THE HIGH COURT

GARDA COMPENSATION

[2016 No. 383 SP]

BETWEEN:

NIALL KAMPFF

APPLICANT

-AND-

MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 25th June, 2018

Summary – how to put a monetary value on pain and suffering?

1. This case concerned a claim by the applicant, Garda Kampff, for compensation in respect of a soft tissue injury to his hand. Counsel for Garda Kampff relied on the Book of Quantum to urge on this Court an award of circa €21,700. As noted in detail hereunder, Garda Kampff sustained bruising to his hand when he struck it against shelving while trying to arrest a suspect. He did not require pain medication or physiotherapy, but he was given anti-inflammatories and his hand was strapped and he was on sick leave for five days before making a full recovery. Despite the Book of Quantum expressly providing that minor injuries to a hand have led to awards of up to €21,700, this Court concludes that the award of anything even close to this magnitude could not be justified for what was in essence bruising to the hand.

2. This Court concludes that the appropriate amount of compensation is €5,000. While this Court is obliged simply to *have regard to* the Book of Quantum in civilian personal injury cases (but not in Garda Compensation cases), which means the Book of Quantum is not binding, this Court (and indeed the District Court and the Circuit Court) is obliged to follow the binding principles for the assessment of damages for personal injuries enunciated by the Court of Appeal and the Supreme Court.

3. Applying these binding principles led this Court to an assessment of a figure of €5,000 for the pain and suffering involved, which is very different from the Book of Quantum figure urged upon this Court by counsel for Garda Kampff. Accordingly, it is important that this Court sets out these principles and the application of these principles to Garda Kampff's case, which led to the assessment of a figure of €5,000, rather than the figure of €21,700 suggested by counsel for Garda Kampff.

4. Accordingly, this judgment:

- summarises the principles laid down by the Court of Appeal and the Supreme Court which this Court is obliged to apply to the calculation of how much general damages are appropriate for any personal injury, including:
  - o the relevance of the average earnings for people in Ireland of €45,611 per annum or €3,800 per month, to the calculation of general damages for pain and suffering,
  - o the necessity for awards for personal injuries to be proportionate to the 'cap' on general damages of €450,000 for pain and suffering for the most catastrophic injuries, such as paraplegia,
  - o the effect of the recent downwards 'recalibration' by the Court of Appeal of the awards of general damages for personal injuries.

This judgment also:

- summarises the principles applicable to one particular category of personal injuries, namely those suffered by members of An Garda Síochána, which cost much more in legal fees than other personal injury cases because:
  - o first unlike other personal injury cases, minor injuries, which are suited to being heard in the District Court or Circuit Court, must under current legislation be dealt with in the High Court, which commonly gives rise to a situation where the costs will be a multiple of the award in damages, which costs are invariably paid by the taxpayer,
  - o secondly, unlike other personal injury cases, under existing Superior Court Rules, there is no incentive for Garda Compensation cases to be settled without the expense of a court hearing, thus leading to no early settlement of cases with no consequent saving on legal costs, which legal costs are, as noted, invariably all paid by the taxpayer, and
  - o thirdly, unlike other personal injury cases, Garda Compensation cases are not subject to the Personal Injuries Assessment Board ("PIAB"), and so garda claims can only be processed by lawyers in the High Court at considerable expense (because of the very considerable cost of High Court litigation). Injured gardaí do not have the right of injured civilians to have their claims dealt with in the speedy and cost-efficient assessment system provided by the PIAB. This is despite the fact that the PIAB is specifically designed to deal with the type of injuries suffered by gardaí which appear before this Court (namely assessment only cases as liability is invariably not contested) and which if dealt with by PIAB could be done with little or no legal costs to the taxpayer.

Garda Kampff's injuries to his hand

5. The case which led this Court to consider in detail the principles applicable to the calculation of general damages for personal injuries in general, and specifically to gardaí, is the claim by Garda Kampff for compensation for bruising to his hand, when he struck it against some shelving when he was effecting the arrest of a suspect almost five years ago on the 1st September, 2013.

€21,700 for bruising to a hand?
6. In this claim, counsel for Garda Kampff suggested to this Court by reference to the Book of Quantum published in 2016 (the "Book of Quantum") that the appropriate award of compensation/general damages for pain and suffering for Garda Kampff should be in the region of €21,700.

7. Garda Kampff's claim for compensation is made under the Garda Síochána (Compensation) Act, 1941 (the "1941 Act"), as amended by the Garda Síochána Compensation (Amendment) Act, 1945 (the "1945 Act"), both of which are referred to as the "Garda Compensation Acts". As noted hereunder, under these Acts, Garda Kampff is entitled to the same level of general damages for the pain and suffering he experienced as any other plaintiff would be entitled to, in a personal injury claim against a third party.

8. It is the fifth claim that Garda Kampff has made under the Garda Compensation Acts, the first was made in relation to a kick to his hand leading to a fracture and Post Traumatic Stress Disorder in relation to a bite injury from the one incident in 1993. The second claim was in 1995 and related to a road traffic accident at work and resulting in severe anxiety which he suffered thereafter. The third claim related to facial abrasions and conjunctivitis from a road traffic accident at work in 1996. The fourth claim related to a soft tissue injury to his scrotum in 1997.

9. As regards the particulars of the current injury to Garda Kampff, an MRI confirmed that he had not sustained a fracture to his hand but sustained some bruising of the bone. His hand was strapped and put in a sling and he was given anti-inflammatories. He did not require any pain medication, nor did he require any physiotherapy. Garda Kampff was on sick leave for five days. He fully recovered from the injury within a short time of the incident and had no long-term effects. However, Garda Kampff stated in his evidence that it was one year before his hand was fully better. Special damages of €1,185 for Garda Kampff were agreed between the parties.

10. In order to consider whether the amount suggested by counsel for Garda Kampff is an appropriate award for general damages, which is essentially an amount for the pain and suffering incurred by Garda Kampff as a result of his hand injury, this Court will consider:

A. Garda compensation claims for personal injuries, and

B. The mechanics of calculating damages for all personal injuries.

A. GARDA CLAIMS FOR PERSONAL INJURIES

11. Every Monday during the legal term, this Court assesses the amount of compensation payable to members of An Garda Síochána who are injured during the course of their duties, i.e. how much is appropriate to compensate an injured party for the pain and suffering caused by the injury. The injuries in question can range from relatively minor injuries (such as a non-bony injury to a finger) to life changing injuries. Thankfully, the vast majority of claims heard in this Court belong to the first category.

12. It is beyond question that each of the plaintiffs before the Court are entitled to compensation for their injuries just as in appropriate cases, civilians may be entitled to compensation for injuries suffered during the course of their employment. Indeed to date, this Court has been struck by the bravery of the gardaí, who on a daily basis risk their lives, and are injured in so doing, in order that members of the public can live peaceful lives.

13. The purpose of this judgment is to outline the principles which this Court is obliged to apply in the assessment of damages for injured gardaí, particularly for minor injuries, since it is a peculiarity of the statutory compensation scheme for gardaí that *all* injuries to gardaí, once they were maliciously inflicted and are not so minor as not to be approved for compensation by the Minister for Justice and Equality under s. 6 of the Garda Compensation Acts, are dealt with by the High Court.

14. It is anticipated that the principles set out hereunder will allow injured gardaí and their legal advisers, as well as the Department for Public Expenditure and Reform, which is the respondent in all such claims and the payer of the compensation, and its legal advisers understand how this Court is obliged to calculate awards. In this way it is hoped that the statement of these principles will facilitate the settlement of these Garda Compensation cases and ultimately lead to a saving in legal costs to the State, since as noted below, invariably it is the State which pays not just its own legal costs but also the legal costs of the injured garda.

1% settlement rate in garda cases v. 90% settlement rate in civilian cases
15. However, as noted hereunder due to what would appear to be an oversight, there is not the same incentive for lawyers to settle Garda Compensation cases as there is for other personal injury claims and hence there is a very low settlement rate of these compensation claims. Indeed, since taking over the Garda Compensation List at the start of 2018, this Court can only recall one case having been settled, which is a settlement rate of less than 1%, while anecdotal evidence would suggest that the settlement rate for other personal injury cases is in the region of 90%.

16. A dispute resolution system (since this is what the assessment of Garda Compensation by the High Court is - where the parties fail to reach agreement on the amount of compensation) which leads to 99% of plaintiffs/applicants having a full hearing in a severely under-resourced High Court (see '*Ireland has lowest number of judges in the OECD*' per Kelly P speaking extra-judicially in the *Bar Review* (2018) Vol 23 No. 1 at page 12) before receiving their award and thus having to put up with a delay in receiving compensation, is not a system that is designed with the injured plaintiffs/applicants in mind. This dispute resolution system does however benefit the lawyers involved, since the legal fees incurred in resolving a dispute after a High Court hearing will in most cases be greater than those involved in settling a claim without a High Court hearing. The reasons for this state of affairs are considered below. First, it is proposed to consider why all injuries to gardaí are dealt with in the High Court.

Why are minor injuries assessed in the High Court?
17. As previously noted, many of the injuries suffered by gardaí during the course of their duties are thankfully relatively minor in nature. Although such relatively minor injuries and the related damages award would be appropriate for the District Court (which has a jurisdiction of up to €15,000), these claims are nonetheless heard in the High Court, as required by the Garda Compensation Acts.

18. This means that two sets of High Court legal costs are paid by the State (out of taxpayers' funds), first to the lawyers acting for the garda (since the garda's legal costs are invariably paid by the State) as well as to lawyers acting for the Minister for Public Expenditure and Reform, even though the majority of awards made under the Garda Compensation Acts would only merit District Court or Circuit Court costs, if the injured party was a civilian.

It could cost the taxpayer €15,000-€20,000 to make an award of €5,000

19. The fact that a minor soft tissue injury to a hand, damages for which are assessed at €5,000, are heard in the High Court means that the costs to the taxpayer of making this award of €5,000 to Garda Kampf could be three to four times the value of the award. This Court is using an estimate of an aggregate of €15,000- €20,000 in legal costs payable by the State to counsel for the State, solicitor for the applicant and counsel for the applicant, pending the receipt from the Chief State Solicitor's Office ("CSSO") of submissions on average actual costs in Garda Compensation cases. This figure takes no account of the costs of the CSSO, since the solicitors therein are employees of the State). It seems to this Court as entirely illogical that it would cost three or four times the value of an award to make an that award and clearly the only beneficiaries of this system are the lawyers at the expense of the taxpayer who is funding these legal costs.

20. This curious situation arises because it is a peculiarity of Garda Compensation cases that all awards for Garda Compensation, and thus including low value awards for minor injuries, are made in the High Court, with all the expense of High Court litigation. In this Court's view, this cannot be justified and it is possible that this approach costs the State up to €100,000 a week (in light of the number of hearings before this Court per week), in legal costs at High Court rates for cases which could be heard in the District or Circuit Court (which figure is an estimate pending the receipt of accurate figures from the CSSO). These legal costs could easily be saved by simply applying the same jurisdictional rules to personal injuries to gardaí, as currently apply to personal injuries to civilians, so that relatively minor injuries to gardaí are assessed in the District Court if the injury would justify an award up to €15,000, and the Circuit Court if the injury would justify an award between €15,000 and €75,000, and in the High Court thereafter. In this regard, this Court is awaiting submissions which are being prepared by the Chief State Solicitor's Office on the level of legal fees which are paid in Garda Compensation cases where a District Court or Circuit Court level award is made in the High Court, to both counsel for the Minister for Public Expenditure and Reform and to the solicitors and counsel acting for the gardaí. Pending the receipt of such figures, this Court is using estimates of the likely costs for High Court actions.

21. In the alternative, if the assessment of relatively minor injuries is to continue to be done in the High Court, the legal costs should be at the District Court/Circuit Court/High Court level, depending on the level of the award. Whichever approach is taken would require a decision of the Oireachtas, since this Court has no power to amend the law applicable to the court which hears Garda Compensation claims or the law applicable to the taxation of legal costs payable in relation thereto.

Eliminating rather than reducing legal costs – use of PIAB

22. Indeed, while the foregoing jurisdictional change or legal costs change would reduce the legal costs to the State of Garda Compensation claims, a way in which these legal costs might be eliminated altogether, would be by having Garda Compensation cases dealt with by the Personal Injuries Assessment Board ("PIAB").

23. This is because, in this Court's view, there is no reason why Garda Compensation cases are not dealt with by PIAB, which would lead to a massive saving to the taxpayer, since no legal fees are paid when PIAB assesses damages for a personal injury. Garda Compensation cases are particularly suited to the PIAB since all the cases which appear before this Court are concerned simply with the *assessment* of the appropriate level of compensation (as liability or causation is rarely an issue), and assessment of compensation for personal injuries is, after all, the very *raison d'être* for the PIAB. A general scheme of a bill from 2012, the Garda Síochána Compensation (Malicious Injuries) Bill 2012 envisages a PIAB type scheme being introduced for the gardaí, but this bill was not enacted.

24. It is worth noting that this Court hears claims which can be seven years old or more, which is a considerable period of time for an injured garda to wait for compensation. It seems clear therefore that while the garda's lawyers may not benefit from the use of PIAB, the injured garda will benefit because the average time for the resolution of claims before PIAB is on average seven months according to the PIAB website. Garda Kampff's injury occurred in 2013 and is only now being assessed. There is no reason, in this Court's view, why members of An Garda Síochána should not be entitled to have their injuries assessed in a quick and cost efficient way using PIAB. The only beneficiaries of the current system of Garda Compensation appear to be the lawyers and the losers would appear to be the taxpayers who are funding those legal costs.

Perverse financial incentive for lawyers not to settle Garda claims

25. One further important observation should be made regarding the costs to the State of assessing compensation for injured gardaí. Unlike in civilian personal injury cases, where the majority of cases settle and only a small percentage of cases are heard (with the consequent saving of legal costs to the parties involved in not having to undergo a hearing), it is the reverse in Garda Compensation cases where only a small percentage of cases settle. As already noted, in this year, this Court only recalls one case being settled. It seems clear to this Court that the likely reason for this is that there is no incentive for the lawyers acting for the gardaí involved to settle the cases. This would seem to be because first there is no risk of the garda not getting an award - since liability on the part of the State is accepted in Garda Compensation cases which are heard in the High Court and so they are 'assessment only' cases - and secondly because there is no risk that the legal costs for the hearing will not be paid, since they are invariably paid by the State.

Arguable that it would defy economic logic for lawyer to settle garda case

26. Indeed, one could argue that, unlike in a civilian personal injury case where there is a risk of the lawyer's costs not being paid if he does not settle, it would defy economic logic for a lawyer to settle a Garda Compensation case before the court hearing, since it will lead to the lawyer losing out on a 'guaranteed' payment for the court hearing, as there is no risk of him/her not being paid for the hearing, which is essentially just a hearing on the quantum of damages to be paid. It is important to note that this observation that Garda Compensation Cases do not settle is not a criticism of the lawyers involved, since the lawyers could not be expected to act against their own financial interests, particularly when their client is guaranteed to receive an award whether the case is settled or there is an award made by the High Court after a hearing, but rather it is a criticism of the system of Garda Compensation in which the lawyers must operate.

27. This absence of an incentive to settle a garda personal injuries claim does not exist in relation to civilian personal injury claims. This perverse financial incentive on the lawyers not to settle the claim is because it is not possible for a lodgment/tender offer to be made in Garda Compensation cases. This is because Order 22 of the Rules of the Superior Courts, which governs the making of lodgments/tender offers, applies to '*any action to which s 1(1) of the Courts Act 1988 applies*'. A claim for compensation under the Garda Compensation Acts is not included in the list of actions to which s 1(1) applies. Accordingly, until the law is amended, it is not possible for the State, unlike a defendant in a civilian personal injury case, to make a lodgment/tender offer to settle a Garda Compensation case. Making a lodgment/tender offer, if it were possible, in a Garda Compensation case would mean that the garda's lawyer would have to advise the injured garda to seriously consider accepting a reasonable offer for his or her injuries, since if the court award did not beat the lodgment/tender offer, the applicant garda would not be awarded his or her full legal costs and would thus be financially worse off. In contrast, under the present Garda Compensation system, the garda invariably gets his or her full legal costs and so there is no incentive to short-circuit the litigation process and save the State the two full sets of legal costs of the hearing (the Minister for Public Expenditure and Reform's legal costs and the garda's legal costs.)

28. As noted by Peart J. in *Kearney v. Barrett* [2004] 1 IR 1 at p 10 when discussing the rationale for lodgments and tender offers:

> "it is desirable that all efforts to resolve disputes without incurring the high cost of a court hearing should be explored before the trial".

Yet somewhat perversely it does *not* seem to be desirable for such efforts to be made in personal injury cases involving gardaí, with the taxpayer being the one who loses out by never making a saving on the amount of legal costs payable in Garda Compensation cases.

29. It seems clear to this Court that the absence of a right on the part of the State to make a lodgment/tender is the reason why Garda Compensation cases do not settle with the result that there is no real prospect of the State ever saving on legal costs by settling a case. There appears to this Court to be no compelling reason why an incentive should not be provided for gardaí personal injury cases to settle, just as there is for civilian personal injury cases to settle. This effective restriction on the State saving money on legal costs could be easily removed by amending the rules regarding lodgments/tenders so that they apply to cases taken under the Garda Compensation Act.

Conclusion - possible savings of millions of euro to the taxpayer

30. The total amount of taxpayers' money which could be saved, by making some or all of the foregoing relatively simple changes, would seem, to this Court, to be in the millions of euro. This is because it has been estimated by the Department of Justice and Equality that there are 682 Garda Compensation claims currently in the system, with new claims being added at a rate of approximately 180 per annum. In each of those cases, one is not dealing with just one side's legal costs to be paid by the State, but rather one is dealing with the State paying for two sets of legal costs (i.e. those of the State's lawyers and the garda's lawyers), and those legal costs are High Court legal costs, which are very significant even though the injuries are in many cases, relatively minor. If each of these 682 cases cost the State on average €20,000 in legal costs (which is an very rough estimate of the actual average costs of a case, pending the receipt of figures from the CSSO), one is dealing with legal costs of €13.6 million for assessments that should be capable of being with by PIAB without any legal costs and thus at a considerable saving to the taxpayer.

31. Having made those observations on changes that might be considered to the current statutory scheme for compensation for gardaí, the focus of the remainder of this judgment is on the mechanics of assessing damages for injured gardaí, whether for relatively minor injuries or for very serious injuries which are suffered by gardaí from time to time during the course of their duties.

B. RULES FOR ASSESSING DAMAGES FOR PERSONAL INJURIES

32. Next, this Court will set out the principles this Court is obliged to apply in assessing damages for all personal injury cases, including those involving gardaí who are injured in the line of duty, in light of the caselaw of the High Court, the Court of Appeal and the Supreme Court on this issue.

33. This Court does so in the hope that if the current system of Garda Compensation continues into the future without any reform, setting out these principles may encourage the Minister for Public Expenditure and Reform to make settlement offers and gardaí to accept them, and thereby increase the current negligible settlement rate and thereby lead to a reduction in legal costs paid by the taxpayer and a saving of court resources which are also funded by the taxpayer.

General damages at issue, not special damages

34. First, it is to be noted that the focus of this judgment is on *general* damages for pain and suffering, both past and future (or simply damages for pain and suffering) and not on *special* damages. Special damages primarily cover past and future expenses actually incurred and arising from the personal injury as well as loss of earnings incurred by the injured party. For this reason, it is easier to quantify and less nebulous than damages for pain and suffering, since the court will have for example receipts for actual expenses incurred and details of the plaintiff's earnings.

35. In this context, it is also important to bear in mind that while reference will be made in this judgment to a 'cap' on damages of €450,000 for a catastrophic injury (referenced in the Court of Appeal decision in *Shannon v. O'Sullivan* [2016] IECA 93), that 'cap' only refers to general damages for pain and suffering. The High Court will in many cases end up awarding many multiples of that figure in damages in catastrophic personal injury cases. However, it is important to bear in mind that the vast majority of these large awards are made up of special damages, which are usually the out of pocket expenses incurred or to be incurred in the future by an injured plaintiff e.g. full time care for life and/or loss of earnings over a lifetime, so in a multi-million euro award of general and special damages, it is usually the case that a maximum of €450,000 of that award will relate to general damages and the remainder of the overall award will be made up of damages in respect of expenses and loss of earnings over the life-time of the injured party.

36. The key aim of this judgment is to outline the precise legal principles, set down by the Court of Appeal and the Supreme Court, which bind the High Court in its calculation of the amount of general damages to be paid to compensate a garda for the injury suffered in the exercise of his or her duties, and thus no reference will be made to special damages in this judgment.

The difficulty of putting a value on a personal injury

37. The very notion of putting a value on the pain and suffering that a person endures as a result of sustaining a personal injury is clearly not a straight forward matter. As noted by the Court of Appeal in Nolan v. Wirenski [2016] IECA 56 at para 26:

> "an award of damages is a very imperfect and inadequate mode of compensation and is a poor substitute for the change in circumstances brought about".

38. Indeed, it is arguable that it is a technical impossibility to value any personal injury, but particularly a serious or life changing injury. The reason for this is because no right thinking person would willingly sustain such life changing injury in return for a sum of money.

39. On one level this means that it is arguable that the amount of damages a person should receive for a serious or life changing injury is limitless since no amount of money can compensate someone for a state of being which he or she would never want. While theoretically this argument could be made, it is clear that the approach of the Irish courts is that there is a limit to the amount of damages for pain and suffering for personal injuries which may be awarded by the Irish courts. In the Supreme Court case of *Sinnott v. Quinnsworth* [1984] ILRM 523 at 532 O'Higgins C.J. stated:

> "a limit must exist, and should be sought and recognised, having regard to the facts of each case and the social conditions which exist in our society."

40. It is for this reason that there is a 'cap' on the amount awarded for general damages (but no cap on the amount of special damages which can be awarded), and this Court must assess in each how much general damages should be paid for a particular personal injury in the knowledge that there is a cap on the maximum that can be awarded, which is considered in more detail hereinafter and as noted below is generally set at €450,000 .

Principles applicable to putting a monetary figure on pain and suffering
41. The following principles are relevant to the Court's assessment of damages for personal injuries in Garda Compensation cases (and for the reasons stated below, also for all personal injury claims).

(I) No difference between an injured garda and any other injured plaintiff
42. The fact that the personal injury is suffered by a garda in the course of duties has no impact on the level of general damages awarded to him or her for pain and suffering. The level of damages appropriate to a particular injury is awarded to the garda irrespective of the circumstances (in the sense that it is a garda, rather than a civilian, who was injured) of the injury. Of course the circumstances of the incident can affect the injury caused e.g. extreme circumstances might lead to post traumatic stress. However, when the Court is assessing damages for an injury, say a broken arm, there is no divergence in the principles to be applied whether one is dealing with a garda injured in the course of duty or a civilian.

43. The same question arises in each case, namely, how much general damages should be paid to compensate the plaintiff for the pain and suffering of the injury in question. In this Court's view, there could be no basis for treating a garda differently from any other plaintiff in assessing the damages to be awarded for a personal injury. In *Murphy v. Minister for Public Expenditure and Reform* [2015] IEHC 868 at para 31, Barton J. stated:

> "In substance, however, the principles to be applied and the object to be achieved in the assessment of a compensatory award under the [Garda Compensation Act], as with an award of compensatory damages [from a wrongdoer to a plaintiff] are the same but are to be distinguished from an award of aggravated or exemplary damages."

44. Similarly in *Carey v. Minister for Finance* [2010] IEHC 247 at para 4.23, Irvine J. held that:

> "There is nothing in the [Garda Compensation Acts] or in the provisions of s. 10 [of the 1941 Act] which suggest that the court should not approach compensation in the same manner as it would approach the issue of damages in a personal injuries claim at common law."

45. For this reason, the principles which follow which the Court of Appeal and Supreme Court have determined apply to all personal injury cases must apply to Garda Compensation cases in this Court's view.

(II) Bravery of an injured garda is not a factor in assessing general damages
46. Some counsel have suggested that this Court should take account of the circumstances in which the injury was incurred, particularly as in many cases before this Court, injured gardaí have shown considerable bravery. It may well be that there are other ways in which the bravery of gardaí are recognised, but there is no power vested in this Court to award say *ex gratia* sums. The role of this Court, whether dealing with a civilian or a garda that is injured, is simply to assess general damages for a particular injury. Whether the injury was incurred as a result of intense bravery, or misfortune which arose out of malicious incident, is irrelevant to the assessment of the level of compensation for pain and suffering for the injured garda. This Court does not have jurisdiction to award damages for bravery or some other form of compensation or financial recognition for the undoubted bravery shown by members of the gardaí.

47. As noted by Irvine J. in *Carey v. Minister for Finance* [2010] IEHC 247 at para 4.25:

> "I see no reason to depart from the approach that would be adopted by the court in assessing these claims for damages at common law and there is nothing in the [Garda Compensation Acts] which would encourage me to conclude that a claimant under the [Garda Compensation Acts] should receive a greater amount for his injuries than his counterpart maintaining an action for negligence at common law."

(III) Damages are not less because injury expected because of nature of job
48. The corollary of the principle, that this Court does not have jurisdiction to reward bravery, is equally applicable. Thus, just because a garda is involved in an occupation where there is a high degree of physicality and exposure to the risk of bodily harm and where bravery may be expected, does not mean that when a garda is injured in the course of his duties, he should get less than a civilian who suffers similar personal injuries.

But no compensation for injuries determined by Minister to be minor
49. However, in one respect, a garda is treated differently from a civilian regarding personal injuries, namely in relation to minor injuries. That is because there is implicit recognition in the Garda Compensation Acts that the physical nature of the job means that minor injuries for gardaí are expected from time to time, since under the Garda Compensation Act that there is no compensation for minor injuries (save for a payment of €127 referenced below). This principle is apparent from s. 6(1) of the 1941 Act, since under that section the Minister for Justice and Equality is entitled to refuse an application for compensation where the injury is '*of a minor character*' and where it was not sustained in the course of a duty involving special risk. Such injuries therefore are not subject to compensation awards by the High Court and in *Merrigan v. Minister for Justice* [1998] IEHC 11 at p 10], Geoghegan J. gave an example of such a minor injury, when he stated:

> "I think that the expression "of a minor character" implies a consideration of the nature of the injury rather than the amount of the compensation which would be paid for it. What the legislature intended, in my view was that if, for example, a member of the force sustained an injury of a kind which would otherwise be compensatable but which cleared up after say two months with no ill effects such an injury would be considered to be of a minor character. I give that as a n example of such an injury rather than definition which would be quite impossible."

50. Therefore, provided that the injury is not determined by the Minister for Justice and Equality to be something which would clear up after say two months with no ill effects, then the garda is entitled to the same damages as he or she would get if he suffered a personal injury as a civilian. The fact that injuries are to be expected in the Garda Síochána, because of the nature of the duties, has no effect on the entitlement to compensation (save, as noted, in respect of minor injuries) or on the level of compensation.

51. However, there is a provision under s. 6(1)(b)(ii) of the 1941 Act for the Minister for Justice and Equality to make a payment of

up to £100/€127 in respect of minor injuries which were incurred in the course of duty involving special risk, where the Minister regards that amount as adequate compensation. It is clear to this Court that this amount of money, which was fixed in 1941, is hopelessly out of date and should be revised.

Once Minster determines that not minor injury, Court must make award

52. In one other respect personal injuries to gardaí are different, since it is clear from the judgment of Irvine J. in Carey v. Minister for Finance that once the Minister for Justice and Equality is of the opinion that the injuries are not of a minor character and so authorised an application for compensation by a garda to the High Court under s. 6(1) of the 1941 Act, and the High Court is satisfied that the injuries were maliciously inflicted in the performance of the garda's duties (or otherwise in accordance with the 1941 Act), then the High Court must award compensation. Unlike in personal injury cases involving civilians, the High Court cannot refuse to award compensation even if it believes that the injury to the garda is minor. At para 4.22, Irvine J. states:

> "I have concluded that the court is at large as to the damages it may award. However, I accept the plaintiffs submissions that where liability and causation are established the court must award compensation irrespective of how modest it concludes the member's injuries are."

(IV) Book of Quantum does not have to be considered in garda claims

53. It is clear from the judgment of Barton J. in *Murphy v. Minister for Public Expenditure and Reform* [2015] IEHC 868 at para. 36 that in dealing with compensation claims under the Garda Compensation Acts that the High Court is not obliged to have regard to the Book of Quantum:

> "For the sake of completeness it is considered appropriate to refer to the provisions of s. 22 of the Civil Liability in Courts Act 2004 (the Act of 2004) which imposes on the Court a requirement, when assessing damages in a personal injuries action, to have regard to the Book of Quantum. Although reference to the book is sometimes made by counsel in the course of submissions on the hearing of the application under the Acts, the Court is not bound to have regard to it since, by virtue of s. 2(1) of the Act of 2004, an application for compensation under the [Garda Compensation Acts] and certain actions for damages are expressly excluded from its scope. However, there is no prohibition on the Court from doing so."

54. It does seem curious that a personal injury to a garda would not be treated the same as a personal injury to a civilian from the perspective of reference being made to the Book of Quantum. However, as noted by Barton J., there is no obligation upon the High Court to have regard to the Book of Quantum in Garda Compensation cases, although it may decide to do so.

55. In any case, as noted hereunder, some of the awards which are contained in the Book of Quantum have been subject to recalibration downwards since it was re-issued in 2016. Even in the context of personal injuries to civilians, the Book of Quantum is of significantly less importance to the High Court's decision on the level of damages, than the principles laid down by the Court of Appeal and the Supreme Court on the proportionality of awards to the 'cap' and the relativity of the award to average earnings (dealt with below), since the Book of Quantum is *not binding* on the courts, while the principles laid down by the Court of Appeal and the Supreme Court *are binding*.

(V) 'Not minor' does not imply not 'moderate' in Book of Quantum

56. While there is no obligation upon this Court to have regard to the Book of Quantum, it may do so. In this regard, as previously noted, under s. 6 of the 1941 Act, the Minister must determine that the injury to the garda is not minor in character before the injury is assessed for compensation by the High Court. In this regard, it is relevant to note that the Book of Quantum sets out four categories of personal injuries and the respective awards made in those categories. The first of the four categories of injuries in the Book of Quantum is the lowest category and it uses the expression 'minor' to describe such injuries for the purposes of damages, while the other three categories are '*moderate*', '*moderately severe*' and '*severe and permanent conditions'*.

57. It is clear to this Court that just because the Minister for Justice and Equality determines that an injury is not '*minor*' pursuant to s. 6(1)(b)(i) of the 1941 Act does not mean that this injury falls outside the 'minor' category of injuries for the purposes of the Book of Quantum, since if this were the case, it would mean that the Minister for Justice and Equality would have a role in determining the level of compensation payable to an injured garda, which is a judicial function under the Garda Compensation Acts and not a function of the Minister.

58. In other words, simply because the Minister for Justice and Equality did not regard the injury to be so minor as to *not* merit compensation, does not mean that it is automatically a 'moderate' or worse injury for the purposes of the Book of Quantum. This is because the expression 'minor' in the Garda Compensation Acts is used as a means of describing an injury that is not sufficiently serious to merit an application to the High Court for compensation. It is not a term of art. The expression 'minor' under the Book of Quantum has a completely different meaning, since the Book of Quantum deals with all injuries that are pursued by civilians for personal injuries and where there is not a threshold for those litigants instituting proceedings (unlike gardaí, who are seeking compensation under the Garda Compensation Acts). The expression '*minor*' in the Book of Quantum simply means the lowest band of injuries, for the purposes of damages, where there are four categories, being '*minor*', '*moderate*', '*moderately severe*' and '*severe and permanent conditions*'. It does not mean that it is an injury which, if it happened to a garda, would not be approved for compensation by the Minister for Justice and Equality.

59. Indeed, a practical example of this issue is the fact that in this case, Garda Kampff suffered soft tissue injuries to his hand and this Court regards that injury as minor for the purposes of the Book of Quantum, notwithstanding that the Minister regards it as not *sufficiently minor* (to use this Court's expression) for the purposes of s. 6(1)(b)(i) of the Garda Compensation Acts to deprive the garda of any compensation. Indeed, as previously noted, it is clear to this Court that even if it believed that Garda Kampff's hand injury was sufficiently minor to not justify compensation, this Court is nonetheless obliged to award him compensation, since this Court has no jurisdiction to reverse the decision of the Minister for Justice and Equality that the injury is not an injury of a minor character, as is clear from the judgment of Carney J. in *McGee v. Minister for Finance* [1996] 3 IR 234, since as noted in that judgment, s. 6(3) of the 1941 Act makes clear that the Minister's decision is final and conclusive.

60. All of this means that because a garda has got approval from the Minister that his or her injury is not 'minor' for the purposes of the Garda Compensation Acts, does not mean that it will not fall into the minor category of injuries for the purposes of assessing damages in the Book of Quantum, since there is no correlation between the two concepts of minor should the High Court decide to refer to the Book of Quantum. However, this raises the status of the Book of Quantum in relation to Garda Compensation claims.

(VI) Resources of the defendant are irrelevant to the calculation of damages

61. Although perhaps self-evident, it bears stating that the fact that in some personal injury cases the defendant is the State with

considerable resources or indeed a wealthy company, if one was dealing with a civilian personal injury, while in other cases the defendant may be a person of limited means, has no impact on the level of damages awarded to an injured plaintiff.

62. The principles which apply to the assessment of damages apply equally to all defendants irrespective of means. Thus, the fact that the payer of the compensation in Garda Compensation cases is the State, which has considerable but not unlimited resources has no bearing on this Court's assessment of the amount of damages which should be paid to an injured garda.

(VII) Existence of insurance is irrelevant to the calculation of damages
63. Although not directly relevant to Garda Compensation cases, it is also the case that the fact that a defendant does or does not have insurance should have no impact upon the level of damages awarded to a plaintiff. The question for the Court is '*what is the correct amount of compensation for the injured plaintiff*?' The fact that the defendant is not personally paying the award, but an insurance company is paying the award, has no impact upon the level of the award. While courts will often be dealing with insurance companies who will have ample resources, a defendant might just as easily have no insurance and for this reason the level of award cannot be based on the assumption that all defendants have insurance, as in some instances defendants will have to pay personal injury awards out of their own resources.

(VIII) High Court must apply recalibration of damages by Court of Appeal
64. The High Court is bound by the principles set down in recent years by the Court of Appeal regarding the level of general damages to be awarded for personal injuries. In *Seligman v. Kuiatkowski* [2018] IEHC 102 at para. 34, Barr J. noted that these Court of Appeal decisions have led to a recalibration of the level of damages to be awarded in personal injury cases:

> "In reaching an assessment of the appropriate level of general damages in this case, the court has been greatly assisted by the guidelines set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56, and *Shannon v. O'Sullivan* [2016] IECA 93 and in particular to the criteria set down by Irvine J. at paras. 43 and 44 thereof. The court has also had regard to the dicta of the Court of Appeal in the case of *Fogarty v. Cox* [2017] IECA 309. In the light of these judgments, this Court has had to somewhat recalibrate its approach to the assessment of general damages in personal injury cases."

Similar statements have been made by the High Court in other recent cases, see *Wilders v. MIBI* [2018] IEHC 126 at para 15; *Flannery v. HSE* [2018] IEHC 127 at para 35;*Whelan v. Castle Leslie* [2018] IEHC 125 at para 22.

65. Since the Court of Appeal judgments in *Nolan v. Wirenski, Shannon v. O'Sullivan* and *Fogarty v. Cox* involved a reduction by the Court of Appeal of the damages awarded by the High Court by 45%, 50% and 45% respectively, 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.

Downward recalibration will apply to Book of Quantum if relied upon
66. While this Court is bound to follow the principles for assessing damages and the level of awards made by the Court of Appeal in all personal injury cases (but not Garda Compensation cases), under s. 22 of the Civil Liability Act, 2004, the obligation on the High Court in civilian personal injury cases is to '*have regard'* to the Book of Quantum. The distinction between '*having regard*' to the Book of Quantum and being bound to follow the Court of Appeal is particularly relevant in light of Barr J.'s conclusion that there has been a downwards recalibration of damages in the Court of Appeal from 2016 onwards.

67. Since the Book of Quantum was published in 2016 and deals with awards and assessments made in and prior to 2016, this means that in having regard to the Book of Quantum, this Court must also take account of the very significant downwards recalibration of personal injury awards by the Court of Appeal to which Barr J. refers, which has taken place since the publication of the Book of Quantum. As this Court is obliged simply to have regard to the Book of Quantum in civilian personal injury cases, it is clear that it is not obliged to expressly follow a particular band or category of monetary figures set out therein.

68. However, if after having regard to the Book of Quantum, this Court decides to place reliance on a particular figure therein, it seems clear that it should only do so after consideration has been given to whether the figure should be recalibrated downwards in light of the Court of Appeal decisions in 2016 and 2017 to reduce High Court damages awards, in some cases by 45% - 50%. This is because the Book of Quantum is a catalogue of personal injury awards from, *inter alia*, the High Court in 2013 and 2014 (see page 5 of the Book of Quantum).

Other principles High Court is obliged to apply to calculation of damages
69. In addition to the downward recalibration of damages, this Court must also follow the following principles set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56 at para 31, for the assessment of damages in a personal injuries case:

> "Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries."

70. Thus, in assessing damages for injured gardaí (or indeed any other injured plaintiffs), this Court is obliged to be:

- fair to the injured party and the defendant (in this case the State);
- proportionate within the scheme of awards for personal injury damages;
- objectively reasonable in light of the common good and social conditions.

(IX) The level of the award must be fair to both parties
71. The first principle, which this Court is obliged by the Court of Appeal in the *Wirenski* case to apply, is that the level of the award must be fair to the plaintiff (the garda) and the defendant (the State). Fairness to the garda is a straightforward concept in that the amount of money must be sufficient to constitute a fair amount of compensation for the injury suffered. When the defendant is the State, this Court interprets the concept of the amount of the award being '*fair to the State*' as meaning that the amount of money which the State is required to pay should be fair to the person paying or funding it, and in Garda Compensation cases it is the taxpayer who is funding the compensation. Being fair to State means ensuring that awards paid by State are not such that, in the words of McMenamin J (see para [73] below) they do not lead to an increase in tax or a reduction in social services. As previously

noted, the fact that the State has considerable resources does not, in this Court's view, mean that it should be treated any differently to any other defendant in a personal injuries action.

THE PROPORTIONATE PRINCIPLE

(X) Award to be proportionate to the scheme of awards and 'cap' on damages

72. The second principle, which this Court is obliged by the Court of Appeal in the *Wirenski* case to apply, is that the level of the award must be proportionate to the general scheme of awards for personal injuries, including the 'cap' on damages (noted below to be €450,000) which this Court refers to as the 'proportionate principle'.

73. This principle was also recognised by MacMenamin J. in the Supreme Court case of *Kearney v. McQuillan* [2012] IESC 43 at para 27, where he explains the rationale for, inter alia, ensuring that damages awards are proportionate to the scheme of awards for other personal injuries. As previously noted, the general scheme of awards for personal injuries has a 'cap' on the amount of damages that can be awarded for general damages/pain and suffering. The rationale for ensuring that awards are proportionate to the capped scheme, he concludes, includes increased insurance costs (relevant to civilian personal injury claims which are paid by insurance companies) and increased taxation and reduced social services (relevant to Garda Compensation claims which are paid out by the general exchequer):

> "It should be logically situated within the legal scheme of awards made for other personal injuries… It is important in this context to recollect, particularly at this time, those criteria of social conditions and common good. 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 services."

There are clear public policy reasons therefore why damages for pain and suffering in personal injury cases should be proportionate to other awards and the 'cap' on damages, including the effect on the common good and in particular insurance costs for society as a whole if this was not to be the case. In the context of Garda Compensation cases, while there might not be an increase in insurance costs, if awards under the scheme were not proportionate to other awards and the cap, there would be less money available for the provision of other State funded services to the detriment of the common good.

The 'cap' on damages for pain and suffering is €450,000

74. The fact that there is a 'cap' on damages was first recognised by the Supreme Court in *Sinnott v. Quinnsworth* [1984] ILRM 523, when the 'cap' was at that stage set at £150,000. The current generally accepted 'cap' on general damages has been noted by the Court of Appeal as being in or around €450,000. In *Shannon v. O'Sullivan* [2016] IECA 93 at para 36, the Court of Appeal stated:

> "It can be stated with relative confidence that cases involving extreme or catastrophic injury coming before the courts in recent years have resulted in awards of in or around €450,000 in terms of general damages. That is not to say that €450,000 is a maximum or that there have not been cases where that sum has been occasionally exceeded. However, the figure of €450,000 is generally accepted by senior practitioners and judges alike as the appropriate level of compensation for pain and suffering in cases of that nature: indeed the High Court, in the exercise of its wardship jurisdiction regularly approves settlement for injures of this type at that level." (per Irvine J)

75. As €450,000 is therefore the generally accepted 'cap' on general damages for the worst possible injury, it follows from the foregoing judgment of the Court of Appeal that the level of the award in a particular personal injures case must be proportionate to that 'cap' on damages. It bears repeating that there is no limit on the amount of special damages which are awarded for such injuries and this is why overall awards will often be in the millions of euro, even though general damages are limited to €450,000. This principle that there needs to be proportionality in general damages between different categories of personal injuries (the 'proportionate principle') was expanded upon by the Court of Appeal in *Murphy v. County Galway Motor Club* [2016] IECA 106 and in *Payne v. Nugent* [2015] IECA 268.

The mechanics of ensuring that awards are proportionate to the 'cap'

76. In *County Galway Motor Club* case at para. 19, the Court of Appeal focused in on how a court was to do the exercise of ensuring that the proposed award was proportionate to the general scheme of awards and in particular to the 'cap' on general damages of €450,000:

> "To achieve proportionality the judge ought to have regard to the entire spectrum of personal injury claims which includes everything from the most modest type of injury, such as soft tissue injuries, to those which can only be described as extreme or catastrophic and which tend to attract damages of in or about €450,000. It is helpful for a trial judge to endeavour to locate where, within that spectrum, the injuries of any particular plaintiff would appear to lie: see, e.g., *Nolan .v. Wirenski*, judgment of Irvine J. 25th February 2015. After all, damages are only fair and just if they are proportionate, not only to the injury sustained by an individual plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude. There must be a rational relationship between awards in personal injury cases. (per Irvine J.)

In addition, the Court of Appeal in an earlier case, the *Payne* case, gave a more concrete example of how to apply the proportionate principle in each case at para. 17:

> "So one of the questions I ask myself when considering whether the award made in this case was reasonable or proportionate is whether the trial judge could have been within the appropriate range when he awarded the plaintiff a sum that placed her injuries in terms of value approximately one sixth of the way along an imaginary scale of damages for personal injuries which ends at €400,000 for the catastrophically injured plaintiff." (per Irvine J)

77. The *Payne* case concerned relatively modest injuries since in that case the injury was a whiplash type injury, where the Court of Appeal reduced the High Court award of damages by 45%. The Court of Appeal explained in that case that the reason the courts needed to apply the '*proportionate principle*' to personal injuries was in order to avoid a real danger of injustice and unfairness for those who suffer serious injuries, such as a loss of a limb, but which are considerably short of catastrophic injuries, such as quadriplegia.

Four types of injuries to be considered when applying proportionate principle

78. The logic of the Court of Appeal's approach seems to this Court to be that there are four types of injuries:

> (i) modest injuries (of which a soft tissue injury is an example),

(ii) middle ranking injuries,

(iii) serious injuries (such as a loss of a limb) and

(iv) catastrophic injuries (such as quadriplegia).

79. Using this categories of personal injuries to apply the proportionate principle, it would be proportionate (relative to the €450,000 'cap' for catastrophic injuries) for a person who has suffered a serious injury e.g. loss of a limb, to receive general damages for pain and suffering (in addition to the amount of special damages to which he is entitled) which are significantly less than €450,000, in order to reflect the considerable difference between somebody who loses a limb and a catastrophically injured plaintiff. In applying the proportionate principle, the High Court must avoid what the Court of Appeal termed the '*concertina*' effect, particularly in relation to modest and middle ranking injuries.

High Court must avoid 'concertina effect' in assessing damages

80. The real focus of the Court of Appeal in the Payne case was on modest injuries and middle ranking injuries which fall well short of a serious injury such as the loss of a limb. Thankfully, the bulk of the cases before this Court in Garda Compensation Act cases are modest and middle ranking injuries.

81. The Court of Appeal makes it clear that the High Court must, when awarding damages for modest injuries and middle ranking injuries, make sure that they are proportionate to serious injury awards, which themselves must be proportionate to awards for catastrophic injuries. Otherwise, if awards for modest injuries and middle ranking injuries are within, or close to, the range for serious injuries, the Court of Appeal has pointed out that this would amount to *'an injustice and unfairness'*. It seems clear that the injustice and unfairness to which the Court of Appeal is referring is one which is visited upon the person with a serious injury, such as the loss of a limb, who discovers that someone who has a modest injury or a middle ranking injury is awarded damages for pain and suffering which are close to the damages he has received.

82. When applying the *'proportionate principle*' to modest and middle ranking injuries in Garda Compensation cases, this Court is obliged by the Court of Appeal in the *Payne case* to avoid the *'concertina type effect*', whereby high awards for modest injuries drives up awards payable for middle ranking injuries. In that case, which involved soft tissue injury to the shoulder, neck and back of the plaintiff, the Court of Appeal explained this rationale at para. 18 as follows:

> "For my part there is a real danger of injustice and unfairness being visited upon many of those who come to litigation seeking compensation if those who suffer modest injuries of the nature described in these proceedings are to receive damages of the nature awarded by the trial judge in this case. If modest injuries of this type are to attract damages of €65,000 the effect of such an approach must be to drive up the awards payable to those who suffer more significant or what I would describe as middle ranking personal injuries such that a concertina type effect is created at the upper end of the compensation scale. So for example the award of general damages to the person who loses a limb becomes only modestly different to the award made to the quadriplegic or the individual who suffers significant brain damage and in my view that simply cannot be just or fair" (per Irvine J.)

83. Thus, in order to avoid an injustice being visited upon those who have suffered more serious personal injuries than those being assessed, it is clear that this Court must ensure that there is a significant difference between awards for general damages (i.e. for pain and suffering) for modest personal injuries (whether gardaí or civilians) and awards for middle ranking personal injuries. In turn, this Court must also ensure that there is a significant difference between awards for middle ranking personal injuries and serious personal injuries. When dealing with awards for serious personal injuries, this Court must ensure that there is a significant difference between those awards and awards for catastrophic injuries. Failing to do so, risks an injustice on other more seriously injured plaintiffs/applicants.

The imaginary scale to use when applying the proportionate principle

84. At para. 17 of the *Payne* case, the Court of Appeal explained how a court could apply the proportionate principle in practice in the following terms (at that time, in the context of a 'cap' of €400,000):

> "The most catastrophically injured members of society who suffer great pain and distress and who may never work or enjoy benefits of a loving relationship and who may remain dependant on the care of others for fifty or sixty years or indeed for the whole of their lifetime are regularly awarded damages for pain and suffering in the region of €400,000. So one of the questions I ask myself when considering whether the award made in this case was reasonable or proportionate is whether the trial judge could have been within the appropriate range when he awarded the plaintiff a sum that placed her injuries in terms of value approximately one sixth of the way along the imaginary scale of damages for personal injuries which ends at Euro 400,000 for the catastrophically injured plaintiff. In my view, thus assessed, the award which he made to the plaintiff was not reasonable or proportionate." (per Irvine J.)

Thus, in applying the proportionate principle, the High Court places the injured plaintiff (or injured applicant in a Garda Compensation case) at the appropriate spot on an imaginary scale which ends at the 'cap' for catastrophic injuries which is currently at €450,000. In doing so, this Court must ask where along that scale is a proportionate point for the injury to be placed. When dealing with modest and middle ranking injuries, one asks the same question whilst bearing in mind where a serious injury, such as a loss of a limb, might be on that scale.

Using the proportionate principle in this case

85. Thus, applying this principle, as this Court must do in every case, a key question for this Court (and for practitioners when advising their clients on how damages are assessed by this Court), is to ask (taking the example of a soft tissue injury to a hand, since this is the injury suffered by the applicant in the case before this Court) the following question, which uses percentages, rather than points on the scale:

> "whether the pain and suffering resulting from a soft tissue hand injury is say 10% of the pain and suffering compensation for a catastrophic injury such as quadriplegia (€45,000) or say 5% (€22,500) or say 1% (€4,500)?"

While it may seem somewhat incongruous or even callous to be doing an exercise such as this in the specific circumstances of a person's personal injury, this cannot be avoided because the task which the Court must do is, to the quote the Court of Appeal in *Nolan v. Wirenski* at para. 26:

> "a very imperfect and inadequate mode of compensation and is a poor substitute for the change in circumstances brought

about".

Unfortunately, if one is going to put a monetary value on a personal injury, which this Court must do, there is no better system for calculating damages for personal injuries.

THE AVERAGE EARNINGS PRINCIPLE

(X) Awards to be reasonable in light of common good and social conditions

86. The third and final principle, which the High Court is obliged by the Court of Appeal decision in *Wirenski* to apply, is whether the proposed compensation is objectively reasonable in light of the common good and social conditions.

87. The perception of what is in the common good will vary depending on the particular circumstances of a personal injuries case. Although it is unlikely to be a regular occurrence, it could well be necessary, in the particular circumstances of a case, for reference to be made to the common good in assessing damages. For example, in rare circumstances, it is possible that the common good might necessitate an award of exemplary damages to indicate the court's disapproval of a party's actions.

88. The focus of this judgment is however on the relevance of 'social conditions' to the level of a general damages award, which in this Court's view will apply in every case where an award is made for pain and suffering. This is because the term '*social conditions*' is, in this Court's view, a much more specific term than '*common good*' and accordingly capable of being of concrete assistance in assessing how much compensation should be paid in respect of a particular personal injury. This arises from the fact that the term *'social conditions*' seems to refer, inter alia, to the average earnings of persons in the State. In interpreting *'social conditions*' in this manner, this Court relies on the judgment of O'Higgins C.J. in *Sinnott v. Quinnsworth* [1984] 523. At p. 532 of that judgment, he stated that in determining whether a figure for general damages was fair and reasonable:

> "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". [emphasis added]

In reaching its conclusion that this Court is obliged to have regard to the general level of incomes in assessing damages for pain and suffering, this Court also relies on the High Court decision in *Yun v. MIBI* [2009] IEHC 318.

89. In that case, in determining the appropriate level of general damages for personal injuries, Quirke J. makes it clear that account must be taken of '*economic realities*' and in particular to *'individual disposable incomes*' which he regards as a relevant factor in the measurement of *'contemporary standards*' and in particular current '*social conditions*' (which is the same expression used by the Court of Appeal in the *Wirenski* case). He clarifies why disposable incomes have no relevance to pecuniary loss or special damages, but are relevant to general damages or non-pecuniary losses, at p. 18 of his judgment:

> "However, in *Heil v. Rankin* [2001] Q.B. 272 at p. 297, the Court of Appeal (Lord Woolf M.R.) pointed out that:
>
> > "A distinction exists… between the task of the court when determining the level of pecuniary loss and when determining the level of non-pecuniary loss. In the case of pecuniary loss, and issues such as that which engaged the House of Lords in Wells v. Wells, the court is only required to make the correct calculation. Economic consequences are then irrelevant. When the question is the level of damages for non-pecuniary loss the court is engaged in a different exercise. As we have said, it is concerned with determining what is the fair, reasonable and just equivalent in monetary terms of an injury and the resultant PSLA. The decision has to be taken against the background of the society in which the court makes the award."
>
> Those observations and the distinction identified by Lord Woolf between pecuniary loss (compensated by special damages) and non-pecuniary loss (compensated by general damages) are quite consistent with the principles and further distinctions identified by the Supreme Court in *Sinnott v. Quinnsworth* and *M.N. v. S.M.*
>
> Hence, the need for the courts to hear evidence of and to consider "contemporary standards and money values" when assessing and calculating the limit or "cap" to be imposed on awards for general damages from time to time.
>
> It was confirmed in evidence that this country is presently enduring a period of unprecedented recession. There has been a significant drop in individual disposable income and it is anticipated that this will become more acute during the next several years. Wealth and living standards have declined appreciably and economic growth has been replaced with contraction.
>
> Those factors are relevant to the measurement of "contemporary standards" and current "social conditions" within this country and it can be validly argued that, in general, awards of general damages should reflect such economic realities."

90. In that case of *Yun v. MIBI*, which considered the rise in the 'cap' on general damages since its introduction in 1984 in *Sinnott v. Quinnsworth* to 2007 (when *Yun v. MIBI* was heard), Quirke J. relied on the rate of increase in the *'average industrial earnings*' during that period as an appropriate rate to apply to the cap on damages.

91. Based on the foregoing caselaw, it seems clear therefore that this Court must have regard to the general levels of income when assessing how much damages to award for pain and suffering in personal injury cases.

92. Furthermore, this Court believes that the general level of incomes or average industrial earnings (which this court refers to as the 'average earnings principle') is a very useful tool, in conjunction with the 'proportionate principle', in calculating an appropriate figure for compensation, particularly when one is dealing with modest or middle ranking injuries, which in severity are a long way from catastrophic injuries, for which €450,000 is the 'cap' on general damages. This is because for very minor injuries in particular, it may be difficult to even contemplate that the injury is any way referable or even on the same scale as quadriplegia, e.g. a wound which required stitches but which fully healed without visible scarring, which is the type of personal injury case sometimes heard in the High Court under the Garda Compensation Act. For such injuries a touchstone such as the average earnings in the State can, in this Court's view, help with the assessment of damages in conjunction with the proportionate principle.

93. The touchstone amount is not what an unemployed person might get per annum on job seeker's allowance (circa €10,000 per annum) or what a pensioner receives (circa €13,000). On the other hand the touchstone amount is not what a successful lawyer or

other successful professional or business person earns per annum, which is likely to be many multiples of these amounts. Rather the touchstone is the average earnings of everyone in the State from those on social welfare up to and including those on the highest salaries. The logic of this approach seems to this Court to be that pain and suffering does not discriminate between the wealth of victims and if one is unemployed or wealthy, the calculation of pain and suffering should be based on the average. In this instance, it means that the average earnings of a person in Ireland is to be used as a touchstone in deciding on the appropriate level of damages for pain and suffering for personal injuries.

What are average earnings in Ireland?
94. Since the purpose of this judgment is to help make concrete the assessment of damages in individual cases for gardaí and their lawyers who are due to appear in Court, it is important to have a precise figure for the general level of incomes, in much the same way as one has regard to a concrete figure for the 'cap' on damages, which is currently a figure of €450,000, although previously it was £150,000 and increased over the years (as have average earnings) For this purpose, this Court would rely on the figures published by the Central Statistics Office ("CSO"), and in particular the annual release of the *'average annual earnings*' in the State, although the Court is open to hearing evidence regarding either a different source for calculating average earnings or indeed future changes to the CSO figure. The most recent figure released by the CSO for the average annual earnings of a person working full-time in the State is €45,611 (CSO Statistical Release, 29th June, 2017), which approximates to €3,800 a month. Basing the average annual earnings principle on the CSO figure also has the advantage that, as this figure is revised annually by the CSO, it should reflect contemporary '*social conditions*' (to use the term utilised by the Court of Appeal in *Wirenski*) and thus the true value of an award at a given time.

95. Accordingly, it is to this figure of €45,611 per annum, which this Court will refer as the 'average earnings' or the '*general level of incomes*' (to use the expression used by O'Higgins C.J.), in order to determine what is a fair and reasonable amount of compensation in a particular case, as required by the Supreme Court and the Court of Appeal. Since one is dealing with abstract notions of valuing personal injuries, one concrete way (but by no means the only one) to seek to use the average earnings to calculate a figure for compensation is to ask the following question:

> 'assuming that a defendant in a personal injuries action earns the average earnings of €45,611 per annum and assuming that he was responsible, by negligence or otherwise for the injury to the plaintiff:
>
> > what period of time would it be reasonable to 'notionally' require that defendant to work full time and hand over his entire salary to the injured plaintiff, in order to compensate the plaintiff for the defendant's negligence which caused the injury?'

96. Although the foregoing question is expressed in the manner of a defendant being at fault and causing the injury to the plaintiff, it is simply a means of notionally valuing a personal injury. It follows that this question is equally relevant to a Garda Compensation Acts case, where the defendant is the Minister for Public Expenditure and Reform even though invariably the Minister is not at fault, since the injury is incurred as a result of an interaction between a garda and a member of the public.

97. It is clear from the *Wirenski* case that the relevance of 'social conditions' in the State and in particular the 'average earnings principle' is to be used in addition to the 'proportionate principle' (i.e. proportionate to the general scheme of awards and the 'cap' of €450,000), when calculating general damages. Thus, this Court must apply both principles as well as the first principle that the final award be fair to the injured party and the payer of the compensation. One way to apply *Wirenski* to a particular case is:

> • First ask, bearing in mind that it takes the average person a year to earn €45,611 (and a month to earn €3,800), is one month/one year/three years' earnings etc (as the case may be) fair and reasonable compensation for the injury suffered by the plaintiff?
>
> • Second ask, is that resulting figure, say if it is €45,000 or €22,500 or €4,500 (to take examples) a proportionate award, bearing in mind that it is 10% or 5% or 1% (as the case may be) of the 'cap' of €450,000 of general damages that is awarded for pain and suffering for a catastrophic injury such as quadriplegia.

98. Thus, in this Court, applicants and their lawyers who wish to consider or make submissions on the level of damages that are appropriate for pain and suffering could pose the foregoing two questions regarding the figure that they believe is appropriate.

Advantage of average earnings principle for ordinary citizens
99. It remains to be observed that the obligation upon this Court to apply the average earnings principle to the calculation of damages for pain and suffering makes, in this Court's view, the whole process of calculating damages somewhat accessible to ordinary citizens who have suffered personal injuries. This is because it may be possible that relating the 'value' of their pain and suffering to how long an average person has to work to earn a certain figure, may make for them the whole process of calculating '*how much an injury is worth*' slightly less nebulous, particularly since it does not involve any difficult legal concepts. Indeed it is arguable that ordinary citizens would be as well positioned as a judge to determine what would be a reasonable amount for a personal injury when this touchstone is explicitly relied upon. In addition, if ordinary citizens appreciate that courts do not pick awards out of the sky, but that there is logical basis for them, it may make the whole process less mysterious for injured plaintiffs and perhaps make it easier for them to decide whether a settlement offer is reasonable compensation for their injury.

(XI) Court must apply scepticism to claims seeking damages
100. The final principle regarding the calculation of damages to which this Court will refer arose in the recent Supreme Court case of *Rosbeg Partners v. LK Shields* [2018] IESC 23. Although the case concerned the assessment of damages in a professional negligence action, it is also of relevance, in this Court's view, to the assessment of general damages in a personal injuries case.

101. In that case, O'Donnell J. (at para. 22) made the following comments regarding claims for damage in the context of a damages award by the High Court, which the Supreme Court reduced by over 50%:

> "It is important to remind ourselves that courts should approach claims such as this not simply on the basis of the genuineness or plausibility of the witnesses, but by applying common sense and some degree of scepticism.
>
> […]
>
> This is not a reflection of the honesty of witnesses, rather it is human nature. Persons involved in routine car accidents will regularly tend to recall events in a way which discounts or avoids their own culpability. It is not unusual to give ourselves the benefit of the doubt, in any field, and all the more so when the stakes are high…

> In many cases courts must sift through differing accounts at some remove in time from the facts, and do their best to allow for human error and the tendency for memories and consequently accounts to become subtly and unwittingly adjusted under the focus of the case, and in light of the consequences of failure…
>
> Courts must, and do, try to bring an appropriate scepticism therefore to their task at each stage of litigation."

102. As the Supreme Court's comments regarding the need for the courts to be sceptical and apply common sense are founded in the role of human nature in claims for damages, and human nature is as applicable to personal injury claims as it is to professional negligence claims, there is no reason why the subjecting of the claim to scepticism would not be as applicable to personal injury claims for damages, as they are to professional negligence claims for damages. On this basis, this Court concludes that the courts are obliged to apply a degree of scepticism to claims for damages by an injured party in a personal injuries action.

103. In this regard, it is clear that the more pain and suffering an injured party claims he/she has suffered, the more likely his/her action for damages will be successful. In light of this Supreme Court decision, the courts need therefore to be conscious of the fact that it is simply human nature for any person who chooses to institute litigation to wish to be successful in that litigation and so avoid the '*consequences of failure'*.

104. It is also clear from this judgment that the more serious the injury then it is likely that the '*stakes are high*' for the injured party and there may be a greater risk of the injured party giving himself/herself the benefit of the doubt.

105. In a personal injuries case, this means that the court should, in the words of O'Donnell J. approach Garda Kampff's claims regarding the effect of the injury on him and the pain and suffering he experienced, by applying common sense and a degree of scepticism.

Submissions on quantum
106. Finally, this Court would also make comments on the submissions on quantum, which were made in this case by counsel of Garda Kampff. Unlike counsel in other personal injury cases, counsel in Garda Compensation cases have to date made submissions on the amount of damages which this Court might award. They have done so usually by reference to the Book of Quantum and in some cases to comparator cases, which go back to a time, a considerable number of years ago when a record of awards to gardaí were kept, which comparator cases are of considerably less relevance with each passing year. As a result of reference to previous cases and/or the Book of Quantum, precise amounts or sometimes a minimum and maximum amount are commonly suggested by counsel to the Court.

107. It is not clear to this Court why in civilian personal injury cases submissions are not made, but in cases involving personal injuries to gardaí, submissions on quantum are made. In any event, to the extent that practitioners decide to make submissions to this Court, it is clear from the caselaw and the statutory provisions referred to in this judgment that the most important issue is not the Book of Quantum, but the proportionate principle and the average earnings principle to which the Supreme Court and Court of Appeal have made reference. To the extent that reference is made to the Book of Quantum, it seems clear from the recent recognition by the High Court in *Seligman* and other cases, of the recalibration of awards of damages in personal injury cases, that reference should be made to the appropriate downward 'recalibration' of those amounts in the Book of Quantum, where relevant.

108. It is however clear that if an amount is to be suggested by counsel the appropriate basis for counsel making a submission to this Court, that the award should be €X, is not simply to pick that figure out of thin air but, that it should be that €X is the appropriate figure for pain and suffering for the injury in question because:

Proportionate to 'cap' of €450,000?

- €X for pain and suffering for the injury in question is proportionate to the general level of awards and in particular the figure of €450,000 that is payable for pain and suffering for catastrophic injury and

Reasonable in light of how long it takes to earn the average earnings

- Bearing in mind that it takes the average person a year to earn €45,611, €X, which is a factor/multiple of the average earnings, is fair and reasonable compensation for the injury suffered by the plaintiff?

This is because, as noted in this judgment, the proportionate principle and the average earnings principles are the principles which this Court is obliged to use in assessing personal injury damages, as well as the principle that the award is fair to the injured party and the payer of the compensation.

Application of proportionate and average earnings principles to this case
109. It is this Court's view that the second and third principle set down by the Court of Appeal for assessing damages in the Wirenski case namely the 'proportionate principle' and the 'average earnings principle' will be of the most concrete assistance on a day to day basis in assessing the appropriate level of compensation for injured gardaí. In the case before this Court, the applicant garda sustained a soft tissue injury to his left hand and was out of work for five days.

Counsel suggests circa €21,700 award for soft tissue injury to hand
110. In the present case, counsel for Garda Kampff submitted to the Court that an award in the region of €21,700 would be a suitable award, without making any reference to the proportionate principle or the average earnings principle. Reference was made to the Book of Quantum where it is provided that the lowest band of awards for injuries to the hand, which are described as 'minor' with the following description:

"E. Hand

Soft Tissue

> Like other sprains, hand sprains are sometimes classified in grades: mild sprains involve some stretching of ligaments; moderate sprains involve partial rupture of a ligament while severe sprains involve complete rupture of a ligament. The injury may last for several weeks or several months but a full recovery is the most common outcome.

Minor up to €21,700

> Minor sprains are mild injuries where there is no tearing of the ligament, and often no movement is lost, although there may be tenderness and slight swelling which has substantially recovered."

111. It is this Court's view that without even applying the scepticism to which O'Donnell J. refers, an award of anywhere close to €21,700, almost a half year's salary for a person on average earnings, as compensation for the pain and suffering involved in bruising to a hand would breach the proportionate principle *and* the average earnings principle set down by the Supreme Court and the Court of Appeal regarding the calculation of damages in personal injury cases.

112. In addition, such an award, for what is a modest injury, would in this Court's view visit an injustice and unfairness on those who suffer middle ranking injuries who might receive damages that are only modestly different from those suffering bruising to a hand, if such an award was to be made, and this would create a concertina effect between modest injuries and middle ranking injuries, contrary to the stated need in the *Wirenski case* to avoid such an eventuality.

113. Applying the three principles from the *Wirenski* case to Garda Kampff's case, this Court would ask the following questions:

Proportionate principle
114. Is the suggested sum of €21,700 for pain and suffering for the soft tissue injury to Garda Kampff's hand, which is 4.82% of the 'cap' on damages for pain of suffering of €450,000 for a paraplegic injury, a proportionate award for a soft tissue injury to a hand? In view of the vast difference between paraplegia and bruising to a hand, this Court concludes that this suggested award breaches the proportionate principle.

Average earnings principle
115. Is the suggested award of €21,700, which sum it would take an average person working full-time five months to earn, a reasonable amount of compensation for this soft tissue injury to the hand? Or to put the matter another way, would it be fair to require a person to notionally work for five months to compensate Garda Kampff for bruising his hand if that person had done so negligently and was being sued by Garda Kampff?

116. In this Court's view, this would not be fair and €21,700 is many multiples of a fair award for this type of injury. This Court concludes that the sum of €5,000 is reasonable compensation for the injury suffered, being over a month's salary of a person on average earnings (or 1.1% of the 'cap' on damages).

Fair to the garda and the State
117. Finally, applying the other principle, which this Court is obliged to do by the Court of Appeal, it is this Court's view that an award of €5,000 would be fair to the garda and the defendant - in this case the State.

Application of scepticism and common sense to claims for damages
118. In addition to these three *Wirenski* principles, this Court is required by the Supreme Court judgment in *Rosbeg Partners v LK Shields*, to approach Garda Kampff's claims regarding the effect of the injury on him and the pain and suffering he experienced, by applying common sense and a degree of scepticism to these claims.

119. It is important to emphasise that this is not a reflection of the honesty of Garda Kampff, and this Court had no reason to doubt his honesty.. Rather it is because, as noted by the Supreme Court, of human nature. It is human nature for a person who is involved in litigation to wish to be as successful as possible in that litigation and avoid the consequences of failure. As noted by the Supreme Court, this human nature can lead to litigants giving themselves the benefit of doubt, which is combined with the tendency of memories and consequently accounts to become subtly and unwittingly adjusted under the focus of litigation.

120. Thus, while Garda Kampff did state in his evidence before this Court that it was one year before his hand was better, it is this Court's view that some degree of scepticism and commons sense needs to be applied to this claim in light of the undisputed medical evidence regarding the nature of the soft tissue injury to his hand. Applying this approach leads also to this Court's assessment of a figure of €5,000 for pain and suffering, without impugning Garda Kampff's honesty to any degree.

CONCLUSION
121. The fact that precedent or support could be found in the Book of Quantum for Garda Kampff's submission that he should be awarded €21,700, which is close to a half year's average earnings, for bruising to his hand, may explain why the Court of Appeal has applied a downwards recalibration to personal injury awards which will be relevant to all awards contained in the Book of Quantum.

122. Applying the proportionate principle and the average earnings principle, which this Court is obliged to do, rather than relying on the Book of Quantum which is a non-binding guide, led this Court to conclude that the appropriate figure for pain and suffering is €5,000, which is over a month's salary based on average earnings in Ireland.

123. The notion that modest soft tissue injuries should receive anything close to a half year's average earnings is a very significant issue for the citizens of the State since, to refer again to the Supreme Court judgment in *Kearney v. McQuillan*:

> "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."

124. This case involved a modest soft tissue injury, for which damages of €5,000 have been awarded in the High Court. This amount is a fraction of the maximum damages of €15,000 that can be awarded in the District Court. Yet this matter had to be heard in the High Court under the Garda Compensation Acts as currently drafted. Because of the very expensive cost of High Court litigation, this means that the costs of obtaining this award of €5,000 is estimated to be in the region of €15,000-€20,000, which defies logic. It is the taxpayer who is funding these sums, since the legal costs of both parties to the litigation are payable by the taxpayer (as liability is invariably conceded by the State and one is dealing only with assessment in Garda Compensation cases). Since this case is a common example of the type of case that is heard in the High Court under the Garda Compensation Acts on a weekly basis, it highlights, in this Court's view, the need for a reform of this area.

125. Finally, in assessing damages for pain and suffering in all personal injury cases, the principles enunciated by the Court of Appeal and the Supreme Court make it clear that:

- First, this Court must apply scepticism and common sense to claims made by a plaintiff/applicant regarding the extent

and effect of the injuries in support of their claims for damages/compensation not because of any presumed dishonesty on the part of the plaintiff/applicant, but rather in light of human nature,

• Secondly, to the extent that reliance is placed on the Book of Quantum, this Court must consider the effect of the recent downward recalibration, in some cases of 45-50%, by the Court of Appeal on awards of damages for personal injuries,

• Thirdly, this Court must determine if the proposed amount for damages for pain and suffering for the personal injury in question is proportionate, bearing in mind that the cap on damages for pain and suffering is €450,000 for a catastrophic injury such as a paraplegia, and

• Fourthly, this Court must determine if the proposed amount is reasonable in light of the fact that it takes an average person a month to earn €3,800 and a year to earn €45,611.

The enunciation of the foregoing principles which the courts are required to apply in calculating damages for personal injuries, and in particular the use of the average earnings principle has the advantage of making the process of calculating damages accessible for ordinary citizens who are involved in such claims on a daily basis. It is hoped that even if there is no reform of the Garda Compensation system, these principles may assist parties who are involved in Garda Compensation and other personal injury litigation to make and accept settlement offers and thereby reduce the amount of court time required to deal with these cases, in light of the current strain on court resources.