THE BAR OF IRELAND

The Law Library

Submission by Council of The Bar of Ireland to the Law Reform Commission Issues Paper: Capping Damages in Personal Injuries Actions

5 March 2020

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A. Introduction

1. The Council of The Bar of Ireland (**'the Council**') is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

2. The Council has prepared this submission in response to the Law Reform Commission's ('**LRC**') public consultation on its recent publication entitled *Issues Paper on Capping Damages in Personal Injuries Actions* (LRC IP 17-2019). In the Issues Paper, there are four potential models chosen as means of limiting damages for personal injuries. The LRC has invited interested parties to make submissions in respect of the Issues Paper and, in particular, in respect of the four models that have been suggested.

3. The cost of insurance is the primary reason why the LRC published the Issues Paper. As is set out in the Issues Paper, between 2016 and 2018 the Department of Finance established two bodies entitled the *Cost of Insurance Working Group* ('**CIWP**') and the *Personal Injuries Commission* ('**PIC**'). Both of these bodies have published reports that comment upon the rising cost of insurance and suggest recommendations to try and address it.

4. It has been acknowledged by the LRC, the CIWP and the PIC that any issues surrounding the cost of insurance are multifactorial. The Council agrees with this analysis. It is important to stress at the outset, therefore, that the selection of any particular model to limit damages in personal injuries actions will not by itself resolve the issue of the cost of insurance. It would be overly simplistic to assume that an issue as complex and multifactorial as this could be solved *solely* by capping damages for personal injuries.

5. The proposal to impose limits on the damages that courts may award in compensation for personal injuries, whether in the form of a single general cap or gradated caps, raises a number of constitutional questions. In its submission, the Council first considers the implications of the proposal for two aspects of the constitutional architecture, that is, the separation of powers between the judiciary and legislature, and the separation of powers between the legislature and the executive. It then goes on to consider the implications of the proposal for a number of constitutional rights, namely the right to bodily integrity, the right to an effective remedy, and the right to equality before the law.

6. The submission also considers some practical effects of the introduction of such legislation.

B. The separation of powers between the judiciary and the legislature

7. Legislation that takes the decision as to the appropriate award of damages to compensate for a particular injury out of the hands of the courts and into the hands of the legislature, either

in whole or in part, clearly raises questions as to its compatibility with the constitutional separation of powers between the judiciary and the legislature. Article 34.1 of the Constitution states that "*justice shall be administered in courts established by law by judges appointed in the manner provided in this Constitution…"* Thus, the courts and the courts alone can administer justice.

8. Once a power is recognised as a judicial function, the courts have robustly defended their sole jurisdiction to administer justice. This is perhaps most clearly demonstrated by the Supreme Court's decision in *Buckley v Attorney General* [1950] IR 67 (the 'Sinn Féin Funds Case'). The Supreme Court held that the Sinn Féin Funds Act 1947, which provided for a general stay on litigation concerning the ownership of certain funds and required the High Court to dismiss any claim and to direct that the funds be disposed of in the manner provided for in the Act, was repugnant to the Constitution. The substantial effect of the Act was that the dispute was determined by the Oireachtas and the Court was required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing or without forming any opinion as to the rights of the respective parties. This was clearly an unwarrantable interference by the Oireachtas with the operation of the Courts in a purely judicial domain. O'Byrne J held at p. 84:

> *"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."*

9. The facts of the Sinn Féin Funds case can be viewed as quite extreme in the sense that the legislation at issue purported to interfere with actual court proceedings that were in being. Clearly, if a statute purported to limit the amount of damages that could be awarded in a particular personal injuries claim that was in being, that would constitute an impermissible encroachment upon the judicial function as in *Buckley.* There seems to be no question of that being proposed. The courts have, however, also defended the exclusive right of the courts to perform judicial functions at a general level, striking down legislation which purports to direct that an aspect of justiciable controversies be decided in general rather than in any particular set of proceedings. In *The State (McEldowney) v Kelleher* [1983] IR 289, section 13(4) of the Street and House to House Collections Act 1962 was challenged. It provided that upon appeal to the District Court of a refusal by a Chief Superintendent to grant a collection permit, where a police officer gave evidence that he had reasonable grounds for believing that the proceeds of the collection would be used for one or more of a number of listed unlawful purposes, the District Court judge was obliged to disallow the appeal. The Supreme Court held that the

provision was an unconstitutional interference with the judicial function. Walsh J said at p. 306:

> *"The statute creates a justiciable controversy and then purports to compel the court to decide it in a particular way upon a particular statement of opinion being given upon oath as to whether or not a statutory reason for refusing the permit exists, whatever opinion the court may have formed on the issue in question, or might have formed if it had heard any evidence upon it."*

10. Thus, the process of evaluating evidence is an integral part of the administration of justice to be performed by the courts.[1] Neither can legislation interfere in proceedings by allowing the executive to indefinitely postpone a trial: *The State (C) v Minister for Justice* [1967] IR 106. On the other hand, a statutory provision that simply makes it mandatory for the court to make a specified order on proof of certain matters is within the competence of the Oireachtas so long as it does not interfere with the court's assessment as to whether those matters are proved: *State (O'Rourke) v. Kelly* [1983] IR 38.

11. It seems uncontroversial that a decision as to what award of damages is appropriate to compensate a plaintiff's injuries is a part of the administration of justice. The courts have confirmed in the criminal context that "*the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive": Deaton v Attorney General* [1963] IR 170. The factors to be taken into account by a court in deciding how to punish on the one hand, and how to compensate on the other, are clearly different, but the decision as to the appropriate compensation in personal injuries cases would seem to be no less integral to the judicial function than the process of sentencing in the criminal context.

12. Legislation that dictated that the court award a particular sum of damages for an injury of a particular severity would seem to compel the courts to decide a justiciable controversy in a particular way, in a similar manner to that ruled unconstitutional in *The State (McEldowney) v Kelleher* [1983] IR 289. None of the models discussed by the LRC in its Issues Paper go quite as far as dictating the actual award of damages for particular injuries, but Model 1 comes dangerously close to doing so in prescribing caps for particular types of injuries, broken down into levels of severity. Depending on how broad those categories are cast, and how restrictive the caps are, the result may be that the courts are in reality bound to award a particular sum of damages for, for example, a moderate whiplash injury. Model 2, in mandating a particular award of damages once the court determine the level of severity of injury, goes further still. The court retains a limited amount of discretion in resolving the dispute in that it retains the power to decide on the level of severity, but once that is determined the legislature directs the court to decide the case in a particular way without exercising any further discretion to take into account, for example, the circumstances and characteristics of the plaintiff and the manner in which the injury occurred.

[1] See also the Supreme Court's decision in *Maher v Attorney General* [1973] IR 140 in the criminal context.

13. Substantial guidance as to the limits of permissible encroachment upon this aspect of the judicial function has been developed in relation to sentencing. The line of case law that has developed in response to attempts by the legislature to mandate particular sentences for criminal offences may provide useful indicators as to the likely view of the courts on legislation restricting the courts' freedom in the selection of damages awards.

14. This line of case law begins with the Supreme Court's decision in *Deaton v Attorney General* [1963] IR 170. It concerned section 186 of the Customs Consolidation Act 1876, which purported to confer on the Revenue Commissioners the right to elect, on a conviction of a customs offence, the penalty to be imposed by the District Court. The Supreme Court held that the legislature may prescribe general rules, but it falls for the court to apply the rules when there is a range of penalties to choose from. Ó Dálaigh CJ held at p.182:

> *"There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. It is here that the logic of the respondents' argument breaks down. 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. Traditionally, as I have said, this choice has lain with the Courts. Where the Legislature has prescribed a range of penalties the individual citizen who has committed an offence is safeguarded from the Executive's displeasure by the choice of penalty being in the determination of* ***an*** *independent judge. The individual citizen needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty; and it is inconceivable to my mind that a Constitution which is broadly based on the doctrine of the separation of powers—and in this the Constitution of Saorstát Éireann and the Constitution of Ireland are at one— could have intended to place in the hands of the Executive the power to select the punishment to be undergone by citizens.*
>
> *…*
>
> *In my opinion the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive as Parliament purported to do in s. 186 of the Customs Consolidation Act 1876."* [emphasis added]

15. The prescription by the legislature of a mandatory sentence for a particular offence does not breach Article 34 or the separation of powers. In *Osmanovic v DPP* [2006] 3 IR 504, the Supreme Court upheld the constitutionality of section 186 of the Customs (Consolidation) Act 1876, as amended by section 89(b) of the Finance Act 1997. It provides that the penalty for conviction on indictment on charges of the illegal importation of goods is a fine of treble the

value of the goods, including the duty payable thereon, or of €12,700, whichever is the greater, or, at the discretion of the court, imprisonment for a term not exceeding five years, or both a fine and imprisonment. The constitutional challenge in *Osmanovic* was based upon an argument that the fine was a fixed penalty contrary to the principles of separation of powers. The Supreme Court rejected this argument on the basis that a range of options were available to the court. The court made further *obiter* comments concerning the constitutionality of mandatory sentences:

> *"There is clearly a multiple choice here. Even within the power to impose a prison term there is clearly the implied power to suspend all or part of that term. The prison sentence whether custodial or suspended or partly custodial and partly suspended may be the only sentence or may be combined with the fine. The selection is entirely to be made by the court. There is no question, therefore, of either the legislature or the executive fixing the punishment. Only the court exercising its judicial power does that. This court cannot accept that because there is a legislative prescription in relation to the fine option there is a breach of the principle of separation of powers. It is quite clear from the judgment of Ó Dálaigh C.J. in Deaton v Attorney General and the Revenue Commissioners [1963] I.R. 170 that the Oireachtas does have powers to lay down general parameters within which a sentence is to be imposed. There is no necessity in this judgment and indeed it would be wholly undesirable to consider what the limits might be (if any) on the power of the Oireachtas to provide for either fixed sentences or mandatory sentences. One could postulate extreme situations where the sentencing powers of judges were removed altogether and every offence had a mandatory sentence. The constitutionality of such a law would obviously be questionable. But it has always been accepted and indeed was accepted, in Deaton v Attorney General and the Revenue Commissioners that, within reason at least, the Oireachtas has power to lay down those parameters."*

16. The constitutionality of mandatory sentences for particular offences was confirmed in *Lynch and Whelan v Minister for Justice* [2012] 1 IR 1. Those two appeals concerned a constitutional challenge to the mandatory life sentence for treason or murder provided for by section 2 of the Criminal Justice Act 1990. The two plaintiffs had each been convicted of murder and it was in relation to the offence of murder that the challenge was considered. The Supreme Court (Murray CJ) upheld the constitutionality of the section in the light of *Deaton,* holding at p. 20 that:

> *"The court is satisfied, as Ó Dálaigh C.J. explained in that case, that the Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified.*
>
> *In this case however s.2 of the Act of 1990 applies to the crime of murder. For the reasons already indicated that crime has always and legitimately been considered to*

be one of profound and exceptional gravity and, in the court's view, one for which the State is entitled to impose generally a punishment of the highest level which the law permits. Given that it is an offence which is committed when, and only when, a person is unlawfully killed and that the person so doing intended to kill or cause serious injury, it is one which can therefore properly be differentiated from all other crimes, including manslaughter."

17. It is clear from Murray CJ's reasoning in *Lynch and Whelan* that the reason why a mandatory life sentence for murder is constitutionally permissible is that it is considered an offence of exceptional gravity. A mandatory life sentence for theft, it would seem, would be disproportionate and thus unconstitutional according to the Court's comments in *Osmanovic* and *Lynch and Whelan*. Similarly, in *Gilligan v Ireland* [2013] 2 IR 745, the Supreme Court upheld the constitutionality of section 13 of the Criminal Law Act 1976, which provides that a sentence of imprisonment imposed for an offence committed whilst a person is serving a sentence shall be consecutive on the sentence being served. MacMenamin J noted that:

> "*The section itself does not prescribe a fixed mandatory sentence; but, rather, only stipulates that, in certain limited conditions, an offender on conviction will receive a consecutive sentence. The provision challenged allows for the application of proportionality by the judiciary in sentencing. There is a rational connection between the nature of the penalty and the harm it seeks to address."*

18. A general cap on damages recoverable in personal injuries cases, as envisaged by Models 1, 2 and 3, can be seen as analogous to mandatory (or mandatory minimum) sentences in criminal law. Such legislation would prescribe a general rule applicable to all individuals. However, the range of sentences available in criminal cases has naturally limitations: the maximum penalty that can ever be imposed on an offender is life imprisonment. It is clear that this penalty may only be prescribed by the Oireachtas for the gravest of offences. On the other hand, awards for personal injuries have no natural limit. A restrictive cap on damages may therefore reduce the damages in a particular case to very far below what the court might think appropriate. As discussed below, a statutory cap that prevented certain plaintiffs from recovering what would be an adequate, fair and proportionate award of damages in light of the injury suffered would engage, and potentially breach, a number of those plaintiffs' constitutional rights. It would seem also to breach the requirement set out in *Osmanovic* and *Lynch and Whelan* that the restriction on such rights be proportionate. Therefore, in order to respect the boundaries of Article 34, it seems that a statutory cap on damages would have to be very high indeed, which may call into question the usefulness of imposing such a cap in the first place.

19. While mandatory sentences are permissible so long as they are proportionate to the offence involved, the courts have resisted further attempts by the legislature to interfere with the courts' role in choosing the appropriate sentence. In two recent cases, the Supreme Court have struck down sections attempting to do this. *PC v Minister for Social Protection* [2017] 2 ILRM 369 concerned a challenge to the constitutionality of section 249(6) of the Social Welfare Consolidation Act 2005, as amended. That section, and regulations made thereunder, disqualified the appellant from receiving the State Pension Contributory whilst serving a

custodial sentence. Giving the judgment of the court, MacMenamin J referred to *Deaton* and recalled the underlying principle that "*while the legislature states a general rule, the application of that rule is for the courts; that is, the degree of punishment which a particular citizen is to undergo for an offence is a matter which may vitally affect his liberty or welfare. Thus, the identification of the degree of punishment is a function of the administration of justice*."

20. He held that section 249(6) breached this principle by mandating an additional penalty not imposed by a court, saying at para. 59:

> *"To my mind, the prohibition on the payment of the SPC to sentenced persons can only constitute an additional punishment. Article 34 of the Constitution provides that justice shall be administered in courts established by law, by judges appointed under the Constitution. Article 38 provides that no person shall be tried on any criminal charge, save in due course of law. But this punishment is not imposed by a court at all. As such, it contravenes Articles 34 and 38 of the Constitution. The imposition of penalties, in the context of sentencing a person convicted of crimes, is a function exclusively reserved by Article 34 of the Constitution to the courts. Sentencing is an integral part of trial in due course of law, guaranteed by Article 38 of the Constitution. The provision, as applied, offends against those principles."*

21. The matter was revisited last year in *Ellis v Minister for Justice and Equality* [2019] 2 ILRM 420, where the discretion of the courts in choosing the appropriate sentence was again reasserted. The appellant challenged the constitutional validity of section 27A(8) of the Firearms Act 1964, as substituted and amended, which required a mandatory minimum sentence of 5 years' imprisonment to be imposed for a second conviction under that section. In her judgment, Finlay Geoghegan J reviewed the decisions discussed above and held that "*the Oireachtas may prescribe by legislation that all persons convicted of a particular offence shall be subject to the prescribed penalty. To do so is not in breach of the separation of powers as an intrusion on the exclusive jurisdiction of the courts to administer justice"* (para. 46). However, she noted that the court was being asked a new question here, that was:

> *"whether it is consistent with the Constitution for the Oireachtas to legislate for a fixed or minimum mandatory sentence or penalty which does not apply to all persons convicted of the offence, but only to a limited class of such offenders, determined by reference to a fact which is either one characteristic of the offender, namely that he has one or more prior relevant conviction, or is one of the circumstances in which the offence of conviction is considered to have been committed, namely that it is the second time or more that the offender has committed this offence or a similar relevant offence."* (para. 52)

22. She held that this is not constitutionally permissible, at paras. 60-63:

> *"However, 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 either of the circumstances in which the offence was committed, or the personal circumstances of the convicted person. This is because the law no longer simply determines the applicable penalty for all who are convicted of the crime and the selection of the appropriate sentence in accordance with law for the particular offence committed by the individual offender forms part of the administration of justice and is pursuant to Art.34.1 exclusively the domain of judges sitting in courts. That is what the Oireachtas purported to do by enacting s.27A(8) of the 1964 Act, as amended.

…

Accordingly, for the reasons set out in this judgment, I have concluded that in enacting s.27A(8) of the 1964 Act, as amended, the Oireachtas has impermissibly crossed the divide in the constitutional separation of powers and sought to determine the minimum penalty which must be imposed by a court, not on all persons convicted of an offence contrary to s.27A(1), but only on a limited group of such offenders identified by one particular characteristic, namely that such person has previously committed one or more of the listed offences.

It follows from this conclusion that the appellant is entitled to a declaration that s.27A(8) of the Firearms Act 1964 (as substituted by s.59 of the Criminal Justice Act 2006) is repugnant to the Constitution."

23. It is submitted that the decision in *Ellis* is instructive when considering the proposed capping of personal injuries awards. Where an overall maximum cap is proposed, this involves a general rule and does not appear to stray into the application of that general rule to particular individuals (although it may breach the requisite proportionality requirement, as discussed above). Where, however, the proposed legislation prescribes the level of damages to be awarded based on the severity of the injury – as does Model 2 – this appears to clearly stray beyond the prescription of general rules permitted by *Deaton.* In a similar manner to the section struck down in *Ellis,* Model 2 directs the court to award a particular amount of damages based on one particular characteristic of their case – the severity of the injury – without allowing the courts to take into account further relevant factors such as the position of the plaintiff, the characteristics of the plaintiff that might cause the injury to affect him more or less, the circumstances in which the injury occurred, and so on.

24. In conclusion, while the Oireachtas may prescribe general rules, it may not stray into the application of rules to particular individuals, which is a function reserved solely for the courts. The Oireachtas is not entitled to dictate how a particular justiciable controversy is to be decided by the courts. While it may impose mandatory sentences of general application – and arguably also general limitations on personal injuries awards – these must be proportionate. Models 1, 2 and 3 all raise serious questions as to their compatibility with Article 34 and the independence of the judicial function. Model 2, in dictating the particular awards to be made based on severity of injury, would almost inevitably breach Article 34 insofar as it strays beyond the prescription of general rules applicable to all.

C. The separation of powers between the legislature and the executive

25. As noted by the LRC in its Issues Paper, Model 3 may also breach the separation of powers in another respect, that is, between the legislature and the executive. It proposes that the Oireachtas would delegate the power to limit personal injuries awards to an arm of the executive. A private members bill, the Civil Liability (Capping of General Damages) Bill 2019, purports to do just that. Article 15.2.1 vests the "*sole and exclusive power of making laws*" in the Oireachtas. It is clear from the seminal decision in *Cityview Press v AnCO* [1980] IR 381 that law making powers cannot be delegated to the executive: the delegation of functions will only be permissible when what is delegated is no more than "*a mere giving effect to principles and policies which are contained in the statute itself".* Where little or no guidance is contained in the statute as to how a function is to be performed, the statute will be struck down as unconstitutional: *McDaid v Sheehy* [1991] 1 IR 1; *Laurentiu v Minister for Justice* [1999] 4 IR 26.

26. In addition, the applicable test (which can be characterised as the 'refined negative test') arising from the Supreme Court decision in *O'Sullivan v. Sea Fisheries Protection Authority & Others*[2] has been described by O'Donnell J. as follows: *is the area of rule making delegated, so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas by Article 15.2.1.* As set out as follows, the scope of the decision making left to the subordinate rule maker – here the Minister for Justice and Equality, is too broad.

27. What the Civil Liability (Capping of General Damages) Bill 2019 purports to do is give an extremely broad power to the Minister for Justice and Equality to interfere with the administration of justice by prescribing a maximum level of general damages that may be awarded for personal injuries. There is nothing in terms of principles and policies set out in the Bill as to how the capping is to be done. Rather, regard is simply to be had to the public interest and ensuring a 'fair and reasonable level of damages'. While section 4 of the Bill requires the Minister's regulation to be laid before the Dáil, it is clear from *Laurentiu* that such a measure alone is insufficient to make out a case of 'overall legislative oversight'.

28. It would seem likely that the private members bill is doubly unconstitutional in that it breaches (a) Article 34 in crossing over the line into the administration of justice, and (b) Article 15.2.1 in that, having claimed legislative powers in this area, the legislature then hands them over to the executive to exercise without the requisite principles and policies to govern their exercise. Of course, the legislature might enact a Bill that contained more in the way of guidance, but any legislation enacted under the proposed Model 3 would require close scrutiny through the lens of Article 15.2.1.

[2] [2017] IESC 75 (unreported, Supreme Court, December 12, 2017). The Court was comprised of Clarke CJ., O'Donnell J., MacMenamin J., Dunne J. O'Donnell J. gave the judgement of the Court; see paragraphs [39] and [40]

D. The impact of capping damages on constitutional rights

I. The right to bodily integrity

29. It is well established that the right to bodily integrity is one of the unenumerated personal rights protected by Article 40.3 of the Constitution. It is one of those rights which, to use the categorisation of Costello P in *W v Ireland (No.2)* [1997] 2 IR 141, is regulated and protected by law (common law and/or statutory law) independent of the Constitution. As stated at p. 165 of that judgment, the right to bodily integrity is protected by extensive provisions in the law of tort.

30. At p. 167, Costello P stated that *"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*." This statement should not be read as a suggestion that the right to bodily integrity will be vindicated so long as the law provides that damages are available in principle as a remedy for personal injury, even where there is a mandatory cap on the level of damages which could be recovered. This comment by Costello P was made in a context in which there was no question of any cap on the recoverable damages, and thus no potential barrier to the recovery of an award of damages that was proportionate in all of the circumstances of the case. More must be required to vindicate the constitutional right to bodily integrity than the mere availability of capped damages, which may fail to provide a proportionate remedy for the personal injury in a given case. What is required to safeguard the right to bodily integrity is that the plaintiff be able to obtain a remedy in damages which is proportionate to the harm suffered.

31. The LRC states at para. [3.16] of its Issues Paper that the standards imposed on the law of negligence by the Constitution are (i) that it is 'just' and (ii) that it must be basically effective. Any mandatory cap on awards of damages for personal injuries could be open to challenge on the basis that it does not satisfy either such standard. The statement in *Sweeney v Duggan* [1991] 2 IR 274 that Article 40.3.2°of the Constitution gave the plaintiff therein "*no more than a guarantee of a just law of negligence*" supports the contention that a mandatory cap would be unconstitutional. Inherent in a just law of negligence is the capacity for the plaintiff to obtain a just remedy. This necessarily entails that the courts maintain jurisdiction to award proportionate compensation which bears a rational relationship to the harm caused. The obvious difficulty with a mandatory cap is that it cannot account for circumstances in which the justice of the particular case would require an award of damages which exceeds that permitted under the cap. Thus, if the cap is set at a level which means that the maximum damages that may be awarded to a plaintiff are insufficient to fully compensate that personal injury suffered, it cannot be said that the law of negligence is operating justly. This would, accordingly, result in a failure to vindicate the right to bodily integrity. The law of negligence would be insufficient to safeguard that right if a statutory cap prevented certain plaintiffs from recovering what would be an adequate, fair and proportionate award of damages in light of the injury suffered. For this reason, any mandatory statutory cap is potentially constitutionally infirm for failure to vindicate the right to bodily integrity.

32. A mandatory cap would raise a similar issue in relation to the requirement that the law of negligence be "basically effective" to vindicate the right. Given that the maximum level allowed under the cap may prevent an individual from achieving proportionate justice on the particular facts of a given case, it could not be said that the law was "basically effective" to vindicate the plaintiff's right to bodily integrity in such circumstances.

33. While the LRC states that para. [3.17] that it is "*not aware of any case in which a plaintiff has asserted that a particular award of damages failed to vindicate his or her right to bodily integrity*", such would in any event raise fundamentally different issues to a situation where a court was statutorily precluded by a mandatory cap from awarding the sum of damages which would be required to give just and proportionate compensation to the plaintiff and hence to vindicate as far as practicable the plaintiff's right to bodily integrity.

II. The right to an effective remedy

34. The Council accepts that the proposed legislative models for capping damages do not directly bear on the right of access to the courts *per se*, insofar as that right is primarily engaged by measures external to the administration of justice (such as the fiat of the attorney general formerly required to bring proceedings against a Minister – see *Macauley v Minister for Posts and Telegraphs* [1966] IR 345) which affect the entitlement of a party to come to court at all (see the judgment of Clarke J in *Farrell v Bank of Ireland* [2013] 2 ILRM 183). The proposed models of reform would not inhibit a plaintiff's right to come to court but rather bear on the remedy, or the extent of the remedy, that a plaintiff can receive.

35. Thus, while the right of access to the courts is not engaged, the proposed legislative models have implications for the right to an effective remedy. In *IS v Minister for Justice, Equality and Law Reform* [2011] IEHC 31, Hogan J pointed out that the combined effect of Articles 34.1, 34.3.1°, 40.3.1° and 40.3.2°, coupled with the corresponding case law, is to demonstrate that the Constitution provides litigants with the right to an effective remedy:

> *"These examples – which are certainly by no means exhaustive – all share one common theme, namely, that <u>the courts will ensure the remedies available to a litigant are effective to protect the rights at issue</u> and that our procedural law (including all legislation restricting or regulating access to the courts) respects basic fairness of procedures and is neither arbitrary or unfair. Article 34.3.1°, Article 40.3.1° and Article 40.3.2° thus reflect the same basic premise as that contained in article 13 of the European Convention on Human Rights, i.e., the guarantee of an effective remedy. That, after all, is the central premise of what the express words of Article 40.3 – the vindication of rights in the case of injustice done – are all about."* [emphasis added]

36. As he stated at para. 14 of that judgment, *"it would be difficult to conceive of a more extensive guarantee of an effective remedy than the one actually provided by [40.3.1° and 40.3.2°], given that the State is thereby committed 'as far as practicable.....to vindicate' the rights in question*." Hogan J echoed this view in *Efe (A Minor) and Others v Minister for Justice and Others* [2011]

2 IR 798:

> *"I do not propose to dwell on what is, strictly speaking, the first question which might otherwise be thought to arise, namely, whether the Constitution (and particularly Article 40) serves to guarantee litigants an effective remedy. Of this there can be absolutely no doubt. …*
>
> *It is true that, unlike article 13 of the European Convention on Human Rights, Article 40 does not actually use the term 'effective remedy', but rather addresses itself to the concept of vindication of rights. It is, of course, merely a truism to observe that constitutional rights cannot be vindicated in the absence of an adequate remedy, as the wealth of constitutional case law on the point amply demonstrates. This difference in approach is simply a question of verbal style – or, if you will, semantics – but it certainly amounts to the same thing. Adapting, therefore, the language of Finlay P. in The State (C.) v. Frawley [1976] I.R. 365, at p. 374, the Constitution guarantees such a right 'even if there never had been a European Convention on Human Rights, or if Ireland had never been a party to it'.*
>
> *It might also be observed that in his judgment in Meadows v. Minister for Justice [2010] IESC 3, [2010] 2 I.R. 701, at p. 721, Murray C.J. commented that it was 'the task of the courts to ensure that where rights are wrongfully breached that remedies are effective'. …"* [emphasis added]

37. Furthermore, although not couched in terms of the right to an effective remedy, the general jurisdiction of the courts to grant a remedy to vindicate the personal rights of the citizen is well established. In *The State (Quinn) v Ryan* [1965] IR 70, Ó Dálaigh CJ famously stated at p. 122 that:

> *"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary it follows that no one can with impunity set these rights at nought or circumvent them, and that the Courts' powers in this regard are as ample as the defence of the Constitution requires."* [Emphasis added]

38. Similarly, in *DG v Eastern Health Board* [1997] 3 IR 511, Hamilton CJ stated as follows at p. 522:

> *"It is part of the courts' function to vindicate and defend the rights guaranteed by Article 40, section 3.*
>
> *If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights."* [Emphasis added]

39. In *DB v Minister for Education* [1999] 1 IR 29, Kelly J referred to *The State (Quinn) v Ryan* and *DG v Eastern Health Board* and said at p. 40 that:

> *"These quotations seem to me to establish the proposition that in carrying out its constitutional function of defending and vindicating personal rights, the Court must have available to it any power necessary to do so in an effective way. If that were not the case, this Court could not carry out the obligation imposed upon it to vindicate and defend such rights. This power exists regardless of the status of a respondent."* [Emphasis added]

40. At paras. [3.21] – [3.23] of its Issues Paper, the LRC refers to the right to litigate and the right to an effective remedy and posits that there are two ways that the protections of these rights may be read: (1) as 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) as 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.

41. The LRC suggests that reading (1) seems implausible in the context of an award of damages because, in reality, a plaintiff can only receive an award of damages if the defendant has the means to pay the award or is insured. Thus, it is stated that "[*i]f reading (1) were followed, a plaintiff could never have his or her rights vindicated against an impecunious defendant*". The LRC suggests that it would seem more natural to maintain that the plaintiff's rights can, in principle, be vindicated by damages as a kind of remedy (reading (2)) but that in this instance the plaintiff will never effectively realise that benefit. The LRC therefore concludes that only reading (1) would present a serious difficulty to a statutory cap. In its view, reading (2) guarantees the less strict principle that, as long as damages are available to a plaintiff in appropriate cases, his or her right to an effective remedy is vindicated.

42. Although discussions of the right to an effective remedy in the case law have tended to focus on the availability of the particular type of remedy sought by the plaintiff (or of any remedy), this should not be taken to suggest that the right is vindicated provided merely that the type of remedy sought is available. As noted above, whatever about its potential status as a freestanding unenumerated constitutional right, at present the right to an effective remedy is derived in large part from the vindication of rights required by the Constitution. The right to an *effective* remedy must incorporate some element of the remedy being sufficient to adequately and proportionately vindicate the right at issue. Thus if a statutory cap on damages operated to prevent the courts from awarding such damages as would be required to fully vindicate the constitutional right in question (e.g. the right to bodily integrity), this would in turn raise issues as to the compatibility of the cap with the right to an effective remedy.

43. Accordingly, the mere availability of damages in principle, where those damages are subject to a statutory cap, will not guarantee that the right to an effective remedy will be vindicated in circumstances where the injury incurred by the plaintiff would have resulted in a higher quantum of damages but for the statutory cap.

44. The Issues Paper concludes that the right to an effective remedy must refer to the availability of the *type* of remedy sought by the plaintiff rather than constituting a guarantee that the *specific remedy* granted will fully vindicate the plaintiff's rights. Central to this conclusion is the suggestion that the right to an effective remedy cannot refer to the *specific remedy* because this would mean that the right could never be vindicated in circumstances where damages are awarded against an indigent defendant. This reasoning appears to rely on potential difficulties in the enforceability and recoverability of the award of damages to suggest that the substance of the right to an effective remedy must refer to the availability of the type of remedy only. However, the inability of the plaintiff to recover the damages award from an impecunious plaintiff is a distinct issue from the jurisdiction of the courts to award him just damages (i.e. an effective remedy) in the first place. To posit an unlikely example, if general damages in all cases of whiplash were capped at €500, it could scarcely be suggested that the availability of damages as a remedy *at all*, notwithstanding that the upper limit of those damages was manifestly too low to meet the justice of all cases, means that the right to an effective remedy has been vindicated. By contrast, the right will be vindicated where a court makes an order for full and proportionate damages, regardless of whether the impecuniosity of the defendant precludes the plaintiff from recovering all of those damages.

45. If "reading (1)" as described at para. [3.21] of the Issues Paper is taken as referring to the jurisdiction of the courts to award the specific remedy (in terms of damages) sought by the plaintiff, rather than to the ability of the plaintiff to recover those damages in all cases, then the suggested implausibility of reading (1) referred to in para. [3.22] falls away.

46. Given that the purpose of the right to an effective remedy is intimately connected with the vindication of constitutional rights, any mandatory cap on damages could potentially give rise to a breach of the right to an effective remedy where the cap is insufficient to vindicate the other constitutional rights of the plaintiff (for example, their right to bodily integrity). The Council does not, therefore, agree that the fact that damages will remain available as a remedy *at all* means that a statutory cap on such damages would not offend the right to an effective remedy.

47. Thus while the LRC concludes that the right to an effective remedy will be vindicated "*as long as damages are available to a plaintiff in appropriate cases*", it may be more accurate to say that what the right in fact requires for the remedy to be effective is that *appropriate damages* be available to the plaintiff. The imposition of a mandatory statutory cap runs the risk that certain plaintiffs will not be able to recover a proportionate quantum of damages to compensate them for the injuries they have suffered in all of their particular circumstances. It is submitted that this would offend the right to an effective remedy; more is required to vindicate this right than simply the availability of (capped) damages in principle.

III. Proportionality and/or rationality

48. Neither the right to bodily integrity nor the right to effective remedy is absolute and both may be subject to legitimate restriction or regulation in accordance with law. The two prevailing standards of review for rights limitation are the proportionality test and the rationality test,

although the precise relationship between the two tests is by no means clear (see Hogan, Whyte et al, *Kelly: The Irish Constitution* (5th Ed., Bloomsbury Professional, Dublin, 2018] at paras. [7.1.97] - [7.1.98]). Given that a mandatory cap on damages awards would potentially restrict both rights, such a cap could only be justified if it passed the proportionality test and/or the rationality test.

IV. Proportionality

49. It is worth setting out in full the proportionality test as formulated by Costello J (as he then was) in *Heaney v Ireland* [1994] 3 IR 593 at p. 607:

> *"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 right as little as possible, and*
> >
> > *(c) be such that their effects on rights are proportional to the objective"*

50. The LRC, in its Issues Paper, refers to the three limbs of the test as set out at (a), (b) and (c). However, it is important to consider the test in its entirety. In order to satisfy the test, the objective of the legislation must "be of sufficient importance" to warrant overriding a constitutionally important right. There is little guidance in the case law as to how this aspect of the test is to be applied, but evidently a court would have to be satisfied of this element of the test. The court would moreover be required to be satisfied that the aim of the provision relates to "pressing and substantial" concerns.

51. It is difficult to conduct a thorough analysis of the issues which could arise in in the context of a proportionality analysis in the absence of a definite draft scheme setting out the specifics of the cap. From a constitutional rights perspective, important considerations would include the figure imposed by the cap; whether the cap was mandatory or presumptive; and, if presumptive, the conditions in which (and the extent to which) the cap could be departed from. To this extent the Council agrees that the proportionality assessment would depend, to a certain extent, on the manner in which the cap was calibrated. Notwithstanding this, some general considerations in respect of the constitutionality of a statutory cap are addressed below.

V. Rationality

52. An alternative standard of review, the rationality test, is sometimes employed by the courts in lieu of, or in addition to, the proportionality test when two constitutional rights or duties are

directly in conflict. As articulated by Finlay CJ in *Tuohy v Courtney* [1994] 3 IR 1 at p. 47, in a challenge to the constitutional validity of any statute, the enactment of which entailed a balancing of constitutional rights and duties:

> *"[T]he 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."*

53. This standard is much more deferential to the legislature, as the courts will uphold the measure unless it is contrary to reason and fairness. This less interventionist approach has generally been applied in circumstances where there is a clash of constitutional rights or duties.

54. The LRC, at para. [3.32] of its Issues Paper, notes that the concept of "rights" that may be balanced under this test is quite broad and may include "*a general sense of the public interest and common good to be weighed against the restriction at issue.*" It further suggests that the decision of the Supreme Court in *Re the Health Amendment (No 2) Bill 2004* [2005] 1 IR 105, where the court declined to apply the rationality test on the basis that the "financial interests" of the State did not constitute a constitutional right for those purposes, can be distinguished. The LRC suggests that the policy behind a cap on damages would go beyond the financial interests of the State and would incorporate an element of the common good, as insurance premiums bear more directly on citizens and businesses operating in Ireland.

55. It is difficult to predict whether the courts would utilise the proportionality test or the rationality test (or both) if called upon to assess a legislative cap on damages. The jurisprudence is somewhat inconsistent in this regard. The rationality test would be more deferential to the legislature; however, it is open to question whether a hard, inflexible cap on damages would pass even the rationality test. Depending on the level at which the cap was pitched, it could be open to challenge on the basis that it is "so contrary to reason and fairness as to constitute an unjust attack" on some individual's constitutional rights to bodily integrity and an effective remedy. Utilising a presumptive cap would allay some of these concerns although, for the reasons set out below, a presumptive cap would not be beyond constitutional challenge.

VI. Implications of the proposed models for the above rights

56. The Council agrees with the suggestion at paragraph [3.3] of the LRC's Issues Paper that a mandatory cap on damage poses clear constitutional problems. Such a cap would have the potential to prevent individual plaintiffs from achieving proportionate justice, in that it would preclude them from obtaining a just award which bears a relationship to the full circumstances of their individual case and injury. As such, a hard cap limits the rights to bodily integrity and an effective remedy to an extent that may not be constitutionally permissible. For the reasons outlined above, an inflexible mandatory cap would be unable to survive a proportionality

analysis and arguably would fail if subjected to a rationality assessment.

57. Accordingly, of the suggested legislative models for capping damages, there are clear difficulties with Model 1 from a constitutional rights perspective insofar as that model requires the imposition of a mandatory cap on damages. Similar objections could be raised to Model 3 if it was to be based on the same manner of hard statutory cap as Model 1.

58. The LRC suggests that a presumptive cap, which could be disapplied where required by specified (or exceptional) circumstances, would be less open to challenge. It states as follows in respect of proposed Model 2:

> *"Model 2 includes an 'uplift' provision, similar to that seen in the England and Wales Civil Liability Act 2018, whereby the court would be entitled, in exceptional circumstances and subject to specific criteria, to award a higher amount than the tariff amount. Such a provision would transform Model 2 from mandatory in nature to presumptive in nature which should assuage some of the constitutional concerns as to independence of the judiciary by retaining a level of judicial discretion." (para. [4.32])*

59. The implications of this approach for judicial independence and the separation of powers are discussed above. From the perspective of constitutional rights, it is far from clear that retaining provision for a judicial uplift would necessarily address (in practice or in principle) all of the concerns associated with a hard mandatory cap, although it would undoubtedly be less constitutionally troublesome.

60. The Council is of the view that many of the same constitutional concerns identified above in respect of a hard cap would still apply where the legislation provides for the possibility of judicial uplift by a set percentage only, rather than in order to meet the justice of the case. In such circumstances, although the possibility for uplift would alleviate some constitutional concerns, the reality is that there would remain an upper limit (even allowing for the uplift) on the maximum amount that a plaintiff may recover. Given that this upper limit may prevent a plaintiff from recovering the full amount of compensation that a court would have assessed had it not been for the cap, the same constitutional difficulties as regards vindicating the rights to an effective remedy and to bodily integrity would still remain.

61. This is significant given that the Issues Paper refers specifically to section 5 of the England and Wales Civil Liability Act 2018 in the context of Model 2. Pursuant to that section, Regulations made by the Lord Chancellor may provide for a court to determine that the amount of damages payable for pain, suffering and loss of amenity in respect of one or more whiplash injuries is an amount greater than the tariff amount relating to that injury or those injuries. However, section 5(3) thereof provides that *"[t]he regulations [made by the Lord Chancellor and allowing for the judicial uplift] must specify the maximum percentage by which the greater amount mentioned in subsection (1)(a), (b) or (c) may exceed the relevant tariff amount."* Under such a model, it remains possible that a court would assess that the total amount of damages required to vindicate the constitutional rights of the plaintiff through a proportionate award of compensation is higher than the cap, even allowing for the stated percentage uplift,

will permit. This could lead to a disproportionate restriction of the rights of the plaintiff.

62. Furthermore, the 2018 Act does not appear to require the Lord Chancellor to make the Regulations by which the judicial uplift can be provided for, which means that the "presumptive" aspect of the presumptive cap may remain theoretical, with a hard cap operating until such Regulations are made.

63. It is suggested that in order for the flexibility and discretion associated with a presumptive cap to be effective, it should remain open to the courts to depart from the cap (subject to the satisfaction of relevant statutory preconditions) to whatever extent is necessary to do justice on the facts of the case, rather than by a stated percentage only, which may still fail to fully vindicate the constitutional rights in issue. Moreover, the circumstances in which the presumptive cap could be departed from would require to be sufficiently broadly drafted to ensure that justice could be done in the circumstances of a given case.

64. The constitutionality of a presumptive cap may also depend on the level at which it is set. If the cap was set at a level which operated in many cases to prevent full and adequate recovery, and the specified circumstances justifying the judicial uplift were unduly onerous to satisfy, such provision might be thought to be constitutionally suspect. One potential way to avoid this difficulty would be to set the cap at a very high level. This, however, would clearly be inconsistent with the goal of lowering awards. Indeed, a high cap could have the effect, over time, of dragging up the size of awards. A second solution would be to permit a broad discretion in the court in terms of awarding the judicial uplift. However, this would again be inconsistent with the aim of lowering damages awards and would not address the underlying unfairness for the plaintiff who would have received a higher damages award but for the cap and yet cannot come within the specified condition for permitting the uplift.

65. The operation of even a presumptive cap therefore runs a risk of denying an appropriate level of recovery to plaintiffs, which would constitute a restriction on their constitutional rights. This restriction would require to be justified on a proportionality and/or rationality analysis. While a presumptive cap less obviously raises constitutional difficulties than would a hard cap, it should not be presumed that the utilisation of a presumptive cap would necessarily avoid all of the constitutional difficulties associated with a hard statutory cap, either from a rights perspective or (as discussed above) in relation to judicial independence and the separation of powers. There are many significant constitutional considerations in respect of even a presumptive damages cap which would require detailed discussion prior to the enactment of any such statutory scheme.

66. Finally, it should be observed that the same constitutional difficulties do not appear to arise in respect of the requirement (as inserted into section 22(1)(b) of the Civil Liability and Courts Act 2004 by section 99(a) of the Judicial Council Act 2019) to give reasons where departing from the personal injuries guidelines.

VII. The Right to equality before the law

67. As identified at para. [3.36] of the Issues Paper, a mandatory cap on damages awards presents potential difficulties in respect of the guarantee of equality contained in Article 40.1 of the Constitution. If the cap was to be set at such a level that seriously injured persons would be unable to obtain the full amount of compensation that they would have obtained but for the cap, whereas it did not prevent full recovery for those who suffered more minor injuries, an argument of unlawful discrimination could be raised by plaintiffs in the former category.

68. Any plaintiff seeking to rely on Article 40.1 must be able to identify an appropriate comparator. As stated by O'Donnell J in *MR and DR v An tArd Chláraitheoir* [2014] 3 IR 533 at p. 611:

> *"Any equality argument involves the 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 unalike). 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 similar or even the same in some respect, but they must 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."*

69. Failure to comply with this requirement will be fatal to a claim based on Article 40.1. It is suggested at para. [3.40] of the Issues Paper that, in the case of a cap on damages, viable comparator classes will be as wide or as narrow as the categories of cap contemplated. Thus it is stated that in the case of a crude general cap, a plaintiff with a minor injury could hypothetically take a plaintiff with a serious injury as a comparator and *vice versa*, whereas if the cap was set categorically by reference to the type and severity of injury, the comparator classes for plaintiffs would be restricted to similarly affected individuals with the same severity and type of injury. However, it does not automatically follow that the selection of narrow bands or categories by the legislature would necessarily preclude a plaintiff from identifying someone in another category as their comparator for the purposes of an equality argument.

70. For example, if persons with spinal injuries were divided into four categories (Minor, Moderate, Severe and Catastrophic), with the operation of the statutory cap precluding full recovery by those with catastrophic injuries but not by those in the other categories, there does not seem to be any reason in principle why a person with a catastrophic back injury would be confined to drawing a comparator from within the same band of severity. A claim of unlawful discrimination vis-à-vis persons with lesser spinal injuries (who may remain in a position to recover full damages) may still be maintainable in those circumstances.

71. The prevailing standard of review is the "legitimate legislative purpose" test first articulated by Barrington J in the High Court in *Brennan v Attorney General* [1983] ILRM 449, as subsequently applied by the Supreme Court on a number of occasions (see, e.g., *Lowth v Minister for Social Welfare* [1998] 4 IR 321 and *An Blascaod Mór Teo v Commissioners of Public Works (No. 3)* [2000] 1 IR 6). In determining what constitutes a fair statutory classification, that

test provides that:

> *"[T]he classification must be for a legitimate legislative purpose, … it must be relevant to that purpose, and … each class must be treated fairly."*

72. A mandatory cap would be open to the criticism that it fails to treat classes fairly. Certainly, if the cap was calibrated such that a person who suffers a less serious injury could obtain full recovery but a person suffering a catastrophic injury was unable to do so, such provision could be vulnerable to the challenge that it fails to treat each class fairly. The use of a presumptive cap may alleviate some of these concerns.

73. The Council agrees with the LRC's suggestion that in the case of distinguishing classes of plaintiff for the purposes of a damages cap, the more calibrated those classes are to type and severity of injury, the less likelihood that unlawful discrimination will result (para. [3.40]). However, unless the cap was implemented in such a way as to retain the possibility for the most seriously injured plaintiffs to obtain full recovery for their injuries (subject to specified/exceptional circumstances etc.), the provision would remain open to the criticism that it fails to treat plaintiffs in that class fairly. Therefore, while careful and considered calibration of the classes may assuage some of the constitutional equality concerns, any cap which prevented full recovery for a certain class could arguably be impugned on that basis.

E. Conclusion

74. The LRC in assessing whether such legislation is constitutional should also consider whether such legislation is necessary, especially in circumstances where the true cause/causes for the high cost of insurance is unknown.

75. The Council believes it is premature, at this stage, to determine if one particular model is desirable to another. The Oireachtas has already established the Personal Injuries Guidelines Committee (**'the PIGC'**) and empowered that body to create guidelines with the strong implication that those guidelines will impose ranges of awards for injuries that are *lower* than current awards. Unless it can be said that there is no prospect of the PIGC and the guidelines having any effect whatsoever, then they should be allowed to take their course and to see whether the effect is appreciable or not. If the effect is not appreciable, then other more radical models may be considered.

76. Therefore, before deciding whether or not to implement a particular model, it must be reiterated that doing so is premature unless it is quite clear that it will have the intended effect. If other causes are in fact resulting in an increase in the cost of insurance, then the cost of insurance will not reduce significantly. If these other causes are not identified and dealt with, then there is little point in discussing whether one model is desirable or not. The Council would reiterate that the only way to properly identify the material causes of insurance costs rising is by an analysis of data rather than conjecture.

77. For those reasons and the reasons set out above, it seems that the fourth model is the most desirable. It is already being implemented and will surely be the most expeditious model with the least cost. The balance between providing more certainty to awards of damages, yet retaining judicial discretion remains with the fourth model. Critically the fourth model avoids the real potential of unforeseen and unintended consequences that are more likely with the other models that could in fact *increase* the cost of insurance by promoting and creating reasonable disputes between parties. This gives it a particular attraction that must be strongly considered.

78. In terms of a general criticism of the Issues Paper itself, the Council submits that there appears to be little to no analysis of what the unintended consequences of all of the various models might be. It appears to be assumed in the Issues Paper that *any* model chosen will necessarily reduce damages which will in turn reduce insurance costs. As a general statement of principle, when any new statutory regulation is introduced to a highly litigated area of law, then there are often unintended consequences. A clear example of this was the introduction of the Personal Injury Assessment Act 2003 which has been the subject of much litigation. It is imperative that before any model is chosen that the unintended consequences of that model are considered. It is imprudent to determine that a particular model would be desirable without considering this element.

79. For the foregoing reasons, the Council formally submits that the fourth model is presently the most desirable model proposed by the LRC and the second model is the least desirable model.

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