the non-delegation doctrine). Separately, if the Oireachtas enacted legislation that entirely removes from the courts their current role of setting the levels of personal injuries awards—now supplemented by the significant new provisions in the *Judicial Council Act 2019*—this would raise significant question marks over whether such a piece of legislation would be in conflict with the appropriate level of the separation of powers between the Oireachtas and the courts. In either legislative model, a crucial question is whether what is being proposed is a mandatory, fixed, amount or a more presumptive approach. If the model is presumptive in approach, this is likely to pose fewer constitutional problems.

- [3.5] There are 3 constitutional rights that are relevant in personal injuries claims and that are therefore relevant to any type of cap on damages. These are: (1) the right to bodily integrity, (2) property rights, and (3) the right to equality before the law. The right to bodily integrity is engaged because tort law, and therefore the damages that are paid pursuant to successful tort law claims, has been identified as a means by which the State meets its constitutional obligation to safeguard this right (among other rights).² The right to litigate, and a corollary right to an effective remedy, is engaged in a discussion on the constitutionality of a cap on damages insofar as a limitation on the amount of damages a litigant may recover may be thought to impact on this right. Finally, the right to equality before the law is engaged as it could be argued that certain types of cap on damages could result in invidious discrimination between some groups of plaintiffs that may have their rights of recovery limited more than others in a way that is invidious or unfair.
- [3.6] Although these rights are all clearly engaged it is important to note that none of them is absolute.³ Legislation may place limits on constitutional rights so long

² *Grant v Roche Products Ltd* [2008] IESC 35, [2008] 4 IR 679, at para 79 (“the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights”); *Carr v Olan* [2012] IEHC 59, at para 36 (“the law of torts may be regarded as the primary mechanism whereby the State’s constitutional duty to vindicate the life and person is achieved”); *PR v KC* [2014] IEHC 126, at para 27 (“the common law [of torts] may be regarded as a realisation of the constitutional command in Article 40.3.2° that the State must protect and vindicate the person”).

³ *W v Ireland (No 2)* [1997] 2 IR 141 at p.164: ‘The rights guaranteed under the Constitution are not absolute rights ... and their exercise and enjoyment may be, and frequently are, limited by reason of the exigencies of the common good.’

as these limits satisfy certain tests identified by the courts. Two key standards in this respect are the *proportionality* test and the *rationality* test. An analysis of how each of these tests may apply to balancing a cap on damages with these rights, with the exception of equality, is conducted in the chapter below. Equality is considered separately as it is not entirely clear that the proportionality standard in *Heaney v Ireland*⁴ applies to the equality guarantee under Article 40.1.⁵ One reason for this may be the phrasing of the guarantee. Article 40.1⁶ begins with an absolute statement and then qualifies it by reference to certain capacities. This may suggest that what really matters in determining whether a discrimination is constitutionally permissible is whether it is sufficiently *relevant* to any of these enumerated capacities, not whether it is a *proportionate* restriction on them.⁷

- [3.7] In addition to the 3 rights discussed above, 2 other important constitutional concerns may arise depending on the specific type of capping model under consideration. These are the *separation of powers* and the *non-delegation doctrine*.
- [3.8] The separation of powers guarantees that the executive, legislative and judicial powers must be exercised separately, and only by the bodies that the Constitution designates. The separation of the legislative and judicial functions is of most importance for the purpose of capping damages and is considered further in the chapter below.
- [3.9] The non-delegation doctrine controls how the Oireachtas may delegate its legislative power. In practice, this often means a designated Minister making regulations under a power granted to him or her by statute. In the case of capping, if the Oireachtas were to delegate the function of determining a cap to another person, whether a Minister or another body, an additional question (that is, in addition to the separation of powers issue) is whether it would be constitutionally permissible to delegate such a determination to another person or body.

⁴ [1994] 3 IR 593, [1994] 2 ILRM 420.

⁵ Hogan, Whyte, Kenny, Walsh, Kelly: *The Irish Constitution* 5th ed (Bloomsbury Professional Ltd, 2018), at para 7.1.52.

⁶ Article 40.1 quoted in para 3.37 below.

⁷ Doyle, *Constitutional Equality Law* (Round Hall, 2004).

1. Relevant constitutional rights and how they may be restricted

- [3.10] This section contains three parts: the first two parts consider the right to bodily integrity and the right to litigate, which right has been held to imply the right to an effective remedy. Both rights are unspecified, or unenumerated, rights, that is, they are not to be found in the text of the Constitution and the case law that identifies them is discussed. The Commission then considers the scope of these rights on their own terms to identify their limitations before they are balanced against capping considerations.
- [3.11] The third part considers how constitutional balancing tests would apply to capping legislation and it identifies the most important considerations that must be borne in mind to ensure that such capping is constitutional under such tests.

(a) The right to bodily integrity

- [3.12] The right to bodily integrity was first recognised as an unspecified right by the Supreme Court in *Ryan v Attorney General*.⁸ This was the first time that the Court recognised a specific right as latent in the general expression “personal rights” which was not deduced from any of the rights specifically enumerated in Article 40.3 of the Constitution. In the *Ryan* case, the claimant was unable to successfully invoke the right to bodily integrity to her case, and the Court rejected her argument that the fluoridation of water under the *Health (Fluoridation of Water Supplies) Act 1960* infringed her rights. However, the case did establish that such a right existed and subsequent case law has developed the scope of its protection.
- [3.13] *Sweeney v Duggan* is an important case to consider with respect to the interaction between the right to bodily integrity and the tort of negligence and, consequently, damages awards pursuant to negligence cases.⁹ In that case the plaintiff asserted that his employer (the defendant) had a duty to safeguard his bodily integrity in the workplace and ensure that any injuries he suffered at the workplace would be duly compensated. This argument was rejected in rather brief terms by the High Court (Barron J), which held that there was nothing in the right to bodily integrity that assisted the plaintiff, as all it guaranteed him was a “just law of negligence”, which was found to exist in the circumstances.¹⁰

⁸ [1965] IR 294.

⁹ [1991] 2 IR 274.

¹⁰ *Ibid*, at p.285.

- [3.14] Some further indications of what a “just” law of negligence would be for constitutional purposes can be gleaned from subsequent cases. In *W v Ireland (No.2)*, the High Court (Costello J) considered that constitutionally guaranteed rights may be split into two classes: “(a) [t]hose which, independent of the Constitution, are regulated and protected by law... and (b) those which are not so regulated and protected”.¹¹ The Court held that the right to bodily integrity falls within class (a) and is protected by an extensive body of tort law. Thus, the Court continued: “if the law of torts makes provision for an action for damages for bodily injury caused by negligence and if the law also adequately protects the injured pedestrian’s guaranteed right to bodily integrity, then the State’s Article 40 duties have been fulfilled.”¹²
- [3.15] The Supreme Court also commented on this issue in *Blehein v Minister for Health*¹³ where it reaffirmed the previous statement of Henchy J in the Supreme Court decision in *Hanrahan v Merck, Sharpe & Dohme Ltd* that “when [a person] founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is *basically ineffective* to protect his constitutional right”.¹⁴
- [3.16] The standards imposed on the law of negligence by the Constitution seem, therefore, to be broadly that the law must be “just” (*Sweeney v Duggan*) and that it must be basically effective (*Blehein v Minister for Health*). In general, where the expansion of liability in tort has been argued on constitutional grounds, it has often been unsuccessful. For example, in *Hanrahan v Merck Sharp & Dohme Ltd* the Supreme Court found that the tort of nuisance was an adequate method to vindicate the plaintiffs’ rights.¹⁵ There have been only two cases where the scope of a tort has been successfully broadened by application of the Constitution: *McKinley v Minister for Defence*¹⁶ and *Lovett v Grogan*.¹⁷ In the *McKinley* case the Supreme Court held that, in accordance with the guarantee of equality in Article 40.1, the common law action for compensation for loss of consortium, which at common law was only available to a husband,

¹¹ [1997] 2 IR 141, at p.164.

¹² *Ibid.*

¹³ [2018] IESC 40.

¹⁴ [2018] IESC 40, at para 50 (McKechnie J), citing *Hanrahan v Merck, Sharp & Dohme Ltd* [1988] ILRM 629 at para 24 (Henchy J) (emphasis added)

¹⁵ [1988] ILRM 629.

¹⁶ [1992] 2 IR 333.

¹⁷ [1995] 3 IR 132.

should be available to a wife. In *Lovett* the Court extended the tort of breach of statutory duty to allow a court to grant an injunction, rather than damages, in circumstances where this would be the only effective way of vindicating the plaintiff's constitutional rights.

- [3.17] It is also notable that even the successful claims described above address situations where plaintiffs wished to expand the scope of *liability* in tort on the basis of constitutional considerations. The Commission is not aware of any case in which a plaintiff has asserted that a particular award of damages failed to vindicate his or her bodily integrity.

(b) Property rights: the right to litigate and an effective remedy

- [3.18] The Cost of Insurance Working Group (CIWG) identified that property rights may be at issue should a statutory cap on general damages be introduced. The Personal Injuries Commission (PIC) identified in particular the right to litigate and the right to an effective remedy.¹⁸ This right has been defined as “the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law”.¹⁹
- [3.19] Many instances of the litigation surrounding the right to litigate and an effective remedy concerned plaintiffs looking for quite specific relief in circumstances where there may not have been a clear common law or statutory jurisdiction to grant such relief.
- [3.20] Summarising this case law, the High Court (Hogan J) stated that:

“These examples... all share one common theme, namely, that the courts will ensure the remedies available to a litigant are effective to protect the right at issue and that our procedural law (including all legislation restricting or regulating access to the courts) respects basic fairness of procedures and is neither arbitrary or unfair.”²⁰

- [3.21] There are two ways in which this protection could be read: (1) it is a guarantee that the *specific remedy* granted to the plaintiff in his or her case, if successful, will fully vindicate his or her rights, or (2) it is a guarantee that a *type* of remedy

¹⁸ Personal Injuries Commission, *First Report of the Personal Injuries Commission* (2017), at p.17. Available at: <https://dbei.gov.ie/en/Publications/Publication-files/First-Report-of-the-Personal-Injuries-Commission.pdf>.

¹⁹ *Tuohy v Courtney* [1994] 3 IR 1, at p.45.

²⁰ *S (a minor) v Minister for Justice, Equality and Law Reform* [2011] IEHC 31, at para 17.

will be available to the plaintiff and that that type of remedy is, in principle, capable of vindicating his or her rights. An example may help to clarify this distinction. Consider a hypothetical plaintiff arguing for an injunction. Reading (1) would require that the plaintiff be granted an injunction in particular terms that fully vindicates his or her rights. Reading (2) would require that the remedy of an injunction be, in principle, available to the plaintiff and would not say anything further about what the terms of that injunction should be.

- [3.22] In the context of an award of damages, reading (1) seems implausible. This is because, in reality, a plaintiff can only receive an award of damages if the defendant has the means to pay the award or else is insured.²¹ While it is established law that the means of the defendant are not relevant to the calculation of the award, they will be relevant to the defendant's ability to actually pay the plaintiff once the award has been assessed. If reading (1) were followed, a plaintiff could *never* have his or her rights vindicated against an impecunious defendant. In such cases it would seem more natural to maintain that the plaintiff's rights can, in principle, be vindicated by damages as a kind of remedy (reading (2)) but that in this instance the plaintiff will effectively never realise that benefit.
- [3.23] Only reading (1) would present a serious difficulty to a statutory cap. Reading (2) guarantees the less strict principle that, as long as damages are available to a plaintiff in appropriate cases, his or her right to an effective remedy is vindicated.

(c) Restrictions on rights: proportionality and rationality

- [3.24] It is clear from the text of Articles 40 to 44 of the Constitution that restriction of the various rights established in those provisions, including the rights discussed above, was envisaged by the drafters. For example, in the context of personal rights enshrined under Article 40.3.1°, the State is obliged to vindicate those personal rights "*as far as practicable*". In the context of personal liberty, Article 40.4.1° provides that "no citizen shall be deprived of his personal liberty *save in accordance with law*". As regards the inviolability of the dwelling, Article 40.5

²¹ It is worth mentioning that this was the type of concern that motivated the plaintiff in *Sweeney v Duggan* [1991] 2 IR 274 to advance his constitutional claim. His claim against the defendant company was effectively worthless because the company had gone into liquidation. Hence, he (unsuccessfully) attempted to argue that the defendant, the main director of and shareholder in that company, had a duty to safeguard his bodily integrity at work. The High Court (Barron J) concluded that the law of negligence was nevertheless "just" in this case, even where it meant the plaintiff could not recover against the company.

provides that the dwelling of every citizen "shall not be forcibly entered *save in accordance with law*".

- [3.25] The question then is to what extent will a curtailment of these constitutional rights be considered valid? The courts have articulated two tests which may be employed to assist in the examination of the validity of a restriction of a particular constitutional right.

(i) *The proportionality test*

- [3.26] The first of these tests, the "proportionality test", was first invoked by the High Court in *Heaney v Ireland*.²² That case concerned section 52 of the *Offences Against the State Act 1939*, which provided that it was an offence for a person arrested pursuant to the Act to fail provide an account of his or her movements when requested to do so by a member of An Garda Síochána. The plaintiff alleged, *inter alia*, that this provision amounted to an unconstitutional violation of his constitutional right to silence and right against self-incrimination.

- [3.27] The Court stated that, where it has been established that a constitutional right has been restricted, "the court must then go on to examine the validity of the restrictions imposed on its exercise by the enactment impugned in the case".²³ The Court then endorsed a three tier test which it referred to as "the test of proportionality"²⁴ This test contains three elements. To pass the proportionality test, a restriction on a constitutional right must:²⁵

- (1) be rationally connected to the objective and not arbitrary, unfair or based on irrational considerations,
- (2) impair rights as little as possible, and
- (3) be such that its effects on the rights is proportional to the objective.

The Court found the object of the section to be to assist a member of An Garda Síochána in his or her investigation and punishment of crimes of a subversive nature which compromised the security of the state. The Court went on to state that, having regard to the protections in place to protect the accused, such as the right of access to the courts, legal advice and medical assistance, which

²² [1994] 3 IR 593, citing the Supreme Court of Canada in *Chaulk v R* [1990] SCR 1303, at 1335-1336. This test was originally set out by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

²³ *Heaney v Ireland* [1994] 3 IR 593, at p.606.

²⁴ *Ibid*, at p.607.

²⁵ *Ibid*.

minimise the risk involved to the accused, it followed that the effect in the form of a restriction on the right to silence was proportionate to the object of investigation and punishing serious subversive crime.²⁶ The proportionality doctrine was explicitly endorsed by the Supreme Court in *Re the Employment Equality Bill 1996*²⁷ in terms virtually identical to those employed in *Heaney* and has been invoked on numerous occasions since then.²⁸

- [3.28] The first element of the proportionality test—rational connection—requires some consideration of the objective the legislation seeks to achieve. In broad policy terms, capping damages legislation might be justified by reference to the control of insurance premiums and the retention of monies for other public expenditure, among other objectives. The rational connection between this policy and the restriction on rights is relatively clear: if awards in personal injury cases were lessened, then insurance premiums would be lower and the State (in cases where it is defendant) would retain more money for expenditure on other public services. It therefore seems unlikely that a cap on damages would fail this first limb of the *Heaney* test.
- [3.29] The second and third limbs—least restrictive means and proportionality to objective—might be taken together as, in this context, these factors would likely be determined by reference to the figure imposed by a cap and whether the cap was mandatory or presumptive. If the figure were set too high, then this might be taken to be an overly restrictive means to pursue the policy objectives described above. In this case, the legislation would be constitutionally vulnerable. However, the Commission stresses that this is an issue that would only be encountered were the figure for the cap calibrated in such a way as to overextend the restriction on a plaintiff's interest in recovery as against the interest of the common good in reducing damages awards.

(ii) The rationality test

- [3.30] The second test occasionally employed by the courts in the context of restriction of constitutional rights is the "*Tuohy* test", or the "rationality test", which came shortly after the judgment of the High Court in *Heaney* but before the Supreme Court explicitly endorsed the proportionality test in *Re the*

²⁶ *Ibid*, at p.608 *et seq*.

²⁷ [1997] 2 IR 321.

²⁸ Hogan, Whyte, Kenny, Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional Ltd, 2018), at para 7.1.51.

Employment Equality Bill 1996.²⁹ The test in *Tuohy v Courtney* was articulated as follows:

“The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the Courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so *contrary to reason and fairness* as to constitute an unjust attack on some individual’s constitutional rights.”³⁰

- [3.31] The Supreme Court in *Re the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995*³¹ stated that, in passing the Bill, the Oireachtas was essentially engaged in “balancing of constitutional rights and duties, including the right to life of the unborn, the right to life of the mother, the right to information and other constitutional rights”.³² The Court went on to state that, where there is an exercise such as this, the correct test to be applied is that set out in *Tuohy*.³³
- [3.32] The Supreme Court in *Tuohy* itself stated that the test should apply to any statute that balances constitutional rights, which in that case included “the constitutional right of the plaintiff to litigate against two other contesting rights or duties, firstly, the constitutional right of the defendant in his property to be protected against unjust or burdensome claims and, secondly, the interest of the public constituting an interest or requirement of the common good which is involved in the avoidance of stale or delayed claims”.³⁴ This suggests that the concept of “rights” that may be balanced under the *Tuohy* test is quite broad: it

²⁹ [1997] 2 IR 321.

³⁰ *Tuohy v Courtney* [1994] 3 IR 1, at p.47 (emphasis added).

³¹ [1995] 1 IR 1.

³² *Ibid*, at p.45.

³³ *Ibid*.

³⁴ *Tuohy v Courtney* [1994] 3 IR 1, p.at 47.

may include a general sense of the public interest and common good to be weighed against the restriction at issue.

- [3.33] It should be noted that the Supreme Court in *Re the Health Amendment (No 2) Bill 2004*³⁵ did not apply the *Tuohy* test on the basis that the financial interest of the State did not constitute a competing constitutional right. That case concerned an attempt on the part of the State to retrospectively validate charges levied on, and paid by, certain persons who had received in-patient services. The State argued that the Court should not intervene because the State was balancing competing constitutional rights, the property rights of the plaintiff as against the interests of the common good in closing a lacuna in the legislation and on this basis the *Tuohy* test should have been applied. The Court rejected this argument, stating that there was no balancing of constitutional interest. This was on the basis that the “financial interests” of the State did not constitute a constitutional right for the purposes of invoking *Tuohy*.
- [3.34] While there may be an element of protection of the State’s financial interest in capping damages, at least insofar as there will be cases where the State is a defendant, it has been argued above that the policy behind a cap on damages in personal injury cases would go beyond this. It would incorporate an element of the common good as insurance premiums bear more directly on citizens and businesses operating in Ireland. It therefore seems likely that a cap on damages could be assessed under the *Tuohy* test for its rationality.

2. Equality before the law

- [3.35] Unlike, for example, the right to bodily integrity, considered above, the right to equality before the law may be found in the text of the Constitution. Article 40.1 provides that:

“All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.”

- [3.36] There are at least two questions that a plaintiff must answer in establishing an entitlement to a remedy for breach of his or her right to equal treatment: (1) does the guarantee of equality apply to them in the circumstances? and (2) is

³⁵ [2005] IESC 7, [2005] 1 IR 105.

the discrimination of which he or she is complaining an *unlawful* discrimination? The answers to these questions will be clearer if they are considered against the background of a hypothetical discrimination scenario. Consider a cap that simply sets a crude upper limit on all awards and which did not speak to the level of damages which should be awarded for less serious injuries. This type of cap could discriminate between the more seriously injured plaintiff and the less seriously injured plaintiff. The more seriously injured plaintiff may not receive the full amount of compensation he or she would have received had there been no cap, while a less seriously injured plaintiff would still achieve full compensation.

- [3.37] Some of the case law on Article 40.1 suggests that for the guarantee to apply, the plaintiff must face prejudice against an essential aspect of his or her "human personality".³⁶ Other cases seem to allow greater latitude to a plaintiff where he or she is arguing that the statutory classification he or she is attacking also infringes some other standalone constitutional right.³⁷ The human personality doctrine has been used restrictively to exclude, for example, economic and trading activity from the scope of constitutional equality protections.³⁸ More recently, in *Re the Employment Equality Bill 1999* the Supreme Court suggested that classifications based on sex, race, language or religious and political opinions would be unconstitutional.³⁹ It is not clear whether a plaintiff who was prejudiced by a system of classification regulating recovery for personal injuries could point to a relevant essential human characteristic, since he or she would be arguing on the basis of the type of injury he or she has suffered, though he or she may be able to point to his or her reduced capacity to fully enjoy life without encumbrance depending on the type of injury he or she has suffered. Alternatively, as already indicated, the courts may be willing to entertain an equality argument where the classification bears on some other constitutional right, as it would in this case.
- [3.38] It therefore seems likely, though not certain, that a plaintiff would be able to state a reasonable case that the guarantee of equality in Article 40.1 would apply to him or her under at least some variations of cap on damages. This

³⁶ *Macauley v Minister for Posts and Telegraphs* [1966] IR 345; *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1; *Murtagh Properties Ltd v Cleary* [1972] IR 330.

³⁷ *The People (DPP) v Quilligan (No.3)* [1993] 2 IR 305.

³⁸ *Quinn's Supermarket Ltd v Attorney General* [1972] IR 1; *Murtagh Properties Ltd v Cleary* [1972] IR 330.

³⁹ [1997] 2 IR 321.

leaves open the question of the standard of review required under Article 40.1, to which the Commission now turns.

- [3.39] In recent years, the courts have favoured the test set out by the High Court (Barrington J) in *Brennan v Attorney General*⁴⁰ when reviewing the extent to which the right to equality may curtailed.⁴¹ This test maintains that “the [statutory] classification must be for a legitimate legislative purpose ... it must be relevant to that purpose, and ... each class must be treated fairly”.⁴² Again, in the case of distinguishing classes of plaintiff for the purposes of a cap on damages, the more calibrated those classes are to type and severity of injury, the less likelihood unlawful discrimination will result between them.
- [3.40] A final point to mention is that one of the requirements a litigant must meet when setting out an equality argument is the identification of a suitable comparator class.⁴³ Viable comparator classes will, in the case of a cap on damages, be as wide or as narrow as the categories of cap contemplated. So, for instance, if a crude general cap were endorsed, and that cap pushed all injuries awards downwards, then a plaintiff with a minor injury could hypothetically take a plaintiff with a serious injury as a comparator and vice versa because they are both affected by the cap but the impact of those effects might be unequal. However, if a cap is set categorically, by reference to the type and severity of injury, then the comparator classes for plaintiffs will be restricted to similarly affected individuals with the same severity and type of injury. This lessens the potential for unlawful discrimination between plaintiff classes.

3. Separation of powers

- [3.41] There are two elements of the separation of powers that are relevant to the Commission’s consideration of the constitutional validity of a cap on damages: (1) the independence of the judiciary, and (2) the non-delegation doctrine. Unlike the concerns outlined above that refer to restrictions on rights, these concerns will arise only where a cap is imposed in a certain way that may be

⁴⁰ [1983] ILRM 449.

⁴¹ *Lowth v Minister for Social Welfare* [1998] 4 IR 321; *An Blascaod Mór Teo v Commissioners of Public Works in Ireland (No.3)* [2000] 1 IR 6, [2000] 1 ILRM 401; *Re the Employment Equality Bill 1996* [1997] 2 IR 321; *Re Part V of the Planning and Development Bill 1999* [2000] 2 IR 321, [2001] 1 ILRM 81; *Re ss.5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360; *D (J) v Residential Institutions Redress Committee* [2009] IESC 59, [2010] 2 ILRM 181; *Gilligan v Ireland* [2013] IESC 45, [2013] 2 IR 745, [2014] 1 ILRM 153; *PC v Minister for Social Protection* [2018] IESC 57.

⁴² *Brennan v Attorney General* [1983] ILRM 449, at p.480.

⁴³ *MR and DR (minors) v An t-Árd Chláraitheoir* [2014] IESC 60, [2014] 3 IR 533.

constitutionally vulnerable. These considerations are therefore instructive in considering what mechanisms would be more, or less, constitutionally secure in introducing a cap.

(a) Judicial independence

- [3.42] The independent exercise of the judicial function is guaranteed in Article 34.1 of the Constitution, which provides:

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

- [3.43] Article 34.1 comes into play in the discussion of a cap on damages, as any restriction of judicial discretion by the legislature may be perceived as interfering with judicial independence. Models 1 and 2 discussed in Chapter 4 below both suggest that the Oireachtas could cap damages by way of an Act, primary legislation, and so both of those models may raise a concern about their impact on the judiciary’s independence.
- [3.44] In the context of capping and the separation of powers, there is, in some respects, an analogy that can be drawn between a cap on damages and what might be considered a “cap” on sentencing in the form of maximum sentences in criminal law.
- [3.45] In *Deaton v Attorney General*⁴⁴ a statutory power of the Revenue Commissioners to choose which penalties were to be imposed on foot of a particular customs offence was challenged on the basis that it was inconsistent with the Constitution and therefore invalid.⁴⁵ The Supreme Court held that the power was incompatible with the constitutional guarantee in Article 34.1 that the administration of justice is the responsibility of the judiciary:

“The Legislature does not prescribe the penalty to be imposed in an individual citizen’s case; it states the

⁴⁴ [1963] IR 170.

⁴⁵ See further the analysis by O’Malley, “The Power to Punish: Reflections on *Deaton v Attorney General*” in O’Dell (ed) *Leading Cases of the Twentieth Century* (2000).

general rule, and the application of that rule is for the Courts."⁴⁶

- [3.46] *Deaton* has been cited and applied internationally as identifying particular boundary lines between the executive and judiciary.⁴⁷ However, there are certain exceptions to the principle which have been made clearer progressively through case law.
- [3.47] The first exception relates to fixed penalties. In *Lynch and Whelan v Minister for Justice, Equality and Reform* the Supreme Court affirmed the constitutionality of the mandatory sentence of life imprisonment for murder and treason under section 2 of the *Criminal Justice Act 1990*.⁴⁸ The Supreme Court held:

“that the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory, penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified.”⁴⁹

- [3.48] The Supreme Court has also held, in *The State (O'Rourke) v Kelly*,⁵⁰ that legislation that requires that the making of a particular order is mandatory once a certain set of facts is established, is not unconstitutional. The *O'Rourke* case concerned section 62(3) of the *Housing Act 1966*, which required that a judge of the District Court must issue a warrant if he or she was satisfied that “a demand had been duly made”. The Supreme Court found that since the judge in this case would still have discretion in determining whether a demand had been

⁴⁶ [1963] IR 170, at p.182.

⁴⁷ *PC v Minister for Social Protection* [2017] IESC 63, [2017] 2 ILRM 369, at para 50. The principle has been applied in, for example: *Hinds v R* [1976] 1 All ER 353 (British Commonwealth Privy Council); *Magaming v R* [2013] HCA 40, [2013] 87 ALJR 1060 (High Court of Australia); *Armbruster v Minister of Finance* [2007] ZACC 17 (Constitutional Court of South Africa); *R (Anderson) v Secretary of State for The Home Department* [2002] UKHL 46, [2003] 1 AC 837 (UK House of Lords).

⁴⁸ [2010] IESC 34, [2012] 1 IR 11.

⁴⁹ *Ibid*, at para 49.

⁵⁰ [1983] IR 58.

duly made, it did not constitute an impermissible infringement of the judicial power.

- [3.49] The question of mandatory sentences came back before the Supreme Court again in *Ellis v Minister for Justice and Equality*.⁵¹ This concerned a challenge to the constitutionality of section 27A(8) of the *Firearms Act 1964* (1964 Act), which provided that on conviction for a second or subsequent firearms offence contrary to section 27A of the 1964 Act the Court shall, imposing sentence, specify a term of imprisonment not less than 5 years as the minimum term to be served by the person.
- [3.50] The Court referred to its previous decisions in *Deaton v Attorney General*⁵² and *Lynch and Whelan v Minister for Justice*⁵³ and stated that, on reading those two cases together, it has been established that the Oireachtas is entitled to prescribe a “general rule” in the form of a fixed, minimum penalty or maximum penalty. However, the Court reaffirmed the restriction that the general rule or penalty imposed must be rationally connected to the offence committed and the requirements of justice.⁵⁴
- [3.51] The Supreme Court held that section 27A(8) of the 1964 Act was unconstitutional on the basis that the Oireachtas had taken into account a “personal characteristic” of the offender, an aggravating factor (the fact that the offence was a second or subsequent offence), which was for the Court to assess in balance with all other aggravating and mitigating factors.
- [3.52] So it appears from the above case law that it is not unconstitutional, at least in the context of sentencing, for the Oireachtas to prescribe the general rule once that rule is rationally connected to the offence, and once the application of that rule is left to the courts.

(b) The non-delegation doctrine

- [3.53] The non-delegation doctrine arises where the Oireachtas, by way of primary legislation, delegates the task of creating regulations relating to a particular subject matter to the Executive, for example, as is suggested under Model 3, discussed below in Chapter 4.

⁵¹ [2019] IESC 30.

⁵² [1963] IR 170.

⁵³ [2010] IESC 34, [2012] 1 IR 1.

⁵⁴ *Ellis v Minister for Justice and Equality* [2019] IESC 30, at para 50

- [3.54] Article 15.2.1° of the Constitution vests the exclusive power to legislate in the Oireachtas. The Supreme Court in *McGowan v Labour Court*⁵⁵ stated that Article 15.2.1° is “an assertion of a core democratic principle. Since all power comes from the People, the only body with power to make legislation binding the People is the Oireachtas containing as it does the chosen representatives of the People”.⁵⁶
- [3.55] However, it would be impossible for the legislature to prescribe rules by way of an Act, primary legislation, for every conceivable situation.⁵⁷ Accordingly, the non-delegation doctrine recognises that the Oireachtas can delegate some legislative details to another body, such as a Minister. The question that has arisen in the case law is how far the Oireachtas can go in this respect. The leading authority on this question is the Supreme Court decision in *Cityview Press Ltd v An Chomhairle Oiliúna*.⁵⁸ An Chomhairle Oiliúna (AnCO) was the industrial training authority established under the *Industrial Training Act 1967* for the purpose of making better training of persons employed in industrial activities. Section 21 of the 1967 Act allowed AnCO designate certain activities as “designated activities” on which it would then be permitted to impose levies, to be paid by employers carrying out those activities. Cityview Press Ltd claimed that section 21 of the Act of 1967 was an unconstitutional delegation of the legislative power to an executive body.
- [3.56] The Supreme Court stated the relevant test in the following terms:
- “[t]he test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a *mere giving effect to principles and policies which are contained in the statute itself*. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it

⁵⁵ [2013] IESC 21, [2013] 3 IR 718.

⁵⁶ *Ibid*, at para 19.

⁵⁷ In a case decided under the 1922 Constitution,, *Pigs Marketing Board v Donnelly* [1939] IR 413, at p.421 the High Court accepted that “the Legislature may... delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions shall be carried out”.

⁵⁸ [1980] IR 381.

be within the permitted limits—if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body—there is no unauthorised delegation of legislative power.”⁵⁹

- [3.57] Applications of this test have shown it to be relatively easy to meet, provided the legislation contains *some* indication of the principles and policies to be applied. Legislation that failed to meet this criteria included section 1 of the *Imposition of Duties Act 1957*, which gave the Government a very broad power to impose, terminate and vary excise, customs and stamp duties with no discernible principle or policy in the Act to guide the relevant Minister in the exercise of these functions.⁶⁰ Similarly, section 5(1)(e),⁶¹ but not section 5(1)(h),⁶² of the *Aliens Act 1935* was found unconstitutional. Section 5(1)(e) allowed the Minister for Justice to “make provision for the exclusion or the deportation” of aliens from the State. Again, in this case, there were no discernible principles or policies to guide the Minister in the exercise of this power. In the case of section 5(1)(h), which allowed for the imposition of certain registration requirements on aliens, the Court held that the “desirability of regulating the registration, change of abode, travelling, employment and occupation of aliens while in the State” was self-evidently a policy to guide the Minister.⁶³
- [3.58] Other pieces of legislation that afford relatively broad latitude to the Minister have been upheld. For example, the amendments proposed to section 53 of the *Health Act 1970* in the *Health (Amendment) (No.2) Bill 2004* were held not to be an unlawful delegation of legislative power by the Supreme Court.⁶⁴ These amendments, which were enacted as the *Health (Amendment) Act 2005*, allowed a Minister to impose charges on the users of in-patient services in nursing homes but with the caveat that such charges could not exceed 80% of the non-contributory old age pension payment and that certain persons were excluded

⁵⁹ *Ibid*, at p.399 (emphasis added).

⁶⁰ *McDaid v Sheehy* [1991] 1 IR 1. However, this finding did not ultimately avail the applicant here as the statutory duties order of 1975 of which he complained had been confirmed by the Oireachtas by section 46 of the *Finance Act 1976*. This was taken by the Court to cure the invalidity of the original order and make it valid from the end of 1976 onwards. As the applicant was complaining of a conviction in 1986, the order was valid at the material time.

⁶¹ *Laurentiu v Minister for Justice* [1999] IESC 47, [1999] 4 IR 26.

⁶² *Leontjava and Chang v Director of Public Prosecutions* [2004] IESC 37, [2004] 1 IR 591.

⁶³ *Ibid*, at p.624.

⁶⁴ [2005] IESC 7, [2005] 1 IR 105.

from the charge. These restrictions aside, there was little to guide the Minister in how he or she might otherwise place additional constraints on such users.

- [3.59] Some of the most recent applications of the *Cityview Press* test have still produced mixed results. Part IV of the *Industrial Relations Act 1946*, which allowed for the creation of Joint Labour Committees that could make recommendations on issues such as minimum wages and work conditions to the Labour Court—pursuant to which, if confirmed by the Labour Court, they would become binding—was declared unconstitutional by the High Court in *John Grace Fried Chicken Ltd v Catering Joint Labour Committee*.⁶⁵ It was successfully argued that the 1946 Act did not articulate sufficient principles and policies to guide the Labour Court in approving such recommendations. Part III of the same 1946 Act was also held to be unconstitutional by the Supreme Court in *McGowan v Labour Court*.⁶⁶ That Part allowed for Registered Employment Agreements to be made between trade unions and employers that, again if approved by the Labour Court, would bind all employers working within that industry. As in the *John Grace Fried Chicken* case, the Supreme Court held that there were insufficient principles and policies to guide the Labour Court in confirming agreements under this Part of the 1946 Act and it was therefore held to be unconstitutional.
- [3.60] In general, it can be said that the standard imposed under the *Cityview Press* test is a relatively low one to meet.⁶⁷ The later case law supports the view that the Oireachtas does not need to account for *all* the relevant principles and policies, but it must include at least *some*, and these must be sufficient to guide the exercise of the delegated legislative power in a way consistent with the intention of the Oireachtas in enacting the primary Act.

⁶⁵ [2011] IEHC 277, [2011] 3 IR 211.

⁶⁶ [2013] IESC 21, [2013] 3 IR 718.

⁶⁷ See *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional Ltd, 2018) at paras 4.2.50 and 4.2.51 for some general problems with the *Cityview* standard.

CHAPTER 4 POSSIBLE LEGISLATIVE MODELS FOR CAPPING DAMAGES

- [4.1] Having outlined the current law in Chapter 2 and the relevant constitutional issues in Chapter 3, the Commission now turns to describe 4 possible legislative models for capping damages. In respect of each model, the Commission identifies any constitutional questions that each model raises, and if so how those might be addressed. The Commission emphasises that it does not express any specific view on those constitutional questions. Rather, they are set out in order to stimulate the views of consultees.
- [4.2] **Model 1** proposes a capping model set by primary legislation that would take a similar form to how sentencing law operates in most instances, under which the Oireachtas sets a maximum penalty, such as a fine of up to €10,000 and/or imprisonment of up to 5 years. A court then imposes a penalty in an individual case using a proportionality test (a penalty that is appropriate to the offence as well as to the offender), on a scale from zero (an entirely suspended sentence) to the maximum permissible sentence for the particular offence. The Commission notes that, in England and Wales, a wide-ranging system of structured sentencing guidance has been developed. Model 1 includes guidelines which are comparable to those currently employed in sentencing in England and Wales. These guidelines would assist the court in assessing the appropriate award up to the level of the legislative cap. The Commission also notes that, in recent years, the Court of Appeal has developed indicative guidelines for imposing sentences in a number of offences,¹ which mirrors the approach taken by the Court of Appeal since 2015 in personal injuries cases, discussed in Chapter 2, above. Model 1 is therefore clearly comparable to the three-point scale approach found in the case law on damages discussed in Chapter 2, to the approach in the Book of Quantum and to comparable Judicial Guidelines from England and Wales, and Northern Ireland. It may also be the case that this approach is likely to be taken in the development of the Personal Injuries Guidelines to be published under the *Judicial Council Act 2019*.

¹ See for example *The People (DPP) v Ryan* [2014] IECCA 11 (firearms offences), *The People (DPP) v Fitzgibbon* [2014] IECCA 12, [2014] 2 ILRM 116 (assault causing serious harm), *The People (DPP) v Z* [2014] IECCA 13, [2014] 1 IR 613 (rape and child cruelty), *The People (DPP) v Road Team Logistic Solutions* [2016] IECA 38 (health and safety) and *The People (DPP) v Casey* [2018] IECA 121 (burglary). The case law is discussed in the Commission's *Issues Paper on Suspended Sentences* (LRC IP 12-2017). The Commission intends to publish its Report on that project in 2020.

- [4.3] **Model 2** proposes, in effect, a cap scheme similar to that in place under the New South Wales *Civil Liability Act 2002* under which general damages are capped and all awards for lesser injuries are indexed to the cap. Model 2 is similar to Model 1 in one respect, in that it would allow the courts the discretion to determine the severity of the plaintiff's injuries and accordingly within which category provided that those injuries should fall. However Model 2 differs from Model 1 in that once the court the severity of the plaintiff's injuries, the court would be bound to award the corresponding percentage of the cap, with the exception that the court could award an alternative sum in damages where it is satisfied that exceptional circumstances justify doing so. This caveat is an important feature of Model 2 as it essentially transforms the cap from one that is mandatory in nature to one that is presumptive in nature. A presumptive cap is generally thought to be less likely to be subject to scrutiny on constitutional grounds as it enables the judiciary to have regard to the circumstances of the case and to determine that the tariff associated with the severity of the injury is not appropriate given the circumstances of the particular case. In that sense judicial discretion is protected.
- [4.4] **Model 3** proposes that any model of capping (including Models 1 or 2) be enacted, but in which the Act would delegate the details of the cap to, for example, a Minister or some other Regulation-making body. This approach would be similar to the approach seen in the *Civil Liability (Capping of General Damages) Bill 2019*, a Private Member's Bill which passed Second Stage in Seanad Éireann in March 2019. That Bill provides that the Minister for Justice may, by way of Regulations, prescribe the maximum level of general damages which may be awarded to a claimant who has suffered a personal injury. The 2019 Bill bears some similarities to the England and Wales *Civil Liability Act 2018*, in that it provides for a delegated Regulation-making power rather than setting a specified amount in the Bill itself. The Bill sets out some principles and policies on which the Minister for Justice and Equality is to determine the tariff for general damages in particular categories of injuries. On the other hand, it differs from the England and Wales 2018 Act in that it appears to provide for a mandatory cap without any possibility of an exceptional "judicial uplift" (as provided for under section 5 of the England and Wales 2018 Act) and it does not contain any provision for any advance consultation with the judiciary.
- [4.5] Each of the above 3 models will have to be considered in light of the newly enacted *Judicial Council Act 2019*, which provides for the establishment of the Personal Injuries Guidelines Committee which will be comprised of 7 judges who will be responsible for producing general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries.

- [4.6] **Model 4** proposes an approach that is closest to the current position, in that it proposes that the courts should continue to determine the level of awards of general damages through case law, as supplemented by the significant new provisions for Personal Injuries Guidelines under the *Judicial Council Act 2019*.
- [4.7] As discussed in Chapter 3, there are 3 constitutional rights that are relevant in personal injuries claims and that are therefore relevant to any type of cap on damages, although none of these rights are absolute. These are (1) the right to bodily integrity, (2) property rights, and (3) the right to equality before the law.
- [4.8] It is not entirely clear whether a cap on damages would be found to breach the right to bodily integrity. As was discussed in Chapter 3, it appears that the standard which the Constitution places on the law of negligence is that the law must be “just” or “basically effective” and that it is only where a tort is “basically ineffective” that the courts will intervene. The question therefore is, could it be said that a cap on damages would give rise to a situation where it could be said that a particular tort is “basically ineffective” in vindicating a plaintiff’s right to bodily integrity? There have been very few cases where a plaintiff has successfully argued for the expansion of a tort based on the Constitution, and the successful claims have addressed the expansion of the liability in tort on the basis of constitutional concerns. Moreover, as stated in Chapter 3, the Commission is not aware of any instance in which a plaintiff has asserted that a particular award of damages failed to vindicate his or her bodily integrity.² In any event, the right to bodily integrity is not absolute, and so, even if it were found that a cap infringed the right, once that infringement is proportionate and rational, it will not be found to be unconstitutional. Whether a measure is proportionate will largely depend on the way in which the cap is calibrated.
- [4.9] In terms of property rights, as stated in Chapter 3, the courts have identified a particular right, that is the right to an effective remedy and the right to litigate. As was stated in Chapter 3, it is considered that the right to an effective remedy is a guarantee that a *type* of remedy will be available to the plaintiff and that that type of remedy should vindicate his or her rights, not that a *specific remedy* should be available to the plaintiff. It would therefore appear that there is nothing in the right to an effective remedy itself that would automatically preclude a cap on damages in personal injury actions. However, as in the case of the right to bodily integrity, this is separate to the consideration that legislative infringements on constitutional rights must be proportionate and rational which would again depend on the way in which the cap is calibrated.

² *Lovett v Grogan* [1995] 3 IR 132 and *McKinley v Minister for Defence* [1992] 2 IR 333.

- [4.10] As discussed in Chapter 3, the right to equality is subject to different qualifications than the other rights considered in this Issues Paper, in that neither the *Heaney* proportionality test nor the *Tuohy* rationality test apply in the assessment of the validity of any restriction on the right to equality before the law. Rather, the court will consider whether the discrimination that the plaintiff complains of amounts to an *unlawful* discrimination. Based on the case law considered in Chapter 3, it appears that, for reasons of proportionality and equality, a system of capping that endorses caps that are categorised based on the type and severity of injury will be less constitutionally vulnerable than a system that endorses a general cap on recovery, in particular where such a general cap was enacted with the objective of revising all awards downwards relative to that cap.

1. Model 1 – Analogy with sentencing

(a) Background

[4.11] Model 1 is broken down into two parts:

- (1) a legislative cap set by primary legislation, that is, an Act of the Oireachtas, which classifies types of injury into separate categories of severity; and
- (2) guidelines which assist the court in determining the category or severity of the injury, and the appropriate amount of damages to award for that particular injury.

[4.12] In this Model, the power to cap is derived from the Oireachtas and is also exercised by the legislature. Accordingly, immediate constitutional concerns that arise will be related to independence of the judiciary. Model 1 attempts to apply the principles which can be gleaned from the case law surrounding sentencing in criminal law discussed in Chapter 3, that is that the legislation setting out the cap should do no more than state the “general rule”,³ and the cap should be rationally connected to the severity of the injury.⁴

[4.13] The cap set by Model 1 would look something like maximum penalties in criminal law as prescribed by legislation. Table 1 below takes an example from the *Non-Fatal Offences Against the Person Act 1997* (1997 Act). The purpose of setting out this example is to demonstrate how maximum penalties, or “caps” on penalties are determined by the Oireachtas and are broken into categories, with the least severe penalty attaching to the least serious offence and the most severe penalty to the most severe offence.

³ *Deaton v Attorney General* [1963] IR 170.

⁴ *Lynch and Whelan v Minister for Justice* [2010] IESC 34, [2012] 1 IR 11.

Non-Fatal Offences Against the Person Act 1997	
Offence Type	Maximum Penalty
Assault (section 2)	On summary conviction, imprisonment for a term not exceeding 6 months, or a fine not exceeding £1,500, or both
Assault causing harm (section 3)	On summary conviction, imprisonment for a term not exceeding 12 months, or a fine not exceeding £1,500, or both. On indictment to a fine or to imprisonment for a term not exceeding 5 years or to both
Causing serious harm (section 4)	On indictment, to a fine or to imprisonment for life or to both

Table 1

- [4.14] The table demonstrates that as the severity of the offence increases, so too does the corresponding maximum penalty. Model 1 proposes that a similar approach could be taken in the context of capping damages in personal injury cases.
- [4.15] The guidelines that accompany the primary legislation might look something like those currently employed in England and Wales in the context of sentencing for criminal offences. Take for example, the offence of aggravated burglary as provided for under section 10 of the England and Wales *Theft Act 1968*. The England and Wales Sentencing Council has produced aggravated burglary guidelines,⁵ setting out 9 steps that the courts must follow when sentencing an offender convicted of an offence of aggravated burglary (except where the court is satisfied that to follow the guidelines would be contrary to the interests of justice).⁶ The guidelines break down the offence of aggravated burglary for the purposes of sentencing as follows:

Offence Category	Starting Point	Category Range
Category 1	10 years' custody	9 – 13 years' custody
Category 2	6 years' custody	4 – 9 years' custody
Category 3	2 years' custody	1 – 4 years' custody

Table 2

- [4.16] Step 1 of the guidelines requires the court to determine within which category the offence falls. This is based on the harm caused and the culpability of the offender. Where the harm caused and culpability of the offender are highest the

⁵ Sentencing Council guidelines on Aggravated Burglary. Available at: <http://www.legislation.gov.uk/ukpga/2003/44/part/12/chapter/5>.

⁶ Section 125(1), *Coroners and Justice Act 2009*.

offence will fall into category 1, whereas where there harm caused was lowest and the culpability of the offender is lower the offence will fall into category 3.

- [4.17] Once the category is determined, step 2 requires the court to determine the starting point associated with that category. For example, where the offence falls into category 1, the starting point for the court will be 10 years imprisonment.
- [4.18] From here, steps 3 through 5 provide mitigating and aggravating factors which the court is to take into account and use to determine whether the sentence should be increased or reduced within the relevant category range.⁷
- [4.19] Step 6, 7 and 9 provide for matters related to the totality of the sentence, compensation and ancillary orders and consideration of time spent on bail.
- [4.20] Step 8 provides that, as per section 174 of the England and Wales *Criminal Justice Act 2003* the Court is obliged to give reasons for, and explain the effect of, the sentence imposed.

(b) The Model

(i) Primary Legislation

- [4.21] Under Model 1, the Oireachtas would enact primary legislation, an Act which would distinguish between types of injury, for example head injuries, spinal injuries, injuries to the eyes etc. The legislation would then break that type of injury into categories, running from minor to severe similar to the way in which offences in criminal legislation are categorised based on the seriousness of the offence. Table 3 demonstrates how this might look:

[Type of Injury]	
Injury Category	Maximum Award/Award Range
Minor	€X
Moderate	€2X
Severe	€3X
Catastrophic	€4X

Table 3

- [4.22] Should this model be adopted, the table need not be broken down in exactly this manner. The main point to be taken is that the more severe the injury

⁷ Whether the offender provided any assistance to the prosecution (step 3), whether there has been a guilty plea (step 4) and the dangerousness of the offender (step 5).

suffered, the higher the cap which would apply. The actual euro amount is not something that is considered in this Issues Paper or project.

- [4.23] Categorising injuries and caps in this way would align with recent statements made by the Court of Appeal that “minor injuries should attract appropriately modest damages, middling injuries moderate damages, severe injuries significant damages and extreme or catastrophic injuries damages which are likely to fall somewhere in the region of [the cap]” (discussed in greater detail in Chapter 2).⁸

(ii) Guidelines

- [4.24] The guidelines to accompany the Model 1 Act could take a form similar to those currently employed in England and Wales in the context of sentencing for criminal offences as discussed above.
- [4.25] The purpose of these guidelines would be to assist the courts in determining within which category the injury should be classed and up to what value of the cap the injury should be valued at. These guidelines might look like something as follows:

Type of Injury		
Injury Category	Starting Point	Cap
Minor	€Y	€X
Moderate	€2Y	€2X
Severe	€3Y	€3X
Catastrophic	€4Y	€4X

Table 4

- [4.26] Step 1 would be to determine which category the injury falls. This might be based simply on the level of physical damage caused, as is done in the current Book of Quantum. The Book of Quantum, by way of example, classifies a minor head/skull injury as one which did not cause any loss of consciousness, while a severe head/skull injury is one where there was a loss of consciousness for more than 24 hours.⁹
- [4.27] Step 2 would be to determine the starting point for damages for that particular category of injury. Taking the example from table 4 above, the starting point for a minor injury would be €Y while the most that can be awarded will be €X.

⁸ *Shannon v O’Sullivan* [2016] IECA 93, at para 94.

⁹ Book of Quantum, at p.19. Available at: <https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>.

- [4.28] Once the starting point has been determined, the object of step 3 would be to determine what award within the level of the cap might be appropriate. The court would start at the starting point and increase or decrease the award taking into account various factors. These factors may be things such as the length of recovery. Where the length of time taken to recover is longer, the award may be higher. Where there is a greater loss of amenity for that particular individual, the award may be higher, whereas where there is no loss of amenity the award may fall below the starting point. Other factors may include ongoing pain and suffering evidenced by ongoing pain management, and any psychological trauma.
- [4.29] This approach reflects the three-point scale adopted by the Court of Appeal since 2015, discussed in Chapter 2 above. It is also in many ways comparable to the four-point scale adopted in the Book of Quantum issued under the *Personal Injuries Assessment Board Act 2003* and in the comparable Judicial Guidelines published since the 1990s in England and Wales, and in Northern Ireland, also discussed in Chapter 2 above. Given these similarities, it is reasonable to assume that a similar approach would be taken by the Personal Injuries Guidelines Committee in developing its guidelines under the *Judicial Council Act 2019*.

2. Model 2 – A mandatory cap (New South Wales), adjusted to presumptive (England and Wales)

(a) Background

- [4.31] Model 2 proposes an approach similar to that currently used in New South Wales since 2002. Section 16 of the New South Wales *Civil Liability Act 2002* provides that general damages are capped and all awards for lesser injuries are indexed to the cap. Model 2 includes a possible adjustment to reflect the approach adopted in England and Wales in the *Civil Liability Act 2018* whereby there is the provision for the possibility that the judiciary may, in exceptional circumstances and subject to specific requirements, “uplift” the tariff set by regulations.
- [4.32] As with Model 1, one of the key constitutional concerns that may arise under Model 2 is that the independence of the judiciary is maintained. Under the New South Wales Act, which is mandatory in nature, once the court has determined the severity of the injury, it is bound to assess the damages at the associated percentage of the cap. Model 2 includes an “uplift” provision, similar to that seen in the England and Wales *Civil Liability Act 2019*, whereby the court would be entitled, in exceptional circumstances and subject to specific criteria, to award a higher amount than the tariff amount. Such a provision would transform Model 2 from mandatory in nature to presumptive in nature which should assuage some of the constitutional concerns as to independence of the judiciary by retaining a level of judicial discretion

(b) New South Wales *Civil Liability Act 2002*

- [4.33] Section 16(2) of the New South Wales *Civil Liability Act 2002* (New South Wales Act) provides for an absolute ceiling on general damages in personal injuries litigation which is only to be awarded in the most extreme case.
- [4.34] Section 16(3) provides that damages for non-economic loss are to be determined in accordance with a table which ranks the severity of the non-economic loss as a percentage of the most extreme case.
- [4.35] Once it is determined what proportion of injury or loss the claimant has suffered, the court then refers to a table. Each percentage injury or loss is linked to a percentage value of the cap on sliding scale up to 33% and on a 1:1 ratio after that. Below is a sample taken from the table contained in section 16 of the New South Wales *Civil Liability Act 2002*:

Severity of the non-economic loss (as a proportion of a most extreme case)	Damages for non-economic loss (as a proportion of the maximum amount that may be awarded for non-economic loss) ¹⁰
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%–100%	34%-100% respectively

Table 5

[4.36] Section 3 of the New South Wales Act defines economic loss as any one or more of the following:

- (a) pain and suffering,
- (b) loss of amenities of life,
- (c) loss of expectation of life,
- (d) disfigurement.

(c) New South Wales Case Law – Application of the New South Wales Act

[4.37] *Nair-Smith v Perisher Blue Pty*¹¹ concerned a plaintiff who had been injured when hit from behind by the defendant's chair lift. In assessing the plaintiff's severity of injury the New South Wales Supreme Court, looked to the plaintiff's position prior to the accident, her level of enjoyment and functioning after the accident, and the contribution of the accident to that difference.¹²

[4.38] In that case, the plaintiff had a pre-existing back condition which caused her pain but nonetheless led an active life. Following the accident she had to cut

¹⁰ The cap is currently set at AUD\$500,000 (approximately €308,156 at November 2019).

¹¹ [2013] NSWSC 727.

¹² *Ibid*, at para 312.

down on her working hours, her holidays and her recreational activities. The Court noted that although the plaintiff still retained a certain level of functionality, she was to be assessed as against the pre-accident condition and not as against the habits of the community at large.¹³

- [4.39] The Court found that the evidence showed that she had suffered a significant soft tissue injury to her spine as a result of the accident, which had aggravated her pre-existing condition and resulted in the development of a pain disorder.¹⁴ Accordingly, the Court assessed the plaintiff's non-economic loss at 25% of the most extreme case.
- [4.40] In *Rasmussen v South Western Sydney Local Health District*¹⁵ the New South Wales Supreme Court assessed the plaintiff's non-economic loss as being 40% of the most serious case where she was suffered a psychological injury as a result of the death of her 4 day old baby, which had occurred as a consequence of the negligence on the part of the defendant.
- [4.41] The Court took into account the fact that her evidence demonstrated that her subsequent pregnancies were particularly anxious experiences, that she was overly concerned for the welfare of her two daughters and that she was suffering from a pathological grief reaction. On the other hand, the Court took into account the fact that she had been able to have 2 children subsequent to the death of her first born, she had been able to engage in part-time work while leaving her children in the care of a crèche and had been able to undertake a Bachelor's Degree.
- [4.42] In *Meneghello v Coles Supermarkets Australia Pty Ltd*¹⁶ the plaintiff had slipped and injured herself in the defendant's supermarket. In assessing the severity of her injuries, the Court of Appeal turned to section 3 of the New South Wales Act and noted that in this case there was "no disfigurement, no loss of expectation of life, very minor pain and suffering, very minor loss of amenities of life and every prospect of an early and complete recovery".¹⁷ Accordingly, the Court considered the plaintiff's injuries to be "very modest" and assessed them as falling at 10% of the most severe injury.

¹³ *Nair-Smith v Perisher Blue Pty* [2013] NSWSC 727, at para 277.

¹⁴ *Ibid*, at para 311.

¹⁵ [2013] NSWSC 656.

¹⁶ [2013] NSWCA 264.

¹⁷ *Ibid*, at para 106.

[4.43] The New South Wales Court of Appeal in *Hall v State of New Wales*¹⁸ gave some consideration to the applicable principles to the assessment of general damages. The Court rejected the notion that section 16 should be approached by reference to the dollar amount which corresponds with the various percentages as to do so would be to subvert the statutory scheme.¹⁹ The Court endorsed the statement made by the Court of Appeal in *Berkeley Challengee Ptd Ltd v Howarth* that:

The importance of the distinction is that the assessment of general damages, now being reduced by statute to a determination of the severity of the injuries as a proportion of a most extreme case, involves no translation of pain and suffering into a cash payment.²⁰

[4.44] The Court went on to note that the task of assessing the proportion of injury is more of an art form than a science, which can lead to imprecision in the judgments.²¹

[4.45] Model 2 proposes a method similar to that contained in section 16 of the New South Wales Act. A cap or maximum amount that may be awarded in general damages would be determined by way of primary legislation and all less severe awards would be indexed to the cap.

[4.46] Model 2 is similar to Model 1 in that it allows the courts the discretion to determine the severity of the plaintiff's injuries and accordingly within which category provided that those injuries should fall.

[4.47] However, Model 2 differs from Model 1 in that, the discretion to determine within which category or percentage of injury is the only discretion afforded to the court under Model 2. Once the severity of the injury is determined, the court is afforded no latitude to pick the appropriate award from a category range but is bound to award the corresponding percentage value associated with the severity of the injury, except where the court is satisfied that exceptional circumstances justify making a higher award.

¹⁸ [2014] NSWCA 154.

¹⁹ *Ibid*, at para 29.

²⁰ [2013] NSWCA 370, at para 13.

²¹ *Hall v State of New Wales* [2014] NSWCA 154, at para 31.

- [4.48] Model 2 could also be said to be a “tariff” style system, that is where the court determines the level of injury, and where Parliament provides a fixed sum for general damages that should accompany that level of injury.

(d) England and Wales *Civil Liability Act 2018*

- [4.49] An example of a tariff system is that provided for under the England and Wales *Civil Liability Act 2018* (England and Wales 2018 Act). Section 3(2) of the 2018 Act, once commenced, will permit the Lord Chancellor to make regulations (secondary legislation) which set tariffs on “whiplash injuries”²² caused in the course of a road traffic accident.²³ In that sense, the 2018 Act differs from the New South Wales Act in that it does not set tariffs itself, but rather permits the Lord Chancellor to set tariffs by way of secondary legislation.
- [4.50] A feature of the England and Wales 2018 Act that is not shared with the New South Wales Act is that section 5 of the 2018 Act provides that the Lord Chancellor may provide for “judicial uplift” in the regulations. That is, the Lord Chancellor may make provision within the regulations for the courts to determine that the damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries is greater than the tariff amount relating to those injuries.
- [4.51] It might be possible to include a similar uplift provision under Model 2 which would permit the courts to depart from it, so that the caps would be presumptive in nature. An uplift provision might avoid constitutionality concerns by allowing the judiciary to retain a greater level of discretion.
- [4.52] Similar provisions can be seen in sentencing law where the Court is, initially at least, required to apply a minimum sentence for a particular offence, but where the legislation provides that the court may apply a lower sentence in exceptional circumstances, thus making the minimum sentence in question presumptive in nature. For example, section 27(3C) of the *Misuse of Drugs Act 1977* as amended provides that, where a person has been convicted of an offence under either section 15A or 15B of the 1977 Act, the court is obliged to impose a minimum sentence of 10 years. However, section 27(3D)(b) goes on to provide that the

²² Section 1 of the England and Wales *Civil Liability Act 2018* defines a whiplash injury as an injury of soft tissue in the neck, back or shoulder, that is (a) a sprain, strain, tear, rupture or lesser damage of a muscle, tendon or ligament in the neck, back or shoulder, or (b) an injury of soft tissue associated with a muscle, tendon or ligament in the neck, back or shoulder.

²³ Section 3(2) of the England and Wales *Civil Liability Act 2018*.

court may apply a lesser sentence where the court is satisfied that there are exceptional and specific circumstances justifying the court in doing so. However, this approach may conflict with the general purpose of a fixed tariff approach, in that there is the risk that uplifting may become the rule rather than the exception. This was a concern that arose in the operation of the presumptive minimum sentencing under section 27(3C) of the *Misuse of Drugs Act 1977* as amended.²⁴

(e) The Model

- [4.53] Under Model 2, the Oireachtas would enact primary legislation which would set an absolute maximum or cap on general damages for pain and suffering with all other injuries and awards being indexed to the most extreme injury. The maximum amount would only be awarded in the most extreme of cases.
- [4.54] The legislation would further provide, as is done under section 16 of the New South Wales Act, that damages for non-economic loss are to be determined in accordance with a table which would rank the severity of the non-economic loss as a percentage of the most extreme case. Each percentage injury would be linked to a percentage value of the cap.
- [4.55] The first step for the court would be to determine the percentage injury suffered by the plaintiff. Once the severity of the injury is determined, the court would turn to the table which would look something like table 5. The court would identify which percentage value of the cap is linked to the percentage of injury determined to have been suffered by the plaintiff.
- [4.56] By way of example, say the cap or maximum amount is set at €X, and the court determines that the plaintiff has suffered the most catastrophic type of injury. In that case the plaintiff will be entitled to €X in damages for pain and suffering. Where the plaintiff is considered to have suffered an injury which is considered to be 50% as severe as the most catastrophic type of injury, that plaintiff will be entitled to 50% of X.

An added provision, similar to the provision in section 5 of the England and Wales *Civil Liability 2018* could also be included in the legislation. That provision could allow the court to “uplift”, or to award a higher award than normally linked to the percentage injury, where exceptional circumstances justify doing so. This caveat could be an important feature of Model 2 as it essentially transforms the cap from one that is mandatory in nature to one that is

²⁴ See the discussion in the Commission’s *Report on Mandatory Sentences* (LRC 108-2013), at para 2.138.

presumptive in nature. A presumptive cap is generally thought to be less likely to be subject to scrutiny on constitutional grounds, as it enables the judiciary to have regard to the circumstances of the case and to determine that the tariff associated with the severity of the injury is not appropriate given the circumstances of the particular case. In that sense judicial independence is retained.

3. Model 3 – Capping damages through delegated legislation

- [4.57] Model 3 proposes that any method of capping (including Models 1 or 2) could be adopted, but instead of being done by way of primary legislation by the Oireachtas, the task is delegated and is done by, for example, a Minister through secondary legislation.
- [4.58] Capping by way of secondary legislation would require the Oireachtas to enact primary legislation or a “Parent Act” which would delegate the power to enact secondary legislation to, for example, a Minister. As with Models 1 and 2, Model 3 runs the risk of infringing upon the independence of the judiciary and also has the added risk that it may fall foul of the “non-delegation doctrine” discussed in Chapter 3. Any primary legislation which purports to delegate the authority to cap damages would be required to meet the requirements of the “principles and policies” test.²⁵
- [4.59] It is not possible, in advance of a particular legislative proposal, to articulate a concrete view on whether the principles and policies test would fail to be met. If a cap on damages in personal injuries litigation were to be set by way of delegated legislation, the Oireachtas would need to ensure that the relevant principles and policies are contained in the parent Act. In the case of a cap on damages this might include, at a minimum, the severity of the injury, the type of injury, and the general impact of that type and severity of injury on a person who has suffered it.

(a) Civil Liability (Capping of General Damages) Bill 2019

- [4.60] One option might be to delegate the power to enact secondary legislation to a Minister. This was proposed in the *Civil Liability (Capping of General Damages) Bill 2019* (2019 Bill), a Private Member’s Bill that proposes to introduce a cap of a type under consideration in this Issues Paper. At the time of writing (November 2019), the Bill had passed Second stage in Seanad Éireann.
- [4.61] Section 2 of the 2019 Bill proposes to assign to the Minister for Justice and Equality (the Minister) responsibility for setting the monetary value of a cap on general damages:

“The Minister may by regulations, subject to section 4, prescribe the maximum level of general damages which

²⁵ *Cityview Press Ltd v An Chomhairle Oilúna* [1980] IR 381, discussed in Chapter 3 above.

may be awarded to a claimant who has suffered personal injury.”

- [4.62] Section 3 proposes that the Minister must have regard to a number of factors including to the “public interest” and ensuring that claimants receive a “fair and reasonable” level of general damages and moderating excessive compensation levels.
- [4.63] Section 4 of the Bill then proposes that the Minister may only make a Regulation if a draft of the proposed Regulation is laid before the Houses of the Oireachtas and approved of by resolution of each House.
- [4.64] An advantage of this framework is that the Minister can respond to changes in social conditions in a more agile way. A disadvantage is that it is more constitutionally vulnerable to have a Minister set the ceiling for damages for which the Minister, as a possible defendant in an action, may be liable. Section 4 of the Bill is clearly meant to offset this, but it is not clear whether this would pass the “principles and policies” test for delegated power²⁶ or the separate issue of whether the executive should be in a position to set a cap on damages at all.
- [4.65] There is also a question as to where the 2019 Bill, if enacted, would leave the Guidelines to be produced by the Personal Injuries Guidelines Committee under the *Judicial Council Act 2019*. As discussed in Chapter 2, once commenced, section 98 of the *Judicial Council Act 2019* will amend section 54 of the *Personal Injuries Assessment Board Act 2003* and remove from PIAB the responsibility of reviewing the Book of Quantum. Section 99 of the *Judicial Council Act 2019*, once commenced, will insert a new section 22 into the *Civil Liability and Courts Act 2004* which will require the courts to have regard to the Guidelines produced by the Personal Injuries Guidelines Committee rather than to the Book of Quantum.
- [4.66] The 2019 Bill was introduced before the addition of the provisions relating to the Personal Injuries Guidelines Committee to the *Judicial Council Act 2019* at Seanad Éireann Report Stage. Section 6(1) of the 2019 Bill, in its current form, proposes that the Book of Quantum must be revised to reflect the maximum level of damages which have been prescribed in Regulations made by the Minister, and section 6(2) of the 2019 Bill proposes that the Book of Quantum must be revised from time to time so as to reflect the recommendations of the

²⁶ *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381, discussed in Chapter 3, above.

Personal Injuries Commission. These provisions are clearly intended to synchronise the Book of Quantum with any Regulations enacted by the Minister. It is unclear how Regulations passed by the Minister would interact with the Guidelines produced by the Personal Injuries Guidelines Committee once sections 98 and 99 of the *Judicial Council Act 2019* are commenced (though presumably if the 2019 Bill progresses further it may be amended to take account of the *Judicial Council Act 2019*).

(b) Comparing and contrasting the *Civil Liability (Capping of General Damages) Bill 2019* with the England and Wales *Civil Liability Act 2018*

- [4.67] The 2019 Bill can be compared and contrasted with the England and Wales *Civil Liability Act 2018*. Section 3 of the *Civil Liability Act 2018* allows the Lord Chancellor to make regulations which prescribe ‘tariffs’ or set amounts which may be awarded in respect of ‘minor’ whiplash injuries suffered as a result of road traffic accidents. In contrast, the *Civil Liability (Capping of General Damages) Bill 2019*, as initiated, appears to allow the Minister for Justice and Equality to prescribe caps on damages in any type personal injury action, no matter how it was suffered or how catastrophic its effect. Moreover, under the England and Wales Act the Lord Chancellor *must* consult with the Lord Chief Justice.²⁷ The 2019 Bill does not contain a similar mandatory consultation provision.
- [4.68] Perhaps most importantly, under section 5 of the England and Wales Act, as was discussed under Model 2, the Lord Chancellor may include in any Regulations a provision that a court would be permitted, in exceptional circumstances and subject to certain criteria, to “uplift” the tariff set for a particular injury. This in effect makes any tariff a presumptive one and acts as a kind of safety valve. No comparable provision is included in the 2019 Bill but such a provision, as discussed under Model 2, could go some way to assuaging any fears that there has been an infringement of judicial independence by allowing the judiciary to retain a level of discretion so that they are not found to have their hands tied by a legislative tariff.

(c) The Model

- [4.69] Model 3 proposes that the Oireachtas delegate the task of capping damages to, for example, a Minister. Whatever form the capping takes, it would be important that the primary legislation which delegates the power to cap contains sufficient

²⁷ Section 3(11) of the UK *Civil Liability Act 2018*.

“principles and policies” so that it does not fall foul of the non-delegation doctrine as discussed in Chapter 3.

- [4.70] As already noted, an example of a model for capping damages by way of secondary legislation can be seen in the *Civil Liability (Capping of General Damages) Bill 2019* which proposes that the Minister for Justice and Equality be tasked with capping damages through ministerial Regulations.
- [4.71] As discussed above, an advantage of this framework is that the Minister can respond to changes in social conditions in a more agile way. The risks are that the proposed power to cap damages may infringe upon judicial independence and that any delegation of power might amount to an unconstitutional delegation of the legislative power.
- [4.72] As stated above, it is not possible, in advance of a particular legislative proposal, to articulate a concrete view on whether the principles and policies test would fail to be met but should a cap on damages in personal injuries litigation be set by way of delegated legislation, it would be desirable that the relevant principles and policies be contained in the parent Act.

4. Model 4: Caps continue to be set by the Judiciary, taking account of the *Judicial Council Act 2019*

- [4.73] Model 4 proposes an approach that could be described as closest to the current position. This Model would see the courts would continue to set a maximum cap for catastrophic cases, and a proportionality test for others cases, would be retained, taking into account the significant new arrangements for setting guidelines under the *Judicial Council Act 2019*.
- [4.74] As discussed in Chapter 2 above, since 2015 the Court of Appeal has delivered a series of decisions that have provided guidance in the assessment of general damages. These include cases such as *Shannon v O'Sullivan*²⁸ and *Nolan v Wirenski*.²⁹
- [4.75] Model 4 would also inevitably take account of the significant reforms to be effected by the establishment of the Personal Injuries Guidelines Committee (the Committee) under the *Judicial Council Act 2019* (2019 Act).
- [4.76] The 2019 Act provides that the function of the Committee is to draft "personal injury guidelines"³⁰ which are to be reviewed by the Board of the Judicial Council and approved by the Judicial Council itself.³¹
- [4.77] Section 99 of the 2019 Act, when commenced, will amend section 22 of the *Civil Liability and Courts Act 2004* so that the courts will no longer be required to have regard to the Book of Quantum in their assessment of damages. A court will, instead, be required to have regard to any personal injuries guidelines produced by the Committee and, where it departs from those guidelines, the court must state the reasons for this departure in its decision. The amended section 22 involves a greater obligation on a court than has been in place under the 2004 Act, under which it has been required to have regard to the Book of Quantum, but that, if it departed from them, it has not been under any obligation to set out any reasons for doing so.
- [4.78] Section 90(1) of the 2019 Act provides that the personal injury guidelines may include guidance on any or all of the following:

- (a) the level of damages for personal injuries generally;

²⁸ [2016] IECA 93.

²⁹ [2016] IECA 56, [2016] 1 IR 461.

³⁰ Section 18(2) of the *Judicial Council Act 2019*.

³¹ Section 19(1) of the *Judicial Council Act 2019*.

- (b) the level of damages for a particular injury or a particular category of injury;
- (c) the range of damages to be considered for a particular injury or a particular category of injuries;
- (d) where multiple injuries have been suffered by a person, the consideration to be given to the effect of those multiple injuries on the level of damages to be awarded in respect of that person.

[4.79] Of note is that, on the face of the 2019 Act, it does not appear that the Committee is restricted to preparing guidelines only with regard to general damages or non-economic damages.

[4.80] In drafting the guidelines, the Committee is required to have regard to:

- (a) the levels of damage awarded for personal injuries by Courts both within the State and outside the State;
- (b) the principles for the assessment and award of damages determined by the High Court, Court of Appeal and the Supreme Court;
- (c) guidelines relating to the classification of personal injuries;
- (d) the need to promote consistency in the level of damages for personal injuries;
- (e) any other factors that the Committee deems appropriate.³²

[4.81] While the format of such guidelines has yet to be determined, it would be reasonable to assume that they are not likely to differ in significant respects from the format of the Book of Quantum. This is because the Book of Quantum was in turn based on the Judicial Guidelines published since the 1990s in England and Wales, and in Northern Ireland, and that the Court of Appeal in recent years has followed the three-point scale seen in the Book of Quantum and those Judicial Guidelines. However, as noted by the Chief Justice in November 2019,³³ they will differ in an important respect in that the new Guidelines will have “more teeth” in that if a court departs from them, it will have to explain why. As well as this difference, the PIGC is empowered under the

³² Section 90(3) of the *Judicial Council Act 2019*.

³³ Keynote speech delivered by the Chief Justice Mr Justice Frank Clarke at Insurance Ireland Conference, 19th November 2019. Available at <https://www.rte.ie/news/2019/1119/1092757-insurance-claims/>.

2019 Act in setting the new Guidelines to depart from what the Chief Justice described as the “going rate”, that is, to set out guidelines figures that differ from the levels being awarded up to now, something that the Book of Quantum could not do.

5. Other Possible Model

- [4.82] The Commission has set out above 4 possible models for capping damages but is conscious that consultees may consider that some other model or approach may be more suitable to address the issue of capping damages in personal injuries actions.
- [4.83] Without prejudice to the ideas that consultees may have in this respect, the Commission considers that other developments in the law of damages may be relevant. By way of example, the Commission notes that Part IVB of the *Civil Liability Act 1961*, inserted by the *Civil Liability (Amendment) Act 2017*, provides for the making of Periodic Payments Orders (PPOs) in civil claims, in particular where the ongoing nature of the injuries involved (such as in certain clinical negligence claims) may require indefinite future care and where a lump sum award may not provide a sufficient capital sum for such treatment. The Commission does not express a view as to whether a periodic payment, as opposed to a lump sum, may be appropriate in cases other than those provided for under the 2017 Act, but invites consultees to consider whether an approach other than those set out in Models 1 to 4 could be considered relevant to the specific issue involved in this project.
- [4.84] The Commission also notes that, in November 2019, in *Hegarty v Health Service Executive*,³⁴ the High Court (Murphy J) held that, as currently drafted, the provision for future indexing of PPOs in the 2017 Act was, for the reasons discussed below, “regrettably, a dead letter”.
- [4.85] In the *Hegarty* case, there was evidence before the High Court in relation to the recommendation in the 2010 *Report of the Working Group on Medical Negligence Litigation and Periodic Payments (Module 1)*.³⁵ In its 2010 Report, the Working Group had recommended that legislation should provide for PPOs, and that this should include provision for earnings and costs-related indices which would allow periodic payments to be index-linked to the levels of earnings of treatment and care personnel and to changes in costs of medical and assistive aids and appliances.³⁶ It had also recommended that these tailored indices

³⁴ [2019] IEHC 788.

³⁵ *Report of the Working Group on Medical Negligence Litigation and Periodic Payments (Module 1)* (chair: Mr Justice John Quirke, judge of the High Court) (Courts Service, October 2010), available at [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/5CEE19C4A5959BC802577DC0055C9F4/\\$FILE/Medical%20Negligence%201.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/5CEE19C4A5959BC802577DC0055C9F4/$FILE/Medical%20Negligence%201.pdf).

³⁶ *Ibid*, at p.32.

should be along the lines of the English *Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Home Carers* (ASHE SOC 6115), which the English Court of Appeal had, in *Thompstone v Thameside and Glossop Acute Services NHS Trust*,³⁷ after an exhaustive survey, approved as the basis for making PPOs under the England and Wales *Damages Act 1996* (under which PPOs are made in England and Wales).³⁸

- [4.86] In the *Hegarty* case, the High Court noted that the recommendation from the 2010 Report concerning the use of an index along the lines of ASHE SOC 6115 had not been implemented in the 2017 Act, which provided for indexing linked to the Harmonised Index of Consumer Prices (HICP). The Court also heard extensive evidence from a wide variety of expert witnesses for the plaintiff, whose evidence was not contradicted by the defendant, that the HICP indexing mechanism in the 2017 Act could not ensure that a PPO made under the 2017 Act would cover the plaintiff's anticipated future care needs in full. On that basis, the Court concluded:

"It is clear, on the basis of the expert evidence before the court, that no competent financial expert would recommend a periodic payment order linked to the harmonised index of consumer prices to provide for the future care needs of a plaintiff. In its current form therefore, the legislation is regrettably, a dead letter. It is not in the best interests of a catastrophically injured plaintiff to apply for a PPO under the current legislative scheme."³⁹

- [4.87] The Court accepted that it remained possible for parties to agree a PPO under the 2017 Act where they also agreed that the PPO should be indexed "by an index other than the HICP."⁴⁰ The Court accepted that it was perhaps unlikely that any public body would agree to apply any index other than the HICP index

³⁷ [2008] EWCA Civ 5, [2008] 2 All ER 537.

³⁸ *Report of the Working Group on Medical Negligence Litigation and Periodic Payments (Module 1)*, at p.32. It is also to be noted that the Court in *Hegarty* quoted from the decision of the Court of Appeal in *Russell (a minor) v Health Service Executive* [2015] IECA 236, [2016] 3 IR 427 which concerned the assessment of a lump sum award as distinct from a PPO, but in which the Court of Appeal had reiterated the benefits of implementing the recommendations in the Working Group's 2010 Report.

³⁹ [2019] IEHC 788, at para 74.

⁴⁰ *Ibid*, at para 75.

set out in the legislation, but that insurers with experience of the operation of PPOs in England and Wales since 2003 might view the matter differently, adding: "Time will tell."⁴¹

- [4.88] The Court also held that it could continue to make interim payments in catastrophic injuries cases, or a payment on account as in the case itself, so that the plaintiff's short term medical care and treatment could continue to be funded.⁴²
- [4.89] At the time of writing (November 2019), the decision in the *Hegarty* case has cast considerable doubt over the operation of PPOs under the 2017 Act. Nonetheless, the Commission considers that the concept of PPOs provides a useful reference point for consultees to consider as an alternative to the models discussed above, all of which are based on the award of a single lump sum payment for general damages.
- [4.90] The Commission does not wish to limit consultees in their responses to this Issues Paper, whether to the 4 models identified above or to the concept of PPOs as the only alternative approach to such models. Rather, the Commission has referred to PPOs as an example of another approach to the questions posed by this project, that is, what possible model or models could be used to have the effect of capping damages in personal injuries actions. The Commission therefore invites consultees to suggest in their responses to this Issues Paper any other possible model to address the issue of capping damages.

⁴¹ *Ibid*, at para 76.

⁴² *Ibid*, at para 84.

QUESTIONS TO CONSULTEES

In light of the above discussion in the Issues Paper, the Commission invites consultees to make submissions on the following questions.

- Q. 1** In your opinion, are there any other constitutional concerns in addition to those discussed in Chapter 3 of this Issues Paper that should be considered in the Commission's Report on this project?
- Q. 2(a)** Do you consider that any of the models discussed in Chapter 4 satisfy the constitutional concerns raised in Chapter 3?
- Q. 2(b)** If the answer to question 2(a) is "yes" please indicate which Model you consider would meet those constitutional concerns, and why?
- Q. 3** Is there any other model for capping damages in personal injuries cases, not considered in this Issues Paper, which you believe would be appropriate?

We would like to receive submissions on this Issues Paper no later than close of business on **Friday 31 January 2020** if possible. For e-mail and postal addresses, please see page iii, above.

