
LAW REFORM COMMISSION

REPORT

CAPPING DAMAGES IN PERSONAL INJURIES ACTIONS

(LRC 126-2020)



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

Report

Capping Damages in Personal Injuries Actions

(LRC 126 – 2020)

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OVERVIEW AND EXECUTIVE SUMMARY

1. Focus of this Report

1. This Report is on a project that 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 legislative model of capping general damages awards in personal injuries actions. The Commission emphasises that it is only awards of general damages (damages awarded for pain and suffering or loss of amenity), in contrast to special damages (that is to say damages that can be calculated and quantified, such as loss of earnings or medical expenses), that are considered in this Report with respect to capping legislation.
2. The Commission acknowledges that this project is set against a background of considerable debate concerning the cost of motor, employer and public liability insurance, which is outlined in Chapter 1. However, the Commission emphasises that the focus of this project is confined to a narrow question: is it constitutionally permissible, or otherwise desirable, to provide for a legislative model of capping general damages in personal injuries litigation.

2. Issues Paper and Report

3. The Issues Paper that formed the basis for this Report² set out four possible models of capping legislation. The Commission invited consultees to express their views on the constitutionality of those models. Consultees were also invited to suggest any other constitutional issue, not addressed in the Issues Paper, that they considered might be engaged by capping legislation and to suggest any other possible legislative model of capping damages, not mentioned in the Issues Paper, that would be constitutionally permissible. Following the publication of the Issues Paper, the Commission received a considerable number of submissions from individuals and bodies with an interest in this area, and the Commission very much appreciates those contributions. Those submissions have been of significant assistance to the Commission, informing its discussion on the constitutional issues contained in this Report and the assessment of the models of capping legislation. No consultee proposed an alternative method of capping damages to those suggested in the Issues Paper. The analysis in this Report therefore concerns the four models discussed in the Issues Paper, without prejudice to any other model that may be considered outside the context of this project.

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

² *Issues Paper on Capping Damages in Personal Injuries Actions* (LRC IP 17-2019).

4. In preparing this Report, the Commission considered that it could be helpful, in particular to those who made submissions in response to the Issues Paper, to follow the sequence of the text in the Issues Paper. Where relevant, the Commission has updated the material discussed in the Issues Paper, taking account of the submissions received as well as case law and legislative developments since the Issues Paper was published in December 2019.

3. Context: general debate on reform of insurance

5. **Chapter 1** of the Report addresses the wider context and background of reforms against which this project is set. The project and this Report come against the background of considerable public discussion and debate concerning the cost of motor insurance, and of employer and public liability insurance. This discussion and debate led in recent years to a number of initiatives, including the establishment of the Cost of Insurance Working Group (CIWG) in 2016, which in two Reports examined factors contributing to the cost of insurance and which also identified a range of further statutory reforms. Arising from a recommendation of the CIWG, the Personal Injuries Commission (PIC) was established, which also published two Reports that analysed clinical standards for measuring personal injuries, including soft tissue or whiplash injuries as well as the levels of awards for such injuries in other jurisdictions.
6. 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. This Report sets out the Commission's examination and conclusions in response to those recommendations.
7. **Chapter 1** also discusses relevant developments since the Commission published its Issues Paper in December 2019, including taking account of the helpful comments made by consultees.
8. As noted above, consultees did not identify any additional model of capping damages to the four models suggested in the Issues Paper. In the Issues Paper, the Commission had referred to the potential role of Periodic Payment Orders (PPOs), and the difficulties encountered in practice with the *Civil Liability (Amendment) Act 2017*. In Chapter 1, the Commission returns to discuss the current relevant law on PPOs as well as other developments since the Issues paper was published, notably the work of the Expert Group for the Management of Clinical Negligence Claims, chaired by Mr Justice Meenan, and a Department of Justice and Equality public consultation on the "discount rate" in personal injuries cases.

4. Current relevant law on damages for personal injuries

9. In **Chapter 2**, the Commission discusses the current relevant law on damages. This includes a discussion of 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, as if the injury involved had not happened. The Commission discusses the common law upper limit, or "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 been adjusted by the courts since then so that it currently (August 2020) stands at €500,000. This includes a discussion of what is sometimes called the "totality rule", that although the separate sums assessed for general and special damages may be appropriate, the total award may be above what is regarded as compensatory or restitutionary. The Commission also discusses the proportionality principle that has been applied by the courts in the assessment of general damages, that is, a three-point scale that has been summarised by the Court of Appeal in 2016 as follows: "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 lesser categories".³ This includes a discussion of the recent decision of the Supreme Court in *Morrissey v Health Service Executive*,⁴ where the Court engaged in an analysis of the effect of the upper limit of €500,000 that has been set and applied by the courts in respect of general damages.

5. Constitutional issues

10. **Chapter 3** of the Report addresses the constitutional concerns that a legislative model of capping damages may raise. The key constitutional rights identified by the Commission are: (1) the right to bodily integrity; (2) property rights; and (3) the right to equality. An important feature of this discussion relates to the proportionality test. For the purposes of clarity, the Commission uses the term "proportionality test" in reference to the constitutional standard applied in *Heaney v Ireland* (the *Heaney* case);⁵ and the term "proportionality principle" when referring to the relationship of an award of general damages to the severity of the injury. None of the three constitutional rights listed is absolute. A restriction of the right to bodily integrity and of property rights can be justified where that restriction can satisfy a proportionality test or, in some instances, a rationality test.

³ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 44.

⁴ [2020] IESC 6.

⁵ [1994] 3 IR 593.

11. In addition to these three rights, the Commission notes that two additional constitutional concerns may arise depending on the specific type of capping model under consideration. Those are: the question of the separation of powers under the Constitution, in particular the role of the judiciary in the administration of justice; and whether it would be constitutionally permissible for the Oireachtas to enact legislation that would include delegating the details of capping levels to, for example, a Minister. This involves a consideration of the non-delegation doctrine, as well as the separation of powers.
12. Consultees, in their responses to the discussion of the constitutional issues in the Issues Paper, provided the Commission with detailed insights and perspectives on those issues. The Commission has incorporated these extremely helpful views into the analysis in Chapter 3 of this Report. The discussion in Chapter 3 forms the basis for the analysis of the models of capping legislation in Chapter 4.

6. Assessment of the four legislative models on capping damages

13. **Chapter 4** of the Report reviews the four models which were set out in Chapter 4 of the Issues Paper and considers the constitutional permissibility of each model. By setting out a number of options, as the Commission has done, it is acknowledged that, in this respect, this project does not involve a single question as to whether a specific form of legislative cap on general damages would be constitutional. A range of possible legislative approaches could be taken. The Commission emphasises that the constitutional viability of any model for capping general damages will depend on the manner in which that cap is calibrated. Further final determination of any constitutional question is a matter, initially, for the Government (with the benefit of the advice of the Attorney General), then of the Oireachtas as the sole law-making body under the Constitution and, ultimately, in the event of a constitutional challenge to any such legislation, to the High Court, Court of Appeal and Supreme Court.

7. Concluding comments on the wider, ongoing, context of the Report

14. The Commission considers that it may be helpful to add some concluding comments to place the analysis in this Report against the background of the debate concerning the cost of motor, employer and public liability insurance, taking account of recent and ongoing developments to which the Commission has had regard at the time of writing (August 2020).
15. As already noted, this Report forms a narrow part of the very wide, and ongoing, review of the insurance market in Ireland. In 2017 and 2018, in four separate Reports, the Cost of Insurance Working Group (CIWG) and the Personal Injuries Commission (PIC) made a total of 33 recommendations for reform in this area and which, in turn,

required 71 implementing actions.⁶ In two related recommendations in two of those reports, the CIWG and the PIC recommended that this Commission consider including in its *Fifth Programme of Law Reform* a project to examine whether it would be constitutionally permissible to enact legislation on capping damages in personal injuries actions.

16. The Commission duly considered these requests and, having applied the relevant selection criteria, included the project in its draft Fifth Programme that it submitted to Government in the second half of 2018. The Oireachtas Joint Committee on Justice and Equality considered the draft Fifth Programme in January 2019. It approved the Programme's contents and did not propose any changes. Following this, the Government formally approved the Fifth Programme in March 2019.
17. The Commission gave immediate priority to this project and, as noted above, published the Issues Paper in December 2019. In light of requests from consultees, the Commission agreed to extend the timeline for receiving submissions from 31 January 2020 to 6 March 2020. The Commission is extremely grateful to consultees for the depth of their engagement with the issues involved in this project in the submissions received. Since March, the Commission has engaged in intensive consideration of those submissions in preparing this Report.
18. The Commission notes that, since the publication in 2018 of the CIWG and PIC Reports, there have been many policy and legislative initiatives to implement the recommendations in those Reports. The overwhelming majority of these initiatives fall well outside the narrow confines of this project and Report,⁷ although one is related to previous work of the Commission on insurance contract law.⁸
19. Of direct relevance to this Report, however, has been the enactment of the *Judicial Council Act 2019*, which provided for the establishment of the Personal Injuries Guidelines Committee (PIGC) and whose key function is to prepare Guidelines on Personal Injuries that will replace the Book of Quantum, which had set out general

⁶ See Cost of Insurance Working Group, *Ninth Progress Update* (July 2019), Foreword, page 3 available at <<https://assets.gov.ie/19322/8404160a5cc44b53b482c34ac1316f3b.pdf>> accessed on 24 August 2020.

⁷ Among the legislative initiatives have been the enactment of the *Central Bank (National Claims Information Database) Act 2018* and the making of the *Non-Life Insurance (Provision of Information) (Amendment) Regulations 2018* (SI No 577 of 2018), which amended the *Non-Life Insurance (Provision of Information) Regulations 2007* (SI No 74 of 2007).

⁸ The *Consumer Insurance Contracts Act 2019* largely reflects the content of the draft *Consumer Insurance Contracts Bill* in the Commission's 2015 *Report on Consumer Insurance Contracts* (LRC 113-2015). Section 16(4)(c) and (d) of the 2019 Act also implemented a recommendation in one of the reports of the CIWG: see paragraph 1.19 fn15 of the Report below.

guidelines as to the amounts that may be awarded or assessed in respect of specified types of injury. The Book of Quantum had been prepared under the *Personal Injuries Assessment Board Act 2003*.

20. The Commission considers that it is of considerable importance to note the enactment of the *Judicial Council Act 2019*. Indeed, in the Issues Paper and this Report, the Commission describes the relevant provisions of the 2019 Act, in particular the role of the PIGC and the legal status of the Personal Injuries Guidelines, in the form of Model 4 in Chapter 4. In addition, in Chapter 2 the Commission discusses the enactment of the 2019 Act against the background of recent developments in the current law on the award of general damages in personal injuries actions.
21. The Commission notes these developments because it underlines that the policy and legislative context related to this project has developed, and continues to develop, since the CIWG and PIC requested the Commission to examine this area. This is not unique to this project: it is a feature of the fast-moving nature of contemporary development of policy and legislation. In the specific context of this project, when it was suggested in 2018 that the the Commission examine this question, the proposal to establish the Judicial Council was then being debated in the Oireachtas in the *Judicial Council Bill 2017*. Initially, the 2017 Bill did not include any reference to a Personal Injuries Guidelines Committee (PIGC), and provision for the PIGC was inserted into the 2017 Bill at Report Stage in Seanad Éireann in June 2019 and was therefore included in the *Judicial Council Act 2019* when it was enacted in July 2019.
22. The Commission took this fully into account when the Issues Paper was published on 11 December 2019, which also noted that the Judicial Council had not yet been established but that this was expected by end 2019. The PIGC could only be established when the Judicial Council itself was established. The Judicial Council was, indeed, established on 17 December 2019,⁹ and held its first formal meeting on 7 February 2020. At that meeting, the Council nominated 28 April 2020 for the establishment of the PIGC.¹⁰ This was a significant development because, in accordance with the 2019 Act, the PIGC is to prepare draft Personal Injuries Guidelines within six months of its establishment, that is, by 28 October 2020. These draft Guidelines will then be submitted to the Board of the Judicial Council for review and must be approved by the Council within 12 months of the date of submission.

⁹ *Judicial Council Act 2019 (Establishment Day) Order 2019* (SI No 641 of 2019). The website of the Judicial Council is www.judicialcouncil.ie.

¹⁰ See <<https://judicialcouncil.ie/personal-injuries-guidelines-committee/>> accessed on 27 July 2020.

23. The Commission notes these developments in order to place the analysis in this Report within the current, fast moving, context of policy and legislative developments since 2018 when it was first suggested, by the CIWG and PIC, that the Commission consider examining the subject matter of this project and Report. It is important to note that the Commission, as an advisory body, invariably does, and must, take full account of the constitutional role of the Oireachtas as the sole law-making authority in the State, and of the constitutional role of the Government in its policy-making executive role, including its role in determining the timing of the commencement of much legislation, including the 2019 Act. In that respect, the establishment of the Judicial Council and the consequent establishment of the PIGC under the 2019 Act are significant expressions of the will of the Oireachtas and Government, and they have been fully taken into account by the Commission in the development of this Report.
24. The Commission is also conscious that this project and Report remains a part of the wider, and continuing, review of the 33 recommendations and 71 actions flowing from the CIWG and PIC reports, and of evolving policy in this area. The Commission notes in this respect that the Programme for Government, adopted in June 2020,¹¹ contains a number of proposals relating to the insurance market in Ireland. Again, it is important to note that many of these fall outside the scope of this project and Report. Of those falling within scope, the Commission notes that the Programme for Government refers to “[r]ecognising the work of the Personal Injuries Guidelines Committee, under the Judicial Council, in providing guidance on personal injury claims” and “[c]onsidering the need for a constitutional amendment to enable the Oireachtas to establish guidelines on award levels.”
25. The Commission emphasises that it has no role in reviewing or examining the contents of a Programme for Government, which sets out a range of policy proposals that are entirely a matter for the Government to pursue. The Commission notes, however, that this Report is being published against the background of the establishment of the Judicial Council in December 2019, that the Judicial Council first met in February this year, that the PIGC was formally established in April 2020, that the PIGC is to prepare draft Guidelines later this year, and that, in the wider context of reform of the insurance market, they will be recognised by the Government who are also to consider the need for a constitutional amendment to enable the Oireachtas to establish guidelines on award levels.
26. The Commission notes these developments because they emphasise, on the one hand, the narrow focus of this project and Report and, on the other hand, the dynamic context within which the Report has been completed. In Chapter 4, the Commission sets out its analysis of the four Models that had been identified in the Issues Paper,

¹¹ *Programme for Government: Our Shared Future* (June 2020) pages 28-29.

taking account of the views expressed by consultees. As noted in Chapter 4, some consultees expressed the strong view that Model 4 constituted the approach that best met the tests of what would be constitutionally permissible, while other consultees considered that Model 2, or a variant of it, best met those tests.

27. The Commission has concluded that there is merit in both these perspectives. In addition, the Commission considers that it would be entirely appropriate, and desirable, that the will of the Oireachtas, recently expressed through the enactment of the *Judicial Council Act 2019* and under which it has conferred extensive functions on the PIGC and the Judicial Council, should be given some time to be applied in practice. This is without prejudice to the consideration of the merits of any other model, such as Model 2, or a variant of it. In any event, the Commission emphasises again that, in expressing its views in this Report, the ultimate forums to consider what policy or legislative initiatives are to be taken in this or any other area are the Government (with the benefit of the advice of the Attorney General) and the Oireachtas. The Commission hopes that the analysis and views expressed in this Report will assist in those forums.

CHAPTER 1 CONTEXT: WIDE-RANGING REFORM OF INSURANCE MARKET

1. Introduction: different forms of capping legislation

- [1.1] This Report forms part of the Commission's *Fifth Programme of Law Reform*¹ and follows the publication of the *Issues Paper on Capping Damages in Personal Injuries Actions* in December 2019.² This project involves an examination of whether it would be constitutionally permissible, or otherwise desirable, to provide for a legislative model of capping general damages awards in personal injuries actions.
- [1.2] The Commission acknowledges that this project does not entail a black and white question as to whether a particular model of capping general damages would be permissible. The term "capping damages" could, in practice, cover a wide range of possible legislative models. The Issues Paper set out four possible models for the consideration of consultees. Consultees were invited to propose any other possible model for capping damages, but none was suggested in the submissions received. This is not to say that another possible model could be proposed but, in light of the submissions received, the Commission concluded that for the purposes of this Report its analysis should focus on the four models discussed in the Issues Paper. In Chapter 4 the Commission discusses those models, and the analysis of their compatibility with constitutional requirements, along with the views of consultees.
- [1.3] Capping legislation could take several forms, and the four models discussed seek to be representative of those forms. Capping legislation could be mandatory, under which the amounts specified must be applied, with no exceptions, as under Model 1. The legislation could be presumptive, under which again the amounts specified must be applied, but subject to some specified exceptions, as under Model 2. A third form would be strong guidelines, under which the amounts are ones to which decision-makers must "have regard to" but could depart from for specified reasons, as under Model 4. In addition, capping might be carried out by way of an Act of the Oireachtas, as under Models 1 and 2, or the details of a cap or caps might be delegated to, for example, a Minister or some other regulation-making body, as in Model 3. It is important to recognise that each model might be adjusted in ways that could either increase or decrease the likelihood of the model surviving a constitutional challenge. These various forms of capping models, including possible adjustments, are discussed in Chapters 3 and 4 below.

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

² *Issues Paper on Capping Damages in Personal Injuries Actions* (LRC IP 17-2019).

2. Overview of the general context for this Report

- [1.4] It is important to briefly describe the general context for this Report, which is discussed in more depth below. This includes: the development by the courts in the 1980s of an upper limit or cap on general damages, which has been adjusted since then; case law since 2015 setting indicative guideline awards in a number of cases; statutory guidelines that have been in place since 2004 in the form of the Book of Quantum, which will be replaced by statutory guidelines to be prepared by the end of 2020 under the *Judicial Council Act 2019*; and wide-ranging reforms of the insurance market that have been, and continue to be, put in place arising from four reports published in 2017 and 2018 by the Cost of Insurance Working Group (CIWG) and the Personal Injuries Commission (PIC).
- [1.5] Beginning in the 1980s, the courts in Ireland have, through case law, developed an upper limit, or “cap”, on general damages, currently at €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, 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 the Judicial Council established under the *Judicial Council Act 2019*. The Commission discusses these developments in the current law in Chapter 2.
- [1.6] 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 principles have been supplemented by legislative provisions. In Chapter 4 the Commission discusses some of these enacted models, as well as possible variations, against the background of the constitutional principles discussed in Chapter 3.
- [1.7] 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. Those recommendations come against a 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. This has been accompanied by much 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 the levels of personal injury awards in the courts have affected these fluctuations. 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.

- [1.8] In order to address these concerns on the cost of insurance, in 2016 the Department of Finance established the CIWG, which examined the factors contributing to the cost of insurance and 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 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.
- [1.9] The Commission emphasises that most 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 set of issues concerning the constitutionality of possible legislative models for capping general damages. The Commission notes that the very wide discussion as to the cause, or causes, of fluctuations in insurance costs is a contested area and, because of the narrow focus of this project, and hence the Report, the Commission expresses no view on that wide discussion.

3. Reforms from 2002 MIAB Report: PIAB, Book of Quantum and reform of Court procedures

- [1.10] The current debate on the cost of insurance has followed previous debates on this issue, and reforms have emerged from those previous debates.³ Prior to the recent work of the CIWG and the PIC, the 2002 Report of the Motor Insurance Advisory Board (the 2002 MIAB Report)⁴ 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.
- [1.11] The *Personal Injuries Assessment Board Act 2003* (the 2003 Act) established the Personal Injuries Assessment Board (PIAB). One of the functions of PIAB is to assess compensation in respect of personal injuries suffered by people in motor accidents, workplace accidents and public liability accidents. The 2003 Act also provided for the

³ 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).

⁴ *Report of the Motor Insurance Advisory Board* (2002).

publication by the PIAB of a Book of Quantum, which sets out in some detail guideline ranges of awards for general damages in personal injuries cases. Those guideline ranges are based on the levels awarded in the courts. The first Book of Quantum was published in 2004. In 2016 a significantly revised and more detailed Book of Quantum replaced this earlier version.⁵

- [1.12] 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.⁶ The concept of a Book of Quantum was based on the comparable guidelines published in England and Wales since 1992 by its Judicial College (formerly, its Judicial Studies Board),⁷ and in Northern Ireland since 1996 by its Judicial Studies Board.⁸ As noted 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 auspices of the Judicial Council.
- [1.13] A notable common feature of the amounts entered in the Book of Quantum, and of the comparable entries in the Judicial Guidelines published in England and Wales and 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 because each category of injury can involve a range of impact, from minor, through medium, to serious. Minor injuries might involve short-term effects while medium injuries might take a longer period to resolve themselves, and sometimes produce consequential effects. Severe injuries might involve long term, irreversible effects.

⁵ Personal Injuries Assessment Board, *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum* <<https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>> accessed on 13 July 2020.

⁶ *Ibid* Foreword at page 5.

⁷ The 15th edition of these Guidelines was published in 2019: Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* 15th ed (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.

⁸ 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 ed (2019) <<https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>> accessed on 13 July 2020.

- [1.14] It is notable that this three-point scale comprised of minor-medium-severe injuries has, since 2015,⁹ also been adopted by the Court of Appeal in a series of cases that have provided important guidance on personal injuries awards. The Commission also discusses these cases 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 principle applied in damages law which, as also noted in Chapter 2, the Supreme Court has applied on multiple occasions, including most recently in *Morrissey v Health Service Executive*.¹⁰
- [1.15] Another legislative outcome of the 2002 MIAB Report was the enactment of the *Civil Liability and Courts Act 2004* (the 2004 Act). 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.
- [1.16] As also noted briefly above, the *Judicial Council Act 2019* enacts an important reform in relation to the establishment of the Personal Injuries Guidelines Committee (PIGC) which is tasked with producing Guidelines in relation to personal injuries awards. Those guidelines 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 the Guidelines, to give reasons for doing so. This additional requirement to comply with the guidelines or to explain any departure, involves a significant strengthening of the status of the Guidelines to be issued under the 2019 Act.

4. Wide-ranging reform proposed by CIWG and PIC Reports

- [1.17] 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

⁹ 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.

¹⁰ [2020] IESC 6.

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 several key objectives and associated detailed recommendations concerning these three categories of insurance.

- [1.18] The objectives and recommendations in the two CIWG Reports involve complex matters that require whole-of-government engagement and 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 (August 2020) being the *Tenth Progress Update* published in March 2020, which sets out the extent to which the objectives and recommendations have been implemented.¹³
- [1.19] The Commission notes that the overwhelming majority of the initiatives arising from the CIWG and PIC Reports, and as referred to in the Tenth Progress Report, fall well outside the narrow confines of this project and Report,¹⁴ although one is related to previous work of the Commission on insurance contract law.¹⁵
- [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

¹¹ Cost of Insurance Working Group, *Report on the Cost of Motor Insurance* (2017) <<https://assets.gov.ie/6254/060219172049-067f7ed921f44343a7f41144ac3d4940.pdf>> accessed on 13 July 2020.

¹² Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018) <<https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>> accessed on 13 July 2020.

¹³ Cost of Insurance Working Group, Tenth Progress Update (March 2020) <<https://www.gov.ie/en/publication/4371cd-cost-of-insurance-working-group-tenth-progress-update/>> accessed on 13 July 2020.

¹⁴ Among the legislative initiatives have been the enactment of the *Central Bank (National Claims Information Database) Act 2018* and the making of the *Non-Life Insurance (Provision of Information) (Amendment) Regulations 2018* (SI No 577 of 2018), which amended the *Non-Life Insurance (Provision of Information) Regulations 2007* (SI No 74 of 2007).

¹⁵ The *Consumer Insurance Contracts Act 2019* largely reflects the content of the draft *Consumer Insurance Contracts Bill* in the Commission's 2015 *Report on Consumer Insurance Contracts* (LRC 113-2015). Section 16(4)(c) and (d) of the 2019 Act also implemented Recommendation 8 in the CIWG's 2017 *Report on the Cost of Motor Insurance*: see Byrne, Annotation to the *Consumer Insurance Contracts Act 2019* (Irish Current Law Statutes Annotated, Release 181, Round Hall Thomson Reuters, July 2020).

2017, was chaired by Mr Justice Nicholas Kearns, former President of the High Court, and it concluded its work in 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.¹⁶
- [1.22] The *Second and Final Report of the Personal Injuries Commission*¹⁷ recommended that the *Judicial Council Bill 2017* should be enacted, which has since occurred with the enactment of the *Judicial Council Act 2019*. As noted above and discussed further below, the *Judicial Council Act 2019* provides for the replacement of the Book of Quantum by Personal Injuries Guidelines to be produced by the Personal Injuries Guidelines Committee (PIGC), a committee of the Judicial Council, published under the auspices of the Council.¹⁸ The PIGC was formally established on 28 April 2020. That 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 the injured person has provided a medical report.

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

- [1.23] It is clear from this 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

¹⁶ Personal Injuries Commission, *First Report of the Personal Injuries Commission* (2017) at page 22 <<https://dbei.gov.ie/en/Publications/Publication-files/First-Report-of-the-Personal-Injuries-Commission.pdf>> accessed on 13 July 2020.

¹⁷ Personal Injuries Commission, *Second and Final Report of the Personal Injuries Commission* (2018) <<https://dbei.gov.ie/en/Publications/Publication-files/Second-and-Final-Report-of-the-Personal-Injuries-Commission.pdf>> accessed on 13 July 2020.

¹⁸ At the time of writing (August 2020), the majority of the provisions of the *Judicial Council Act 2019* have been commenced. The Personal Injuries Guidelines Committee (PIGC) was formally established on 28 April 2020 and, in accordance with the provisions of the 2019 Act, is due to submit the first draft of its personal injury Guidelines to the Board of the Judicial Council by the end of October 2020.

would set a cap or caps 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".¹⁹ The CIWG went on to state that the main question for a court, if such a measure was challenged, would be whether such legislation 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."²⁰

- [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*, Recommendation 5 (which forms part of the CIWG Objective 2 recommendations) stated that it would, through the Department of Justice and Equality, request that the Commission examine this specific issue in the context of the development of its *Fifth Programme of Law Reform*.²¹
- [1.26] 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.
- [1.27] The Commission duly considered these requests and, having applied the criteria for consideration of projects within the Fifth Programme,²² concluded that this project was suitable for inclusion. The Government then approved the Commission's *Fifth Programme of Law Reform* in March 2019.

¹⁹ Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018) at page 86. <<https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>> accessed on 16 July 2020.

²⁰ Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018) at page 86. <<https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>> accessed on 13 July 2020.

²¹ Cost of Insurance Working Group, *Report on the Cost of Employer and Public Liability Insurance* (2018) at page 91. <<https://assets.gov.ie/6256/060219173306-502d0dda6b644e7db5d019dd44ac49b6.pdf>> accessed on 13 July 2020.

²² As to these criteria, see *Report on Fifth Programme of Law Reform* (LRC 120-2019), Part 2.

- [1.28] Following the approval of the Commission's *Fifth Programme of Law Reform*, the Commission published its *Issues Paper on Capping Damages in Personal Injuries Actions* in December 2019.
- [1.29] Chapter 3 of the Issues Paper examined the relevant constitutional provisions that are engaged in the context of possible statutory models of capping damages. Chapter 4 set out four possible legislative models of capping damages. Consultees were then invited to express their views on possible models, without prejudice to any other models or approach they might suggest.
- [1.30] Following the publication of the Issues Paper, the Commission received a number of submissions from both individuals and bodies with an interest in this area and the Commission very much appreciates those contributions. Those submissions have been of significant assistance to the Commission, informing its discussion on both the constitutional issues that appear to be engaged by capping legislation (discussed in Chapter 3 below) and the application of those constitutional issues to four models of capping legislation (discussed in Chapter 4 below).

6. Other related aspects of, and developments in, the law on personal injuries actions

- [1.31] In Chapter 4 of the Issues Paper, the Commission invited consultees to propose any additional model of capping damages that they considered would be constitutionally permissible. In this context, the Issues Paper had referred to the potential role of Periodic Payment Orders (PPOs), and the difficulties encountered in practice with the legislation enacted in 2017. The Commission notes that no consultee suggested any additional model.
- [1.32] Without prejudice to any other model that may be considered outside the context of this project, and having regard to the submissions received, the analysis in Chapters 3 and 4 of this Report concerns the four models discussed in the Issues Paper. For the sake of completeness, the Commission returns briefly here to discuss the current relevant law on PPOs as well as other developments since the Issues Paper was published. These developments, which include the work of the Meenan Expert Group on Clinical Negligence Claims and the Department of Justice public consultation on the "discount rate" in personal injuries claims, further underline the wide-ranging, and evolving, context against which this Report has been prepared.

(a) Periodic Payment Orders (PPOs)

- [1.33] Part IVB of the *Civil Liability Act 1961*, inserted by the *Civil Liability (Amendment) Act 2017*, provides for the making of PPOs in civil claims, in particular where the ongoing nature of the injuries involved (such as certain clinical negligence claims) may require

indefinite future care and where a lump sum may not provide a sufficient capital sum for such treatment.

- [1.34] The Commission notes that, in November 2019, in *Hegarty v Health Service Executive*,²³ the High Court (Murphy J) held that, as currently provided for under the *Civil Liability (Amendment) Act 2017*, the provision for future indexing of PPOs was “regrettably, a dead letter”.²⁴
- [1.35] 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)*.²⁵ 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.²⁶ It had also recommended that these tailored indices 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),²⁷ which the English Court of Appeal had, in *Thompstone v Thameside and Glossop Acute Services NHS Trust*,²⁸ approved as the basis for making PPOs under the UK *Damages Act 1996*, as amended by the UK *Courts Act 2003*, under which PPOs are made in England, Wales and Northern Ireland. In Scotland, the relevant legislation is the *Damages (Investment Returns and Periodical Payments) (Scotland) Act 2019*.
- [1.36] 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

²³ [2019] IEHC 788.

²⁴ *Ibid* at para 74.

²⁵ *Report of the Working Group on Medical Negligence Litigation and Periodic Payments (Module 1)* (October 2010).

<[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)> accessed on 27 July 2020.

²⁶ *Ibid* at page 32.

²⁷ *Report of the Working Group on Medical Negligence Litigation and Periodic Payments (Module 1)* at page 32. It is also to be noted that the Court in *Hegarty* quoted from the decision of the Court of Appeal in *Russell 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.

²⁸ [2008] EWCA Civ 5, [2008] 2 All ER 537.

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 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."²⁹

- [1.37] The Court accepted that it remained possible for parties to agree to a PPO under the 2017 Act where they also agreed that the PPO should be indexed "by an index other than HICP".³⁰ The Court accepted that it was perhaps unlikely that any public body would agree to apply any index other than the HICP index 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.
- [1.38] 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 be funded.³¹
- [1.39] In *Morrissey v Health Service Executive* the Supreme Court made the following reference to *Hegarty*:

"Regrettably it would appear that, for the reasons set out by Murphy J in the High Court in *Hegarty & anor v Health Service Executive* [2019] IEHC 788, despite the fact that it took a considerable period of time for the recommendations of the Working Group on Medical Negligence and Periodic Payments

²⁹ [2019] IEHC 788 at para 74.

³⁰ *Ibid* at para 75.

³¹ [2019] IEHC 788 at para 84.

to be enacted into legislation, there are real reasons to fear that the periodic payment regime will not work in practice.”³²

(b) Expert Group to Review Law of Torts and Current Systems for Management of Clinical Negligence Claims

- [1.40] The Commission notes that, in June 2018, the Government established an Expert Group, chaired by Mr Justice Meenan, judge of the High Court, to examine tort law as it currently applies to personal injuries arising in the healthcare context and the current systems for the management of clinical negligence claims. The Expert Group published its Interim Report in March 2019.³³
- [1.41] As noted in the Interim Report, the terms of reference of the Expert Group include a wide range of matters. They include consideration of “whether there may be an alternative mechanism to the court process for resolving clinical negligence claims, or particular categories of claims, particularly from the perspective of the person who has made the claim.” They also include examining the role of the State Claims Agency in managing clinical negligence claims on behalf of the Health Service Executive to determine whether improvements can be made to the current claims management process. They also include considering “the impact of current tort legislation on the overall patient safety culture, including reporting on open disclosure.”
- [1.42] The Commission notes that the Expert Group is referred to in the Programme for Government, adopted by the Government in June 2020, which states that the Government will “[r]e-assess how claims for medical negligence are handled in Ireland, including the role of the State Claims Agency, so that the Irish medical negligence regime is brought into line with other OECD countries following from the Meenan Report”.³⁴

(c) Future rate of return on large damages awards: the “discount rate”

- [1.43] The discount rate is used in a small number of very severe personal injury cases where substantial sums of special damages have been awarded to the plaintiff. The purpose of the discount rate is to reflect the future income or the real rate of return that the plaintiff should be able to obtain if the lump sum is invested appropriately. The size of

³² *Morrissey v Health Service Executive* [2020] IESC 6 at para 14.14. The Commission discusses the *Morrissey* case in Chapter 2, below, in the context of the judicially developed cap on general damages.

³³ *Expert Group to Review the Law of Torts and the Current Systems for the Management of Clinical Negligence Claims: Interim Report* (March 2019), available at <<https://assets.gov.ie/9383/0525cc13985941f1a884b4ce6b7ad250.pdf>> accessed on 13 July 2020.

³⁴ *Programme for Government: Our Shared Future* (June 2020) at page 46.

the lump sum award is “discounted” by the percentage return that the plaintiff can expect to make by prudently investing the award. The lower the discount rate, the higher the lump sum award will be. The higher the discount rate is, the lower the lump sum award will be.

- [1.44] The discount rate is currently determined by the courts, but the Minister for Justice and Equality also has the power to set the rate under section 24 of the Civil Liability and Courts Act 2004. The rate was initially set by the High Court in *Boyne v Bus Átha Cliath*³⁵ at 3%. More recently in *Russell v Health Service Executive*,³⁶ the High Court determined that the discount rate should be set at 1% for future care costs and at 1.5% for other future pecuniary losses. The Court of Appeal upheld this decision.³⁷
- [1.45] The Commission notes that, at the time of writing (August 2020), the Department of Justice and Equality has initiated a public consultation process as to how the discount rate should be set. This arises from Recommendation 24 in the 2017 CIWG *Report on the Cost of Motor Insurance* (whose work has been discussed above) that the Department of Justice and Equality should “[e]xamine the setting of the discount rate (in personal injury lump sum awards), without prejudice to the outcome of relevant proceedings, and to be reviewed at regular intervals.”³⁸

³⁵ [2002] IEHC 135.

³⁶ [2014] IEHC 590.

³⁷ [2015] IECA 236, [2016] 3 IR 427.

³⁸ Cost of Insurance Working Group, *Report on the Cost of Motor Insurance* (January 2017) <<https://assets.gov.ie/6254/060219172049-067f7ed921f44343a7f41144ac3d4940.pdf>> accessed on 31 July 2020.

CHAPTER 2 CURRENT RELEVANT LAW ON DAMAGES FOR PERSONAL INJURIES

1. Introduction

- [2.1] In this Chapter, the Commission discusses the current relevant law on damages in personal injuries actions. This discussion largely mirrors the discussion of the current relevant law on damages in Chapter 2 of the Issues Paper, and also takes account of the helpful observations in the submissions received from consultees as well as other developments such as the Supreme Court decision in *Morrissey v Health Service Executive*.¹

2. The purpose of damages

- [2.2] The purpose of an award of damages for personal injuries is, so far as money can do, to restore the injured person to the same position as if the injury involved had not happened. This is sometimes referred to as the principle of *restitutio in integrum*.
- [2.3] To achieve this restoration through an award of damages, the law considers two aspects of the plaintiff's injury. The first is whether the plaintiff 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, whether it is temporary or permanent, as this will be relevant to the level of compensation. This aspect of an award is referred to as **general damages** or damages for "pain and suffering".
- [2.4] The second aspect in determining the amount or quantum of an award of damages is to ask whether the injury has 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** because the amount involved

¹ [2020] IESC 6.

can be calculated precisely, for example as regards past and future loss of earnings, by an actuary.

- [2.5] As discussed below, it is more difficult to achieve in practice the restorative intention behind an award of damages where the injuries involved are profound and irreversible. In those cases, an award of money can only be, at best, an approximation of what the law aims 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.

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

- [2.6] The core issue in this project and Report is whether it would be constitutionally permissible, or otherwise desirable, to provide for a legislative model of capping general damages awards in personal injuries actions. To properly analyse that question, it is important to first consider the current general position regarding the law of general damages 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 £150,000,² and which has since been raised to €500,000,³ to take account of inflation and other economic factors;

(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 sometimes called a “totality rule”,⁴ 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 fair compensation; and

(c) that in all cases the courts apply a proportionality principle, in which the award must be fair to both parties and “there is a rational relationship between awards of damages in personal injuries cases”⁵ and which has led the Court of Appeal to develop a three-point scale of injuries related to damages

² *Sinnott v Quinnsworth Ltd* [1984] ILRM 523.

³ *Morrissey v Health Service Executive* [2020] IESC 6.

⁴ *Reddy v Bates* [1983] IR 141.

⁵ *MN v SM* [2005] IESC 17 at para 44, [2005] 4 IR 461 at page 474.

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”.⁶

(a) First judicial upper limit on general damages in Ireland: the *Sinnott* case

- [2.7] The courts in Ireland first developed a formal upper limit on general damages in catastrophic cases in 1984, in the Supreme Court decision in *Sinnott v Quinnsworth Ltd*.⁷
- [2.8] 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] The High Court awarded the plaintiff 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 1988.⁸ On appeal, the Supreme Court found that the award of £800,000 for general damages “lack[ed] all sense of reality”.⁹
- [2.10] The Supreme Court gave some consideration to the purpose of general damages, stating that to talk of “compensating” an individual who has suffered a catastrophic injury such as the plaintiff in *Sinnott* would be “to talk of assaying the impossible” but that this was nonetheless the task that the court must attempt. The Court noted that there was a danger that because money could not actually compensate the injured person in such cases, the question might be asked whether it mattered what sum was awarded. The Court stated that it did, indeed, matter, both to a defendant and to a defendant’s indemnifier (which could either be an employer or an insurance company, or both, as was the case in *Sinnott*). The Court stated that it:

⁶ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 44.

⁷ [1984] ILRM 523.

⁸ The *Courts Act 1988* abolished the right to a jury trial in certain personal injuries cases in the High Court, including injuries caused by negligence and breach of duty. 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 in *Sinnott* as a safeguard against disproportionate damages awards.

⁹ [1984] ILRM 523, at page 532, judgment of O’Higgins CJ, with whom Henchy, Griffin, Hederman and McCarthy JJ agreed. McCarthy J dissented in part on other aspects of the outcome of the case but concurred on the upper limit of £150,000 for general damages in such cases: see [1984] ILRM 523 at pages 535-536.

“would be a ground for legitimate complaint, if the sum awarded were so high as to constitute a punishment for the infliction of the injury rather than a reasonable, if imperfect, attempt to compensate the injured. It also matters to contemporary society if, by reason of the amount decided upon and the example which it sets for other determinations of damages ... the operation of public policy would thereby be endangered.”¹⁰

[2.11] The Supreme Court then went on to set out the rationale for setting an upper limit for general damages. The Court stated that:

“a limit must exist, and should be sought and recognised, having regard to the facts of each case and the social conditions which obtain in our society. In a case such as this, 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 and will be paid to him in capital sums calculated on an actuarial basis. These sums will cover all his loss of earnings, past and future, all hospital and other expenses in relation to the past and the future and the cost of the special care which his dependence requires, and will require, for the rest of his life. What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation. In assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me, that some regard should be had 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.”¹¹

[2.12] Based on these considerations, the Supreme Court reduced the sum of general damages awarded in the High Court by the jury from £800,000 to £150,000 and stated that “[u]nless there are particular circumstances which suggest otherwise, general

¹⁰ [1984] ILRM 523 at page 532.

¹¹ [1984] ILRM 523 at page 532. The Commission notes that the Supreme Court cited this passage with approval in *Morrissey v Health Service Executive* [2020] IESC 6, which is discussed below.

damages, in a case of this nature, should not exceed a sum in the region of £150,000".¹²

(b) Judicial upper limit on general damages in Canada

- [2.13] The Commission notes that, six years before the decision in *Sinnott*, the Supreme Court of Canada also set a general upper limit or "cap" on general damages in three cases decided on the same day, each of which involved catastrophic injuries, *Andrews v Grand & Toy Alberta Ltd*,¹³ *Thornton v School District No 57*¹⁴ and *Arnold v Teno*.¹⁵ The three cases became known as the Damages Trilogy cases.¹⁶
- [2.14] The Damages Trilogy cases acknowledged that it is not always possible to reflect accurately what a reasonable amount of general damages should be, especially in catastrophic injury cases. This was because of what was referred to as the "incommensurability" of different kinds of injuries. In other words, it is difficult, perhaps impossible, to measure accurately the subjective effect, the subjective pain and suffering, of different catastrophic injuries on different people. As Spence J stated in the *Arnold* case: "[t]here is simply no equation between paralyzed limbs and/or injured brain and dollars."¹⁷ This was later echoed in the view expressed in *Sinnott* that general damages involve a reasonable, if imperfect, effort to provide fair compensation to the injured person.
- [2.15] The Damages Trilogy cases also referred to the potential social risk of excessive awards if a judicial limit or cap on general damages was not set down. In the *Arnold* case, Spence J referred to the enormous rise in the level of awards in general damages in the United States at that time, especially in clinical negligence claims, and that this could lead to significant adverse social outcomes if it occurred in Canada. Spence J added: "We have a right to fear a situation where none but the very wealthy could own or drive automobiles because none but the very wealthy could afford to pay the enormous insurance premiums which would be required by insurers to meet such exorbitant awards."¹⁸ This was also echoed in *Sinnott* where the Supreme Court commented that the original award in that case "lack[ed] all sense of reality", and that

¹² [1984] ILRM 523 at page 532.

¹³ [1978] 2 SCR 229.

¹⁴ [1978] 2 SCR 267.

¹⁵ [1978] 2 SCR 287.

¹⁶ On the Canadian position generally, see Berryman, "Non-Pecuniary Damages for Personal Injury: A Reflection on the Canadian Experience," in Quill and Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (Hart Publishing, 2016).

¹⁷ [1978] 2 SCR 287 at page 332.

¹⁸ *Arnold v Teno* [1978] 2 SCR 287 at page 333.

public policy would be endangered if high awards were allowed to stand. In the Damages Trilogy cases, the Supreme Court of Canada set the general upper limit for general damages at \$100,000. It is worth noting that subsequent cases have gradually raised this to over \$350,000, a feature of the Canadian cap that, as discussed below, also broadly reflects the Irish experience since *Sinnott*.

- [2.16] In the 1981 decision of the Supreme Court of Canada, *Lindal v Lindal*,¹⁹ Dickson J stated that the Damages Trilogy cases had “reaffirmed the basic principle that the purpose of awarding damages for personal injury is compensation not punishment.”²⁰ This emphasis on an award being based on compensation, not punishment, was also referred to in the *Sinnott* case.
- [2.17] In *Lindal*, Dickson J also explained the “functional” approach to general damages he had outlined in the Damages Trilogy cases,²¹ and in this respect cited with approval the views expressed in England in the 1978 *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (the Pearson Commission) that general damages “should be awarded only when they can serve some useful purpose, for example, by providing the plaintiff with an alternative source of satisfaction to replace one that he has lost.”²² This functional approach was also echoed in *Sinnott* in the view that general damages should relate to “the things upon which the plaintiff might reasonably be expected to spend money.”²³
- [2.18] Another related aspect of the Damages Trilogy cases and later Canadian case law is that the Supreme Court of Canada noted that, under the heading of special damages,

¹⁹ [1981] 2 SCR 629.

²⁰ *Ibid* at page 634.

²¹ The language of the “functional” approach here seems to be taken from Ogus, “Damages for Lost Amenities: For a Foot, a Feeling or a Function?” (1972) 35 *Modern Law Review* 1. Ogus outlines three approaches to understanding the object of compensation in a personal injuries case: (1) the “conceptual approach”, which focuses on the value of the lost amenity *simpliciter* (eg, the general value of a foot), (2) the “personal approach”, which focuses on the value of the lost amenity to **that particular plaintiff** (eg, the value of a foot to a plaintiff with a considerable passion for football), and (3) the “functional approach”, which focuses on the use of the compensation to purchase solace or consolation for the lost amenity (eg, compensating a footballer plaintiff with the value of what it would cost to finance trips to important football matches in different parts of the world).

²² *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (the Pearson Commission) (Cmnd 7054-I, 1978) volume 1 at para 397, cited in *Lindal v Lindal* [1981] 2 SCR 629 at page 638 (Dickson J).

²³ Corbett has observed that a preference for the functional approach is detectable as early as *Reddy v Bates* [1983] IR 141: Corbett, “Does the ‘Cap’ Fit? A Review of Developments in the Law of General Damages” (2020) 2 *Tort Law and Litigation Review* 1.

the injured person will be, indeed must be, fully compensated for the financial loss he or she incurs. In the *Lindal* case, Dickson J stated:

“[A]nything having a money value which the plaintiff has lost should be made good by the defendant. If the plaintiff is unable to work, then the defendant should compensate him for his [or her] lost earnings. If the plaintiff has to pay for expensive medical or nursing attention, then this cost should be borne by the defendant. These costs are “losses” to the plaintiff, in the sense that they are expenses which he [or she] would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant’s pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. The first and controlling principle is that the victim must be compensated for his [or her] loss.”²⁴

[2.19] Thus, the award under the heading of special damages must represent full, 100%, compensation to the injured person for the financial (pecuniary) loss that he or she has incurred, and which can be calculated in a relatively straightforward way. Dickson J also pointed out that “at this point” arguments about potential social costs were not relevant, because the award under special damages is to ensure that the injured person’s future care is fully covered (so far as lump sum award can do).²⁵ The Canadian view is that potential social costs become an issue only in respect of the award of general damages where, as discussed above, the ‘loss’ is not easy to assess in money terms (that is, non-pecuniary loss). This analysis was also echoed in the *Sinnott* case, where the Court made clear that the injured person’s financial losses must be fully compensated. The Supreme Court also reiterated that view in 2020 in *Morrissey v Health Service Executive*,²⁶ which is discussed below.

[2.20] In *Lee v Dawson*,²⁷ the British Columbia Court of Appeal dismissed a claim that the upper limit on general damages set out in the Damages Trilogy cases was in breach of the right to equality under the Canadian Charter of Rights and Freedoms. This is comparable to a challenge on constitutional grounds in Ireland, which the Commission discusses in Chapter 3, below. The Supreme Court of Canada declined to hear a further

²⁴ [1981] 2 SCR 629 at page 634.

²⁵ See the discussion of Periodic Payment Orders (PPOs), below.

²⁶ [2020] IESC 6.

²⁷ [2006] BCCA 159.

appeal in the *Lee* case, and therefore the upper limit or cap remains in place in Canada.

(c) The judicial upper limit on general damages in Ireland since *Sinnott*, including the *Morrissey* case

- [2.21] Returning to the Irish case law since the *Sinnott* case, the courts have revised the figure of £150,000 set in *Sinnott* on several occasions. In 2009, the High Court (Quirke J) in *Yun v Motor Insurers' Bureau of Ireland*²⁸ sought to assess general damages at a level broadly equivalent, in terms of the value of money in 2009, to the award of £150,000 made in 1984.²⁹ Having heard expert evidence of the economic and social history between 1984 and 2009 and taking into account future social and economic outlooks, the Court determined that the figure should be revised upward to €500,000. The Court then applied a downward adjustment of 10% (€50,000), reducing the figure to €450,000, to reflect the reduction in wealth and living standards that had commenced in early 2008 and which was expected to continue for a further period of five years.³⁰
- [2.22] In a number of decisions since *Yun v Motor Insurers' Bureau of Ireland*, the High Court had adjusted the upper limit following the recovery from the recession that had emerged in 2008, so that by 2016 the Court concluded that the limit should be revised back up to €500,000.³¹
- [2.23] Most recently, in March 2020, in *Morrissey v Health Service Executive*,³² the Supreme Court acknowledged that the limit of €450,000 in the *Yun* case had been fixed at a time of particular economic depression and was expressly reduced by the High Court from what would otherwise have been regarded as an appropriate limit of €500,000.³³ The Court noted that the limit is not fixed forever but rather can be reviewed from time to time by reference to prevailing conditions.³⁴
- [2.24] In *Morrissey*, the Supreme Court also engaged in a comparative review of broadly comparable upper limits for general damages. The Court referred to the 2019 edition of the *Guidelines for the Assessment of General Damages in Personal Injury Cases in*

²⁸ [2009] IEHC 318.

²⁹ [2009] IEHC 318 at para 137.

³⁰ [2009] IEHC 318 at paras 206-208.

³¹ *Woods v Tyrell* [2016] IEHC 355, [2016] 1 IR 349 at para 39.

³² [2020] IESC 6. Clarke CJ delivered the only judgment in the case, with which the other members of the Court agreed.

³³ [2020] IESC 6 at para 14.22.

³⁴ [2020] IESC 6 at para 14.22.

Northern Ireland,³⁵ which as discussed below (and previously in the Issues Paper) is a resource for courts and practitioners in the assessment of damages in personal injury cases. The Supreme Court noted that the highest level of damages specifically provided for in those Guidelines is in respect of injuries resulting in quadriplegia, which attract awards between £475,000 and £700,000.³⁶ The Court also referred to the 2017 edition of the England and Wales *Guidelines for the Assessment of General Damages in Personal Injury Cases* which state that the highest awards of damages recommended are also in respect of injuries resulting in quadriplegia, and which will generally attract an award of between £284,610 to £354,260. The Court also noted that, in Germany, awards for severe cerebral palsy have been around the sum of €700,000.³⁷

- [2.25] Based on this review, the Supreme Court stated that an upper limit of €450,000 or €500,000 would not appear to be out of line with the highest level of damages awarded in other comparable systems. On that basis the Court concluded that, taking into account the economic circumstances that prevailed at the time that the limit of €450,000 was fixed in 2009 in the *Yun* case, it was not inappropriate to place the limit at €500,000 in March 2020.³⁸
- [2.26] The Supreme Court also went on to make an important distinction between, on the one hand, the means used to calculate special damages such as future medical care, which the Court noted “are capable of reasonably precise assessment”³⁹ and, on the other hand, the means used to calculate general damages for pain and suffering.
- [2.27] As to calculating special damages, the Court approved of the approach taken by the Court of Appeal in *Russell v Health Service Executive*,⁴⁰ which the Supreme Court noted involved detailed economic and other evidence that had enabled the Court of Appeal to conclude that it was appropriate to calculate future financial (pecuniary) loss on the basis of an assumption that the real rate of return on monies invested would be 1.5%. The Supreme Court in *Morrissey* noted that “such an exercise was required precisely because such damages are capable of at least being approached on the basis of a

³⁵ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* 5th ed (2019) <<https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>> accessed on 13 July 2020.

³⁶ [2020] IESC 6 at para 14.18.

³⁷ [2020] IESC 6 at para 14.19.

³⁸ *Morrissey v Health Service Executive* [2020] IESC 6 at para 14.24. The Commission expresses no view on the possible impact of the Covid-19 pandemic since the decision in *Morrissey*.

³⁹ *Morrissey v Health Service Executive* [2020] IESC 6 at para 14.24.

⁴⁰ [2015] IECA 236, [2016] 3 IR 427.

calculation.”⁴¹ In *Russell*, the Court of Appeal stated, in connection with special damages, that is, pecuniary loss:

“It is thus of vital importance to state, in no uncertain terms, that it is mandatory for the court to approach its calculation of future pecuniary loss on a 100% basis regardless of the economic consequences that the resultant award may have on the defendant, on the insurance industry or on the public finances.”⁴²

[2.28] In *Morrissey*, the Supreme Court fully supported the analysis in the *Russell* case that special damages must involve 100% compensation for any loss incurred by commenting that:

“it must be accepted that any person who establishes a claim in negligence for serious injuries will be fully compensated for any financial loss which they suffer or any financial costs which they incur so that the award of general damages is designed to deal only with pain and suffering.”⁴³

[2.29] This important point, that special damages (financial or pecuniary loss) must involve full compensation, also reflects the analysis in the *Sinnott* case, and indeed in the Canadian case law discussed above. In turn, in both the *Sinnott* case and the Canadian cases, this was also related to the thinking behind development the judicial upper limit, or “cap”, on general damages.

[2.30] The Commission emphasises that the requirement that special damages be fully compensated means that the models for capping legislation considered in this Report relate to awards of general damages **only**. There is no proposal in this Report or under any Model considered in this Report that awards of special damages would be subject to capping.

[2.31] In *Morrissey*, the Supreme Court went on to state that:

“there is a significant subjective element to the calibration of compensation for pure pain and suffering. In those circumstances, it does not seem to me that a detailed evidence based approach to a change in circumstances is necessary or

⁴¹ [2020] IESC 6 at para 14.24.

⁴² *Russell v Health Service Executive* [2015] IECA 236, [2016] 3 IR 427 at para 66.

⁴³ [2020] IESC 6 at para 14.15.

required when identifying the limit on general damages for pain and suffering. Rather, a court is entitled to take a broad approach based on its own experience, just as some of the courts which have set and varied the limit have done to date.”⁴⁴

- [2.32] The reference to the subjective element of calculating general damages echoes the approach in *Sinnott*, and also in the Canadian case law discussed above.
- [2.33] It is therefore clear that currently the courts have developed, in effect, an upper limit cap on general damages in catastrophic cases. This cap stood at £150,000 in 1984 and has been raised from time to time so that it currently (August 2020) stands at €500,000. This increase has been arrived at by taking account of the factors 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”

- [2.34] It appears that, as a result of a number of Supreme Court decisions, in some instances where there is a high award of general damages combined with a high award of special damages, the courts consider that a combined total award may be subject to what is sometimes called a “totality rule”. This rule regulates situations where, although the separate sums for general and special damages may be appropriate, the total award may be above what would be regarded as compensatory.
- [2.35] The Supreme Court first outlined the “totality rule” 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

⁴⁴ [2020] IESC 6 at para 14.24.

for the plaintiff for the injuries suffered, or whether it is out of all proportion to such circumstances.”⁴⁵

- [2.36] The Supreme Court took the opportunity in *Cooke v Walsh*⁴⁶ to further clarify this statement, 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”.⁴⁷
- [2.37] In the *Sinnott* case, the Supreme Court quoted with approval the passage from *Reddy v Bates* setting out the “totality” rule. In addition, as already noted above, the Court added 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”.⁴⁸

5. Application of the “totality rule” and the *Sinnott* limit since the *Sinnott* case

- [2.38] Since the *Sinnott* case, there has been some doubt as to whether the totality rule applies in all cases. As noted below, in the context of considering the *Sinnott* limit, 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, with the effect that the *Sinnott* limit applies only where both awards are very high.
- [2.39] In *Burke v Blanch*,⁴⁹ 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

⁴⁵ [1983] IR 141 at page 148. This passage was also cited by the Supreme Court in *Morrissey v Health Service Executive* [2020] IESC 6 at para 14.7.

⁴⁶ [1984] ILRM 208.

⁴⁷ *Ibid* at page 220. As noted above, the *Courts Act 1988* abolished juries in High Court personal injuries actions.

⁴⁸ *Sinnott v Quinnsworth Ltd* [1984] ILRM 523 at page 532.

⁴⁹ (High Court, 28 July 1989).

particular bearing in mind that the plaintiff, apart from general damages, will be receiving half a million pounds approximately, I think a fair and reasonable sum for general damages is an additional sum of £100,000.”⁵⁰

- [2.40] McMahon and Binchy observe that the *Burke v Blanch* approach has been supported in several subsequent cases.⁵¹ In *Kealy v Minister for Health*,⁵² the High Court (Morris P) distinguished *Sinnott* on the basis that *Sinnott* concerned a substantial award of special damages whereas the case before the Court did not.⁵³ The case before the Court involved a small award of special damages (£15,000). The Court stated that the cap on general damages, to which the Supreme Court in *Sinnott* referred, has limited relevance where there is no “omnibus sum” of both general and high special damages.⁵⁴
- [2.41] The Supreme Court also endorsed this understanding in *Fitzgerald v Treacy*.⁵⁵ In that case, the plaintiff had suffered back injuries and had 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 which this Court would contemplate for general damages in what I have described as the catastrophic case, where there would be significant elements of special damages as well”.⁵⁶ The plaintiff did not fall into this category, as according to her own medical evidence she would be able to work again.
- [2.42] In *Gough v Neary*⁵⁷ 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. Geoghegan J stated as follows:

“[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

⁵⁰ *Burke v Blanch* (High Court, 28 July 1989) at page 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 Quinnsworth Ltd* [1984] ILRM 523; and *Griffith v Van Raaj* [1985] ILRM 582.

⁵¹ McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional 2013) at para 44.240.

⁵² *Kealy v Minister for Health* [1999] 2 IR 456.

⁵³ *Ibid* at page 458.

⁵⁴ *Ibid*.

⁵⁵ [2001] 4 IR 405.

⁵⁶ *Ibid* at page 409.

⁵⁷ *Gough v Neary* [2003] 3 IR 92.

into account in a general way in assessing the appropriate general damages in a non-cap sense.”⁵⁸

- [2.43] McMahon and Binchy observe that there appears to be a difficulty with this approach and suggest an issue of equality under Article 40.1 of the Constitution may arise in this context, as it implies that two plaintiffs can suffer similar or identical catastrophic injuries, but receive different amounts of damages for pain and suffering because the amount of economic loss suffered by each is not identical.⁵⁹
- [2.44] The Commission notes that 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*⁶⁰ 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”.⁶¹ Similarly, in *Nolan v Wirenski*⁶² the Court of Appeal preferred the view that the *Sinnott* cap was a general cap on general damages to be assessed entirely separately and was not contingent on other factors on the basis this would be “unjust and even perhaps irrational”.⁶³
- [2.45] The Supreme Court has recently offered further guidance on the circumstances in which the cap applies in *Morrissey v Health Service Executive*.⁶⁴ As set out above, in some cases the *Sinnott* cap has been characterised as one that only applies in certain cases, such as where there is a large award of special damages, or cases involving “catastrophic injuries where [the plaintiff’s] every need has been quantified and provided for on the basis of actuarial life expectancy tables and where appropriate multiplicands have been applied”.⁶⁵
- [2.46] In *Morrissey*, the Supreme Court set out two separate ways in which the “cap” in *Sinnott* might be characterised. One way of understanding the cap would be an “artificial limitation” on recovery, lowering the quantum of damages that might otherwise properly be awarded to fully compensate the injured party. The other

⁵⁸ *Ibid* at page 134.

⁵⁹ McMahon and Binchy, *Law of Torts* 4th ed (Bloomsbury Professional 2013) at para 44.239.

⁶⁰ *Shannon v O’Sullivan* [2016] IECA 93.

⁶¹ *Ibid* at para 37.

⁶² *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461.

⁶³ *Ibid* at para 36.

⁶⁴ [2020] IESC 6.

⁶⁵ *B v C* [2011] IEHC 88 at para 40.

reading, which was the one the Court ultimately preferred,⁶⁶ was that the “cap” (and the Court stressed that, on this reading, the “cap” might not really be a “cap” at all, strictly speaking) reflected the current view of the appellate courts in cases concerning the most serious injuries. This reading would, in turn, require that other awards of damages for less severe injuries would be broadly proportionate to the “cap” figure, having regard to the level of injury incurred.

- [2.47] One consultee raised the important question as to whether the decision of the Supreme Court in *Morrissey* could be interpreted as authority for the proposition that the limit or “cap” of €500,000 in general damages applies to all personal injuries actions; that is, that there are no longer “non-cap” cases in which the limit or “cap” may be exceeded. The consultee suggested that this would be an unlikely interpretation of the decision in the *Morrissey* case and, for the reasons set out below, the Commission considers that there are good grounds for taking that view, that is, that there remain “non-cap” cases in which the upper limit or “cap” does not apply.
- [2.48] As the Commission has noted above, the case law prior to *Morrissey* strongly suggests that the upper limit or “cap” on general damages applies to those cases where there is a high award of both special damages and general damages, that is, where there is an “omnibus sum” or “totality award”, as was the position in *Reddy v Bates*, *Sinnott v Quinnsworth Ltd* and in the *Morrissey* case itself.
- [2.49] Since the *Morrissey* case was a “cap” case as understood in the case law to date, that is, a case involving a high level of both special damages and general damages, it is not surprising that the judgment of Clarke CJ for the Supreme Court in *Morrissey* cited at length from the case law in such cases, beginning with *Reddy v Bates* and *Sinnott v Quinnsworth Ltd*. Indeed, Clarke CJ began by noting that, in *Sinnott*, O’Higgins CJ had cited with approval the following passage from the judgment of Griffin J 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

⁶⁶ “I have come to that view while considering that the proper approach to the limit for damages for pain and suffering is the one which sees that limit as the appropriate sum to award for the most serious damages” [2020] IESC 6 at para 14.28.

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. In my view, the income which that capital sum would generate with reasonably careful and prudent investment is a factor which the jury (and this Court on appeal) should take into consideration in arriving at a conclusion in this behalf.”⁶⁷

[2.50] It is important to note that in *Reddy v Bates* and in *Sinnott v Quinnsworth Ltd* the Supreme Court dealt with cases in which both plaintiffs had been awarded very significant amounts in special damages, and that this was also the position in the *Morrissey* case.

[2.51] It is true that there are two passages in the judgment of Clarke CJ that appear to suggest that the upper limit or “cap” of 500,000 applies to all cases. Thus, Clarke CJ stated:

“Given that I have, for the reasons already set out, come to the conclusion that the limit on general damages for pain and suffering as currently considered should be fixed at €500,000, it seems to me that such a sum amounts to an appropriate means of compensating Ms. Morrissey under that heading and I would not, therefore, interfere with the trial judge’s award in that regard.”⁶⁸

[2.52] In the concluding part of his judgment, Clarke CJ stated:

“Having analysed the relevant case law, I express the view that €500,000 now represents the appropriate maximum damages to be awarded for pain and suffering in personal injury cases. I also express the view that Ms. Morrissey is entitled to that maximum sum.”⁶⁹

⁶⁷ *Reddy v Bates* [1983] IR 141 at page 148, cited in *Morrissey v Health Service Executive* [2020] IESC 6 at para 14.7.

⁶⁸ [2020] IESC 6 at para 14.29.

⁶⁹ [2020] IESC 6 at para 16.9.

- [2.53] Taken in isolation, these passages might, at least arguably, be interpreted as suggesting that €500,000 now represents the maximum damages to be awarded for pain and suffering in all personal injury cases. The Commission considers, however, that this would be to ignore the context, including the previous case law and the factual setting of the *Morrissey* case itself, in which those comments were made by Clarke CJ.
- [2.54] As already noted, the *Morrissey* case was a “cap” case in the sense generally understood from the previous case law, beginning with *Reddy v Bates* and *Sinnott v Quinnsworth Ltd*, in which there were high levels of both special damages and general damages awarded. It is also relevant to note that Clarke CJ cited with approval the relevant comments from *Reddy v Bates* and *Sinnott v Quinnsworth Ltd* that have underpinned the rationale for the upper limit or “cap”, namely, that the high level of special damages means that plaintiffs in such cases have been awarded under that heading an amount that will provide for all their prospective losses, all their bodily needs, and to enable them to live in comparative comfort.
- [2.55] It is also notable that at no point in his judgment does Clarke CJ make any comment, one way or the other, as to whether the decision in *Morrissey* should be interpreted as applying to cases where the level of special damages is low. This is entirely understandable, because it is a well-established principle that a decision of a court is usually taken to set a precedent by reference to the particular circumstances that arise in that case; and therefore a court will not be required to state that any comment made in the judgment is to be limited to those circumstances and should not be applied to any other type of case.
- [2.56] Another reason for taking the view that the *Morrissey* case does not have any implications for the “non-cap” cases, the cases where special damages are low, is that there is no suggestion in the judgment of Clarke CJ that this issue was raised in the case. Again, this is perfectly understandable because the parties in litigation will not wish to raise matters that stray outside the context of the particular case being argued in court, as this could lead to the court taking the view that the parties are engaging in wasting of court resources.
- [2.57] A final reason for the conclusion that the prior case law on “non cap” cases continues after *Morrissey* is that it would be quite surprising that the consistent line of authority beginning with *Reddy v Bates* and *Sinnott v Quinnsworth Ltd*, which was approved in *Morrissey*, had at the same time been implicitly undermined in *Morrissey*. As already noted, the Court in *Morrissey* made no explicit comment that placed any question mark over the “non cap” cases. For example, the Court in *Morrissey* could have said (*obiter*) that, although it did not arise in *Morrissey*, there might be a case in the future where the “non cap” cases might have to be reviewed, but it did not do so.

[2.58] In any event, the Commission considers that the “non cap” cases are, in fact, entirely consistent with the “cap” cases for the very reason that they are cases where special damages are low and therefore the plaintiffs in those cases have not already had their prospective losses addressed under that heading. This was the clear view of Geoghegan J in the Supreme Court decision in *Gough v Neary*,⁷⁰ in which the Court reduced an award in the High Court of €250,000 in general damages to €200,000, to which was added €23,223.27 in special damages. This was, therefore, a “non-cap” case because the special damages were, even when reduced on appeal, just over 10% of the amount awarded in general damages. Geoghegan J, who had been a member of the Supreme Court in *Fitzgerald v Treacy*,⁷¹ commented in *Gough* that:

“As far as I can recall there was never an issue in that case [*Fitzgerald*] as to whether capping had to be applied in a case of low special damages but substantial general damages. Such a principle would certainly be an extension of the original rule enunciated [in *Sinnott*] by O’Higgins CJ ... In my view, there 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 case.”⁷²

[2.59] This analysis has also been applied in a long line of High Court decisions over the past 20 years, including the decision of the High Court (Morris P) in 1999 in *Kealy v Minister for Health*⁷³ and the decision of the High Court (Barton J) in 2019 in *BD v Minister for Health and Children*.⁷⁴ If the upper limit or “cap” first developed in *Sinnott* applied to cases where special damages were low that would, as Geoghegan J noted, certainly be an extension of the original rule.

[2.60] In the absence of any express statement in *Morrissey* that casts doubt on comments such as those of Geoghegan J in the *Gough* case, and of the long line of High Court decisions in the past 20 years, the Commission considers that the better view is that the upper limit or “cap” continues to apply in cases where both the special damages and the general damages awards are very high, that is, the “omnibus” or “totality” cases. At the same time, as also noted by Geoghegan J in *Gough*, while the upper limit

⁷⁰ [2003] IESC 39, [2003] 3 IR 92.

⁷¹ [2001] 4 IR 405.

⁷² [2003] IESC 39, [2003] 3 IR 92, at page 133.

⁷³ [1999] 2 IR 456 at page 458.

⁷⁴ [2019] IEHC 173 at para 50.

or “cap” does not, as such, apply to the cases where special damages are low, this 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” case.⁷⁵

- [2.61] While the above discussion reflects the views of the Commission on the case law concerning “cap” and “non cap” cases, the Commission also considers that it would be desirable that, in a suitable future case, additional judicial guidance on this could be provided. Notwithstanding that view, the four models of legislation on capping general damages considered by the Commission in Chapter 4 of this Report proceed on the assumption that any such capping legislation would apply to all general damages in personal injuries cases, irrespective of the quantum, if any, of special damages awarded arising from the injuries sustained.

6. A proportionality principle: minor injuries, middling injuries and more severe injuries

- [2.62] Separately from the cap that emerged from *Sinnott* and the later cases discussed above, the courts have also applied a general proportionality principle in assessing the level of general damages to be awarded in personal injuries cases.
- [2.63] In 2005, in *MN v SM*,⁷⁶ the Supreme Court stated that an award of damages should be fair to both the plaintiff and the defendant and that it “should be proportionate to social conditions, bearing in mind the common good” and it “should also be proportionate within the legal scheme of awards made for other personal injuries.”⁷⁷

⁷⁵ The Commission is conscious that the courts have been required to address highly exceptional “non cap” cases. Thus, in *B v C* [2011] IEHC 88, the High Court (Clark J) awarded the plaintiff €700,000 in general damages for pain and suffering, which included the plaintiff’s mental distress and psychological trauma arising from a future risk of between 1% and 10% that he might develop CJD from contaminated blood plasma he had been given. The Court held that in the exceptional circumstances that arose in that case, the *Sinnott* upper limit or “cap” did not apply. The Commission is also conscious that there may be other exceptional cases in which an award of compensatory damages may go far beyond any sum awarded in personal injuries actions. For example, in *Shortt v Commissioner of An Garda Síochána* [2005] IEHC 311, [2007] IESC 9, [2007] 4 IR 587, the Supreme Court increased an award of compensatory damages made in the High Court (Finnegan P) from €500,000 to €2,250,000. It should be noted that this involved a combination of compensatory and aggravated damages in a miscarriage of justice case in which the plaintiff, an entirely innocent person, had been convicted of a serious criminal offence on the basis of falsified evidence prepared by members of An Garda Síochána and had, as a result, been imprisoned for 27 months before he was released.

⁷⁶ [2005] IESC 17, [2005] 4 IR 461.

⁷⁷ [2005] IESC 17, [2005] 4 IR 461 at para 38.

[2.64] In 2012, in *Kearney v McQuillan and North Eastern Health Board (No 2)*,⁷⁸ the Supreme Court reiterated this proportionality principle 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.”⁷⁹

[2.65] This proportionality principle 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 and the wider interests of society and the common good that 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.

[2.66] 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”.⁸⁰ 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.

[2.67] There has been some debate as to whether the intention of the Court of Appeal has been to recalibrate awards downwards. In *Jedruch v Tesco (Irl) Ltd*,⁸¹ the High Court (Barr J) stated 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”.⁸² In contrast, the High Court (Barton J) in *BD v*

⁷⁸ [2012] IESC 43.

⁷⁹ [2012] IESC 43 at para 28.

⁸⁰ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 44.

⁸¹ [2018] IEHC 205.

⁸² [2018] IEHC 205 at para 74. The High Court (Barr J) made essentially the same statement in *Seligman v Kuitkowski* [2018] IEHC 102 that the court has “had to somewhat recalibrate its approach to the assessment of general damages in personal injury” at para 34. In *Kampff v*

*Minister for Health*⁸³ stated that “[*Payne v Nugent* and *Nolan v Wirenski*] did not recalibrate 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 injuries so as to ensure that the award made is just, equitable and proportionate”.⁸⁴ As the cases discussed below indicate, the Court of Appeal has in some cases reduced High Court awards and in others increased them.

- [2.68] The first Court of Appeal decision in this series was *Payne v Nugent*.⁸⁵ In this case, the plaintiff had incurred what were described as “modest shoulder, neck and back injuries” in a road traffic collision. The High Court awarded her €65,000 in general damages. The Court of Appeal reduced this figure by 45% to €35,000. The Court noted that the plaintiff’s injuries were modest, and were not worth, in effect, approximately one sixth of the cap for catastrophic injuries (at the time regarded as €400,000). 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.⁸⁶
- [2.69] In *Nolan v Wirenski*⁸⁷ the plaintiff had suffered shoulder and neck injuries as well as injuries to her hand as a result of a road traffic collision. The High Court awarded the plaintiff €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 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”.⁸⁸ This statement has been cited in a number of subsequent decisions.

Minister for Public Expenditure and Reform [2018] IEHC 371, the High Court (Twomey J) referred to this statement of High Court in *Seligman*, stating: “it seems clear that the recalibration of the damages to which Barr J. refers is a downwards recalibration of the awards, which in those cases approximated to a halving of the awards” at para 65.

⁸³ [2019] IEHC 173.

⁸⁴ *Ibid* at para 14.

⁸⁵ *Payne v Nugent* [2015] IECA 268.

⁸⁶ *Ibid* at paras 18 and 19.

⁸⁷ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461.

⁸⁸ *Ibid* at para 44.

- [2.70] *Shannon v O'Sullivan*⁸⁹ concerned two plaintiffs, who had both suffered "modest"⁹⁰ neck injuries in a road traffic collision which caused each of them to develop adverse psychological effects. The High Court awarded the first plaintiff €90,000 and the second €130,000 in general damages. On appeal, the Court of Appeal reduced these figures 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".⁹¹
- [2.71] In *Cronin v Stevenson*⁹² the plaintiff had suffered severe soft tissue injuries to her cervical spine, 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 referred 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.⁹³ 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".⁹⁴
- [2.72] The plaintiff in *Gore v Walsh*,⁹⁵ a four 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, sued the landlord of the property through his mother. The High Court had made an award of €50,000 which the Court of Appeal reduced 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

⁸⁹ *Shannon v O'Sullivan* [2016] IECA 93.

⁹⁰ *Ibid* at para 68.

⁹¹ *Ibid* at para 34.

⁹² *Cronin v Stevenson* [2016] IECA 186.

⁹³ *Ibid* at para 76.

⁹⁴ *Ibid* at para 78.

⁹⁵ *Gore v Walsh* [2017] IECA 278.

of damages commonly reserved for those who sustain the most extreme type of catastrophic injury such as severe brain damage or quadriplegia".⁹⁶

- [2.73] *Fogarty v Cox*⁹⁷ 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 for those concerned ...".⁹⁸ The Court found that the injuries sustained by the plaintiff did not inhibit her ability to lead a relatively normal life. On this basis the Court of Appeal reduced the general damages to €62,500, a 45% reduction of the High Court award.
- [2.74] 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*⁹⁹ had suffered a more severe type of injury. The plaintiff in that case was 19 years of age when a vehicle struck him 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. 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".¹⁰⁰
- [2.75] *Rowley v Budget Travel Ltd*¹⁰¹ 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 for pain and suffering to date and €5,000 for pain and suffering 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 on-going discomfort and impaired function in the wrist with an increased risk of arthritis. Having regard to both *Nolan* and *Shannon* and the need for

⁹⁶ *Ibid* at para 38.

⁹⁷ *Fogarty v Cox* [2017] IECA 309.

⁹⁸ *Ibid* at para 64.

⁹⁹ *Murphy v County Galway Motor Club Ltd* [2016] IECA 106.

¹⁰⁰ *Ibid* at para 22.

¹⁰¹ *Rowley v Budget Travel Ltd* [2019] IECA 165.

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”.¹⁰²

[2.76] 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%.

[2.77] The decision of the Supreme Court in *Morrissey v Health Service Executive*¹⁰³ is also useful to consider in a discussion of proportionality in the assessment of general damages. That case concerned an appeal from the decision of the High Court, which made an award of €500,000 in general damages in favour of the plaintiff. In 2014, the plaintiff had been diagnosed with cervical cancer after two of her cervical smear tests had been inaccurately reported in both 2009 and 2012 as being free from abnormalities. Following her diagnosis, an audit was carried out on both the 2009 and 2012 smears which reported that the original results provided in respect of both tests were incorrect, but the plaintiff was not informed of the results of that audit until 2018. The Supreme Court rejected the defendant’s argument that the trial judge had erred in awarding €500,000 in general damages for pain and suffering to the plaintiff. In coming to this conclusion, the Court gave some consideration to the upper limit on general damages. The Court concluded that the limit on damages for pain and suffering should stand, at March 2020, at €500,000. This was based on the reasoning set out by Clarke CJ, having stated that the proper approach to the limit for pain and suffering is the one which sees that limit as the appropriate sum to award for its most serious damages, as follows:

“This is therefore the sum by reference to which all less serious damages should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. The point which I have sought to make, however, is that the type of

¹⁰² *Ibid* at para 20.

¹⁰³ [2020] IESC 6.

injuries which do properly qualify for the maximum amount may nonetheless come into different categories. While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award. But those very same considerations also recognise that it may be possible to regard injuries of very different types as broadly comparable.”¹⁰⁴

- [2.78] These comments of the Supreme Court in *Morrissey*, accompanied by the three-point scale developed by the Court of Appeal, and the earlier statements of the Supreme Court in cases such as *MN v SM*¹⁰⁵ and *Kearney v McQuillan and North Eastern Health Board (No 2)*,¹⁰⁶ clearly establish that proportionality between awards for injuries of differing severity, by reference to the upper limit, is key in the assessment of general damages in personal injuries action.

7. Comparison with Book of Quantum and Judicial Guidelines

- [2.79] It is worth noting that the proportionality principle 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*.¹⁰⁷ 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 College (formerly, its Judicial Studies Board),¹⁰⁸ and in

¹⁰⁴ [2020] IESC 6 at para 14.28.

¹⁰⁵ [2005] IESC 17, [2005] 4 IR 461.

¹⁰⁶ [2012] IESC 43.

¹⁰⁷ *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum* (2016) <<https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>> accessed on 13 July 2020. 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* (SI No 646 of 2002).

¹⁰⁸ The 15th edition of these Guidelines was published in 2019: Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* 15th ed (Oxford 2019). The English

Northern Ireland since 1996 by its Judicial Studies Board,¹⁰⁹ both most recently updated in 2019.

- [2.80] Under the reforms enacted in the *Judicial Council Act 2019* (2019 Act), the Book of Quantum will be replaced by statutory Guidelines on Personal Injuries Awards, which will be produced by the Personal Injuries Guidelines Committee (PIGC) and published under the auspices of the Judicial Council, thus reflecting even more closely the position in England and Wales, and in Northern Ireland. The PIGC was formally established on 28 April 2020 and is required, in accordance with the terms of the 2019 Act, to prepare draft guidelines within six months of that date (28 October 2020) and submit that draft to the Board of the Judicial Council (the Board).¹¹⁰ The Board will then review the draft guidelines, and make any amendments and modifications to those draft guidelines as it considers appropriate.¹¹¹ The Judicial Council must adopt the draft guidelines and any modifications made by the Board to those guidelines within 12 months of the draft guidelines being submitted to the Board.¹¹²
- [2.81] 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.¹¹³ 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,¹¹⁴ the authors suggest that, in

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.

¹⁰⁹ 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) <<https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>> accessed on 13 July 2020.

¹¹⁰ Section 18(4) of the *Judicial Council Act 2019*.

¹¹¹ Section 11(1)(d) of the *Judicial Council Act 2019*.

¹¹² Section 7(2)(g) of the *Judicial Council Act 2019*.

¹¹³ *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum* at page 5. <<https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>> accessed on 13 July 2020.

¹¹⁴ *Ibid* at pages 9-11 (“How to Use the Book of Quantum”).

approaching how PIAB can calculate an award, injuries can be categorised as follows:¹¹⁵

- **Minor**

Injuries that have substantially recovered.

- **Moderate**

Includes injuries from which a claimant has substantially recovered but there are on-going symptoms that interfere 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.

[2.82] 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 the other three points on the scale will apply in the majority of instances.

[2.83] In addressing, for example, whiplash injuries, one of the most litigated injuries, the 2016 Book of Quantum provides the following guidance:¹¹⁶

"The most common type of neck injury is called a "whiplash" injury which is an over extension or sprain often suffered in a

¹¹⁵ *Ibid* at page 10.

¹¹⁶ *General Guidelines as to the amounts that may be awarded or assessed in Personal Injury Claims: Book of Quantum* at page 27 <<https://www.piab.ie/eng/forms-guidelines/Book-of-Quantum.pdf>> accessed on 13 July 2020.

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

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 person's 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 on-going 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 on-going pain and stiffness with the necessity to wear a collar for long periods in the day.”

[2.84] 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 Guidelines¹¹⁷ adopt the same general approach to determining appropriate quantum for personal injuries, it is notable that their discussion of minor whiplash injuries is more detailed. Thus, the Northern Ireland 2019 Guidelines state:¹¹⁸

<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; 	
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¹¹⁷ *Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland* 5th edition (2019) <<https://judiciaryni.uk/sites/judiciary/files/media-files/Green%20Book%202019%20Fifth%20Edition%2025.02.19%20PDF.pdf>> accessed on 13 July 2020.

¹¹⁸ *Ibid* at pages 26-27.

<ul style="list-style-type: none"> the need to take medication to control symptoms of pain and discomfort. 	
(i) Where a full recovery takes place within a period of about one to two years. This bracket will also apply to short-term acceleration and/or exacerbation injuries, usually between one and two years.	Up to £12,500 ¹¹⁹
(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 £5,000 ¹²⁰
(iii) Where a full recovery is made within a period of a few days, a few weeks or a few months.	Up to £3,000 ¹²¹

[2.85] 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”.

8. Discussion and conclusion

[2.86] With respect to the current, judge-made, cap on damages that at present applies, the Commission wishes to emphasise two points. The current cap: (1) does not apply to special damages, and (2) only applies in cases where there is a high amount of special damages awarded to the plaintiff.

[2.87] The cap does not apply to special damages as the courts have held that such loss must be compensated to 100% of its value, which is in principle calculable. This would continue to hold true under any proposed capping legislation. Therefore, the Commission emphasises that under none of the models considered in this Report would awards of special damages be subject to a cap or limitation.

[2.88] While the current, judge-made, cap applies only in circumstances where there is a high award of special damages, due to its interconnection with the *Reddy v Bates* “totality rule” considered above, this would not necessarily be true under capping legislation. Indeed, under the models considered by the Commission, there would be no “cap” or

¹¹⁹ Approximately €13,722 at August 2020 (exchange rate of £1 to €1.10).

¹²⁰ Approximately €5,489 at August 2020.

¹²¹ Approximately €3,293 at August 2020.

“non cap” case distinction, as there is in the current case law. Each of the four models of legislation on capping general damages considered by the Commission in this Report proceeds on the assumption that any such capping legislation would apply to all general damages in personal injuries cases, irrespective of the quantum, if any, of special damages awarded arising from the injuries sustained.

- [2.89] 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.
- [2.90] The Court of Appeal in *Payne v Nugent*¹²² 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 claims”.¹²³ Similarly, the Court of Appeal in *Shannon v O’Sullivan*¹²⁴ and *Nolan v Wirenski*¹²⁵ 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”.¹²⁶ 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.”¹²⁷
- [2.91] A presumptive approach in any legislative model for capping damages would arguably be less prone to constitutional challenge than one that is mandatory, because it would allow a court discretion to depart from any cap where it considered that justice so requires for the individual who has been injured. This is discussed further under the discussion of two of the possible models of legislative capping, Model 1 and Model 2, in Chapter 4 below.

¹²² *Payne v Nugent* [2015] IECA 268.

¹²³ *Ibid* at para 18.

¹²⁴ [2016] IECA 93.

¹²⁵ [2016] IECA 56, [2016] 1 IR 461.

¹²⁶ *Shannon v O’Sullivan* [2016] IECA 93 at para 32; *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 31.

¹²⁷ [2016] IECA 93 at para 36.

[2.92] 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 Act of possession or the importation of drugs with a value of €13,000,¹²⁸ the court may impose a sentence up to life imprisonment but must specify a term of “not less than 10 years”.¹²⁹ 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.¹³⁰

[2.93] 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:

- (1) 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
- (2) 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.

[2.94] In *McEvoy v Meath County Council*¹³¹ 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.¹³² The Court held that the phrase means that the relevant decision-maker:

- (1) must not ignore the guidelines and proceed as if they did not exist;
- (2) must inform itself fully of and give reasonable consideration to such guidelines with a view to accommodating the objectives of such guidelines;
- (3) but is not required rigidly or “slavishly” to comply with the guidelines and may depart from them for *bona fide* reasons.

¹²⁸ Sections 15A and 15B of the *Misuse of Drugs Act 1977* as amended.

¹²⁹ Section 27(3C) of the *Misuse of Drugs Act 1977* as amended.

¹³⁰ See also paras 4.64–4.65, below, referring to the discussion of the 1977 Act in the Commission’s *Report on Mandatory Sentences* (LRC 108-2013).

¹³¹ *McEvoy v Meath County Council* [2003] IEHC 31, [2003] 1 IR 208.

¹³² *Ibid* at pages 220-224.

- [2.95] 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”.¹³³
- [2.96] 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 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 proportionality principle articulated in the case law discussed above. While this new “comply or explain” regime imposes some limit to judicial discretion, it also retains a key element of judicial independence.
- [2.97] As noted in a speech delivered by the Chief Justice in November 2019,¹³⁴ 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. 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.
- [2.98] The Commission now turns in Chapter 3 to, *inter alia*, discuss proportionality in the constitutional context and the separation of powers against the background of the wide range of constitutional issues that various statutory models of capping damages would raise.

¹³³ *Ibid* at page 220.

¹³⁴ Keynote speech delivered by the Chief Justice Mr Justice Frank Clarke at Insurance Ireland Conference, 19th November 2019, see video at <<https://www.rte.ie/news/2019/11/19/1092757-insurance-claims/>> accessed on 17 July 2020.

CHAPTER 3 CONSTITUTIONAL ISSUES

- [3.1] A number of constitutional issues may be engaged by different models of capping damages legislation. Some models of capping will raise more constitutional concerns than others, while some concerns will be common to each model. The constitutional permissibility of many models of capping will ultimately depend on how a cap or caps is or are calibrated.
- [3.2] Constitutional questions regarding capping damages might be, at a basic level, broken down into the following questions:
- (1) **what** would capping legislation require, and
 - (2) **how** would a cap (or caps) be set, and **by whom**?
- [3.3] The first question concerns the substance of capping legislation, and the most relevant considerations in that regard are whether it would conflict with some constitutional rights and, if it did, whether it would be a permissible restriction of those rights. The most relevant considerations for the second set of questions are whether capping legislation would conflict with limitations the Constitution sets on the exercise of legal powers by the organs of the State under the separation of powers.

1. Overview of the constitutional issues raised

- [3.4] There are three constitutional rights that are relevant to personal injury claims and therefore relevant to any proposed legislation capping damages in personal injuries actions. Those rights are:
- (1) the right to bodily integrity,
 - (2) property rights, and
 - (3) the right to equality before the law.
- [3.5] The right to bodily integrity is engaged because the law in this area (tort law) and its remedies, including damages, have been identified as a means by which the State meets its constitutional obligation to safeguard this right. In terms of property rights, the right to litigate and the correlative right to an effective remedy, both of which have been identified as property rights, might be engaged by capping legislation. It might be argued that capping legislation could limit the ability of the plaintiff to obtain an effective remedy. It might also be argued that the right to equality before the law is engaged by capping legislation as it could be argued that certain types of cap could result in invidious discrimination between some groups of plaintiffs who may have their rights of recovery limited more than others in a way that is invidious or unfair.

- [3.6] Although the above rights might be engaged, it is important to note that none of them is absolute.¹ Legislation may place limits on constitutional rights so long as these limits can satisfy certain tests that have been identified by the courts. Two key standards in this respect are the **proportionality** test and the **rationality** test. The Commission analyses in this chapter how each of these tests may apply to those rights in the context of capping damages, with the exception of the right to equality.
- [3.7] The right to equality is considered separately because it appears that the proportionality or rationality standards may not apply to the equality guarantee under Article 40.1 of the Constitution.² One reason for this appears to be the phrasing of the guarantee under Article 40.1. Article 40.1 begins with an absolute statement that all citizens shall, as human persons, be held equal before the law. The right is then qualified by reference to certain capacities. This appears to suggest that what really matters in determining whether 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.
- [3.8] In addition to the three rights discussed above, two other important, and related, constitutional concerns may arise depending on the specific type of capping model under consideration. These are: **separation of powers** and the **non-delegation doctrine**, to which the “principles and policies” test applies.
- [3.9] The separation of powers provides that, in general, the three key branches of government in the State, the executive (in general terms, referring to the Government), the legislature (the President and the Houses of the Oireachtas) and the judiciary (judges engaged in the administration of justice) are to operate separately and, to a large extent, independently of each other. However, it is also important to note that the Constitution does not set out a rigid or strict separation of powers, but rather what has been described as a division of power. The phrase that is often used in connection with the comparable division or separation of powers under the US federal Constitution is a system of “checks and balances” in which each of the three branches

¹ “None of the personal rights of the citizen are unlimited; their exercise may be regulated by the Oireachtas when the common good requires this.” *Ryan v Attorney General* [1965] IR 294 at page 312.

² Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at paras 7.1.52 and 7.1.54. The Court of Appeal in *The People (DPP) v DW* [2020] IECA 145 noted that the authors of *Kelly* commented at para 7.1.52 that the proportionality test in *Heaney*, which is discussed below, has been held not to apply to certain rights, such as equality and the right to trial in due course of law. The Court went on to quote *Kelly* at para 7.1.54, including as follows: “[t]he *Heaney* test has also been co-opted into areas of law where no standard of review of this sort is needed, but rather where an ordinary meaning of the word proportionality would be appropriate.”

has some functions that overlap with those of the other branches. The Supreme Court has also used the phrase “checks and balances” to describe the separation of powers under the Irish Constitution.³ In the context of capping legislation, the essential question is whether the matters to which such legislation pertains belong exclusively within the legislative power, or the executive power or the judicial power, or whether such a strict separation is necessitated by the Constitution. The effect of the separation of powers in the Constitution is discussed in section 5, below.

- [3.10] The non-delegation doctrine, which is also an aspect of the separation or division of powers, controls how the Oireachtas may delegate its legislative power. In practice, this often means that an Act confers on a designated Minister or other relevant body (such as a supervisory or regulatory body) the power to make detailed Regulations. In the case of capping general damages, if the Oireachtas were to delegate the capping function to another entity, whether a Minister or another body, an additional question is whether it would be constitutionally permissible to delegate such a determination to another person or body and, if so, on what terms and conditions. This is also discussed in section 5, below.

2. Relevant constitutional rights and how they may be restricted

- [3.11] This section contains three parts. The first two parts consider the right to bodily integrity and the right to litigate/right to an effective remedy, respectively. These rights are unspecified or unenumerated rights, meaning that they are not found in the text of the Constitution. The Commission considers the scope of these rights to determine whether, and how, they would relate to any proposed damages capping legislation. It is well established that, before standards of review such as proportionality or rationality need be applied, an identified constitutional right must be in issue.⁴
- [3.12] The third part considers how these rights, if engaged, may legitimately be restricted, and how a proportionality or a rationality test might apply to capping damages legislation.

³ See the comments of Denham J in *Laurentiu v Minister for Justice* [1999] IESC 47, [1999] 4 IR 26 at page 61 (discussed further below at para 3.97).

⁴ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.54, footnote 181, citing: *McCann v Minister for Education* [1997] 1 ILRM 1; *McDermott v Governor of Cloverhill Prison* [2010] IEHC 324; *O’Sullivan v Chief Executive of the Irish Prison Service* [2010] IEHC 301, [2010] 4 IR 562.

(a) The right to bodily integrity

- [3.13] The right to bodily integrity was first recognised by the courts as an unenumerated, or implied, constitutional right by the Supreme Court in *Ryan v Attorney General*.⁵ This was the first time that the courts recognised a specific right as being implied from, or latent in, the general expression “personal rights” and which was not one of the rights specifically enumerated in Article 40.3 of the Constitution: hence, the term “unenumerated” right.⁶ In the *Ryan* case, the plaintiff was not able to successfully invoke the right to bodily integrity to challenge the constitutionality of certain provisions of the *Health (Fluoridation of Water Supplies) Act 1960*. The Court rejected her argument that those provisions infringed her rights. However, while the Court rejected the argument that the fluoridation of the public water supply was a violation of the plaintiff’s right to bodily integrity, the Court recognised that the general guarantee of personal rights in Article 40.3.1° of the Constitution extends to the right to bodily integrity. Later case law has further developed this right.
- [3.14] An important case to consider in relation to the interaction between the right to bodily integrity, the tort of negligence and damages awards is *Sweeney v Duggan*.⁷ The plaintiff in that case was an employee of a company whose shares were almost wholly owned by the defendant. The plaintiff worked at a quarry which was the property of that company, Kenmare Limeworks Ltd, of which the defendant was the main shareholder and also its manager. The plaintiff was seriously injured in an accident and commenced proceedings against the company, which were defended until the company went into a creditor’s voluntary liquidation, after which date the defence to the action ceased. The plaintiff obtained judgment for the sum of £20,866 and costs against the company. At the date of commencement of the subsequent plenary proceedings by the plaintiff against the defendant, no part of the damages or costs awarded in the judgment had been paid to him, though it appeared that in the liquidation of the company, he would receive approximately 15% of his claim as a preferential creditor.
- [3.15] In the plenary proceedings under consideration, the plaintiff claimed for loss of the judgment which he had obtained against the company in the previous proceedings. The plaintiff argued that the defendant, as the manager of the quarry, and as the

⁵ [1965] IR 294.

⁶ The Supreme Court has, recently, preferred the term “derived rights” for rights identified in the jurisprudence of the Irish courts that are not expressly provided for in the text of the Constitution: *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49. This language was presaged in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81 at paragraph 88, where O’Donnell J found that the right to privacy was “derived from the protection of the person to be found in the words of Article 40.3 of the Constitution” (emphasis original).

⁷ [1991] 2 IR 274.

effective owner and operator of the quarry, had a duty, *inter alia*, to safeguard his right to bodily integrity in and about his employment by ensuring that he would be duly compensated for any occupational injuries suffered. The plaintiff alleged that the defendant was in breach of the duty imposed by Article 40.3.2° of the Constitution to safeguard his bodily integrity. The High Court (Barron J) held that there was nothing in Article 40.3.2° to assist the plaintiff, stating that that provision of the Constitution “gives him no more than a guarantee of a just law of negligence, which in the circumstances exists”.⁸ The decision was subsequently appealed to the Supreme Court. That appeal was ultimately rejected by the Supreme Court, although no reference was made to Article 40.3.2° in that appeal.⁹

- [3.16] Some further indications of what a “just” law of negligence might entail can be gleaned from subsequent cases. In *W v Ireland (No 2)*¹⁰ 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 the 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
- [3.17] In the Supreme Court decision in *Blehein v Minister for Health*,¹³ McKechnie J cited with approval the 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 The Supreme Court considered the issue again in *MC v Clinical Director of the Central Medical Hospital*.¹⁵ The Court stated that “[w]hat is ‘effective’ in that sense is

⁸ [1991] 2 IR 274 at page 285.

⁹ *Sweeney v Duggan* [1997] 2 IR 531.

¹⁰ [1997] 2 IR 141.

¹¹ *Ibid* at page 164.

¹² *Ibid* at page 167.

¹³ [2018] IESC 40.

¹⁴ *Ibid* at para 50, citing *Hanrahan v Merck, Sharp & Dohme Ltd* [1988] ILRM 629 at para 34.

¹⁵ [2020] IESC 28.

not tested by reference to whether a plaintiff can establish the case, but whether the elements of the tort ... are present, and would establish a cause of action".¹⁶

- [3.18] It would appear from the case law above that the Constitution imposes the following standards in terms of common law causes of action: that the law must be just (*Sweeney v Duggan*) and that it must be basically effective (*Blehein v Minister for Health*); and if the plaintiff cannot establish liability under a common law tort (such as negligence or malfeasance of public office) because the facts of his or her case do not meet the elements of the common law cause of action, the existence of the tort will usually meet the standard of a "basically effective" remedy, so that no separate claim for breach of a constitutional right will, usually, arise (*MC v Clinical Director of the Central Medical Hospital*).
- [3.19] In the specific context of the subject matter of this project, it was argued by some consultees that more is required to vindicate the constitutional right to bodily integrity than the availability of capped damages, which may fail to provide a proportionate remedy for the personal injury in the given case. It was argued by one consultee that the statement of the High Court in *Sweeney* that Article 40.3.2° of the Constitution offers "no more than a guarantee of a just law of negligence" supports the contention that capping legislation that took the form of a mandatory cap would be unconstitutional, on the basis that, inherent in a "just law of negligence" is the capacity for the plaintiff to obtain a just remedy and this necessarily entails that the courts maintain jurisdiction to award proportionate compensation that bears a rational relationship to the harm caused.
- [3.20] The Commission agrees that it is clear that proportionality between the general damages award (for pain and suffering) and the severity of the injury plays an important role in the assessment of damages and this has been affirmed by the courts on numerous occasions, including by the Supreme Court in 2020 in *Morrissey v Health Service Executive*.¹⁷ As discussed in Chapter 2, the courts have also developed a specific form of proportionality to be applied in the assessment of general damages in personal injuries cases, that being the three-point scale to the effect 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 other lesser categories".¹⁸ This proportionality test has resulted in some awards of general damages being reduced where the Court of

¹⁶ *Ibid* at para 134.

¹⁷ [2020] IESC 6.

¹⁸ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 44.

Appeal considered that the injuries were modest,¹⁹ and some awards of general damages being increased where the Court of Appeal considered that the injuries were more severe.²⁰

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

- [3.21] The Cost of Insurance Working Group (CIWG) identified that property rights may be at issue should a statutory cap or caps on general damages be introduced. The Personal Injuries Commission (PIC) identified in particular the right to litigate and the correlative right to an effective remedy. Consistently with the case law discussed above, the PIC defined these related rights as “the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damages or loss as recognised by law”.²¹
- [3.22] Much of the litigation surrounding the right to litigate and an effective remedy has 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. The following statement by the High Court (Hogan J) in *S v Minister for Justice, Equality and Reform*²² summarises the case law as follows:
- “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 nor unfair.”²³
- [3.23] In *MC v Clinical Director of the Central Medical Hospital*,²⁴ the Supreme Court echoed this summary by citing the views of the same judge in *XA v Minister for Justice, Equality and Law Reform*, to the effect that the judicial branch of government must ensure that

¹⁹ *Payne v Nugent* [2015] IECA 268; *Shannon v O’Sullivan* [2016] IECA 93; *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461; *Cronin v Stevenson* [2016] IECA 186; *Gore v Walsh* [2017] IECA 278; *Fogarty v Cox* [2017] IECA 309.

²⁰ *Rowley v Budget Travel Ltd* [2019] IECA 165; *Murphy v County Galway Motor Club Ltd* [2016] IECA 106.

²¹ Personal Injuries Commission, *First Report of the Personal Injuries Commission* (2017) at page 17. <<https://dbei.gov.ie/en/Publications/Publication-files/First-Report-of-the-Personal-Injuries-Commission.pdf>> accessed on 17 July 2020.

²² [2011] IEHC 31.

²³ *Ibid* at para 27.

²⁴ [2020] IESC 28.

fundamental rights protected by the Constitution “are to be taken seriously” so that they are given “life and reality.”²⁵

- [3.24] In the *MC* case, the plaintiff had killed one of her children and attempted to kill another of her children in 2002. She was diagnosed with a severe mental illness (schizoaffective disorder) and, at her trial in 2006, was found guilty but insane. Following the enactment of the *Criminal Law (Insanity) Act 2006* (2006 Act), she was reclassified as a person found not guilty by reason of insanity. After her transfer to the Central Mental Hospital, the plaintiff responded very well to treatment under the general direction of the Director of the Central Mental Hospital (the Director) and, after a number of years the clinical care team determined that, while remaining under the general care of the Director, the plaintiff could be released from the Central Mental Hospital and could live in her family home with her husband and other children.
- [3.25] In accordance with the 2006 Act, the plaintiff’s detention was reviewed by the Mental Health Review Board (the Board), who made an order that the plaintiff should be released from the care of the Director, and directing the Director to give effect to this. The Director refused to give effect to the Board’s order on the ground that, in his view, this would not be consistent with the clinical needs of the plaintiff. The plaintiff then applied to the High Court for an order directing the Director to carry out the Board’s order, and also claimed damages for breach of her constitutional rights arising from the delay in carrying out the Board’s order. By the time the case came before the courts, the Director had implemented the Board’s order. The courts nonetheless addressed the question whether the plaintiff was entitled to claim damages for breach of her constitutional rights.
- [3.26] In the Supreme Court, the Court held that the plaintiff’s claim for damages against the Director of the Central Mental Hospital was, in effect, a claim based on the tort of “misfeasance of public office”, based on the ground that he had failed to comply with a statutory duty imposed on him under the 2006 Act. The Supreme Court agreed that the Director was in breach of his statutory duty under the 2006 Act. However, the Court also pointed out that an element of the tort of misfeasance of public office was that the public official must be shown to have acted in bad faith (*mala fides*), and the Director had not acted in bad faith in this case, because his refusal to carry out the Board’s order was based on his good faith (*bona fide*) opinion as to what was in the plaintiff’s clinical interests.

²⁵ *XA v Minister for Justice, Equality and Law Reform* [2011] IEHC 397 at paras 15 and 33, quoted in *MC v Clinical Director of the Central Medical Hospital* [2020] IESC 28 at para 55.

- [3.27] The Supreme Court therefore held that the plaintiff had an effective cause of action under tort law, but that her claim for damages was dismissed because she could not establish bad faith, which was an element of the tort in question. In that situation, the common law cause of action was effective and the Supreme Court concluded that the plaintiff had no separate claim for breach of any constitutional right. The Court accepted that there could be exceptional, rare, cases in which a separate claim for breach of a constitutional right (a “constitutional tort”) might apply where the common law claim failed, but this was not, in the Court’s view, such an exceptional case.
- [3.28] There are two ways in which the right of access to the courts and to an effective remedy could be read: either (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 will be available to the plaintiff and that that type of remedy is, in principle, capable of vindicating his or her rights. In the context of an award of damages, reading (1) would require the plaintiff receive a specific amount (quantum) of damages to vindicate his or her rights. While 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. Thus, if reading (1) were followed, a plaintiff could never have his or her rights vindicated against an impecunious defendant.
- [3.29] In such cases, it would seem more natural to maintain that the availability of damages can in principle, as a type of remedy, vindicate the plaintiff’s rights (reading (2)). This second reading also appears to be consistent with the view of the Supreme Court in *MC v Clinical Director of the Central Medical Hospital*,²⁶ discussed above, which held that a common law remedy is “effective” even if, on the facts, the plaintiff’s claim is dismissed. Thus, the right to an effective remedy is vindicated even if the plaintiff’s rights have been breached but that because of the elements of the cause of action to which the effective remedy relates – in the *MC* case, the need to establish bad faith by the defendant – the plaintiff does not meet the threshold needed to establish any liability by the defendant.
- [3.30] Some consultees argued that the right to an effective remedy must incorporate some element of the remedy being sufficient to vindicate the right at issue adequately and proportionately. Those consultees argued that it may be more accurate to say that what the right in fact requires is that appropriate damages be available to the plaintiff. This, of course, presupposes that the plaintiff has first established that not only have

²⁶ [2020] IESC 28.

his or her rights been infringed but that he or she has established the defendant's liability under a recognised breach of legal duty.

- [3.31] As discussed in Chapter 2, the Supreme Court, in *Morrissey v Health Service Executive*²⁷ considered in detail the general approach to the assessment of damages in personal injuries actions. The Court drew an important distinction between special damages and general damages, noting that special damages (such as loss of earnings and future health care) are capable of being approached on the basis of fairly precise calculation, while the calibration of damages for general damages (pain and suffering) entails a significant subjective element. In that regard, the Court considered that a detailed evidence-based approach to a change in economic circumstances is not necessary when identifying the limit on general damages; instead, a court is entitled to take a "broad approach based on its own experience".²⁸
- [3.32] In addition, as already noted in Chapter 2, the Supreme Court in *Morrissey* reiterated the analysis that has been consistently expressed in the case law on the judicial upper limit or cap on general damages, beginning with the decision of the Court in *Sinnott v Quinnsworth Ltd.*²⁹ This analysis states that the award of special damages, precisely because it is capable of calculating the actual loss suffered by the injured person (such as loss of earnings and future care needs), must involve complete, 100%, compensation. By contrast, because the award of general damages necessarily involves a less precise, imperfect, assessment of what level of compensation should be awarded, the Supreme Court did not make a similar statement that general damages must involve complete, 100%, compensation.
- [3.33] What is clear from the discussion above, the discussion in Chapter 2 and the discussion relating to the right to bodily integrity, is that proportionality, in the ordinary sense of the word, is the key principle in assessing the appropriate level of damages. The Court in *Morrissey* reiterated that the appropriate level of special damages must be complete, 100%, compensation because it reflects the actual, objectively verifiable, loss incurred by the injured person. However, while the Court held that proportionality is relevant in the calculation of general damages, in that more serious injuries should receive higher awards and lesser injuries should receive proportionately lower awards, in relation to the need to award, nonetheless, it is not possible to say that complete, 100%, compensation is to be awarded for general damages because, to put it simply, the calculation of general damages is subjective and imperfect, not objective.

²⁷ [2020] IESC 6.

²⁸ *Ibid* at para 14.24.

²⁹ [1984] ILRM 523 at page 532.

(c) Restriction on rights: proportionality and rationality

- [3.34] It is clear from the text of Articles 40 to 44 of the Constitution that restrictions on the various rights are envisaged in the provisions themselves. In the context of personal rights, including the right to bodily integrity, enshrined under Article 40.3.1°, the State is obliged to vindicate those personal rights “as far as practicable”. Under Article 40.3.2° the State must, by its laws, protect property rights (among other rights) from “unjust attack”.
- [3.35] The question then is to what extent a curtailment of these constitutional rights is constitutionally permissible. In that regard, the courts have employed two standards: (1) the proportionality test, first set out by the Supreme Court in *Heaney v Ireland*,³⁰ and (2) the rationality test, first set out by the Supreme Court in *Tuohy v Courtney*.³¹

(i) Proportionality Test

- [3.36] The first of these tests, the “proportionality test” is generally considered to have been first applied in *Cox v Ireland*.³² While the Supreme Court in *Cox* did not explicitly mention proportionality, it has been commented that the articulation of many core elements of the proportionality test in that judgment led the courts in later judgments to comment that the doctrine of proportionality had “surfaced obliquely” and was “adumbrated” in that case.³³
- [3.37] The proportionality test was first explicitly invoked in Ireland by the High Court (Costello J) in *Heaney v Ireland*.³⁴ The High Court stated that where it has been established that a constitutional right has been restricted, “the court must go on to examine the validity of the restrictions imposed on its exercise by the enactment impugned in the case”.³⁵ The Court adopted the test that had been formulated by the Supreme Court of Canada³⁶ in the following terms:

³⁰ [1994] 3 IR 593.

³¹ [1994] 3 IR 1.

³² [1992] 2 IR 503.

³³ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.47, quoting from *Rock v Ireland* [1997] 3 IR 484 at page 500; and *Heaney v Ireland* [1994] IR 593 at page 607.

³⁴ [1994] 3 IR 593.

³⁵ *Heaney v Ireland* [1994] 3 IR 593 at page 606.

³⁶ *Heaney v Ireland* [1994] 3 IR 593, citing the Supreme Court of Canada in *R v Chaulk* [1990] 1 SCR 1303 at pages 1335–1336. This test was originally set out by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103.

“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) impair the rights as little as possible; and
- (c) be such that their effects on rights are proportional to the objective.”³⁷

[3.38] The proportionality doctrine and its Canadian origins were explicitly endorsed by the Supreme Court in *In Re Article 26 and the Employment Equality Bill 1996*.³⁸ The Court stated:

“In effect a form of proportionality test must be applied to the section [of the Bill being examined] (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into the constitutional rights as little as is reasonably possible? (c) Is there proportionality between the section and the [right in question] and the objective of the legislation? A similar test was used by the Canadian Supreme Court in *R. v. Oakes* [1986] 1 S.C.R. 103 and *Chaulk v. R.* [1990] 3 S.C.R. 1303.”³⁹

[3.39] It is useful to consider how the courts have applied each element of the *Heaney* proportionality test separately. How each of these elements might interact with legislation capping damages is considered in relation to each of the Models 1 to 4 in Chapter 4 below.

A. The objective of the provision must be of sufficient importance to warrant overriding a constitutionally protected right (sufficient importance)

[3.40] The courts have not generally approached the first element of the *Heaney* proportionality test, the sufficient importance element, very stringently.⁴⁰ It appears to be that, once an objective can be identified, that is usually sufficient to satisfy this first

³⁷ *Heaney v Ireland* [1994] 3 IR 593 at page 607.

³⁸ [1997] IESC 6, [1997] 2 IR 321.

³⁹ [1997] IESC 6, [1997] 2 IR 321 at page 383.

⁴⁰ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.57.

element of the proportionality test. In some instances, the courts have asserted the importance of a particular objective, with little discussion of how this conclusion was reached.⁴¹

[3.41] For example, in *In Re Article 26 and the Employment Equality Bill 1996*,⁴² the Supreme Court noted that the 1996 Bill proposed (among other matters) to address discrimination within the workplace against both older employees and younger employees. The Court held that the 1996 Bill “in seeking to eliminate such discrimination from the work place so far as practicable is designed to meet an important objective which is enshrined in the Constitution itself”,⁴³ namely, the right to equality under Article 40.1. The Court did not discuss this objective any further.

[3.42] In the context of capping damages, it might be argued that there are multiple objectives behind any proposed measure. One objective behind capping damages legislation might be to control insurance costs and, because the State is often a defendant in personal injuries claims, any savings as a result of a reduction in the award of damages could be used for other areas of public expenditure. The courts have already endorsed the notion that in the assessment of damages for personal injuries regard must be had to the social good, and this includes that the level of damages awards may impact on insurance costs, taxation or other State services. For example, the Supreme Court in *Kearney v McQuillan and North Eastern Health Board (No 2)*⁴⁴ stated that:

[e]ach 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.⁴⁵

[3.43] Another plausible objective behind capping damages could be to ensure that an award of damages is properly related to the severity of injury suffered by the plaintiff. Any individual or body involved in determining the appropriate level of damages, whether a policymaker, member of the judiciary, the Government or the Oireachtas,

⁴¹ *In Re National Irish Bank Ltd (No 1)* [1999] 3 IR 145 at page 179; *In Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6, [1997] 2 IR 321 at page 348; *Blehein v Minister for Health* [2008] IESC 40, [2009] 1 IR 275 (Denham J) at para 18.

⁴² [1997] IESC 6, [1997] 2 IR 321.

⁴³ [1997] IESC 6, [1997] 2 IR 321 at page 348.

⁴⁴ [2012] IESC 43.

⁴⁵ [2012] IESC 43 at para 28 (emphasis added). This passage has subsequently been cited in: *Kampff v Minister for Public Expenditure and Reform* [2018] IEHC 371 at paras 73 and 123; *Donnelly v Dunnes Stores* [2019] IEHC 347 at para 18; *Houston v Barniville* [2019] IEHC 601 at para 110.

will have an interest in ensuring that the amount of compensation that is awarded should reflect the actual injury suffered. This objective is reflected in the long-established principle, expressed for example by the Supreme Court in *Sinnott v Quinnsworth Ltd*, that general damages, the type of damages that would be the object of capping legislation, are:

"intended to represent fair and reasonable compensation for pain, suffering, inconvenience and loss of the pleasures of life which injury has caused and will cause to the plaintiff."⁴⁶

- [3.44] The Commission considers that either of the two objectives outlined above (controlling insurance costs and proportionality in damages awards to the injury suffered) would likely be considered to be of sufficient importance to warrant an interference with constitutional rights. This view was supported by a number of consultees who made submissions on this matter.

B. The measure should be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations (rational connection)

- [3.45] As with the first element of the *Heaney* test, the courts have not rigorously applied the second element, rational connection, in cases where it has been discussed.
- [3.46] One of the few examples of a measure being struck down for lack of rational connection under the *Heaney* test occurred in *McCann v Judge of Monaghan District Court*.⁴⁷ That case concerned section 6 of the *Enforcement of Court Orders Act 1940* which provided for the imprisonment of debtors in default. The High Court (Laffoy J) held that section 6 was unconstitutional, in part because the procedure of imprisoning a debtor, who was *bona fide* unable to meet the debt ("can't pay", as opposed to "won't pay"), for failure to comply with an instalment order, where the objective is to procure the discharge of the arrears of instalments, was arbitrary, unfair and not based on rational considerations.⁴⁸
- [3.47] Another example of a measure being struck down for lack of rationality arose in *Blehein v Minister for Health*.⁴⁹ That case concerned section 260 of the *Mental Treatment Act 1945* (1945 Act) which presumptively barred all persons who had been detained under the 1945 Act from taking a civil case, unless they could set out a case of "bad faith or without reasonable cause", even if neither bad faith, nor lack of

⁴⁶ [1984] ILRM 523 at page 532.

⁴⁷ [2009] IEHC 276, [2009] 4 IR 200.

⁴⁸ *McCann v Judge of Monaghan District Court* [2009] IEHC 276, [2009] 4 IR 200 at para 159.

⁴⁹ [2008] IESC 40, [2009] 1 IR 275.

reasonable cause formed part of the intended litigation. The objective of the 1945 Act, as set out in the long title to the Act, was to provide for the prevention and treatment of mental disorders and the care of persons suffering therefrom, and to provide for other connected matters. The Supreme Court accepted that the objective of the Act was both legitimate and important. However, the provision failed to pass the proportionality test, because, while it was rationally connected to the stated objective, it was arbitrary, in referring to only two possible grounds of application, and therefore unfair.⁵⁰

- [3.48] In other instances, the courts have declined to comment on the necessity of a particular measure in achieving the objective. Once the choice made was a social policy choice, the measure is held to be one which the Oireachtas is entitled to enact.⁵¹ The Supreme Court in *In Re Article 26 and the Employment Equality Bill 1996*⁵² commented that “[w]hile it is possible to argue that the Oireachtas has made the wrong choice, that cannot amount to a finding that the classification ... which they have adopted is irrelevant to the objective intended to be achieved or unfair or irrational”.⁵³
- [3.49] As discussed above, there might be a number of objectives behind a particular model of capping legislation. In broad policy terms, capping legislation might be justified by the general objective that an award of damages should be appropriately related to the severity of injury suffered by the plaintiff. Another objective might be the control of the cost of insurance and, as regards claims against public bodies, the retention of monies for other public expenditure, among other objectives.
- [3.50] In that regard, one consultee argued that it is questionable whether it could be persuasively argued that capping legislation could be rationally connected to the objective of reducing insurance premiums, on the basis that (1) there is no evidence of overcompensation in the State and (2) the wide range of policy and legislative matters that contribute to insurance costs makes it difficult to identify a direct correlation between the levels of damages awards and the levels of insurance premiums.
- [3.51] The Commission again emphasises that this project concerns only whether capping legislation would be constitutionally permissible, and the Commission does not express any view on the exact reasons for, or causes of, fluctuations in the cost of

⁵⁰ [2008] IESC 40, [2009] 1 IR 275 at para 18.

⁵¹ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.61.

⁵² [1997] IESC 6, [1997] 2 IR 321.

⁵³ *In Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6, [1997] 2 IR 321 at page 349.

insurance during any given time period. These have been discussed in the CIWG and PIC Reports discussed in Chapter 1 and, as the Commission has already noted, they involve many policy and related matters that are far outside the scope of this project and Report. Nonetheless, to the extent that the objective or objectives of such legislation come within the proportionality test, the Commission considers from the case law outlined above that, whatever the objective might be, it appears that the rational connection between the objective and the measure is not typically stringently examined by the courts, in particular, where the choice made by the Oireachtas was one expressed to be made in the interests social justice, or the exigencies of the common good, which is a matter primarily for the Oireachtas. Moreover, the above case law seems to indicate that the courts will be reluctant to interfere with the decision of the Oireachtas in enacting a particular measure. As already noted, the Supreme Court in *In Re Article 26 and the Employment Equality Bill 1996* stated that even where it could be argued that the Oireachtas may have made the “wrong choice”, this will not lead to a finding that the legislation fails the proportionality test provided that the choice was not based on irrational or arbitrary considerations.⁵⁴

C. The measure should impair the rights as little as possible (minimum impairment)

[3.52] While the Irish courts have given the third element of the *Heaney* test more attention than the first two elements (discussed above), its application has not been without problems. This is at least in part because there are a number of ways that the minimum impairment element of the *Heaney* test could be read and applied. The application of the minimum impairment element of proportionality by the Canadian courts may be helpful to consider.⁵⁵ As noted above, the High Court in *Heaney* cited the proportionality test set out by the Supreme Court of Canada in *R v Chaulk*,⁵⁶ which was originally articulated by the Supreme Court of Canada in *R v Oakes*.⁵⁷ It has been suggested that the Irish courts do not find Canadian case law “obviously persuasive” as to how the test should apply.⁵⁸ Notwithstanding that, it is to be noted that one

⁵⁴ *In Re Article 26 and the Employment Equality Bill 1996* [1997] IESC 6, [1997] 2 IR 321 at page 349.

⁵⁵ For a very detailed and critical overview comparing and contrasting the Irish and Canadian implementations of proportionality, see Kenny, “Proportionality and the Inevitability of the Local: a Comparative Localist Analysis of Canada and Ireland” (2018) 66 *American Journal of Comparative Law* 537.

⁵⁶ [1990] 1 SCR 1303.

⁵⁷ [1986] 1 SCR 103.

⁵⁸ Kelly at para 6.2.104, citing the following passage from the Supreme Court (Geoghegan J) in *PJ Carroll & Co Ltd v Minister for Health and Children* [2005] IESC 26, [2005] 1 IR 294 at page 318: “I do not think it necessary to rely on Canadian case law for this purpose. It is fair to say

element only of the test (that the measure be “pressing and substantial in a free and democratic society”) is derived from the text of the Charter.⁵⁹ In addition, the Irish courts have consistently cited, with approval, the *Heaney* proportionality test, which is explicitly based on *R v Oakes* and *R v Chaulk*.

- [3.53] In its original formulation in *R v Oakes*, the language employed in formulating the “minimum impairment” aspect of the proportionality test was that the means chosen should impair the right “as little as possible”.⁶⁰ However, the linguistic rigidity of this standard quickly gave way to less stringent formulations. Very shortly after *Oakes*, in *R v Edwards Books and Art* the Supreme Court of Canada reframed the minimum impairment standard as requiring that a measure infringe the relevant right(s) “as little as is reasonably possible”.⁶¹
- [3.54] The case relied on in both *Heaney* and the *Employment Equality Bill* reference – *R v Chaulk* – reproduces the *Oakes* test as it originally appeared. However, it supplied some additional commentary on the application of the minimum impairment limb of the test that reflects how this limb of the test was softened in subsequent case law:

“Recent judgments of this Court ... indicate that Parliament is **not** required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the “same” objective or would achieve the same objective as effectively.”⁶²

- [3.55] Choudhry has observed that, since *Edwards Books*, the court continued to depart from the *Oakes* standard, particularly regarding the strictness imposed under minimum impairment. Subsequent case law preferred categorical distinctions (eg, criminal law vs civil law) that would attract varying amounts of deference depending on the degree to

that the Canadian cases cited were partly determined on foot of the Canadian Charter of Rights”.

⁵⁹ Section 1 of the Charter of Fundamental Rights and Freedoms provides that “[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

⁶⁰ *R v Oakes* [1986] 1 SCR 103 at para 70, citing *R v Big M Drug Mart* [1985] 1 SCR 295, at page 352. Emphasis original.

⁶¹ *R v Edwards Books and Art* [1986] 2 SCR 713 at page 768.

⁶² *R v Chaulk* [1990] 3 SCR 1303 at page 1341, citing: *R v Edwards Books and Art Ltd* [1986] 2 SCR 713; *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927; *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990] 1 SCR 1123.

which Parliament could be said to have had a reasonable basis for concluding it had impaired the right as little as possible.⁶³

- [3.56] It is notable that in *In Re Article 26 and the Employment Equality Bill 1996*, the Supreme Court preferred the less stringent *Edwards Books* formulation of the minimum impairment test. The Court set out this element of the test as asking whether the measure “intrude[s] into constitutional rights **as little as is reasonably possible?**”⁶⁴ While the *Heaney* statement of the test is the most frequently referenced in Irish case law, both the Canadian jurisprudence after *Oakes* and the way in which the test was stated in the *Employment Equality Bill* reference provide important contextual and interpretative assistance in applying the “minimum impairment” limb of proportionality.
- [3.57] It is clear from *Edwards Books* that the Canadian courts have held that a standard of perfection is not required, and that some leeway and deference should be afforded to the legislature.⁶⁵ That is particularly so when Parliament is tackling a complex social problem where there may be many options open to achieve the desired object and no certainty as to which will be the most effective.⁶⁶ The Canadian courts have therefore held that a measure will pass the “minimum impairment” test if it is established that there was some degree of tailoring and that the measure chosen falls “within a range of reasonable options”.⁶⁷
- [3.58] In assessing whether the chosen measure falls within a range of reasonable alternatives, the Canadian courts have held that the test is whether “there is an alternative, less drastic means of achieving the objective in a real and substantial manner”.⁶⁸ The requirement to choose an “equally effective” alternative measure should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government’s goal. However,

⁶³ Choudhry, “So What is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis Under the Canadian *Charter*’s Section 1” (2006) 34 *Supreme Court Law Review* 501 at page 511.

⁶⁴ *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 at page 384. Emphasis added.

⁶⁵ See also *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 (MacLachlin J) at para 160.

⁶⁶ *Canada (Attorney General) v JTI-Macdonald Corp* [2007] 2 SCR 610 at para 43.

⁶⁷ *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 (MacLachlin J) at para 160.

⁶⁸ *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567 at para 55.

the Canadian courts have also held that while the government is entitled to deference in formulating its objective, that deference should not be “blind or absolute”.⁶⁹

- [3.59] In Ireland, the courts have, occasionally, held that the minimum impairment test does not even require the court to examine the availability of alternative, less restrictive means of achieving the same objective. This approach sees the court consider only whether the measure adopted could have been less restrictive in and of itself. This approach was taken by the Supreme Court in *Murphy v Independent Radio and Television Commission*⁷⁰ where the Supreme Court, when considering a ban on all religious advertisements under section 10(3) of the *Radio and Television Act 1988* (1988 Act), held that “once the Statute is broadly within the area of competence of the Oireachtas and the Oireachtas has respected the principle of proportionality, it is not for this Court to interfere simply because it might have made a different decision.”⁷¹ This approach was later followed by the High Court (O’Sullivan J) in decision in *Colgan v Independent Radio and Television Commission*⁷² which again concerned section 10(3) of the 1988 Act. The Court considered that the statements of the Supreme Court in *Murphy* were to be read as meaning that the court will not condemn a wider infringement for failing to impair the rights as little as possible, where there is a rational explanation for the wider infringement.⁷³

- [3.60] Kenny has observed that:

“There are few cases where the [minimum impairment] test has invalidated legislation. The only instances of strong minimum impairment are isolated cases that are unusual and unexplained departures from general practice, or are best understood as not being minimum impairment problems at all.”⁷⁴

⁶⁹ *Ibid.*

⁷⁰ [1999] 1 IR 12.

⁷¹ *Ibid* at page 27.

⁷² [1998] IEHC 117, [2000] 2 IR 490.

⁷³ [1998] IEHC 117, [2000] 2 IR 490 at page 512.

⁷⁴ Kenny, “Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland” (2018) 66 *American Journal of Comparative Law* 537 at page 552. The examples given of an “unusual and unexplained departure from general practice” are *King v Minister for the Environment* [2007] 1 IR 296 (where a stronger “minimum impairment” test was applied after the measure had already failed the fourth “balancing” limb of the test) and *Dunnes Stores v Ryan* [2002] 2 IR 60. See also Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para [7.1.67].

[3.61] This approach to the minimum impairment test (which in general terms appears to be comparable to the Canadian approach), if applied in the context of capping damages, would likely be quite deferential to the legislative measure adopted. This would see the court consider only whether the method of legislative capping chosen itself could have been less restrictive and would not necessarily consider alternative possible models of capping damages. The factors likely to be considered under this approach would be the value of any cap or caps and whether the legislation is mandatory or presumptive in nature.

D. The measure must be such that its effects on rights are proportional to the objective (overall proportionality)

[3.62] One of the most, if not the most, comprehensive applications of the fourth and final element of the *Heaney* test, the overall proportionality element, can be seen in *Daly v Revenue Commissioners*.⁷⁵ In that case, the High Court (Costello P) found that legislation that effectively resulted in the double taxation of individuals providing professional services to the State was unconstitutional. The Court carefully weighed the objective of the measure against the effects. The Court identified the objective as being to minimise the difference in the way employed professionals and self-employed professionals are treated in the tax system and to prevent tax avoidance. The burden to the plaintiff was that he overpaid taxes, with a delayed refund, for an indefinite period. The Court concluded that the benefits achieved by the measure were small, but that the effects on the plaintiff were severe, and so the measure adopted was out of proportion to the objective.

[3.63] While *Daly* is generally considered to be one of the few cases that applied the overall proportionality test well,⁷⁶ it is worth noting that the case was unusual in that the statutory provision involved was very specific in nature and so it lent itself to a detailed assessment. However, the commentary of the Court remains relevant and useful in the context of a discussion around capping legislation. In particular, the Court made a point of stating that it is not the task of the court, nor is it within the court's jurisdiction, to determine how the relevant objective could best be achieved. The task for the court is limited to an assessment only as to whether the measure affects constitutional rights in a manner out of proportion with the objective that it is

The examples of cases that are not really minimum impairment cases at all are *Blehein v Minister for Health* [2009] 1 IR 275 and *McCann v District Judge Monaghan* [2009] 4 IR 200, both of which involved judges suggesting the relevant issue was a "rational connection" one rather than "minimum impairment". See also Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para [7.1.60].

⁷⁵ [1995] 3 IR 13.

⁷⁶ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.71.

designed to achieve. In the context of capping legislation, the objective behind any measure might be the control of the cost of insurance, or to ensure proportionality between damages and the severity of injury, or any other objective that the Oireachtas might find desirable. Applying the comments of the High Court in *Daly*, it would not be for the court to consider whether either of these measures would be better achieved by an alternative model of capping damages, or some other type of legislative measure.

(ii) *Rationality Test*

[3.64] The second test occasionally employed by the courts in the context of a restriction of constitutional rights is the “*Tuohy* test” or the “rationality test”. This test was set out by the Supreme Court in *Tuohy v Courtney*⁷⁷ shortly after the judgment of the High Court in *Heaney*, but before the Supreme Court explicitly endorsed the proportionality test in *In Re Article 26 and the Employment Equality Bill 1996*.⁷⁸ The *Tuohy* case concerned, in part, a challenge to section 11 of the *Statute of Limitation Act 1957* (1957 Act) which placed a fixed, mandatory, six year time limit on initiating a civil claim in tort (other than an action for personal or fatal injury). As a result of section 11, the plaintiff found his claim was statute barred, even though he had been unaware that he had a cause of action until after the relevant time period had expired. The question for the Court was whether section 11, because it did not include a “date of discoverability” caveat, constituted an impermissible infringement of the plaintiff’s right to litigate. Having recorded that it had been argued by counsel, and in the opinion of the Court, correctly argued, that the Oireachtas, in legislating for time limits on the bringing of actions is “essentially engaged in a balancing of constitutional rights and duties”, the test 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.”⁷⁹

⁷⁷ [1994] 3 IR 1.

⁷⁸ [1997] 2 IR 321.

⁷⁹ [1994] 3 IR 1 at page 47 (emphasis added).

- [3.65] The Court, in applying the rationality test, examined the objectives behind the legislation, those being to protect the defendant against stale actions, to ensure expeditious trials and to promote finality and certainty in potential claims and the counter-balance that limitation periods should not cause undue hardship. The Court took note of the fact that the 1957 Act contained extensions of the periods of limitation in cases of disability, acknowledgment, part payment, fraud and mistake which constituted "a significant inroad on the certainty of finality" and the Court also pointed to the fact that the defendant is required to establish sufficient gross or unreasonable delay before an action would be dismissed. Taking all these factors into account, the Court upheld section 11 as constitutionally valid, stating that the measure was "supported by just and reasonable policy decisions and is not accordingly a proper matter for judicial intervention."⁸⁰
- [3.66] The *Tuohy* test is generally considered to be more deferential or less interventionist⁸¹ than the *Heaney* test, and so, depending on which of the two tests is employed by the court, there could be a significant effect in terms of the outcome of any constitutional assessment of relevant legislation.
- [3.67] Similarly, the Supreme Court in *In Re Article 26 and the Regulation of Information (Services outside the State for the Termination of Pregnancies) Bill 1995*⁸² 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".⁸³ The Court went on to state that, where there is an exercise such as this, the correct test to be applied is the *Tuohy* test.⁸⁴
- [3.68] The Supreme Court in *Tuohy* itself stated that the rationality test should apply to any legislation 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".⁸⁵ This suggests that the concept of "rights" that

⁸⁰ [1994] 3 IR 1 at pages 49-50.

⁸¹ Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.87.

⁸² [1995] 1 IR 1.

⁸³ [1995] 1 IR 1 at page 45.

⁸⁴ [1994] 3 IR 1 at page 47.

⁸⁵ [1994] 3 IR 1 at page 47.

may be balanced under the *Tuohy* test is quite broad: it may include a general sense of the public interest and common good to be weighed against the restriction at issue.⁸⁶

- [3.69] In *In Re Article 26 and the Health Amendment (No 2) Bill 2004*⁸⁷ the Supreme Court opted not to apply the *Tuohy* test on the basis that the financial interests of the State did not constitute a competing constitutional right. The Court clarified that *Tuohy* should only apply to private interests, and not interests exclusive to the State, such as finances. The Court stated as follows:

“This is not at all the type of balancing legislation which was in contemplation in *Tuohy v. Courtney* [1994] 3 I.R. 1, *White v. Dublin City Council* [2004] 1 I.R. 545 or *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321 ... the invocation of these Articles [Articles 43 and 40.3.2° of the Constitution] in circumstances where rights such as arise in this case, rights very largely of persons of modest means, are to be extinguished in the sole interests of the State's finances would require extraordinary circumstances.”⁸⁸

- [3.70] One consultee considered that in the context of capping legislation, the *Heaney* test is the appropriate test. This was based on a number of factors, including that (1) the *Heaney* test is the more widely-applied test; (2) the better view is that the *Tuohy* test only applies where there is a direct conflict between competing constitutional rights; and (3) the *Heaney* test is the more appropriate standard where the benefit of the measure is more diffuse to society in general. This argument was further supported by the statement in *Kearney v McQuillan and North Eastern Health Board (No 2)*⁸⁹ that a damages 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

⁸⁶ With regard to the role of the Oireachtas in balancing rights as against the common good, Kenny J noted, in *Ryan v Attorney General* [1965] IR 294 at page 312, that: “When dealing with controversial social, economic and medical matters on which it is notorious that views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of its citizens”.

⁸⁷ [2005] IESC 7, [2005] 1 IR 105.

⁸⁸ [2005] IESC 7, [2005] 1 IR 105 at page 206.

⁸⁹ [2012] IESC 43.

be reflected in increased insurance costs, taxation, or perhaps a reduction in some social service.”⁹⁰

- [3.71] In the view of the consultee, this statement locates damages awards in a societal context.
- [3.72] For the sake of completeness, and since a number of consultees expressed the view that it could not be predicted with any certainty which of the two tests would be applied in the context of capping damages legislation, each of the four Models set out in Chapter 4 below is considered in light of both the *Heaney* and the *Tuohy* tests.

3. Equality before the Law

- [3.73] Some consultees agreed that, depending on how capping legislation might be calibrated, the right to equality could be engaged. The right to litigate and the right to an effective remedy discussed above, are unenumerated, implied, rights under Article 40.3. By contrast, the right to equality before the law is found in Article 40.1, which 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 the differences of capacity, physical and moral, and of social function.”

- [3.74] There are two questions that a plaintiff must answer in establishing an entitlement to a remedy for breach of his or her right to equality under Article 40.1:
- (1) does the guarantee of equality apply to him or her in the circumstances? and
 - (2) is the discrimination he or she is complaining of unlawful (ie, “invidious”)?

- [3.75] On the first question, does the guarantee of equality apply to the plaintiff in the circumstances, the reference to “human person” has been held in some instances to require that the plaintiff must face prejudice against an essential aspect of his or her “human personality” in order for the protection under Article 40.1 of the Constitution to apply. The human personality doctrine has been used restrictively to exclude, for example, economic and trading activity from the scope of constitutional equality protections,⁹¹ though there is evidence that this approach appears to have fallen out

⁹⁰ [2012] IESC 43 at para 28.

⁹¹ *Quinn’s Supermarket Ltd v Attorney General* [1972] IR 1; *Murtagh Properties Ltd v Cleary* [1972] IR 330.

of favour.⁹² In *In Re Article 26 and the Employment Equality Bill 1996* the Supreme Court held that, while the forms of discrimination that are, presumptively, prohibited by Article 40.1 are not specified, they would “manifestly include classifications based on sex, race, language, religious or political opinions”.⁹³

- [3.76] As noted above, the Supreme Court also considered that, while age discrimination (whether involving older or younger persons) and disability discrimination were not included in its list of “manifestly” prohibited classes of discrimination, it was entirely a legitimate objective for the Oireachtas to address those forms of discrimination in the 1996 Bill. While the list of “manifest” classes of discrimination in the *Employment Equality Bill* case appears relatively limited, it should be borne in mind that this list was written almost 25 years ago, and that a more expansive “manifest” list could be adopted a quarter of a century later.
- [3.77] In other instances, the courts have seemed 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 right.⁹⁴
- [3.78] On the second question, as to the lawfulness of the discrimination, the courts have repeatedly held that the mere fact that a law discriminates between one group of persons and another, does not in and of itself render the measure constitutionally invalid. What is necessary to establish invalidity is the existence of **invidious** discrimination.⁹⁵
- [3.79] In examining whether a piece of legislation constitutes an invidious discrimination, the courts have favoured the test set out by the High Court (Barrington J) in *Brennan v Attorney General*.⁹⁶ This test is:

that the [statutory] classification must be for a legitimate legislative purpose, that it must be relevant to that purpose, and that each class must be treated fairly.”⁹⁷

⁹² Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.2.54.

⁹³ [1997] IESC 6 at para 116, [1997] 2 IR 321 at page 347.

⁹⁴ *The People (DPP) v Quilligan (No 3)* [1993] 2 IR 305.

⁹⁵ *The People (DPP) v Quilligan (No 3)* [1993] 2 IR 305 at page 321.

⁹⁶ [1983] ILRM 449 (HC); [1984] ILRM 355 (SC). The case involved a constitutional challenge to the validity of agricultural valuation legislation.

⁹⁷ [1983] ILRM 449, at page 480. On appeal, the Supreme Court held that Article 40.1 was not relevant to the plaintiffs’ challenge to the agriculture valuation legislation, because it did not

- [3.80] An application of that test can be seen in *In Re Article 26 and the Employment Equality Bill 1996* where the Supreme Court, when dealing with the issue of age discrimination, held that a classification based on age was not in and of itself impermissible under Article 40.1 but that it must, however, be capable of justification on the grounds set out by the High Court in *Brennan v Attorney General*.⁹⁸
- [3.81] 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 viable comparator class. The context within which the equality argument is made is relevant to the identification of the comparator class. In this regard, the Supreme Court (O'Donnell J) in *MR and DR v An t-Ard Chláraitheoir* stated that:

“[a]ny equality argument involves a proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unlike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement.”⁹⁹

- [3.82] In the same vein, it could be said that two plaintiffs, each of whom has suffered a personal injury, one minor and one severe, are the same in some regards, for example, for the purposes of access to the court, and the right to an effective remedy. On the other hand, it could not be said that the two plaintiffs are the same for the purposes of the actual award of general damages to which they are entitled. This is supported by the fact that the courts have themselves developed a three-point scale to be applied in the context of assessing personal injuries awards, that is 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 other lesser categories”.¹⁰⁰ In the context of capping damages,

affect them in their capacity as human persons: [1984] ILRM 355 at pages 364-365. However, the Supreme Court agreed with the view of the High Court that “the whole system is shot through with unnecessary anomalies and inconsistencies” ([1983] ILRM 449 at page 469) and that, on that ground, it was unconstitutional because it involved an unjust attack on the plaintiffs’ property rights under Article 40.3: [1984] ILRM 355 at page 365.

⁹⁸ [1997] IESC 6, [1997] 2 IR 321 at page 346.

⁹⁹ [2014] IESC 60, [2014] 3 IR 533 at para 241.

¹⁰⁰ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 at para 44.

viable comparator classes will be as wide or as narrow as the category or categories of cap or caps contemplated. Well-defined categories that are clear, comparable to the categories defined by the courts and have a qualitative distinction would make any model of capping less vulnerable to an equality argument.

4. Fair procedures and bias

- [3.83] Some consultees raised in their submissions that a particular model of capping legislation could raise an additional issue not discussed in the Issues Paper, namely, if the model involved conferring an advantage on the executive, whether this breached a fundamental principle of fair procedures.
- [3.84] It was also suggested by a consultee that a related principle to the right to an effective remedy, discussed above, is the principle of “equality of arms.” This phrase is conventionally used in the context of a dispute between parties of unequal bargaining powers, including where a private party, whether an individual or a business, is in dispute with a State authority. Fundamentally, equality of arms requires that both sides in such a dispute should have the same opportunity to make their case, which is, as noted below, a basic principle of fair procedures.¹⁰¹ The consultee suggested that the principle of equality of arms may be engaged where one party to the litigation, a State body, has the benefit of a monetary limitation on the amount of its liability through capping legislation.
- [3.85] In essence, the long-established principle of fair procedures, or natural justice, comprises two elements. The first element, procedural fairness, requires that those affected by a decision must be given an equal opportunity to present their side of the case before the decision is given, the requirement to hear both sides (*audi alteram partem*). The second element, the rule against bias, is that decision-making should involve an independent decision-maker who is not biased in the sense that the decision-maker does not have an interest, financial otherwise, in the outcome of the case, or should not be a “judge in their own cause” (*nemo iudex in causa sua*).
- [3.86] In the context of capping legislation, some consultees suggested that, if the model conferred an advantage on the State, in that its objective might explicitly be to reduce

¹⁰¹ The following is an explanation of the concept of equality of arms, given in the context of the right to an effective remedy under Article 13 of the European Convention on Human Rights and Fundamental Freedoms: “As a general rule, the fundamental criterion of fairness, which encompasses the equality of arms, is a constitutive element of an effective remedy. A remedy cannot be considered effective unless the minimum conditions enabling an applicant to challenge a decision that restricts his or her rights under the Convention are provided.” See European Court of Human Rights, *Guide to Article 13 of the European Convention on Human Rights – Right to an Effective Remedy* (2020) at page 13, available at <https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf> accessed on 14 July 2020.

the level of awards in cases involving the State as defendant in personal injuries claims, this may raise an issue under the principles of fair procedures. This may be especially the case if the model involved delegating to a Minister the setting of a cap or series of caps without any opportunity for those affected to be heard, that is, to have an input into the decision-making process. In addition, and assuming that the Act conferring such a delegated power could meet the “principles and policies” test of the non-delegation doctrine, which is discussed below,¹⁰² the other question that arises is whether it is constitutionally permissible for a Minister who, as a member of the executive branch may have an interest in limiting the expenditure involved in awards against the State, to set limits to the level of awards in such cases.

[3.87] As to whether affected persons have a “right to be heard” before legislation is enacted, the submissions received accepted that it was unlikely that such an argument could succeed. In the Supreme Court decision *Garda Representative Association v Minister for Public Expenditure and Reform*, Clarke CJ noted:

“[L]egislation may confer on a decision maker the power to make specific decisions affecting the rights and obligations of individuals. Sometimes that power is conferred on a Minister, sometimes the power is conferred on officials and sometimes the power is conferred on a statutory body. In such cases, it is clear that constitutionally fair procedures must be followed prior to any adverse decision being made.

However, it does not seem to me that the real question which arises in determining whether constitutionally fair procedures are mandated is concerned with the form in which such a decision is promulgated. The fact that an individual decision affecting individual rights and obligations might take the form of a statutory instrument could not, in and of itself, deprive the individual concerned of such entitlements in relation to fair procedures as they would enjoy if exactly the same decision were to be taken in a different form. The entitlement to fair procedures depends on the substance rather than the form of the type of decision which may be taken.

That being said, there clearly are many forms of delegation conferred by statute whereby the role conferred (most typically on a Minister or the Government) can properly be described as a secondary legislative function rather than an individual decision

¹⁰² See paras 3.130–3.143, below.

making function. It seems to me to be unnecessary, for the purposes of this case, to attempt to define with any precision where the line between a legitimately delegated legislative function, on the one hand, and an individual decision making function, on the other hand, may lie. The entitlement to make regulations such as those at issue in these proceedings, which potentially affect the entire public sector and where the only decisions made concern the nature of a new sick pay regime to be introduced and questions as to whether any particular broad section of public servant is to be included, fall clearly on the legislative end of the scale.”¹⁰³

- [3.88] Having regard to the views expressed by the Supreme Court in the *Garda Representative Association* case, the Commission concurs with the view expressed in the submissions that it is not likely that a challenge could be made out based on a “right to be heard” in advance of the making of a set of ministerial Regulations that otherwise met the “principles and policies” test.
- [3.89] Having said that, the Commission considers that it would be entirely consistent with general policy and guidance on better regulation that suitable public consultation would occur prior to the enactment of primary legislation, and also in advance of making any delegated legislation.¹⁰⁴ Thus, while not required under the Constitution, such advance consultation would, in the Commission’s view, add legitimacy of the ensuing legislation, provided of course that all other relevant constitutional requirements were met.
- [3.90] Turning to the other aspect of fair procedures, the rule against bias, at one level a Government Minister has no direct interest as such in the outcome of cases involving the State as defendant, other than having a general interest as a member of the executive in monitoring the limited resources available to the State to provide the public services expected in a modern State such as Ireland. In that respect also, the Commission considers that a claim of bias would be difficult to make out.

¹⁰³ [2018] IESC 4, at paragraph 8.6–8.8

¹⁰⁴ See generally *Consultation Principles & Guidance* (Department of Public Expenditure and Reform, 2016), available at <https://assets.gov.ie/5579/140119163201-9e43dea3f4b14d56a705960cb9354c8b.pdf>.

5. Separation of powers, including delegating powers guided by “principles and policies”

[3.91] Having considered the relevant constitutional rights engaged by capping legislation, the Commission turns to discuss the relevance of separation of powers.

(a) Separation of powers in the Constitution echoes US “checks and balances”

[3.92] The concept of the “separation of powers” is that the three key elements of decision-making in the State, the executive (in general terms, referring to the Government), the legislature (the President of Ireland and Houses of the Oireachtas) and the judiciary (the judges engaged in the administration of justice) are, in general terms, to operate separately. This concept, which derives from 18th century Enlightenment political thinking, is in part based on the idea that State power should not be concentrated in a single authority, whether a monarch or the head of government of a republic.

[3.93] However, it is also important to note that the Constitution does not contain a rigid or strict separation of powers, and that there are important overlapping roles and functions between these three branches. This is also consistent with the 18th century concept of separation of powers, what is described in the US as “checks and balances.” Thus, while the three branches have separate roles and functions, they also overlap. In the Constitution of Ireland, the following examples illustrate this non-rigid separation of powers.

[3.94] Article 13 of the Constitution provides that the Taoiseach, the head of the executive branch (the Government) must be elected by Dáil Éireann, one of the Houses of the Oireachtas, the National Parliament. Similarly, Article 35.2 provides that “[a]ll judges shall be independent in the exercise of their judicial functions”, while Article 35.1 provides that judges shall be appointed by the President of Ireland, who forms a constituent part of the Oireachtas, and the President makes this appointment on the nomination of the Government, the executive.

[3.95] Article 15.2 of the Constitution confers on the Oireachtas the sole and exclusive function of enacting legislation, but Article 34 of the Constitution also confers on the High Court and, on appeal, the Court of Appeal and the Supreme Court, the power to declare invalid any legislation enacted by the Oireachtas if any of those courts determines, in a case that can be initiated by any person affected by any legislation, that the challenged legislation is invalid having regard to the provisions of the Constitution. Article 26 of the Constitution also provides that the President may refer a Bill that has been passed by both Houses of the Oireachtas to the Supreme Court to determine whether any such Bill, or any provision of the Bill, is repugnant to the Constitution. The Supreme Court must hear and determine such a reference from the

President and, if the Supreme Court finds any provision of such a Bill to be in conflict with the Constitution, the President must refuse to sign the Bill into law.

- [3.96] A consequence of these areas of overlap is that each branch shows appropriate respect for the other branches, which is sometimes illustrated by a deference to the decision-making made by another branch, a reluctance to “second guess” the correctness of the other branches’ decisions. This includes, for example, the entirely appropriate reluctance of the Government and the Oireachtas to criticise decisions of the courts out of deference to the separation of powers. It also includes the correlative deference of the courts to the choices made by the Government and Oireachtas, and to declare those choices unconstitutional only where a clear breach of the Constitution has been established.
- [3.97] This non-rigid separation of powers, in which the three branches overlap each other, has been recognised by the courts in a number of cases. Thus, in *Abbey Films Ltd v Attorney General*¹⁰⁵ the Supreme Court stated that “the framers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers.” In *Laurentiu v Minister for Justice*, the first case in which the Supreme Court struck down legislation under the “principles and policies” test (considered further below), Denham J in the Supreme Court stated that:

“the general structure of the Constitution follows the doctrine of the separation of powers. A similar approach, though not identical, can be seen in the Constitution of the United States of America. The Irish structure is not a simple or clear-cut separation of powers. There is overlapping and impingement of powers. However, in a general sense there is a functional division of power”.¹⁰⁶

- [3.98] Denham J, in her judgment, underlined the broad analogy with the US federal Constitution, with which the phrase “checks and balances” is often associated, when she added:

“The framework of the Constitution, the separation of powers, the division of power, retains a system which divides by function the powers of government to enable checks and balances to benefit democratic government. Also, in accordance with the democratic basis of the Constitution, it is the people’s representatives who make the law, who determine the principles and policies”.¹⁰⁷

¹⁰⁵ [1981] IR 158 at page 171.

¹⁰⁶ [1999] IESC 47, [1999] 4 IR 26 at page 60 (judgment of Denham J, with whom Hamilton CJ concurred).

¹⁰⁷ [1999] IESC 47, [1999] 4 IR 26 at page 61.

- [3.99] This reflects a specific element of the “checks and balances” in the Constitution, namely, that there are circumstances in which the Oireachtas may, subject to certain “checks”, delegate a limited amount of legislative power to another body, such as a Government Minister or another body such as a supervisory or regulatory body. This is also sometimes referred to as the “non-delegation” doctrine, because such delegation is not permitted unless the Oireachtas has provided, in an Act, the “principles and policies” that provide clear guidance to the delegated decision-maker.
- [3.100] The basis for allowing such delegation of what appears to be the “sole and exclusive” law-making authority of the Oireachtas is, to some extent, pragmatic. This is because it would not be practicable for the Oireachtas to enact all the detailed rules in an Act, and therefore the details are left to a Minister or some other body to set out the details in, for example, Regulations made under the Act. In such instances, the “non-delegation” doctrine provides a “check” on excessive delegation by the Oireachtas through the requirement that the Oireachtas must provide guiding “principles and policies” to the delegated decision-maker that places a limit on the scope of the delegated power. The Commission discusses the non-delegation doctrine, the “principles and policies”, test, below.

(b) Separation of powers allows for overlapping functions

- [3.101] The nature of the separation of powers under the Constitution and the related question of delegation of functions between the three branches is clearly engaged by the subject matter of this project and Report. A key question is whether the separation of powers provided for in the Constitution prohibits one or other branch from imposing a cap of any type on general damages.
- [3.102] Thus, does the separation of powers prohibit the Oireachtas from enacting capping legislation that would exclude any role for the judiciary? Does the historical fact that, prior to the foundation of the State, the amount of damages awarded in personal injuries was largely determined by juries rather than judges indicate that this function is not a fundamental feature of the administration of justice that, under Article 34, can be carried out only by judges? Is this affected by the fact that the Oireachtas, in the *Courts Act 1988*, provided that the award of damages in High Court personal injuries actions should be transferred from juries to judges, but remain with juries in defamation, false imprisonment and assault cases?
- [3.103] The Commission considers that it may be helpful in this context to return to the decision of the Supreme Court in *Laurentiu v Minister for Justice*.¹⁰⁸ In the course of discussing the separation of powers found in the Constitution the Court, as noted above, compared it with the “checks and balances” associated with the US federal

¹⁰⁸ [1999] IESC 47, [1999] 4 IR 26.

Constitution. The Court (Denham J) also cited with approval the decision of the US Supreme Court in *Mistretta v United States*,¹⁰⁹ in which that Court upheld the constitutionality of the US federal *Sentencing Reform Act 1984* (1984 Act), which had established the United States Sentencing Commission.

- [3.104] The US Supreme Court held that the 1984 Act complied with the US non-delegation doctrine (called the “intelligible principle” test) because the 1984 Act had set down clear principles for the Sentencing Commission to apply. The US Supreme Court also held that it was permissible for the Houses of the US Congress to establish the Sentencing Commission as an independent body located within the judicial branch, and to include in the 1984 Act a requirement that federal judges serve on the Commission. The US Supreme Court held that it was also permissible for the US Congress to provide that the Sentencing Commission should share their statutory authority with lay members (non-judges) and to provide that the lay members would be appointed by the US President and that the President could remove the lay members for cause.
- [3.105] In *Laurentiu*, the Supreme Court quoted the following passage from the judgment of Blackmun J for the US Supreme Court in the *Mistretta* case:

“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. The Constitution provides that ‘[a]ll legislative Powers herein granted shall be vested in a Congress of the United States,’ U.S. Const., Art I. § 1, and we long have insisted that ‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch. *Field v. Clark*, 143 U.S. 649, 692 (1892). We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate branches. In a passage now enshrined in our jurisprudence, Chief Justice Taft, writing for the Court, explained our approach to such cooperative ventures: ‘In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination.’ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorised to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’ *Id.*, at 409.

¹⁰⁹ 488 US 361 (1989).

Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives. See *Opp Cotton Mills, Inc. v. Administrator, Wage and Hour Div. of Dept. of Labour*, 312 U.S. 126, 145 (1941) ('In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy'); see also *United States v. Robel*, 389 U.S. 258, 274 (1967) (opinion concurring in result). 'The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function.' *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). Accordingly, this Court has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.' *American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)."¹¹⁰

[3.106] Having cited this passage from *Mistretta*, Denham J in the Supreme Court in *Laurentiu* commented:

"This judgment sets out clearly the policies established by the legislature of the United States. The Supreme Court of the United States applied the 'intelligible principle' test and found the delegation to be sufficiently specific and detailed. It found that Congress had requested the Commission to meet three goals which were spelt out. Further, Congress specified four purposes which the delegated authority must pursue, Congress prescribed the tool for the Commission to use and Congress directed the Commission, as a guide, to consider seven specified factors. In addition, Congress set forth eleven factors for the Commission to consider in establishing categories and the Congress also provided detailed guidance about categories of offences and offender characteristics. This case shows modern legislation in the United States of America giving a delegated discretion yet with detailed principles and standards set out by the legislature."¹¹¹

[3.107] The decision in *Laurentiu*, including its citing with approval the approach of the US Supreme Court in the *Mistretta* case, has some relevance to the subject matter of this project and Report. As noted below, and in the discussion of the four capping models in Chapter 4, a general analogy may be made between sentencing legislation and

¹¹⁰ 488 US 361, 371 (1989), quoted in *Laurentiu v Minister for Justice* [1999] IESC 47, [1999] 4 IR 26 at pages 53-54 (judgment of Denham J).

¹¹¹ [1999] IESC 47, [1999] 4 IR 26 at pages 57-58 (judgment of Denham J).

legislation providing for the capping of damages awards in personal injuries cases. The Commission appreciates that, like all analogies, there are significant differences that can also be drawn between them.

- [3.108] Nonetheless, for the purposes of this Report, the Commission notes that the Supreme Court in *Laurentiu* considered that the analysis of the US Supreme Court provided a useful precedent in support of the view that, consistent with separation of powers, a function such as sentencing could, through legislation, be a matter in which competence could be shared across the three branches, legislative, executive and judicial. As the US Supreme Court put it, the legislature may seek the cooperative assistance of another branch, and this was also for the practical reason that this may be required “in our increasingly complex society, replete with ever changing and more technical problems.”
- [3.109] It is notable that the cooperative model at issue in the *Mistretta* case is, in broad terms, similar to the composition of the Sentencing Guidelines and Information Committee (SGIC) established under the *Judicial Council Act 2019*, a combination of judicial and lay involvement established under legislation enacted by the Oireachtas.
- [3.110] The Commission considers that a similar view could be taken in respect of capping legislation. However, it is also important to consider another aspect of the separation of powers in this context, namely judicial independence.

(c) Separation of powers and judicial independence

- [3.111] 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.”

- [3.112] Thus, Article 34.1 vests the power to administer justice in the courts. As noted by one consultee, once a power is recognised as a judicial function, the courts have defended their jurisdiction to administer justice. A clear example of this can be seen in *Buckley v Attorney General*¹¹² (the Sinn Féin Funds Case), which concerned section 10 of the *Sinn Féin Funds Act 1947*. That section provided that, on the passing of the Act all further proceedings in an action concerning the ownership of £20,000, the remains of a fund originally built up by the old Sinn Féin organisation, should by virtue of section 10 be stayed and that the High Court “if an application in that behalf were made *ex parte* or

¹¹² [1950] IR 67.

on behalf of the Attorney General, [should] make an order dismissing the pending action without costs".¹¹³ The effect of the Act was that the dispute was determined by the Oireachtas and the Court was required to dismiss the plaintiffs' claim. The Supreme Court held as follows:

"We have already referred to the distribution of powers effected by Art. 6. The effect of that article and of Arts. 34 to 37, inclusive, is to vest in the Courts the exclusive right to determine justiciable controversies between citizens or between a citizen or citizens, as the case may be, and the State. In bringing these proceedings the plaintiffs were exercising a constitutional right and they were, and are, entitled to have the matter in dispute determined by the judicial organ of the State. The substantial effect of the Act is that the dispute is determined by the Oireachtas and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute. In our opinion this is clearly repugnant to the provisions of the Constitution, as being an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain."¹¹⁴

[3.113] Article 34.1 therefore comes into play in the discussion of capping damages, as any restriction of judicial discretion by the legislature may be perceived as interfering with judicial independence if the determination of the amount (quantum) of damages is an exclusively judicial function. Models 1 and 2, discussed in Chapter 4 below, both envisage that the Oireachtas cap damages by way of primary legislation, while Model 3 envisages that this power could be delegated to a Minister or other body. All three models therefore raise a concern in relation to their potential impact on the independence of the judiciary.

[3.114] In some respects, capping legislation may be seen as analogous to sentencing in criminal legislation. A line of case law, beginning with *Deaton v Attorney General*,¹¹⁵ that explores the interference by the Oireachtas with sentencing discretion is instructive in considering damages capping legislation.

¹¹³ Section 10 of the *Sinn Féin Funds Act 1947*.

¹¹⁴ [1950] IR 67 at page 84.

¹¹⁵ [1963] IR 170.

[3.115] In the *Deaton* case a statutory power of the Revenue Commissioners, conferred under section 186 of the *Customs Consolidation Act 1876*, was challenged on the basis that it was inconsistent with the Constitution. Section 186 allowed the Revenue Commissioners to choose between penalties to be applied pursuant to a conviction for a customs offence. 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 general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative domain.”¹¹⁶

[3.116] *Deaton* has been cited and applied internationally as identifying particular boundary lines between the executive and the judiciary. However, later case law has progressively established certain exceptions to the *Deaton* principle.

[3.117] One of those exceptions relates to mandatory sentences or penalties prescribed by the Oireachtas upon conviction or the establishment of a particular set of facts. In *Lynch and Whelan v Minister for Justice*¹¹⁷ the Supreme Court upheld the constitutionality of section 2 of the *Criminal Justice Act 1990* which imposes a mandatory sentence of life imprisonment for murder and treason. The Supreme Court stated that as follows:

“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.”¹¹⁸

¹¹⁶ *Deaton v Attorney General* [1963] IR 170 at page 182.

¹¹⁷ [2010] IESC 34, [2012] 1 IR 11.

¹¹⁸ [2010] IESC 34, [2012] 1 IR 11 at para 49

- [3.118] The Supreme Court has also held, in *The State (O'Rourke) v Kelly*,¹¹⁹ that legislation that obliged the court, once a certain set of facts has been judicially established, to make a particular order, 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 held that since the judge in this case would still have the discretion in determining whether a demand had been duly made, it was not an impermissible infringement of the judicial power.
- [3.119] Mandatory sentences were considered again by the Supreme Court in *Ellis v Minister for Justice and Equality*.¹²⁰ In the *Ellis* case, the Supreme Court considered 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, in imposing sentence, specify a term of imprisonment not less than five years as the minimum term to be served by the person. The plaintiff had been charged with the offence of possession of a sawn-off shotgun contrary to section 27A(1) of the 1964 Act and he had a previous conviction for carrying a firearm under section 27B of the 1964 Act. The Circuit Court judge sentenced the plaintiff to five years' imprisonment but suspended the sentence in its entirety. The Director of Public Prosecutions sought a review of the sentence on grounds of undue leniency, noting the error of the trial judge, who had been unaware of the mandatory nature of the sentence to be imposed on a repeat offender.
- [3.120] The Supreme Court outlined a number of relevant principles that could be gleaned from its previous decisions on the matter of mandatory penalties, the first being that both the Oireachtas and the courts may have a role in the determination of a sentence which is to be imposed on an offender.¹²¹ The Court stated that the combined effect of the *Deaton* and *Lynch and Whelan* cases was that the Oireachtas is entitled to prescribe a "general rule" in the form of a specified penalty that will apply on the commission of an identified offence. The Court stated that another way of putting it is that the Oireachtas "may prescribe by legislation that all persons convicted of a particular offence shall be subject to the prescribed penalty".¹²² However, the Court reaffirmed that the general rule or penalty imposed must be rationally connected to the offence committed and the requirements of justice.¹²³

¹¹⁹ [1983] IR 58.

¹²⁰ [2019] IESC 30.

¹²¹ [2019] IESC 30 at para 45.

¹²² [2019] IESC 30 at para 46.

¹²³ [2019] IESC 30 at para 50.

- [3.121] The Supreme Court ultimately held that section 27A(8) of the 1964 Act was unconstitutional on the basis that, while it is permissible for the Oireachtas to prescribe a specified penalty that applies to all persons convicted of a specified offence, “it is not constitutionally permissible for the Oireachtas to determine or prescribe, by Statute a penalty to which only a limited class of persons who commit a specified offence are subject, by reason of either the circumstances in which the offences was committed, or the personal circumstances of the convicted person”.¹²⁴
- [3.122] It appears from the case law set out above that, at least in the context of sentencing, it is not unconstitutional for the Oireachtas to prescribe the general rule, but that general rule must be rationally connected to the offence committed and must apply to all persons uniformly. As put by the Supreme Court in *Ellis* “[t]his power forms part of the law-making function which has general application”.¹²⁵
- [3.123] A number of consultees raised additional concerns with the analogy drawn between capping damages and mandatory penalties in criminal law. They submitted that the range of sentences available in criminal cases has a natural limit (life imprisonment) while awards for personal injuries, on the other hand, have no natural limit. In addition, one consultee contended that the decision of the Supreme Court in *Morrissey v Health Service Executive*¹²⁶ suggests that the current maximum amount that may be awarded to a catastrophically injured plaintiff, in a case where all of the plaintiff’s needs are being provided for by way of special damages, is not properly referred to as an artificially imposed limit or ‘cap’ but simply represents what the court considers to be currently appropriate for general damages in such a case. On that basis, it was submitted that a restrictive cap has the potential to reduce damages to far below what the court might think proportionate in a particular case.
- [3.124] As discussed in Chapter 2, above, the Supreme Court in its decision in *Morrissey v Health Service Executive* considered the purpose of the upper limit on general damages and its purpose. The Court stated, of the upper limit, that:

“On one view, it is said that whatever the limit may be, it can properly be described as a “cap” on general damages so that it would, on that basis, operate as an artificial limitation reducing the damages which might otherwise properly be awarded to fully compensate an injured party. An alternative view is that the limit, which might in this context not be properly described as a “cap” at all, amounts to the current view of the appellate courts

¹²⁴ [2019] IESC 30 at para 60.

¹²⁵ [2019] IESC 30 at para 60.

¹²⁶ [2020] IESC 6.

as to the damages which should be awarded in cases of the most serious injuries. On that view, it might be said that all other damages, ranging from the very minor to those which are relatively serious but not of the most serious category, would require to be broadly proportionate to the damages awarded in the most serious cases, having regard to the level of injury suffered.”¹²⁷

- [3.125] The Court stated that it considered that the latter approach is the more appropriate. The limit amounts to the current view of the appellate courts as to the level of general damages that should be awarded in cases of the most serious injuries.¹²⁸
- [3.126] In this regard it is useful to consider why the Supreme Court originally formulated the upper limit in *Sinnott v Quinnsworth Ltd* (reconsidered and affirmed in *Morrissey*). In *Sinnott*, the Supreme Court considered that the sum of £800,000 originally awarded in the High Court (at that time, by a jury) to the catastrophically injured plaintiff “lacked all sense of reality”. The Supreme Court expressed concern that, if general damages became too high, they would constitute a punishment for the infliction of the injury, rather than an attempt to compensate the injured, and could thereby endanger the operation of public policy. On that basis, the Court considered that it was necessary that a limit or “a yardstick of a reasonable nature” must exist. The Court stated that the objective must be to determine a figure that is “fair and reasonable” and, to that end, some 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”.¹²⁹
- [3.127] It appears that the primary concern for the Supreme Court in *Sinnott* was the potential for awards of general damages to rise to levels out of proportion with the injury suffered and on that basis the Court felt it necessary to define an upper limit, one that is fair and reasonable, all things considered. From a reading of these comments of the Supreme Court in *Sinnott* and the comments of the Supreme Court in *Morrissey*, outlined above, the obvious objective is that all lesser injuries should be broadly proportionate to the damages awarded in the most serious cases.
- [3.128] Another consultee submitted that the analogy to criminal sentencing legislation and guidelines is too rudimentary to deal with the range of issues arising in a comprehensive scheme for all personal injuries, one of the reasons being that, unlike

¹²⁷ [2020] IESC 6 at para 14.6.

¹²⁸ [2020] IESC 6 at para 14.28.

¹²⁹ [1984] ILRM 523 at page 532.

time periods for the length of sentences of imprisonment set in criminal legislation, the monetary value of awards is subject to inflation and deflation, bringing additional problems not often arising in practice with respect to criminal sentencing provisions.

- [3.129] While it may be true that time periods in criminal sentencing legislation will not be subject to the same inflation and deflation as monetary awards in personal injuries actions, criminal penalties in the form of fines will be subject to the same inflationary and deflationary pressures, and, as with sentencing provisions, fines also come in bands that correspond to the relative seriousness of the crime. This is the case, for example, with the maximum fines prescribed for assault,¹³⁰ assault causing harm¹³¹ and causing serious harm¹³² under the *Non-Fatal Offences Against the Person Act 1997*, set out in Table 1 of Chapter 4 below. In the context of sentencing, it can also be noted that sentencing outcomes may be impacted by several factors, depending on the perception of certain crimes as more, or less, problematic, and the influence of different sentencing principles. This was discussed in the Chapter 2 of the Commission's *Report on Mandatory Sentences*.¹³³

(d) Non-delegation doctrine

- [3.130] As already noted above in the discussion of the *Laurentiu* case, the non-delegation doctrine arises where the Oireachtas, by way of primary legislation, delegates the task of creating regulations to the Executive, for example, as is suggested under Model 3, discussed in Chapter 4 below.
- [3.131] Article 15.2.1° of the Constitution vests the exclusive power to legislate in the Oireachtas and that power has been recognised as an "assertion of a core democratic principle. Since all power comes from the People, the only body with the power to make legislation binding the People is the Oireachtas containing as it does the chosen representatives of the People".¹³⁴
- [3.132] However, as noted in *Laurentiu* when referring to the US non-delegation doctrine, it would be difficult for the Oireachtas, in an ever-increasingly complex world, to prescribe rules by way of an Act, primary legislation, for every conceivable situation. In *BUPA Ireland v Health Insurance Authority*¹³⁵ the High Court (McKechnie J) stated that "given the constitutional and statutory framework which operates in this Country, it

¹³⁰ Section 2 of the *Non-Fatal Offences Against the Person Act 1997*.

¹³¹ Section 3 of the *Non-Fatal Offences Against the Person Act 1997*.

¹³² Section 4 of the *Non-Fatal Offences Against the Person Act 1997*.

¹³³ *Report on Mandatory Sentences* (LRC 109-2013).

¹³⁴ *McGowan v Labour Court* [2013] IESC 21, [2013] 3 IR 718 at page 732.

¹³⁵ [2006] IEHC 431.

would be impossible, or at least highly impracticable, to oblige the Oireachtas to respond in a timely manner to ever changing and evolving circumstances which could have a major impact on fundamental issues".¹³⁶ The non-delegation doctrine therefore recognises that the Oireachtas can delegate some legislative details to another body, such as a Minister.

[3.133] 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*.¹³⁷ The plaintiffs challenged section 21 of the *Industrial Training Act 1967* (1967 Act), which allowed An Chomhairle Oiliúna (AnCO), the Industrial Training Authority, to 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 1967 Act was an unconstitutional delegation of legislative power to an executive body.

[3.134] 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 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."¹³⁸

[3.135] The application of the *Cityview Press* test has produced mixed results, but the test has often been relatively easy to meet. Part of the reason for this is that the test must operate in accordance with the presumption of constitutionality, and the presumption that actions by Ministers and officials will act in a constitutionally sound manner.¹³⁹ Generally, where the legislation contains some indication of the principles and policies to be applied, the legislation has been upheld.

¹³⁶ [2006] IEHC 431 at para 158.

¹³⁷ [1980] IR 381.

¹³⁸ [1980] IR 381 at page 399.

¹³⁹ *Laurentiu v Minister for Justice, Equality and Law Reform* [1999] IESC 47, [1999] 4 IR 26 at page 90.

- [3.136] *McDaid v Sheehy*¹⁴⁰ provides an example of a case where a court struck down a legislative provision as unconstitutional for lack of principles and policies. Section 1 of the *Imposition of Duties Act 1957* 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 those functions. Similarly, in *Laurentiu v Minister for Justice*,¹⁴¹ discussed above, section 5(1)(e) of the *Aliens Act 1935*, which allowed the Minister for Justice to “make provision for the exclusion or deportation” of “aliens”¹⁴² from the State, was found unconstitutional. Again, in this case, there were no discernible principles or policies to guide the Minister in the exercise of this power.
- [3.137] In contrast, in *Leontjava and Chang v Director of Public Prosecutions*, the Supreme Court upheld section 5(1)(h) of the *Aliens Act 1935* as constitutional. That provision allowed the Minister to make and order which would “require ... aliens to comply, while in Saorstát Éireann, with particular provisions as to registration, change of abode, travelling, employment, occupation, and other like matters”. The Court considered the policy behind the measure as being: “the desirability of regulating the registration, change of abode, travelling, employment and occupation of aliens while in the State and the further desirability of regulating ‘other like matters’”.¹⁴³ The Court stated that the use of the term “particular provisions” in section 5(1)(h) was unexceptional, it being entirely appropriate for the Oireachtas to specify the matters which it considered required regulation, while leaving it to the Minister to put in place specific regulatory provisions. Similarly, the Court considered that use of the expression “other like matters” is appropriate where the broad scope of the envisaged regulations is being set out in statutory form.¹⁴⁴
- [3.138] Other pieces of legislation that afford a relatively broad latitude to the Minister have been upheld. For example, the amendments proposed in section 53 of the *Health Act 1970* in the *Health (Amendment) (No 2) Bill 2004* were held not to be an unlawful delegation of the legislative power by the Supreme Court.¹⁴⁵ These amendments, which were enacted as the *Health (Amendment) Act 2005*, allowed the Minister to impose charges on users of in-patient services in nursing homes but with the caveat

¹⁴⁰ [1991] 1 IR 1.

¹⁴¹ [1999] IESC 47, [1999] 4 IR 26.

¹⁴² This refers to non-citizens. The term “non-national” is more frequently used in modern legislation (eg, *Immigration Act 1999, Irish Nationality and Citizenship Act 2001*).

¹⁴³ [2004] IESC 7, [2004] 1 IR 591 at page 624.

¹⁴⁴ [2004] IESC 37, [2004] 1 IR 591 at page 624.

¹⁴⁵ *In Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7.

that such charges could not exceed 80% of the non-contributory old age pension and that certain persons were excluded from the charge.

[3.139] More recent applications of the *Cityview Press* test have produced mixed results. Part IV of the *Industrial Relations Act 1946* (1946 Act), 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*.¹⁴⁶ 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 1946 Act was also held to be unconstitutional by the Supreme Court in *McGowan v Labour Court*.¹⁴⁷ 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 the industry. As in the decision in *John Grace Fried Chicken* case, the Supreme Court held that there were insufficient policies and principles to guide the Labour Court in confirming agreements and it therefore held the Part unconstitutional. In another application of the non-delegation doctrine to industrial relations legislation, Chapter 3 of the *Industrial Relations (Amendment) Act 2015* was struck down by the High Court in *Náisiúnta Leictreach Contraitheoir Eireann v The Labour Court* for failing to provide sufficient principles and policies to the Minister (and, indirectly, the Labour Court) in exercising a power to impose mandatory minimum terms and conditions of employment across a particular economic sector.¹⁴⁸

[3.140] In contrast to *John Grace Fried Chicken* and *McGowan*, the Supreme Court in *Bederev v Ireland*¹⁴⁹ upheld section 2(2) of the *Misuse of Drugs Act 1977* (1977 Act) which allowed the Minister for Justice, using secondary legislation, to add drugs to Schedule 2 of the 1977 Act, the possession or supply of which was an offence. The plaintiff in the *Bederev* case had been charged with possession of methylethcathinone, a narcotic that had been added to Schedule 2 of the 1977 Act by way of secondary legislation. The plaintiff claimed that the power conferred on the Minister by section 2(2) was too

¹⁴⁶ [2011] IEHC 277, [2011] 3 IR 211.

¹⁴⁷ [2013] IESC 21, [2013] 3 IR 718.

¹⁴⁸ [2020] IEHC 303. In a subsequent judgment, Simons J suspended this declaration of unconstitutionality for a period of six months, with a further stay on the suspended order pending an appeal: [2020] IEHC 342. However, the *Sectoral Employment Order (Electrical Contracting Sector) 2019* (SI No 251 of 2019) was quashed with immediate effect as a result of it being *ultra vires* the Minister and a breach of fair procedures, rather than its being unconstitutional as a consequence of the unconstitutionality of the 2015 Act.

¹⁴⁹ [2016] IESC 34, [2016] 3 IR 1.

broad and did not contain sufficient oversight and guidance. The Court of Appeal upheld this argument, finding that the principles and policies contained in the 1977 Act were not sufficient to guide the executive in the exercise of their power. The Court of Appeal rejected the argument that the use of the words 'dangerous', 'harmful' and 'capable of misuse' in the long title of the Act provided some guidance, holding that these words were, in themselves, too general to be sufficient guidance.¹⁵⁰ The Court of Appeal also rejected the argument that the power was implicitly limited by reference to the types of drugs already contained in the schedules to the Act.

- [3.141] On appeal, the Supreme Court overturned the Court of Appeal decision, finding that there was sufficient guidance contained within the 1977 Act. The Supreme Court considered that the entire 1977 Act, including the Long Title, the individual sections and the Schedule setting out the drugs then controlled, should be read as a whole in order to determine the boundaries to the power to add new substances. Taking the 1977 Act in its entirety, including the drugs already contained in the Schedule to the Act, the Supreme Court concluded that it was clear that the only drugs that may be added to the Schedule by way of secondary legislation are those which are dangerous to human health and subject to abuse.
- [3.142] Some consultees suggested that where an Act of the Oireachtas purports to confer a broad power on the executive, concerning a wide area of delegated legislation, this increases the need for the Oireachtas to prescribe guidance by way of principles and policies in the Act. This argument is supported by the following comments of the Supreme Court in *O'Sullivan v Sea Fisheries Protection Authority*:¹⁵¹

"An apparently wide delegation may be limited by principles and policies clearly discernible in the legislation. On the other hand, a very narrow area of delegation may require very little in terms of principles and policies in parent legislation, on the basis that by delegating an area with only a limited number of possible solutions the Oireachtas was plainly satisfied that any one of those outcomes could be chosen consistent with the policy of the Act, and properly be decided on by a subordinate body which might have access to further detailed information, or indeed on the basis that the outcome might be more easily

¹⁵⁰ [2015] IECA 38 at para 68.

¹⁵¹ [2017] IESC 75, [2017] 3 IR 371.

adjusted within the scope left to the subordinate, in the light of changing circumstances.”¹⁵²

- [3.143] In general, it can be said that the standard imposed under the *Cityview Press* test, which operates in accordance with the presumption of constitutionality, is a relatively low one to meet. Subsequent case law, in particular the decision of the Supreme Court in *Bederev*, supports the contention that the Oireachtas does not need to account for all the relevant principles and policies but must include 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. What will constitute sufficient guidance, might, as pointed out by consultees, be dictated by the breadth of power conferred by the primary legislation.

6. Discussion and conclusion

- [3.144] The key constitutional rights identified by the Commission that may be implicated by a legislative cap on damages are: (1) the right to bodily integrity; (2) property rights; and (3) the right to equality.
- [3.145] As discussed above, no constitutional right under the Irish Constitution, including the rights named above, is absolute. A restriction of constitutional rights (other than the right to equality) might be justified where that restriction can satisfy the *Heaney*¹⁵³ proportionality test or, in some instances, the *Tuohy*¹⁵⁴ rationality test.
- [3.146] The *Heaney* proportionality test comprises four elements: sufficient importance; rational connection; minimal impairment; and overall proportionality. In the context of capping damages, it is arguable that, if one model of capping damages were to satisfy the first two elements of the *Heaney* test, then any model would satisfy these two elements. This is because overall importance and rational connection both speak to the policy objective behind the measure in question. There may be several objectives behind a model of capping damages. One objective behind capping damages legislation might be to control insurance costs. Because the State is often a defendant in personal injuries claims, any savings as a result of a reduction in the award of damages could be used for other areas of public expenditure. Another plausible objective behind capping damages could be to ensure that an award of damages is related to the severity of injury suffered by the plaintiff. Any individual or body involved in determining the appropriate level of damages, whether a policymaker, member of the judiciary, the Government or the Oireachtas, will have an interest in

¹⁵² [2017] IESC 75, [2017] 3 IR 751 at para 41.

¹⁵³ *Heaney v Ireland* [1994] 3 IR 593.

¹⁵⁴ *Tuohy v Courtney* [1994] 3 IR 1.

ensuring that the amount of compensation that is awarded to someone should reflect the actual injury suffered.

- [3.147] The application of the minimal impairment and overall proportionality elements of the *Heaney* test would likely be influenced by the manner in which the chosen method of damages capping is ultimately formulated. An assessment under these elements may be influenced by factors such as whether capping legislation is presumptive or mandatory in nature and the level of any cap or caps.
- [3.148] As between the two tests, *Tuohy* and *Heaney*, the *Heaney* proportionality test requires less deference to the Oireachtas, the *Tuohy* test requiring only that the court assess “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”. As a result, the extent to which the tests are applied could have a significant effect in terms of the outcome of any constitutional assessment of relevant legislation. As noted above, for the sake of completeness, and in recognition of the fact that not all consultees were convinced that it can be predicted with any certainty which of the two tests would be applied in the context of capping legislation, each of the four Models set out in Chapter 4 below is considered in light of both the *Heaney* and the *Tuohy* tests.
- [3.149] In addition to the three key relevant constitutional rights identified above, the Commission notes that an important additional constitutional concern that may arise, depending on the specific type of capping model under consideration, is the question of the separation of powers, including the “principles and policies” test of the non-delegation doctrine. Whether or not this constitutional concern would arise in relation to a particular model of capping would depend on the form of the capping legislation.
- [3.150] Article 34.1 of the Constitution vests the power to administer justice in the courts and therefore comes into play in the discussion of capping damages, as any restriction of judicial discretion by the legislature may be perceived as interfering with judicial independence if the determination of quantum of damages is an exclusively judicial function
- [3.151] The non-delegation doctrine would come into play if the Oireachtas delegated the power to legislate to, for example, a Minister, or some other regulation-making body. The case law discussed above indicates that any primary Act of the Oireachtas that delegates the task of creating regulations to the Executive should contain sufficient principles and policies to guide the designated Minister or regulation making body in the exercise of that delegated power.¹⁵⁵ While it appears that the Oireachtas is not

¹⁵⁵ *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] IR 381.

required to provide for every principle and policy in the primary Act,¹⁵⁶ the broader the delegated power the greater the need for principles and policies.¹⁵⁷

[3.152] The Commission now turns in Chapter 4 below to review the four models that were set out in Chapter 4 of the Issues Paper and to consider the constitutional permissibility of each model in light of the key relevant constitutional criteria discussed above.

¹⁵⁶ *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1.

¹⁵⁷ *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, [2017] 3 IR 371.

CHAPTER 4 POSSIBLE LEGISLATIVE MODELS FOR CAPPING DAMAGES

1. Introduction

- [4.1] The Commission now turns to analyse four possible legislative Models of capping damages. These Models were set out in the Issues Paper to stimulate the views of the consultees. The Commission received many submissions in response to the Issues Paper and, as already noted, no submission suggested any additional Model. The Commission, therefore, considers those four Models again in the discussion below, taking account of the helpful comments received from consultees.
- [4.2] In discussing these four models of legislation on capping general damages, the Commission has proceeded on the assumption that any such capping legislation would apply to all general damages in personal injuries cases, irrespective of the quantum, if any, of special damages awarded arising from the injuries sustained.
- [4.3] As discussed in Chapter 2, the Commission considers that it is important to reiterate, for the sake of clarity, that the capping Models under discussion refer to legislation that could involve capping the amount of compensation that may be awarded in personal injuries actions under the heading “general damages,” that is, damages for pain and suffering, sometimes referred to as non-pecuniary damages. The Models under discussion do not refer to the amount of compensation that may be awarded in such cases under the heading “special damages”, that is, damages for loss that can be clearly calculated, such as any loss of earnings or any required medical care, sometimes referred to as pecuniary damages.
- [4.4] As also discussed in Chapter 2, the reason capping legislation would not apply to special damages is because it is agreed, and the courts have reiterated this many times, that such loss must be completely, 100%, compensated. By contrast, general damages, for pain and suffering, involve an imprecise, subjective, assessment or approximation of the amount of appropriate compensation, and the courts have therefore not made a similar comment concerning such damages. This distinction between special damages and general damages is also fully reflected in the scope of guidelines on damages to be awarded in personal injuries actions, such as the Book of Quantum, which have referred exclusively to general damages, on the assumption that the award of special damages must involve full compensation.
- [4.5] The Commission recognises that this project does not involve a single question as to whether a specific model of capping would be constitutional. The four Models discussed below indicate that there are a range of legislative approaches that could be

adopted. The central question to be addressed in this project is, therefore, whether any, or some, or all of those Models could, in the Commission's view, be constitutionally permissible, judged against the relevant criteria identified in Chapter 3.

[4.6] As discussed in Chapter 3, there are a number of constitutional rights that would be engaged by any legislation that involves capping damages, those being, the right to bodily integrity, property rights in the form of the right to litigate (to have access to the courts), the correlative right to an effective remedy and the right to equality. No constitutional right under the Constitution, including those mentioned above, is absolute. It is permissible for the Oireachtas to limit or restrict constitutional rights once those limits or restrictions can satisfy relevant tests. Two standards have been applied by the courts to test the constitutionality of restrictions on rights: the proportionality test as set out in *Heaney v Ireland*¹ and the rationality test as set out in *Tuohy v Courtney*.² The correct test to be applied typically depends on the rights being balanced and, in some instances, both tests are applied by the courts. Any legislative model for capping damages that could affect constitutional rights should therefore be analysed by reference to one or both of these tests.

[4.7] The *Heaney* test comprises four elements:

- (1) the objective of the legislation must be of sufficient importance to justify overriding a constitutionally protected right (sufficient importance),
- (2) the restriction on the right must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations (rational connection),
- (3) the restriction must impair the right as little as possible (minimum impairment), and
- (4) the restriction must be such that the effect on constitutional rights is proportionate to the objective (overall proportionality).³

[4.8] The first two elements of the proportionality test – sufficient importance and rational connection – might be taken together. If each of these elements can be satisfied in relation to a legislative model, it is likely that they would be satisfied in relation to most models of capping. This is because these elements require consideration of the

¹ [1994] 3 IR 593.

² [1994] 3 IR 1.

³ *Heaney v Ireland* [1994] 3 IR 593, citing the Supreme Court in Canada in *R v Chaulk* [1990] SCR 1303 at pages 1335-1336. This test was originally set out by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103. The *Heaney* test is discussed in detail in Chapter 3, above.

policy objectives that the legislation seeks to achieve, which would be the same across all models of capping. The sufficient importance element refers to the importance of the objective that the legislation seeks to achieve. As discussed in Chapter 3 above, this element of the *Heaney* test is not generally rigorously applied by the courts. The rational connection element of the test requires that there be a rational connection between the measure and the objective, with the additional necessity that the measure chosen not be arbitrary or unfair in achieving the relevant objective.

- [4.9] As also discussed in Chapter 3, an objective behind capping legislation might be to control insurance costs or, because the State is often a defendant in personal injuries claims, to achieve savings from these claims which could be used for other areas of public expenditure. The courts have endorsed the principle that, in the assessment of damages for personal injuries, regard must be had to the social good and this includes that the level of damages awards may impact on insurance costs, taxation or other State services. For example, the Supreme Court in *Kearney v McQuillan and North Eastern Health Board (No 2)* stated that:

“[e]ach 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.”⁴

- [4.10] It could therefore be argued that legislation that provides for damages capping could, in principle, pass the rational connection test where it **may**, though not necessarily **must**, result in less adverse impact on taxation and other resources resulting in increased financial availability for social services.
- [4.11] Another plausible objective behind capping damages could be to ensure that an award of damages is related to the severity of injury suffered by the plaintiff. Any individual or body involved in determining the appropriate level of damages—whether a policymaker, member of the judiciary, the Government, or the Oireachtas—will have an interest in ensuring that the amount of compensation that is awarded should reflect, so far as money can do so, the injury suffered. This objective is reflected in the long-established principle, expressed by the Supreme Court in *Sinnott v Quinnsworth Ltd*, that general damages (damages for pain and suffering), the type of damages that would be the subject of legislation on capping damages, are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life that the injury has caused, and will cause, to the injured party. The Court added that it is to be borne in mind that any actual financial loss, past or

⁴ [2012] IESC 43 at para 28 (emphasis added).

future, will be addressed in the award of special damages.⁵ This approach was reiterated in 2020 by the Supreme Court in *Morrissey v Health Service Executive*.⁶

- [4.12] It could be argued that this policy objective, to ensure fair and reasonable compensation, to the extent that any financial award can achieve this and bearing in mind the subjective and imprecise nature of this assessment as to general damages, may be easier to see implemented in practice. This is because the Book of Quantum, as well as case law from the Court of Appeal since 2014 and judicial guidelines from other jurisdictions, have each already developed a clear three-point (in some instances four-point) scale setting out a correspondence between categorical types of injury (minor, moderate, serious) and amounts of general damages (low, moderate, high).
- [4.13] It is the view of the Commission that the third and fourth elements of the proportionality test—minimum impairment and overall proportionality—require individual consideration in the context of each model of capping. The ability of any one model to satisfy the “minimum impairment” or the “overall proportionality” elements of the *Heaney* test will depend on how that model of capping is formulated. Influential factors would include whether the capping involved was mandatory or presumptive in nature, or whether a specific figure in a capping model is set at such a low level that it involves an impermissible restriction on rights, even taking account of the acknowledged subjective, imprecise, nature of that assessment. On that basis, the Commission examines the constitutional permissibility of each of the four legislative models of capping damages in light of the proportionality test with a particular focus on minimum impairment and overall proportionality.
- [4.14] Each model is also assessed in light of the *Tuohy* rationality test. The *Heaney* test arguably involves less deference to the Oireachtas than the *Tuohy* test. Any model of legislative capping must satisfy only one criterion under the *Tuohy* test; it should not be so contrary to reason and fairness as to constitute an unjust attack on an individual’s constitutional rights.
- [4.15] In addition to the constitutional rights discussed above, the right to equality would be engaged by damages capping legislation. It could be argued that some groups of plaintiffs, as distinct from others, may have their right to recovery limited in a way that is invidious or unfair. This would depend on how the legislation is drafted.
- [4.16] Finally, depending on the specific type of capping model under consideration two other important and related constitutional concerns might arise. First, the separation of powers requires the Oireachtas to respect the independence of the judiciary.

⁵ [1984] ILRM 523 at page 531. The *Sinnott* case is discussed in detail in Chapter 2, above.

⁶ [2020] IESC 6. The *Morrissey* case is also discussed in detail in Chapter 2, above

Second, the non-delegation doctrine requires the Oireachtas, where it delegates a legislative power to the Executive, to set out the relevant “principles and policies” in the primary legislation.

- [4.17] The Commission briefly recounts each of the four Models before proceeding to a more detailed discussion below.
- [4.18] **Model 1** proposes a model of legislative capping, mandatory in nature, set by primary legislation that takes a similar form to how sentencing law operates in many instances, under which the Oireachtas sets a maximum penalty, such as a maximum fine or a maximum term of imprisonment, that may be applied in respect of a particular offence. The court then imposes a penalty on the offender using a proportionality test. This is an application of proportionality in the ordinary sense of the word, that is, the imposition of a penalty that is appropriate to the gravity of the offence. Model 1 includes guidelines (subject to statutory principles) that are comparable to those currently employed in the sentencing system in England and Wales. In this regard, the Commission notes, solely in the context of the analogy between capping legislation and sentencing, that the recently enacted *Judicial Council Act 2019* has established both a Personal Injuries Guidelines Committee (PIGC) and a Sentencing Guidelines and Information Committee (SGIC), both of which are tasked with producing guidelines, the format of which is intended to be similar to those currently in use in England and Wales in the context of sentencing. Model 1, as with any other legislative model of capping, has the potential to infringe upon the constitutional rights of the plaintiff. As such, Model 1 is assessed below in accordance with the *Heaney* proportionality test and the *Tuohy* rationality test. Model 1 is also assessed in terms of its compatibility with the right to equality and, because the model proposes a cap by way of primary legislation, it is also assessed in light of the separation of powers and its interaction with the independence of the judiciary.
- [4.19] **Model 2** proposes a Model with two key features. The first is similar to the system 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 that cap. Model 2 is similar to Model 1 in that it allows the court to determine the severity of the injury. However, Model 2 differs from Model 1 in that, once the severity of the injury is determined, the court is required to refer to a table in the legislation, and to award the corresponding percentage value of the cap. The second feature of Model 2, a feature that further differentiates Model 2 from Model 1, is a provision that would provide that the court could award an alternative sum where it is satisfied that exceptional circumstances justify doing so, thus, making Model 2 presumptive in nature. Model 2, as with Model 1, is assessed below in accordance with the *Heaney* proportionality test and the *Tuohy* rationality test. Model 2 is also assessed in terms of its compatibility with the right to equality and, because the model proposes a cap by way of primary

legislation, it is also assessed in light of the separation of powers and its interaction with the independence of the judiciary.

- [4.20] **Model 3** proposes that any model of capping, including Models 1 or 2, would be the subject of an Act of the Oireachtas, but that the Act could delegate regulating the details of any cap or caps to, for example, a Minister or some other body so that the cap or caps would be set out in Regulations (delegated legislation). This approach would be similar to the approach proposed in the *Civil Liability (Capping of General Damages) Bill 2019* (the 2019 Bill), a Private Member's Bill that had passed Second Stage in Seanad Éireann in March 2019. The 2019 Bill, which is considered later in the discussion on Model 4, had proposed that the Minister for Justice and Equality could, by way of Regulations, prescribe the maximum level of general damages that could be awarded to a plaintiff who suffered a personal injury. As Model 3 proposes capping by way of secondary legislation, it raises concerns in relation to the separation of powers as between the Oireachtas and the executive and is therefore assessed in accordance with the "non-delegation doctrine". It would not be possible to consider further any potential infringement of constitutional rights, or any interference with the independence of the judiciary, without first establishing the exact details of any cap or caps made by delegated legislation under Model 3.
- [4.21] **Model 4** proposes an approach that could be described as being closest to the current position, in that it proposes that the courts should continue to determine the level of awards for general damages through case law, as supplemented by the significant new provisions for Personal Injuries Guidelines under the *Judicial Council Act 2019*. Model 4 is assessed in accordance with the *Heaney* proportionality test and the *Tuohy* rationality test. Because Model 4 does not involve a legislative cap on damages in the same sense as Models 1 to 3, it would be less likely that this model would raise concerns in relation to the separation of powers, including the non-delegation doctrine.
- [4.22] The detailed discussion below of each of the four legislative Models also takes account of the views expressed by consultees, which greatly assisted the Commission's further reflection and analysis of the complex issues involved in this project and Report.
- [4.23] Without prejudice to the analysis below, the Commission notes that all models received some support in the submissions. There was a diversity in the submissions with regard to which model would be preferable. Some consultees opted for Models 1 or 3, making an analogy with how the *Civil Liability Act 1961* currently functions in, for example, regulating recovery for mental distress suffered by dependents of a person killed in a fatal accident whose death was caused by the wrongful act of another.⁷

⁷ Sections 48 and 49 of the *Civil Liability Act 1961*.

Model 2 received some support, but there were divergent views taken as to whether it could resist a constitutional challenge. Some consultees thought it would be less vulnerable to invalidation than Models 1 or 3, but others took the opposite view. Other consultees praised Model 2's nominal simplicity but ultimately preferred a different model. Separately, a number of consultees considered that Model 4 was the most appropriate from an analysis of the relevant constitutional criteria and was also preferable. The Commission has had full regard to these various views in the discussion below.

2. Model 1: Mandatory capping set by an Act (primary legislation)

(a) The Model

[4.24] Model 1 involves drawing an analogy with the legislation on sentencing, and is broken down into two parts:

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

[4.25] The Commission also notes that, in recent years, the Court of Appeal has developed indicative guidelines for imposing sentences in relation to a number of offences,⁸ which mirror the approach taken by the Court of Appeal since 2015 in personal injury cases.

(i) Guiding principles in Model 1 Act

[4.26] In this Model, the guidelines to follow from the primary legislation would take a form similar to those prepared by the Sentencing Council of England and Wales. Such guidelines follow from, and should be distinguished from, the statutory “guiding principles” under which the Sentencing Council of England and Wales prepares the sentencing guidelines. Thus, section 121 of the England and Wales *Coroners and Justice Act 2009* (England and Wales 2009 Act) sets out detailed guiding principles that the Sentencing Council of England and Wales must apply when developing its sentencing guidelines. That guidance includes: the factors that should be taken into account by the Sentencing Council when describing categories of offence; that the guidelines should specify an “offence range” which, in the opinion of the Council, may be appropriate for a court to impose on an offender convicted of that offence; that the guidelines should specify the starting point for the offence range and any aggravating or mitigating factors which, by virtue of any enactment or other rule of law, the court is required to take into account when considering the seriousness of the offence; and

⁸ 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). For further analysis of guideline judgments in the context of sentencing, see the Commission’s *Report on Suspended Sentences* (LRC 123-2020).

any other aggravating or mitigating factors which the Council considers are relevant to such a consideration.

[4.27] Similarly, section 91 of the *Judicial Council Act 2019* (2019 Act) also sets out comparable guiding principles for the Sentencing Guidelines and Information Committee (SGIC), which will prepare sentencing guidelines under the 2019 Act. The guiding principles in section 91 contain more detail than the England and Wales 2009 Act in that they provide that the SGIC must take account of the following:

- (a) sentences that are imposed by the courts,
- (b) the need to promote consistency in sentences imposed by the courts,
- (c) the impact of decisions of the courts relating to sentences on the victims of the offences concerned,
- (d) the need to promote public confidence in the system of criminal justice,
- (e) the financial costs involved in the execution of different types of sentence and the relative effectiveness of them in the prevention of re-offending, and
- (f) such factors as the SGIC or the Board of the Judicial Council, as the case may be, considers appropriate relating to the offence concerned and the offender committing the offence.

[4.28] By analogy, as noted in Model 4, below, section 90 of the 2019 Act provides that the Personal Injuries Guidelines Committee (PIGC) must have regard to the following guiding principles in preparing Personal Injuries Guidelines:

- (a) the level of damages awarded for personal injuries by—
 - (i) courts in the State, and
 - (ii) courts in such places outside the State as the Committee or the Board, as the case may be, considers relevant;
- (b) principles for the assessment and award of damages for personal injuries determined by the High Court, the 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 awarded for personal injuries;

(e) such other factors that the Committee or the Board, as the case may be, considers appropriate including factors that may arise from any records, documents or information received, consultations held, research conducted or conferences, seminars or meetings organised (as referred to in section 18 (7)).

It is clear, therefore, that the Guidelines to be produced by the PIGC under the auspices of the Judicial Council, like those to be produced by the SGIC, are akin to the approach proposed under Model 1.

(ii) Capping ranges in Model 1 Act

[4.29] Under Model 1, capping ranges could be derived from an Act of the Oireachtas and be drafted in a manner similar to legislation that sets maximum penalties in criminal law. Table 1 below sets out some of the provisions from the *Non-Fatal Offences Against the Person Act 1997* (1997 Act) in tabular form.

<i>Non-Fatal Offences Against the Person Act 1997</i>	
Offence-Type	Maximum Penalty
Assault (section 2)	On summary conviction, imprisonment for a term not exceeding six months, or a fine not exceeding €2,500, or both
Assault causing harm (section 3)	On summary conviction, imprisonment for a term not exceeding 12 months, or a fine not exceeding €2,500 or both On indictment, to a fine or to imprisonment for a term not exceeding five years or to both
Causing serious harm (section 4)	On indictment, to a fine or to imprisonment for life or to both

Table 1 Offences and Penalties in the Non-Fatal Offences Against the Person Act 1997

[4.30] The purpose of this example is to demonstrate how maximum penalties or “caps” on sentences are set by the Oireachtas in the context of criminal law. The penalties are broken down into categories, with the least severe penalty attaching to the least severe offence and the most severe penalty attaching to the most severe offence. It can be seen from Table 1 that there is a clear qualitative distinction between the offences that justify the imposition of a maximum penalty of life imprisonment for the more serious penalty of causing serious harm⁹ and a maximum term of six months imprisonment for the less serious offence of assault.

⁹ Section 4 of the *Non-Fatal Offences Against the Person Act 1997*.

[4.31] Model 1 proposes that the Oireachtas could set caps on general damages in personal injuries actions by primary legislation that would look similar to maximum sentences in criminal law (Table 1). Table 2 sets out how this might appear:

[Type of Injury]	
Injury Category	Maximum Award/Award Range
Minor	€0 to €w
Moderate	€w to €x
Severe	€x to €y
Catastrophic	€y to €z

Table 2 Sample of how a Cap on General Damages in Personal Injuries Might be Modelled on Sentencing Bands in Criminal Law

[4.32] The Commission emphasises that it does not take any view on the actual euro amounts that might be used in such capping legislation in this Report.

[4.33] Under this Model, the Oireachtas would enact primary legislation that would distinguish between types of injury. The legislation would then break each injury type into categories of severity, with the lowest award being attached to the least serious, or most minor category of injury, and the highest award being attached to the most severe injury.

(iii) Capping guidelines derived from Model 1 Act

[4.34] As noted above, Model 1 also suggests that the guidelines to follow the primary legislation should take a form similar to the guidelines currently employed in England and Wales in the context of sentencing.

[4.35] It may be useful in this respect to set out a worked example of this. Thus, section 10 of the England and Wales *Theft Act 1968* provides for the offence of aggravated burglary. The England and Wales Sentencing Council has produced aggravated burglary guidelines that the court is to follow in sentencing an offender who is convicted of the offence of aggravated burglary. Those guidelines break the offence down into categories, as set out in Table 3 below.

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 3 Sentencing Council of England and Wales Aggravated Burglary Guidelines

- [4.36] These guidelines require that the court must first determine within which Offence Category the offence falls, based on the harm caused and the culpability of the offender. From there, the court must determine where, within the relevant "Category Range" associated within the Offence Category, that the particular offence falls.
- [4.37] The England and Wales Sentencing Council has set out nine 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).¹⁰
- [4.38] 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 of the highest order the offence will fall into category 1. Where harm and culpability are of the lowest order, the offence will fall into category 3.
- [4.39] 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.
- [4.40] 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.¹¹
- [4.41] Steps 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.
- [4.42] 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.
- [4.43] As already noted, these sentencing guidelines derive from and must be based on the guiding principles in section 121 of the England and Wales 2009 Act. These are

¹⁰ Section 125(1) of the *Coroners and Justice Act 2009*.

¹¹ 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).

analogous to the guiding principles under which the Sentencing Guidelines and Information Committee (SGIC) and the Personal Injuries Guidelines Committee (PIGC) will prepare their respective guidelines under the *Judicial Council Act 2019*. Those guidelines will assist the courts in their assessment of damages in personal injuries actions, and, in the same way as the England and Wales Sentencing Council is guided by the guiding principles set out in section 121 of the England and Wales Act of 2009, the PIGC, when producing the Guidelines, will be guided by the guiding principles as set out in section 90 of the *Judicial Council Act 2019*.

- [4.44] Applied to the context of damages awards, these guidelines might take something like the following form:

[Type of Injury]		
Injury Category	Starting Point	Cap
Minor	€x	€y
Moderate	€2x	€2y
Severe	€3x	€3y
Catastrophic	€4x	€4y

Table 4 Hypothetical Guidelines for Personal Injuries Awards Under a Model 1-type Scheme

- [4.45] Step 1 would be to determine in 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.¹²
- [4.46] Step 2 would be to determine the starting point for damages for that category of injury. Taking the example from table 4 above, the starting point for a minor injury would be €x while the most that could be awarded would be €y.
- [4.47] Once the starting point has been determined, the object of step 3 would be to determine what award within the range of the starting point and the cap might be appropriate. The court would begin 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.

¹² *Book of Quantum* (2016) at page 19.

[4.48] 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 the Personal Injuries Guidelines Committee may take a similar approach in developing its guidelines under the *Judicial Council Act 2019*.

(b) Discussion and conclusion

[4.49] As already noted, in recent years, the Court of Appeal has developed indicative guidelines for imposing sentences for a number of offences,¹³ which mirrors the approach taken by the Court of Appeal since 2015 in personal injury cases, discussed in Chapter 2. Model 1 thus involves building on this analogous approach. Model 1 also aligns with the three-point scale approach found in the case law of the Court of Appeal, the approach of the Supreme Court in *Morrissey v Health Service Executive*,¹⁴ the approach in the Book of Quantum and to comparable Judicial Guidelines from Northern Ireland, and from England and Wales. These developments have also been discussed in Chapter 2, above.

[4.50] Model 1 is mandatory in nature, meaning that there is no provision for the kind of deviation, or “judicial uplift”, discussed in Model 2, below. Under Model 1, the court would be bound to apply a mandatory cap in every case. The Commission considers that a mandatory cap might be less likely to survive constitutional scrutiny than a cap that is presumptive in nature. There are two main reasons for this. The first is that a mandatory cap would be less likely to satisfy a proportionality test, as discussed below, and therefore, more likely to constitute a disproportionate infringement on the constitutional rights of the plaintiff. It is the view of the Commission that a mandatory cap also potentially carries more risk of infringing on the independence of the judiciary. A mandatory cap would limit the extent to which the judiciary is able to exercise discretion in relation to the assessment of damages in individual cases, in particular where exceptional circumstances arise which would justify an award higher than a particular cap would allow.

[4.51] The Commission now turns to consider Model 1 in accordance with the *Heaney* proportionality test, the *Tuohy* rationality test, the right to equality, and the separation of powers, and having regard to the submissions received.

¹³ See footnote 8, above.

¹⁴ [2020] IESC 6.

(i) *Proportionality*

- [4.52] As discussed in the introduction to this Chapter, it is assumed that most Models of capping damages would satisfy the first two elements of the *Heaney* test: sufficient importance and rational connection.
- [4.53] The third element of the test, minimum impairment, has been applied in different ways by the Irish courts. One consultee argued that the availability of alternative models of capping, or alternative measures of controlling the cost of insurance that would not involve any cap on damages, is a convincing basis for arguing that any model of capping goes further than is required to achieve the objective of reducing the cost of insurance. This approach is similar to that discussed in Chapter 3 above, where the minimum impairment element of the *Heaney* test is viewed as permitting the court to examine whether alternative measures that would be less restrictive of the relevant constitutional rights could have been adopted to achieve the same objective. In the context of Model 1, if that approach were adopted, the court might examine whether alternative methods of capping would be less restrictive of the relevant constitutional rights.
- [4.54] On the other hand, the court might choose to adopt an approach which would see the court ignore alternative legislative options entirely and consider only whether the means actually adopted could have been less restrictive. This application of the minimum impairment test can be seen in *Murphy v Independent Radio and Television Commission*¹⁵ and *DK v Crowley*.¹⁶ In the context of Model 1, one way in which the model could be less restrictive would be if it contained an "uplift provision". Model 1, in its current proposed form, is mandatory in nature, meaning that a court would be bound by the level of a specific cap in all circumstances. Model 1 would limit the extent to which the court could apply individual circumstances to the assessment of damages in a particular case. This could give rise to a situation where a plaintiff has suffered, for example, a moderate injury of a particular type but that, due to exceptional circumstances, the court considers that the award should be higher than the limit that the associated award range for a moderate injury of that type would allow. The court would be precluded from making an award higher than the relevant cap, despite the exceptional circumstances, meaning that there is a risk that the plaintiff would not receive fair and reasonable general damages.
- [4.55] In terms of the "overall proportionality" element of the *Heaney* test, the objectives sought to be achieved by the legislation would be examined, and then weighed against the extent to which any constitutional rights are restricted, to establish

¹⁵ [1999] 1 IR 12.

¹⁶ [2002] 2 IR 744.

whether an overall balance was achieved. As discussed in Chapter 3 and in the introduction to this chapter, there might be a number of objectives behind capping legislation. One possible objective might be to ensure that the award is proportionate to the injury suffered by the plaintiff. Another objective could be to form part of the many initiatives aimed at regulating the cost of insurance. These objectives would be weighed against the extent to which Model 1 interferes with constitutional rights. The extent of that interference would be determined by factors such as the level at which the award ranges are set in the first place, as well as the mandatory nature of the Model. If a cap, or category range, was set very low, this would be more likely to impact upon the constitutional rights of the plaintiff than a cap that was set at a high level, in the sense that a cap that is disproportionately low may result in damages awards that might not achieve fair and reasonable compensation.

(ii) Rationality

- [4.56] As discussed in Chapter 3, the *Tuohy* test requires the court to consider only whether the impugned measure was “so contrary to reason and fairness as to constitute an unjust attack on some individual’s constitutional rights.”¹⁷
- [4.57] In that regard, the Supreme Court held, in *King v Minister for the Environment (No 2)*,¹⁸ in connection with the enactment of legislation concerning eligibility to stand as a general election candidate, that “the Oireachtas must be considered to have a reasonable degree of discretion ... provided that the categories of persons concerned are so determined in a manner which is rational and not arbitrary.”¹⁹
- [4.58] Under the *Tuohy* test, the courts are reluctant to interfere with Oireachtas discretion. Model 1 draws well-defined categories that distinguish between minor, moderate, severe and catastrophic injuries. Since these are comparable to the three-point scale that is often employed by the courts²⁰ and are analogous to the approach to penalties in criminal legislation, the Commission considers that it would be unlikely that Model 1 would fail an application of the *Tuohy* rationality test.

(iii) Right to equality

- [4.59] Any equality argument involves the proposition that like should be treated alike. As discussed in Chapter 3, one of the requirements a litigant must meet when setting out an equality argument is the identification of a suitable comparator class. The comparator classes must be the same for the purposes in respect of which the

¹⁷ *Tuohy v Courtney* [1994] 3 IR 1 at page 47.

¹⁸ [2006] IESC 61, [2007] 1 IR 296.

¹⁹ [2006] IESC 61, [2007] 1 IR 296 at page 317.

²⁰ *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461: see further Chapter 2.

comparison is made. Viable comparator classes will, in the case of capping legislation, be as wide or as narrow as the category or categories of capping contemplated.

- [4.60] Model 1 draws well-defined categories, which distinguish between minor, moderate, severe, and catastrophic injuries. These categories are comparable to the three-point scale that is often employed by the courts, that is, 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 other lesser categories”.²¹ These well-defined categories, which are clear and have a qualitative distinction, make Model 1 less vulnerable to an equality argument. A qualitative distinction between severity of injuries justifies a relative distinction between awards, just as the qualitative distinction between offences in criminal law justifies the imposition of a maximum penalty of life for the more serious penalty of causing serious harm²² and a maximum term of imprisonment of six months for the less serious offence of assault.²³

(iv) Separation of powers – judicial independence

- [4.61] Under Model 1 it is proposed that the Oireachtas would enact capping legislation by way of an Act of primary legislation. Accordingly, this may, as a number of consultees suggested, raise concerns as to its compatibility with the independence of the judiciary.
- [4.62] As discussed in Chapter 3, from a constitutional rights perspective an analogy can be drawn between capping legislation and mandatory minimum sentences in criminal law. The case law discussed in Chapter 3 appears to demonstrate that, at least in the context of sentencing, it is not unconstitutional for the Oireachtas to prescribe a general rule in the form of a minimum penalty, once that penalty is rationally connected to the offence, and once the application of the rule is left to the courts.
- [4.63] Model 1 attempts to apply some of the principles that can be gleaned from the case law on minimum, maximum and fixed penalties. Model 1 proposes that the Oireachtas would prescribe the maximum award that can be awarded in respect of particular injuries and injury severity but it would be for the court to determine the severity of the injury, and also where within the award range the award should fall. In that regard, the assessment of the award is similar to the assessment of the penalty to be imposed on an offender in the criminal context.

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

²² Section 4 of the *Non-Fatal Offences Against the Person Act 1997*.

²³ Section 2 of the *Non-Fatal Offences Against the Person Act 1997*.

- [4.64] However, while an analogy can be drawn between Model 1 and sentencing in criminal legislation, typically legislation that sets a mandatory minimum sentence for a particular offence will include a provision that would allow the court to apply a lesser penalty in exceptional circumstances. An example of this is section 27(3C) of the *Misuse of Drugs Act 1977* (1977 Act), which 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' imprisonment. However, section 27(3D)(b) goes on to provide that a court may impose a lesser sentence where the court is satisfied that there are exceptional and specific circumstances justifying the court in doing so.
- [4.65] Section 27 of the 1977 Act creates a sort of safety valve by ensuring that the discretion of the judiciary is retained. Where exceptional circumstances arise that, in the court's view, justify the imposition of a lesser sentence than the minimum penalty prescribed in the legislation, a provision such as section 27(3D)(b) allows the court the discretion to apply that lesser sentence. This is important, particularly in the context of mandatory minimum periods of imprisonment, where an unduly harsh term of imprisonment would infringe upon the plaintiff's right to liberty. In the context of capping legislation, there may be circumstances associated with a particular case that, in the view of the court, justify damages being assessed at a value higher than a cap, but the mandatory nature of Model 1 would preclude the court from making an award above any cap, even in exceptional circumstances. An unfairly low award could breach the plaintiff's constitutional right to bodily integrity and to an effective remedy.
- [4.66] Including an uplift provision would help to alleviate some of the concerns in relation to the independence of the judiciary by allowing the judiciary the discretion to make a higher award in certain exceptional circumstances. With the inclusion of an uplift provision, Model 1 would become more akin to how the Book of Quantum works at present, and to how the slightly more constrained discretion will apply in connection with the Personal Injuries Guidelines to be prepared under the *Judicial Council Act 2019* (see Model 4, below).

(v) Further observations

- [4.67] One consultee argued that the analogy drawn here between sentencing and assessing damages in personal injuries actions is too rudimentary to deal with the range of issues arising in a comprehensive scheme for all personal injuries. That consultee noted that, unlike the time periods as to the length of sentences of imprisonment set out in criminal legislation, the monetary value of awards is subject to inflation and deflation, bringing additional problems not often arising in practice with respect to sentencing provisions. The Commission accepts this point but notes that deflation or, as the case may be, inflation tend to proceed quite gradually over time, so that if a cap

were to be reviewed and appropriately adjusted periodically, this issue would be avoided. The Commission also notes that sentencing outcomes can also be subject to inflation/deflation within the overall sentencing limits, depending on the perception of certain crimes as being more, or less, problematic at particular times, and the varying influences over time of different sentencing principles, such as punishment versus rehabilitation. The Commission previously drew attention to the varying influences over time of different sentencing principles in Chapter 2 of its 2013 *Report on Mandatory Sentences*, including during the debate in the late 1990s on presumptive sentences for drug offences.²⁴

(vi) Conclusion

- [4.68] In conclusion, the Commission considers that, while Model 1 has the benefit of being given effect to by an Act (primary legislation) rather than delegating that power, it appears to be at some risk of constitutional challenge on the ground that it is mandatory in nature. While this could potentially withstand challenge for the reasons discussed above, the Commission considers that any capping legislation enacted through primary legislation would be less likely to be prone to constitutional challenge if it included a discretion to disregard any mandatory cap or caps for stated reasons, such as for exceptional reasons concerning the particular injured person.

²⁴ *Report on Mandatory Sentences* (LRC 108-2013) at para 2.138.

3. Model 2 - A presumptive cap set by primary legislation

(a) The Model

- [4.69] Model 2 has two key features. In the first place, it proposes a method of capping similar to that currently in place in New South Wales since 2002. Section 16(2) of the New South Wales *Civil Liability Act 2002* (New South Wales 2002 Act) provides for an upper limit or maximum amount of damages that may be awarded for general damages, referred to in the New South Wales 2002 Act as “non-economic” damages (in New South Wales, special damages are referred to as “economic damages”). Section 17 of the New South Wales 2002 Act provides that the maximum amount originally specified in section 16 of the New South Wales 2002 Act, AU\$350,000, must be adjusted annually by Ministerial Order on 1 October of each year, and the adjusted figure replaces the original amount specified in section 16. Section 17(2) provides that the annual adjustment in the Ministerial Order is to be based on the average weekly total earnings of full-time adults in New South Wales over the previous four quarters. In accordance with the annual Ministerial Order made in 2019, the maximum amount under section 16 stands, at the time of writing (August 2020), at AU\$658,000.²⁵
- [4.70] The second feature of Model 2 is a provision similar to that contained in the England and Wales *Civil Liability Act 2018* (England Wales 2018 Act) and, in this jurisdiction in section 27(3D)(b) of the *Misuse of Drugs Act 1977*, that would allow the court to disregard a cap in exceptional circumstances.

(i) The cap

- [4.71] Section 16(2) of the New South Wales 2002 Act provides for an absolute ceiling on general damages in personal injuries litigation, and which a court should only award in the most extreme case.²⁶
- [4.72] Section 16(3) provides that damages for non-economic loss are to be determined in accordance with a table which ranks the severity of non-economic loss, or the severity of injury, as a percentage of the most extreme case. Once it is determined what proportion of injury or loss the claimant has suffered by reference to the most extreme case, the court then refers to a table where each percentage injury is linked to a percentage value of the maximum award. Table 5 below reflects that position:

²⁵ See New South Wales *Civil Liability (Non-economic Loss) Amendment Order 2019* (2019 No 485), available at <https://www.legislation.nsw.gov.au/view/pdf/asmade/sl-2019-485>.

²⁶ The case law under the New South Wales 2002 Act is discussed in the Issues Paper to this Report at paras [4.37] to [4.44].

Severity of 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)
28%	14%
29%	18%
30%	23%
31%	26%
32%	30%
33%	33%
34%-100%	34%-100% respectively

Table 5 Section 16 of the New South Wales 2002 Act Injury/Recovery Bands

- [4.73] Section 3 of the New South Wales Act of 2002 defines non-economic loss as including: pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement. These equate with the headings of general damages in Irish law.
- [4.74] Model 2 does not involve a simple transplation to Ireland of the figures and percentages in Table 5, above. The New South Wales model is used for the purpose of illustrating a type of capping legislation where all damages are indexed to a maximum award.
- [4.75] The Commission also notes here a feature of the New South Wales model that was not discussed in the Issues Paper but should be mentioned briefly here for the sake of completeness. Section 16(1) of the New South Wales 2002 Act provides for a threshold rule, namely that general damages are to be awarded only where the severity of the non-economic loss is at least 15% of the most extreme case. Given that a 10% degree of severity of injury against the most extreme case would lead to a zero award, the Commission considers that such a threshold could not survive constitutional challenge, as it would clearly fail to meet any test of what would be "fair and reasonable".²⁷

²⁷ It is also notable that the 2002 Act still requires judges to make subjective determinations, estimations and evaluations when assessing the proportion between the injury the plaintiff has actually suffered with the most serious injury. Appellate courts in New South Wales have noted that they will generally be slow to intervene in such determinations by trial courts unless there is a demonstrable error of fact or law. See *AEA Constructions Pty Ltd v Wharekawa* [2019] NSWCA 16 at paragraph 11 (citing *Dell v Dalton* (1991) 23 NSWLR 528 at 533-34).

(ii) The uplift provision

- [4.76] Model 2 differs from the New South Wales Act of 2002 in that it would include an uplift provision, or a safety valve, similar to that contained in the England and Wales 2018 Act and, in this jurisdiction, in section 27(3D)(b) of the *Misuse of Drugs Act 1977*. In the context of Model 2, this would involve the inclusion of a provision that would allow a court, in exceptional circumstances, and where it considers it to be in the interests of justice to do so, to depart from the table set out in the legislation.
- [4.77] Section 3 of the England and Wales 2018 Act, once commenced,²⁸ will permit the UK Lord Chancellor, who is also the UK Secretary of State for Justice, to make Regulations (secondary legislation) that will set tariffs on “whiplash injuries” sustained in road traffic accidents. Section 5 of the Act permits the Lord Chancellor to include what might be described as a judicial uplift provision that can be applied by the Court in exceptional circumstances.
- [4.78] The Commission notes that section 5(3) of the England and Wales 2018 Act provides that the Regulations must specify the maximum percentage by which the court may exceed the relevant tariff amount. The Commission does not suggest that the uplift provision proposed in Model 2 should contain a similar restriction. The Commission considers that, to meet constitutional requirements concerning the independence of the judiciary, any uplift provision should allow the court the full latitude to exceed the capped amount, provided that this would apply in exceptional circumstances only.
- [4.79] Section 27(3D)(b) of the *Misuse of Drugs Act 1977* as amended, which was also discussed under Model 1, also provides an example of a type of safety valve that would be relevant under Model 2. Where a person has been convicted of an offence under either section 15A or 15B of the Act, which, in accordance with section 27(3C), carries a minimum term of imprisonment of 10 years, the court may apply a lesser sentence where it is satisfied that doing so is justified by exceptional and specific circumstances.
- [4.80] It is envisaged under Model 2 that an uplift provision would be contained in the legislation, similar to those discussed above. Such provision would allow the courts to depart from the legislative cap in exceptional circumstances and where the court considers it to be in the interests of justice to do so.

²⁸ In April 2020, the UK Lord Chancellor, who is also the UK Secretary of State for Justice, announced that, in view of the Covid-19 pandemic, section 3 of the 2018 would not be commenced until April 2021: see <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2020-04-21/HCWS194/>.

(b) Discussion and conclusion

- [4.81] The first element of Model 2 is based on section 16 of the New South Wales *Civil Liability Act 2002*, under which the court assesses the severity of the injury as a percentage of the most extreme injury. The court then turns to the table contained in the legislation, where the injury severity percentage is linked to a percentage proportion of the specified maximum amount of damages (see Table 5 above).
- [4.82] The second element of Model 2 is based on the “judicial uplift” provision in the England and Wales *Civil Liability Act 2018*, which allows a court to disregard the level of a cap in exceptional circumstances.
- [4.83] The Commission now turns to consider Model 2 in accordance with the *Heaney* proportionality test, the *Tuohy* rationality test, the right to equality, and the separation of powers, and having regard to the submissions received.

(i) Proportionality

- [4.84] In terms of proportionality, a number of consultees raised concerns with the lack of direct correlation between the level of general damages and the injury sustained at the lower end of the scale in the New South Wales 2002 Act (see Table 5 above). One consultee argued that the lack of direct correlation would not satisfy the minimum impairment element of the *Heaney* proportionality test. The Commission shares these concerns. A direct transplantation of the New South Wales 2002 Act might be found to be arbitrary and might constitute a disproportionate infringement of the constitutional rights of plaintiffs who have suffered minor injuries.
- [4.85] As noted in Chapter 3,²⁹ for any measure to satisfy the rational connection element of the *Heaney* test, the courts would examine whether the measure was based on arbitrary or irrational considerations. Thus, there would need to be a clear rationale behind the absence of direct correlation between the level of general damages and the nature and severity of the injury sustained at both ends of the injury scale.
- [4.86] In the same vein, it might be argued that a direct transplantation of the New South Wales 2002 Act would not satisfy the minimum impairment element, or the overall proportionality element of the *Heaney* test. In the first place, it might be argued that the New South Wales 2002 Act does not minimally impair the rights of those plaintiffs who have suffered minor injuries.
- [4.87] Whether a direct transplantation of the New South Wales model would satisfy the final element of the *Heaney* proportionality test would be influenced by the relevant objective being balanced against the Model. In that regard, it was noted in the

²⁹ See paras 3.45 and 3.51 above.

introduction to this Chapter that one of the objectives behind capping legislation might be to ensure that the amount of compensation that is awarded is proportionate to the injury suffered. A policymaker, member of the judiciary, the Government or the Oireachtas, will have an interest in ensuring that the amount of compensation that is awarded to someone should reflect the actual injury suffered.

- [4.88] This objective is reflected in the long-established principle, expressed for example by the Supreme Court in *Sinnott v Quinnsworth Ltd*, that general damages, the type of damages (for pain and suffering) that would be the subject of capping legislation, are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life that the injury has caused, bearing in mind that any actual financial loss, past or future, will be addressed in the award of special damages.³⁰ This approach was reiterated in 2020 by the Supreme Court in *Morrissey v Health Service Executive*.³¹
- [4.89] It might be difficult to argue that a direct transplantation of the New South Wales 2002 Act would be consistent with this objective. That is because a plaintiff who has suffered a severe injury is awarded damages at a significantly different ratio than an individual who has suffered a minor injury.
- [4.90] The Commission accepts that the precise ratio between damages and the relevant injury, that is to say the correlation between the relevant injury severity and the maximum amount of damages awardable, would, ultimately, be a matter for the Oireachtas. It should also be borne in mind that any measure that restricts constitutional rights should not be “arbitrary, unfair or irrational.”³²
- [4.91] Bearing all these considerations in mind, the Commission considers that Model 2 would be more likely to satisfy the *Heaney* test if the correlation difficulty within the New South Wales element of Model 2 (discussed above) was removed, and if that was combined with the “judicial uplift” element from the England and Wales 2018 Act.

(ii) *Rationality*

- [4.92] Whether Model 2 is, under the *Touhy* rationality test,³³ so contrary to reason and fairness as to constitute an unjust attack on some individual’s constitutional rights would likely be influenced by how it is ultimately formulated.

³⁰ [1984] ILRM 523 at pages 531-532. The *Sinnott* case is discussed in detail in Chapter 2, above.

³¹ [2020] IESC 6. The *Morrissey* case is also discussed in detail in Chapter 2, above.

³² *In Re the Employment Equality Bill 1996* [1997] IESC 6, [1997] 2 IR 321 at page 349.

³³ *Tuohy v Courtney* [1994] 3 IR 1 at page 47.

- [4.93] While the courts are generally reluctant to interfere with the discretion of the Oireachtas when applying the *Tuohy* rationality test, the Oireachtas is still under an obligation not to enact legislation that is irrational or disproportionate.³⁴ In that regard, it might be argued that a direct transplantation of the New South Wales Act would be both irrational and disproportionate as to how it would treat plaintiffs who have suffered injuries at the lower end of the spectrum, and who would accordingly receive damages at a reduced rate in relation to the injury actually suffered.
- [4.94] Again, in this respect Model 2 would, in the Commission's view, be more likely to satisfy the *Touhy* test if the correlation difficulty within the New South Wales element of Model 2 was removed, and if that was combined with the "judicial uplift" element from the England and Wales 2018 Act.
- (iii) *The right to equality*
- [4.95] The Commission considers that, depending on the correlation between the level of injury and the amount of general damages awarded as a proportion of the cap, Model 2 would be more, or less, likely to infringe the right to equality of the injured person under Article 40.1.
- [4.96] As discussed in Chapter 3, where capping is done categorically by reference to the type and severity of the injury, then the comparator classes for plaintiffs will be restricted to similarly affected individuals with the same type of injury and severity. It might be considered that Model 2 represents a situation where each percentage of injury is, in effect, its own category. This could mean that the only viable comparator classes are those within a few percentages of the plaintiff asserting the inequality argument. This could mean it would be difficult for a plaintiff with a particular injury to make a category-based inequality argument.
- [4.97] The Commission considers, however, that while an inequality argument based on differences between the categories might be difficult, it would not be impossible. In the context of Model 2, plaintiffs who have suffered injuries that are only 1 – 2% apart in terms of severity of injury as a proportion of the most extreme case, could possibly be considered to be sufficiently similar so as to be viable comparators for the purpose of an inequality argument. Therefore, if there are two plaintiffs who have suffered injuries with only 1 – 2% in the difference in terms of severity, and those plaintiffs are treated in a considerably different manner, with one receiving substantially more damages, the difference seemingly not being based on the actual severity of the injuries, then the plaintiff who has suffered the more minor injury might be able to argue a breach of his or her right to equality.

³⁴ *Iarnród Éireann v Ireland* [1996] 3 IR 321 at page 376.

[4.98] Take the example of two plaintiffs, one who has suffered an injury assessed by the court as being 30% as severe as the most serious case, and the second who has suffered an injury assessed by the court as being 29% as severe as the most serious case. Under the New South Wales 2002 Act (see Table 5 above), the first plaintiff would receive damages at 23% of the value of the maximum cap, while the second plaintiff would receive damages at 18% of the value of the maximum cap. Based on the maximum cap under the New South Wales cap at the time of writing (August 2020) of AU\$658,000, this would result in the first plaintiff receiving nearly AU\$33,000 more than the second plaintiff whose injury is 1% less severe. This 5% differential in damages between plaintiffs whose injuries are only negligibly different in terms of severity might make Model 2 vulnerable to an inequality argument.

(iv) Separation of powers

[4.99] A number of consultees raised concerns as to the compatibility of Model 2 with the independence of the judiciary aspect of separation of powers. In particular, one consultee raised a concern that Model 2 strays beyond the prescription of a “general rule” by the Oireachtas, as permitted in *Deaton v Revenue Commissioners*.³⁵ It was also argued that Model 2 would be in conflict with the decision of the Supreme Court in *Ellis v Minister for Justice and Equality*,³⁶ on the basis that it directs the court to award a particular amount of damages based on one particular characteristic of the case – the severity of the injury – without allowing the courts to take into account further potentially relevant factors.

[4.100] The Commission acknowledges that it could be argued that Model 2 goes further than the prescription of a general rule to be applied by the courts. However, the Commission considers that an analogy might be drawn between Model 2 and fixed penalties in criminal law, which the courts have upheld as constitutional in certain circumstances. As noted in Chapter 3, in *Lynch and Whelan v Minister for Justice, Equality and Reform*,³⁷ the Supreme Court upheld the constitutionality of the mandatory sentence of life imprisonment for murder and treason under section 2 of the *Criminal Justice Act 1990*, stating 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 into question if there was no rational

³⁵ [1963] IR 170.

³⁶ [2019] IESC 30.

³⁷ [2019] IESC 30 at para 86.

relationship between the requirements of justice with regard to the punishment of the offence specified.”³⁸

- [4.101] The Supreme Court in *Ellis* outlined a number of relevant principles derived from its previous decisions on the matter of mandatory penalties, the first being that both the Oireachtas and the courts may have a role in the determination of a sentence to be imposed on an offender.³⁹ The Court stated that the Oireachtas “may prescribe by legislation that all persons convicted of a particular offence shall be subject to the prescribed penalty”⁴⁰ provided that this general rule is rationally connected to the requirements of justice.⁴¹ The provision being considered by the Court in *Ellis*, section 27A(8) of the *Firearms Act 1964*, was ultimately held to be unconstitutional, on the basis that the Oireachtas had not prescribed a “general rule”, but had overstepped its boundaries in this instance by prescribing a penalty “to which only a limited class of persons who commit a specified offence are subject, by reason of either the circumstances in which the offences were committed, or the personal circumstances of the convicted person.”⁴²
- [4.102] As recorded in Chapter 3, in *The State (O'Rourke) v Kelly*,⁴³ the Supreme Court held that legislation requiring a court to make a particular order once a certain set of facts is established was not unconstitutional. That case concerned section 62(3) of the *Housing Act 1966* which required a judge of the District Court to 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 the discretion in determining whether a demand had been duly made, it did not constitute an impermissible infringement of the independence of the judiciary.
- [4.103] The Commission considers that the cap envisaged under Model 2 aligns with the case law outlined above in relation to fixed penalties, with the damages award representing the fixed penalty. Model 2 would make the award of a particular amount of damages mandatory once the severity of the injury was ascertained, but the court would retain the discretion to determine the severity of that injury.
- [4.104] An additional feature of Model 2 that would be relevant to any assessment of its relationship to the independence of the judiciary is its uplift provision, or its

³⁸ [2019] IESC 30 at para 86.

³⁹ [2019] IESC 30 at para 45.

⁴⁰ [2019] IESC 30 at para 46.

⁴¹ [2019] IESC 30 at para 50.

⁴² [2019] IESC 30 at para 60.

⁴³ [1983] IR 58.

presumptive nature. The uplift provision contained in Model 2 allows the court to disregard the level of the cap and to make a higher award in exceptional circumstances. Thus, the court retains the discretion that it would not otherwise have under a mandatory model of capping.

(v) Administrative difficulties

- [4.105] An additional concern raised by a number of consultees was that, while Model 2 has the benefit of simplicity, it may raise administrative difficulties in that a change to the overall level of the cap means that damages for all lesser injuries are also changed, which may not be administratively desirable. The Commission considers that any such administrative difficulties would not have direct relevance to the issue being addressed in this project and Report, whether the Model would be constitutionally permissible, but it acknowledges that this would be an additional consideration for policy makers in enacting any capping legislation.

(vi) Conclusion

- [4.106] In conclusion, the Commission considers that Model 2 would be more likely to satisfy the constitutional issues identified above if the correlation difficulty within the New South Wales element of Model 2 was removed, and if that was combined with the inclusion of the “judicial uplift” element from the England and Wales 2018 Act.

4. Model 3 – Capping damages through delegating legislation

(a) The Model

[4.107] Model 3 proposes that capping legislation, including legislation along the lines of Models 1 or 2, could be set by secondary legislation (regulations), rather than primary legislation (an Act enacted by the Oireachtas).

[4.108] As with Models 1 and 2, Model 3 runs the risk of infringing on the independence of the judiciary. Model 3 also raises an additional concern arising from the non-delegation doctrine. Any Act that would propose to delegate the details of capping to a Minister or other Regulation-making body would be required to meet the requirements of the “principles and policies” test as first set out by the Supreme Court in *Cityview Press Ltd v An Chomhairle Oiliúna*.⁴⁴

(i) *Civil Liability (Capping of General Damages) Bill 2019*

[4.109] The *Civil Liability (Capping of General Damages) Bill 2019* (2019 Bill), a Private Member’s Bill, proposed a form of capping that involved delegating the details to a Minister. The Bill passed Second Stage in Seanad Éireann in 2019.⁴⁵

[4.110] Section 2 of the Bill of 2019 proposed that the Oireachtas delegate to the Minister for Justice and Equality (the Minister) responsibility for setting the monetary value of a cap or caps on general damages as follows:

“The Minister may by regulations, subject to section 4, prescribe the maximum level of general damages which may be awarded to a claimant who has suffered personal injury.”

[4.111] Section 3 of the 2019 Bill provided that, when making Regulations under section 2 of the Bill, the Minister would be obliged to have regard to the public interest in ensuring that—

“(a) claimants receive a fair and reasonable level of general damages compensation for pain and suffering arising from personal injury,

(b) excessive compensation levels are moderated, and

⁴⁴ [1980] IR 381.

⁴⁵ The 2019 Bill lapsed on the dissolution of Dáil Éireann in advance of the February 2020 General Election. At the time of writing (August 2020), the 2019 Bill has not been restored to the Seanad Order Paper.

(c) a greater degree of stability and predictability is introduced in respect of the pricing of third-party liability general insurance.”

- [4.112] Section 4 of the 2019 Bill provided that Regulations under section 2 could be made only if a draft were laid before both Houses of the Oireachtas, and that both Houses approved the draft Regulations. This “positive resolution” requirement is in contrast to the more common “negative resolution” provision that Regulations have the force of law unless either House of the Oireachtas passes an annulling resolution. In that respect, section 4 of the 2019 Bill contained a useful protection through Oireachtas oversight.
- [4.113] Section 6(1) of the 2019 Bill proposed that the Book of Quantum would be deemed to be revised to reflect the maximum level of damages prescribed by Regulations made by the Minister. Section 6(2) of the 2019 Bill proposed that the Book of Quantum must be revised from time to time to reflect the recommendations of the Personal Injuries Commission (PIC): see the discussion of the PIC in Chapter 1 above.
- [4.114] The 2019 Bill can be compared and contrasted with the England and Wales *Civil Liability Act 2018* (England and Wales 2018 Act). Section 3 of the England and Wales 2018 Act permits the UK Lord Chancellor to make Regulations that 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 2019 Bill appeared to allow the Minister for Justice and Equality to prescribe caps on general damages in any type of personal injury action, regardless of how the injury was sustained and regardless of the nature and severity of the injury.
- [4.115] The England and Wales 2018 Act contains an additional important feature not found in the 2019 Bill. Thus, section 5 of the England and Wales 2018 Act provides that the UK Lord Chancellor may include an “uplift” provision in any Regulations that would permit the court, in exceptional circumstances and subject to certain criteria, to “uplift” the tariff. However, an important caveat to this uplift provision is that section 5(3) also provides that the UK Regulations must specify the maximum percentage by which the court may uplift the tariff, so that, in effect, there is still a maximum amount that a court is permitted to award, even in exceptional circumstances. No comparable uplift provision is included in the 2019 Bill, and in the Commission’s view it is at least arguable that an uplift provision would go some way to addressing a constitutional challenge concerning judicial independence by allowing the judiciary to retain a level of discretion as to the application of any cap. However, as suggested in paragraph 4.78, any uplift provision should allow the court the full latitude to exceed the capped amount, provided that this would apply in exceptional circumstances only.

(b) Discussion

[4.116] As with the other Models under consideration, it is not possible for the Commission to reach any definitive view on whether a cap on damages enacted by way of secondary legislation would be constitutionally permissible, because this depends on the detailed content of any proposed legislation. Nonetheless, and consistently with the analysis of Models 1 and 2, it appears likely that proportionality, the right to equality and the independence of the judiciary are engaged. The additional issue of the non-delegation doctrine clearly arises because of the use of secondary legislation.

[4.117] The Commission now turns to consider Model 3 in accordance with the *Heaney* proportionality test, the *Tuohy* rationality test, the right to equality, and the separation of powers and the non-delegation doctrine, and having regard to the submissions received.

(i) Proportionality

[4.118] Depending on how the cap is formulated, Model 3 may be more or less likely to pass a proportionality test.

[4.119] Model 3 would require independent consideration in relation to the *Heaney* proportionality test, and in particular, in relation to both the minimum impairment and overall proportion elements of the test. The factors likely to influence an assessment under the proportionality test would be matters such as the value of any cap or caps and whether the legislation is mandatory or presumptive in nature.

(ii) Rationality

[4.120] As with the *Heaney* proportionality test, the likelihood of Model 3 passing a *Tuohy* rationality test would depend on how the capping is formulated.

(iii) The right to equality

[4.121] As with Models 1 and 2, for a plaintiff to successfully challenge Model 3 based on alleged infringement of his or her right to equality, he or she would be required to establish a viable comparator class. Viable comparator classes would, in the case of Model 3, be as wide or as narrow as the categories of cap or caps contemplated.

(iv) The separation of powers

[4.122] The independence of the judiciary also applies to Model 3, because any restriction of judicial discretion by the legislature may be perceived as interfering with judicial discretion in the determination of the amount (quantum) of damages.

(v) *The non-delegation doctrine*

- [4.123] As discussed in Chapter 3, the non-delegation doctrine recognises that the Oireachtas can delegate some legislative details to another body, such as a Minister. The key question is how far the Oireachtas can go in this respect. The leading case is the Supreme Court decision in *Cityview Press Ltd v An Chomhairle Oiliúna*,⁴⁶ in which the Court stated that the test is whether the delegated authority from an Act is “more than a mere giving effect to principles and policies which are contained in the statute itself”.⁴⁷ Under this “principles and policies” test, the Act, the primary legislation, must contain principles and policies that are sufficient to guide the exercise of the delegated legislative power in a manner consistent with the intention of the Oireachtas in enacting the Act.
- [4.124] A number of consultees raised concerns in relation to a lack of principles and policies in the 2019 Bill. One consultee argued that, where primary legislation seeks to confer a broad power by way of delegation, there is an increased need for the Oireachtas to set detailed guidance by way of principles and policies. Another consultee argued that the requirement, under section 4 of the 2019 Bill, that each Regulation must be laid before the Houses of the Oireachtas would, on its own, be insufficient to make out a case of overall legislative oversight, citing the decision of the Supreme Court in *Laurentiu v Minister for Justice*,⁴⁸ which the Commission has discussed in chapter 3 above. The Model 3 Act would have to contain guiding principles and policies.

(c) Overlap with *Judicial Council Act 2019*, fair procedures and administrative difficulties

- [4.125] If the 2019 Bill had been enacted, the question would have arisen as to its overlap with the effect of the enactment of the *Judicial Council Act 2019*, which, it should be noted, had not been enacted when the 2019 Bill was introduced. Once sections 98 and 99 of the 2019 Act are commenced, the Personal Injuries Assessment Board will no longer have responsibility for maintaining the Book of Quantum and the courts will, instead, be required to have regard to the guidelines produced by the PIGC. The 2019 Bill was introduced before the addition of the provisions relating to the PIGC to the *Judicial Council Act 2019* at Seanad Éireann Report Stage, and the provisions contained in section 6 of the 2019 Bill were obviously intended to synchronise the Book of Quantum with any Regulations enacted by the Minister.
- [4.126] Consultees also raised concerns as to whether the constitutional right to fair procedures, which includes the rule against bias, would apply in the case where the

⁴⁶ [1980] IR 381.

⁴⁷ [1980] IR 381 at page 399.

⁴⁸ [1999] IESC 47, [1999] 4 IR 26.

task of capping damages is delegated to a Minister. The Commission discussed this matter in Chapter 3 and concluded, as did consultees, that such a challenge was unlikely to succeed.

- [4.127] Consultees also discussed whether delegating the power to cap would be administratively undesirable, having regard to the experience in relation to the quantum of damages awarded for mental distress under section 49 of the *Civil Liability Act 1961* (the 1961 Act) in the case of a death caused by a wrongful act of another for the benefit of the dependents of the deceased. Section 49 of the 1961 Act provides for a strict limit, or “cap”, on such an award, which it is important to note is not an award of damages in the ordinary sense. This is because, without section 49 of the 1961 Act, the award for the mental distress to which it applies would not otherwise be made at common law. Section 49(1A) of the 1961 Act, inserted by the *Civil Liability (Amendment) Act 1996*, provides that the Minister for Justice and Equality may, having regard to the changes in the value of money generally, amend the limit under the 1961 Act by way of statutory instrument. However, despite being given the power in 1996, that power to vary the level of the cap was not exercised until 2014, when it was revised upward to €35,000. The value of the cap has not been amended since, which, as argued by consultees, may mean that current value of the cap is now out of date.
- [4.128] Again, as with the discussion of Model 2 above, administrative and policy issues fall outside the scope of this project and Report. The Commission nonetheless notes that this would be an additional consideration for policy makers in enacting any capping legislation.

(d) Conclusion

- [4.129] In conclusion, the Commission considers that Model 3, in the form proposed in the 2019 Bill, would be likely to be open to constitutional challenge on the basis that, as well as being required to pass the *Heaney* and *Touhy* tests, it would also present constitutional difficulties under the “principles and policies” test. While Model 3 could withstand challenge under one or more of these headings, the Commission considers that it is more vulnerable to constitutional challenge than either Models 1 or 2. On that basis, the risks that would therefore arise have led the Commission to conclude that such a Model would not, from a constitutional perspective, be a desirable form of capping legislation to enact.

5. Model 4 – Presumptive cap set by the Judiciary, taking account of the *Judicial Council Act 2019*

(a) The Model

[4.130] Model 4 envisages an approach that could be described as closest to the current position. This Model would see the courts continue to set a maximum upper limit or cap for general damages in catastrophic injury cases, to which the upper limit for lesser injury cases would be proportionate, taking into account the significant reforms arising from the establishment of the Personal Injuries Guidelines Committee (PIGC) under the *Judicial Council Act 2019* (the 2019 Act).

[4.131] As discussed in Chapter 2, since 2015 the Court of Appeal has delivered a series of decisions that have provided extensive guidance to be applied by the courts in the assessment of general damages. These principles can be summarised as follows:

- (a) general damages should constitute fair and reasonable compensation to the particular plaintiff in the individual case (*Sinnott*),⁴⁹ which can be seen as comparable to the general principle in sentencing that the sentence must fit not only the crime but also the convicted person;
- (b) general damages awarded to the particular plaintiff should be proportionate within the general legal scheme of awards for other personal injuries (*MN v SM*);⁵⁰
- (c) minor injuries should attract appropriately modest general damages, middle-range injuries moderate damages and more severe injuries damages of a level that are clearly distinguishable in terms of the amount (quantum) from those that fall into the other two categories (*Nolan v Wirenski*);⁵¹
- (d) the amount of general damages awarded, including any maximum upper limit or cap on general damages, must be proportionate to current social conditions, bearing in mind the common good (*Sinnott*⁵² and *MN v SM*);⁵³
- (e) the common good in this context should reflect the fact that the resources of society are finite, and that each award of damages for

⁴⁹ [1984] ILRM 523.

⁵⁰ [2005] IESC 17, [2005] 4 IR 461.

⁵¹ [2016] IECA 56.

⁵² [1984] ILRM 523.

⁵³ [2005] IESC 17, [2005] 4 IR 461.

personal injuries may be reflected in increased insurance costs, increased taxation or a reduction in some social services (*Kearney v McQuillan*);⁵⁴

- (f) the amount of damages awarded, including any maximum upper limit or cap on general damages, should have regard to:
- (i) ordinary living standards in the State,
 - (ii) the general level of incomes in the State, and
 - (iii) the things on which the plaintiff might reasonably be expected to spend money (*Sinnott*).⁵⁵

[4.132] The general proposition that there should be proportionality between the amount of the award of damages and the severity of the injury suffered by a plaintiff was reiterated by the Supreme Court in 2020 in *Morrissey v Health Service Executive*,⁵⁶ where the Court stated that “respect for the proper calibration of damages for pain and suffering requires that there be appropriate proportionality between what might be considered to be a generally regarded view of relative seriousness of the injuries concerned and the amount of any award”.⁵⁷

[4.133] Model 4 also inevitably takes account of the significant reforms arising from the establishment of the Personal Injuries Guidelines Committee (PIGC) under the 2019 Act.

[4.134] The 2019 Act provides that the function of the PIGC is to draft “personal injury guidelines” which are to be submitted to the Board of the Judicial Council (the Board) within six months of the establishment of the Committee. The PIGC was formally established on 28 April 2020, so that draft guidelines are to be prepared by 28 October 2020. The draft guidelines are to be reviewed and, if required, amended by the Board⁵⁸ and approved by the Judicial Council within 12 months of the date of submission to the Board,⁵⁹ that is, by 28 October 2021.

[4.135] Section 99 of the 2019 Act, which at the time of writing (August 2020) has not yet been commenced, 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 PIGC. The amended

⁵⁴ [2012] IESC 43.

⁵⁵ [1984] ILRM 523.

⁵⁶ [2020] IESC 6.

⁵⁷ *Ibid* at para 14.28.

⁵⁸ Section 11(1)(d) of the *Judicial Council Act 2019*.

⁵⁹ Section 7(2)(g) of the *Judicial Council Act 2019*.

section 22 will be stronger and place a greater obligation on the court in that it will also place an obligation on the court to state the reasons for any departure from the guidelines in its decision.⁶⁰ Currently, there is no obligation on a court to explain any departure from the Book of Quantum.

[4.136] Section 90 of the 2019 Act provides detailed guiding principles that the PIGC must follow in the production of the Guidelines and will therefore form the basis for the Guidelines they prepare. Section 90(1) 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;
- (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.

[4.137] In drafting the guidelines, the PIGC is required, under section 90(3) of the 2019 Act, to have regard to:

- (a) the levels of damages awarded for personal injuries by courts both within the State, and, where relevant, outside the State;
- (b) the principle for the assessment and award of damages for personal injuries determined by the High Court, the 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 awarded for personal injuries;
- (e) such other factors that the PIGC or the Board considers appropriate.

[4.138] While the precise format of the guidelines has yet to be determined, it is clear that they will differ from the Book of Quantum in a significant regard, that being that the PIGC is empowered to depart from the “going rate” when producing the guidelines, by contrast to the Personal Injuries Assessment Board, which prepares and publishes the

⁶⁰ Keynote speech delivered by the Chief Justice Mr Justice Frank Clarke at Insurance Ireland Conference, 19 November 2019. See video at <<https://www.rte.ie/news/2019/1119/1092757-insurance-claims/>> accessed on 17 July 2020.

Book of Quantum and “is not entitled to depart from the ‘going rate’”.⁶¹ This has the important effect that the guidelines may potentially differ from the levels of damages currently awarded by the courts.

(b) Discussion and conclusion

[4.139] The Commission now turns to consider Model 4 in accordance with the *Heaney* proportionality test, the *Tuohy* rationality test, the right to equality, and the separation of powers, and having regard to the submissions received.

(i) Proportionality

[4.140] In terms of proportionality, the Commission notes that a number of consultees suggested that Model 4 was the only Model of the four identified by the Commission (and bearing in mind that no consultee referred to any additional possible Model) that it could be said with confidence would satisfy a proportionality test.

[4.141] Under Model 4, the courts would continue to set the overall upper limit of the cap, and would be required to have regard to the Guidelines produced by the PIGC but would be permitted to depart from those guidelines, provided that reasons for doing so were given. As noted in Chapter 3 above, it is well established that, before a standard of review such as proportionality or rationality need be applied, an identified legal right must be in issue.⁶² The Commission considers that, given that Model 4 represents a situation closest to the current position under the 2019 Act, by which the courts will continue to assess the amount of general damages, having regard to the guidelines to be published by the PIGC, it is arguably less prone than any other Model to constitutional challenge for curtailing an engaged constitutional right.

[4.142] Nonetheless, assuming for the purposes of this Report that Model 4 could be found to infringe some constitutional right, thus requiring a *Heaney* proportionality analysis, it would, in the view of the Commission, be less likely to be prone to challenge for lack of minimum impairment. In relation to overall proportionality, any challenge would be dependent on the extent to which the Guidelines produced by the PIGC were shown to be consistent with the nature and severity of the injuries to which they relate. In addition, it will be recalled that Model 4 closely represents the current position, in which the courts assess the level of damages, and would be required to have regard to

⁶¹ Keynote speech delivered by the Chief Justice Mr Justice Frank Clarke at Insurance Ireland Conference, 19 November 2019. See video at <<https://www.rte.ie/news/2019/11/19/1092757-insurance-claims/>> accessed on 17 July 2020.

⁶² Hogan, Whyte, Kenny and Walsh, *Kelly: The Irish Constitution* 5th ed (Bloomsbury Professional 2018) at para 7.1.54, footnote 181, citing: *McCann v Minister for Education* [1997] 1 ILRM 1; *McDermott v Governor of Cloverhill Prison* [2010] IEHC 324; *O’Sullivan v Chief Executive of the Irish Prison Service* [2010] 4 IR 562.

the Guidelines produced by the PIGC but be permitted to depart from those guidelines, provided that reasons for doing so are given.

(ii) Rationality

- [4.143] As with the *Heaney* proportionality test, the Commission considers that, if Model 4 were found to infringe upon some constitutional right, thus requiring a rationality analysis under the *Touhy* test, it would be unlikely to fail that test, bearing in mind that the *Touhy* test is, as discussed above, less demanding than the *Heaney* test.

(iii) Right to equality

- [4.144] The Commission considers that, as with the other constitutional rights and concerns discussed in the context of capping legislation, it would be difficult to identify a particular breach of the right to equality under Model 4.

(iv) Separation of powers

- [4.145] Similarly, it would be difficult to argue that Model 4 would interfere with the independence of the judiciary, in that the judiciary continue to assess general damages under Model 4. Moreover, the PIGC is made up of members of the judiciary, and the courts will be permitted to depart from the Guidelines produced by the PIGC in any event in accordance with the provisions of the 2019 Act.

(v) Conclusion

- [4.146] For the reasons discussed above, the Commission considers that caps imposed by Guidelines approved by the Judicial Council, pursuant to the *Judicial Council Act 2019*, will likely resist any constitutional challenge. Such Guidelines are unlikely to be found to infringe the separation of powers, which concern arises to some degree or another under each of the other Models. The proportionality of the Guidelines may only be assessed fully when the amounts of the caps to be imposed under such Guidelines are published. However, assuming that the Guidelines may broadly reflect the Book of Quantum and the recent Court of Appeal case law on the principle of proportionality in damages awards, it is likely that the Guidelines will prove proportionate under the *Heaney* test. It is particularly significant with regard to a proportionality assessment that individual judges will be able to depart from the Guidelines in particular cases, subject to an obligation to state the reasons for which they do so.

6. Final concluding comments

- [4.147] As noted above, a number of consultees considered that Model 4 was the most appropriate from an analysis of the relevant constitutional criteria, and was also preferable. A number of consultees considered that, even though Model 4 was their preferred option, Model 2 could, subject to variation, be regarded as constitutionally permissible but as a fall-back option only. It is also important to point out, as noted above, that a number of consultees preferred Models 1 and 3.
- [4.148] The Commission concludes that, in principle, legislation capping awards of general damages in personal injuries litigation could be constitutionally permissible. How any particular proposal is formulated will influence how likely or unlikely it is to be struck down. For instance, as discussed above, legislation that imposes a **presumptive** cap will, all other things being equal, be more likely to survive constitutional challenge than legislation imposing a mandatory cap. The actual amounts chosen in a cap, or caps, will also strongly influence whether the measure is taken to be proportionate under the *Heaney* standard or rational under the *Tuohy* standard. The Commission reiterates that advice on any specific government proposal for capping legislation rests with the Attorney General and final resolution of any constitutional challenge taken to enacted capping legislation rests with the Superior Courts.
- [4.149] The Commission is also conscious that this Report is published within the current, fast moving, context of policy and legislative developments since 2018 when it was first suggested that it be asked to consider examining the subject matter of this project and Report. It is important to note that the Commission, as an advisory body, invariably does, and must, take full account of the constitutional role of the Oireachtas as the sole law-making authority in the State, and of the constitutional role of the Government in its policy-making executive role, including its role in determining the timing of the commencement of much legislation, including the *Judicial Council Act 2019*. In that respect, the establishment of the Judicial Council and the consequent establishment of the PIGC under the 2019 Act are significant expressions of the will of the Oireachtas and Government, and they have been fully taken into account by the Commission in the development of this Report.
- [4.150] The Commission is also conscious that this project and Report remains a part of the wider, and continuing, review of the 33 recommendations and 71 actions flowing from the CIWG and PIC reports, and of evolving policy in this area. The Commission notes in this respect that the Programme for Government, adopted in June 2020,⁶³ contains a number of proposals relating to the insurance market in Ireland. Again, it is important to note that many of these fall outside the scope of this project and Report. Of those

⁶³ *Programme for Government: Our Shared Future* (June 2020) pages 28-29.

falling within its scope, the Commission notes that the Programme for Government refers to “[r]ecognising the work of the Personal Injuries Guidelines Committee, under the Judicial Council, in providing guidance on personal injury claims” and “[c]onsidering the need for a constitutional amendment to enable the Oireachtas to establish guidelines on award levels.”

- [4.151] The Commission emphasises that it has no role in reviewing or examining the contents of a Programme for Government, which sets out a range of policy proposals that are entirely a matter for the Government to pursue. The Commission notes, however, that this Report is being published against the background of the establishment of the Judicial Council in December 2019, that the Judicial Council first met in February this year, that the PIGC was formally established in April, that the PIGC is to prepare draft Guidelines later this year, and that, in the wider context of reform of the insurance market, they will be recognised by the Government who are also to consider the need for a constitutional amendment to enable the Oireachtas to establish guidelines on award levels.
- [4.152] The Commission notes these developments because they emphasise, on the one hand, the narrow focus of this project and Report and, on the other hand, the dynamic context within which the Report has been completed. In this Chapter, the Commission has set out its analysis of the four Models, taking account of the views expressed by consultees.
- [4.153] The Commission has concluded that there is merit in the perspectives of consultees who preferred Model 2 and those who preferred Model 4. In addition, the Commission considers that it would be entirely appropriate, and desirable, that the will of the Oireachtas, recently expressed through the enactment of the *Judicial Council Act 2019* and under which it has conferred extensive functions on the PIGC and the Judicial Council, should be given some time to be applied in practice. This is without prejudice to the consideration of the merits of any other model, such as Model 2, or a variant of it. In any event, the Commission emphasises again that, in expressing its views in this Report, the ultimate forums to consider what policy or legislative initiatives are to be taken in this or any other area are the Government (with the benefit of the advice of the Attorney General) and the Oireachtas.

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The Commission's law reform role is carried out primarily under a Programme of Law Reform. Its *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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