AN CHÚIRT UACHTARACH

THE SUPREME COURT

S: AP:IE: 2022:0000100
[2024] IESC 10

Charleton J.
Hogan J.
Murray J.
Collins J.
Whelan J.
Faherty J.
Haughton J.

BETWEEN

BRIDGET DELANEY

Appellant

AND

THE PERSONAL INJURIES ASSESSMENT BOARD, THE JUDICIAL COUNCIL, IRELAND AND THE ATTORNEY GENERAL

Respondents

JUDGMENT of Mr. Justice Robert Haughton delivered on the 9th day of April, 2024

Introduction

1. At the centre of this appeal is the constitutional validity of s. 7(2)(g) of the Judicial Council Act, 2019 ("*the 2019 Act*") and the personal injury guidelines adopted pursuant thereto by the Judicial Council on 6 March 2021 ("*the Guidelines*").

2. The factual background to the appeal is that the plaintiff/appellant was injured when she fell on a public footpath in Dungarvan, Co. Waterford, suffering an undisplaced fracture of the tip of her right lateral malleolus. As a result, she had to wear a walker boot for some four weeks and was advised that she would have swelling in her ankle for approximately six to nine months, and the orthopaedic opinion was that she would have no significant long-term *sequelae*.

3. As the plaintiff claims that her fall was caused by a defect in the footpath for which the local authority was liable, she first applied on 29 May 2019 to the Personal Injuries Assessment Board ("*PIAB*") pursuant to Part 2, Chapter 1 of the Personal Injuries Assessment Board Act, 2003 ("*the PIAB Act*") for assessment of her claim. At the time her claim was filed the basis for assessing damages was s. 20(4) of the PIAB Act – as it stood at that time – by reference to the same principles governing the measure of damages in tort as would be applied by a court, but on the basis that regard was to be had to the Book of Quantum prepared by PIAB pursuant to s. 54(1)(b) of the PIAB Act. Under the Book of Quantum (2016) the applicable range for general damages for "*minor*" fractures of the foot ("*non-displaced fractures to a single bone in the foot with no joint involvement which have substantially recovered*") was €18,000 - €34,900.

4. Assessment was, for various reasons, delayed until 14 May 2021. In the meantime, on 6 March 2021 the draft Guidelines required by the 2019 Act to be prepared by a committee of the Board of the Judicial Council were adopted by the Judicial Council pursuant to s. 7(2)(g)(i) of the 2019 Act. Thereafter the Guidelines (purportedly) came into operation on 24 April 2021 by virtue of S.I. No. 180 of 2021.

5. Also central to this appeal is s. 22(1) of the Civil Liability and Courts Act, 2004 ("*the 2004 Act*") which as amended/substituted[1] with effect from 24 April 2021 provides:-

[1] By s.30 of the Family Leave and Miscellaneous Provisions Act 2021 (*"the 2021 Act").*

"(1) Subject to section 100 of the Act of 2019 and subsection (1A)(b), the court shall, in assessing damages in a personal injuries action commenced on or after the date on which section 99 of that Act comes into operation –

(a) have regard to the personal injuries guidelines (within the meaning of that Act) in force, and

(b) where it departs from those guidelines, state the reasons for such departure in giving its decision." [2]

[Emphasis added]

The full text of the amended s. 22 is set out in Appendix 2. The legislative history of this substituted provision is relevant. The original s. 99 of the 2019 Act, set out in Appendix 1, first amended s. 22 of the 2004 Act by introducing a subsection (1) requiring the court to have regard to "*the personal injuries guidelines (within the meaning of section 2 of the Judicial Council Act 2019)*" and stipulating that where the court departed from the guidelines it must state reasons for such departure. Subsection (2) then read:-

"(2) Subsection (1) shall not operate to prohibit a court from having regard to matters other than those personal injuries guidelines when assessing damages in a personal injuries action."

[2] Subsection (1)(A((b) provides that the court shall have regard to the Book of Quantum (2016) where a personal injuries action was commenced "*before the date on which s.99 […] comes into operation*" i.e. before 24 April 2021, or where PIAB had already made an assessment before that date that the claimant had declined to accept. Subsection (2) was then amended to provide that is such instances the court is not prohibited from having regard to *matters other than those personal injury guidelines*. The effect of the 2021 Act amendments is that in respect of claims assessed by PIAB on or after 24 April 2021there is no proviso that the PIAB or the court can have regard to *matters other than those personal injury guidelines.*

This is the *"Proviso"* as it was referred to in argument. Section 99 was itself substituted by s. 30(a) of the Family Leave and Miscellaneous Provisions Act, 2021 ("*the 2021 Act*") (signed into law by the President on 27 March 2021), which was commenced on 24 April 2021 (after the adoption of the Guidelines by the Judicial Council). The version quoted at the start of this paragraph is subsection (1) as substituted in with effect from 24 April 2024. The underlined words have relevance to an argument pursued by the State parties (on which the Court received further written submissions and heard oral submissions on 13 March 2024) that, even if the Guidelines lacked constitutional validity when adopted by the Judicial Council, the legislature by virtue of the 2021 Act ratified or confirmed the Guidelines. I address that argument towards the end of this judgment.

6. Section 20(5) of the PIAB Act was also amended by the 2021 Act to provide that in making an assessment as to a relevant claim the PIAB assessors:-

> *"…shall–*
>
> > *(a) have regard to the personal injuries guidelines (within the meaning of that Act) in force, and*
> >
> > *(b) where they depart from those guidelines, state the reasons for such departure and include those reasons in the assessment in writing under section 30(1)."*

Again, the underlined words are relevant to ratification argument.

7. The result of these complex amendments was that in assessing the plaintiff's claim on or about 14 May 2021 PIAB had regard to the Guidelines, not the Book of Quantum or *any other matters*. The Guidelines identified a range between €500 - €3,000 for a "*minor*" ankle injury with substantial recovery within six months. The affidavit of Suzanne Hill sworn on 2 December 2021 on behalf of PIAB indicates that the assessors considered whether to depart from the Guidelines but determined that it was not "*necessary*" to do so. The assessment was thus a fraction of what the plaintiff might

reasonably have anticipated she would have achieved under the Book of Quantum (2016). She did not accept it and issued these proceedings.

8. In his draft judgment, which I have had the benefit of reading, Collins J. has more fully set out the relevant legislative provisions, and the background facts and the grounds advanced by the plaintiff, and he has summarised the judgment of the High Court (Meenan J.) and the arguments advanced on appeal. He has identified the various issues that arise, and in this judgment I propose to concentrate on two issues, where I respectfully disagree with his analysis or conclusions. These are:-

(1) What is the status and effect of the Guidelines ("*the Guidelines Issue*"); and

(6) Whether, in imposing functions on the judiciary in relation to the adoption of the Guidelines, the 2019 Act infringes the independence of the judiciary ("*the Judicial Independence Issue*").

In addition I will address the issue of whether, if s. 7(2)(g) is unconstitutional, the 2021 Act had the effect of ratifying the Guidelines.

I will however in the course of my judgment briefly indicate my views in respect of the other issues identified by Collins J., and for that purpose will follow his numbering. Broadly speaking, I agree with his conclusions on these other issues.

(1) The Guidelines Issue

9. I agree with the view that the status and effect of the Guidelines impacts significantly on the other issues, and needs to be addressed first. In my view the question is ultimately whether the Guidelines are in effect substantive law, as opposed to being merely guidelines which judges are not bound to follow. Put another way, are the Guidelines *soft law*, merely guidelines that are advisory in

nature and can be departed from, as opposed to *hard law* which the courts are for the most part obliged to apply?

10. This raises a fundamental question of 'what constitutes a law, or legislation'? This is a jurisprudential question that has taxed jurists for centuries, and it has no simple answer. Hogan J. in his draft judgment approves of a helpful passage from the recent judgment of Simons J. in *Ryanair DAC v. An Taoiseach* [2020] IEHC 461, [2021] 3 IR 355, where he had to consider whether Government guidelines in respect of travel advice issued during the Covid-19 pandemic were legally binding. Simons J. held that they were not so binding, because if they were they would have the effect of conferring law-making power on the Government in breach of Article 15.2.1°. At paragraph 41 he states:-

> *"Without presuming to offer an exhaustive definition of a "law" for the purposes of the "power of making laws for the State" under Article 15.2.1°, the* purported *introduction by the executive of a unilateral and non-consensual restriction of general application which affects the rights of individuals, and which is asserted to be enforceable would approximate to "law" making."*

Like Hogan J. I find this passage helpful. For present purposes I regard "*laws*" as non-consensual norms creating substantive legal rights and obligations of unilateral or general application, which affect the rights of individuals, and which the courts have an obligation to consider and apply in the administration of justice. While I adopt the phrase "*affect the rights of individuals*" I do so advisedly because in my view the Guidelines do not create property or personal rights, such as, for example, a right to sue in tort. Rather, as I conclude, the Guidelines *affect* the level of compensation to which a claimant becomes entitled when the personal injuries are assessed by PIAB or by a court.

11. Are the Guidelines such *norms*? Whilst I agree that this is primarily a matter of statutory interpretation I do not consider that it is answered by the simple fact that s. 7 of the 2019 Act refers to "*guidelines*" and s. 90(1) uses the terms "*general guidelines*" and "*guidelines*" which:-

> *"may include guidance on any or all of the following: (a) the level of damages for personal injuries generally; (b) the level of damages for a particular injury or a particular category of injury; (c) the range of damages to be considered for a particular injury or a particular category of injuries; (d) where multiple injuries have been suffered by a person, the consideration to be given to the effect of those multiple injuries on the level of damages to be awarded in respect of that person."*

Clearly the Guidelines constitute "*guidelines*" as that word is used in section 7. While the ordinary meaning of "*guideline*" is a guidance that is not mandatory or binding, in my view the use of that word or the term "*general guidelines*" are not of themselves conclusive as to the *legal effect* of the Guidelines.

12. Firstly it is necessary to construe the use of these words in the context of s. 22(1) of the 2004 Act which places the dual obligation on courts "*to have regard to*" the Guidelines and "*where it departs from those guidelines, state the reasons for such departure in giving its decision*" (and the similar obligations imposed on PIAB by s. 20(5) of the PIAB Act when making its assessments). I would agree with Collins J. in his draft judgment that the phrase "*have regard to*" does not preclude the court having regard to other matters, and that a judge is entitled to depart from the guided range, but this raises questions as to the scope for departure – 'what reasons or other matters could justify departure?', and 'what is the extent of departure from a given range that could ever be justified?' – questions which I address below.

13. Secondly in my view it is appropriate to carefully consider the actual Guidelines which are the subject of challenge in these proceedings. The court has the advantage of considering actual Guidelines adopted by the Judicial Council rather than considering the constitutionality of guidelines on a purely hypothetical or abstract basis. This includes, in my view, considering the Introduction to the Guidelines, and in particular the section headed '*Use of Guidelines*' onwards, as these are addressed to the court (and PIAB) when approaching the assessment of damages, and explain how the Guidelines are to be applied in practice in different situations, for example where a claimant suffers multiple injuries. I say this because the Guidelines document as a whole was what was adopted by the Judicial Council and it includes these sections.

14. This is important for a number of reasons. Firstly, in adopting the Guidelines the Judicial Council accepted the following statement in the Introduction concerning s. 22(1):-

> *"Accordingly, whilst the Court retains its independence and discretion when it comes to making an award of general damages, it is mandatory for the Court to make its assessment having regard to the Guidelines subject always to the proviso that where it chooses to depart from the Guidelines it should detail, in its judgment, the considerations which warranted that departure."*

The Judicial Council therefore considered that it was adopting Guidelines that were mandatory in nature, and this is the message within the Guidelines that introduces them to every court assessing general damages for personal injury covered by the Guidelines.

15. Further in the Guidelines under the heading '*Use of Guidelines*' judges are told at the conclusion of the case to ask the parties to identify the dominant injury, the relevant damages bracket, and where within the bracket the damages should be located in terms of severity. The trial judge is

then advised to make findings of fact concerning the claimant's injury and to consider how the Guidelines should "*impact on the Court's award*." It is then stated:-

> *"The obligation on the part of the trial judge to have regard to the Guidelines is mandatory as is his or her obligation, should he or she consider that the justice of the case warrants an award above the level of damages proposed for that or a similar injury in the Guidelines, to state his or her reasons for so departing."*

Once again the Guidelines speak in terms of *mandatory obligation*, and it was on that basis that the Guidelines were adopted by the Council. This in my view is consonant with the statutory objective under the 2019 Act to achieve consistency and proportionality, and the further statutory obligation to have regard to the guidelines, and to give reasons when departing.

16. Thirdly of significance is the very detailed nature of the Guidelines, which seek to describe by category and sub-category the vast majority of possible types of injury, and to further describe those by level of severity, and then provide a range of damages. This is not a criticism of the Guidelines – indeed it is a recognition that the Committee produced, and the Judicial Council adopted, a very comprehensive draft which covers all of the matters referenced in s. 90(1) of the 2019 Act.

17. The result in my view is that the Guidelines as adopted confer on a claimant the right to have his/her compensation for tort assessed pursuant to the Guidelines, and oblige the defendant to pay that compensation – but only such compensation as is assessed by reference to the Guidelines.

18. Further the Guidelines place a clear legal obligation on the court (and PIAB) to assess that compensation not by reference to subjective views on what is appropriate, nor by reference to pre-Guidelines precedent/norms, but by reference to the detailed guidance in the Guidelines, and within the ranges indicated. The court is mandated "*to have regard*" to the Guidelines, and if departing from them must give reasons.

19. Nor in my view does the fact that a judge has a margin or discretion to decide the appropriate award within a given range, or the fact that the judge can depart from a Guideline range for stated reasons, mean that they are not legislative in nature. In many instances a court under statute is given a measure of discretion, but that does not mean that the court is not concerned with applying laws or that the statutory obligation is not a legal one.

20. It is important to note here that the Guidelines are based on a maximum figure for general damages for "*the most devastating and catastrophic of injuries*" of €550,000. This cap is expressly referred to in the "*General principles*" at page 6 of the Guidelines, and is the maximum guideline figure given for "*injuries resulting in foreshortened life expectancy*", "*quadriplegia*" and "*most severe brain damage*".

21. Further, in preparing the granular detail in the Guidelines the Committee was obliged by s. 90(3) of the 2019 Act to have regard *inter alia* to:-

> "*(a) the level of damages awarded for personal injuries by– (i) courts in the State …*" and
>
> "*(b) principles for the assessment and award of damages for personal injuries determined by the High Court, the Court of Appeal and the Supreme Court*" and
>
> "*(d) the need to promote consistency in the level of damages awarded for personal injuries*".

22. The Guidelines on page 7 acknowledge that they were drawn up using *inter alia* "*data assembled from awards of damages made for particular types of injuries in this…jurisdiction*". It is clear from the Committee Report that its members had regard to and analysed all relevant court awards in Ireland in the period January 2017 to July 2020 in contested cases (337 cases, some 271 of which were records/summaries of *ex tempore* judgments, and the balance written judgments; filtering to ensure robustness of data was undertaken, and multiple injury cases were excluded: see paragraphs

92-94). It therefore follows that all available relevant recent precedents in the assessment of personal injuries by the superior courts in the State informed the brackets of damages and bandwidths.

23. Then, taking the lead from the decision of Clarke C.J. in *Morrissey v. HSE* [2020] IESC 6, at paragraph 14.28, and *Payne v. Nugent* [2015] IECA 268, the Guidelines apply the principle of proportionality – to ensure that awards of damages would (a) be proportionate *inter se,* and (b) proportionate to the cap; this is expressly referenced on page 6. The resulting Guidelines set bands which reflect the principle of proportionality but allow limited scope for judges to make awards within bands to reflect the objective facts that might tend to bring a case higher or lower in the band, and/or to reflect the claimant's subjective pain and suffering.

24. It is clear from the most basic of comparisons between the Book of Quantum and the Guidelines that the former was not used as the basis for the Guidelines. The Committee confirmed this in its Report and gave reasons at paragraph 105-106, including that a) many injuries were not covered in the Book of Quantum, b) the Committee felt that other factors influenced the lower brackets in the Book of Quantum, and c) the bandwidths were overly wide.

25. The resulting Guidelines is a detailed and complex document, that covers most types of injury. Each section not only classifies and describes a wide range of injuries by reference to one part of the body, but in the narrative description it identifies many variations on the type of injury covered in that section. It then identifies relative seriousness by reference to *Severe*, *Serious*, *Moderate* and *Minor*, and in subheadings gives examples of what might qualify within each of these – and then gives the appropriate band/range of compensation.

26. While the Guidelines allow judges some flexibility this is constrained by the bands, by the terms of the Guidelines themselves, and the statutory obligation of the judge to give reasons if departing from them.

27. Although that the Committee Report is not part of the Guidelines, it is instructive to consider what it had to say about the bands, and departure from the bands:-

> *"47. Although the principles established by the courts give considerable guidance as to where general damages should be pitched once a top award has been set, they cannot account for the fact that pain and suffering are inherently subjective so that no single definitive amount can adequately compensate every claimant in every case because, as the case may be, there may be particular facts which will warrant the making of a higher or lower award. To address this concern, the Guidelines do not prescribe single amounts for each injury but set out bands within which an award for general damages should fall. Indeed, if there are exceptional circumstances which warrant departure from the bands, the courts have the discretion to so depart. However, the exercise of this discretion must be limited to exceptional cases because the principle of proportionality would otherwise be offended. <u>If courts are too quick to depart from the Guidelines, awards for minor injuries could soon overtake awards for moderate injuries and moderate those of severe injuries. We have to conclude, therefore, that proportionality also affects the width of brackets as well as the jurisdiction of the courts to deviate from them.</u>"*
>
> [Emphasis added]

28. Whilst I agree that the Committee's concept of *exceptional cases* does not form part of the Guidelines, the passage emphasised illustrates the reality that if judges treat the Guidelines as merely advisory and are too quick to depart from applicable bands – and such departures are not reversed on appeal – then the principle of proportionality will equally quickly be eroded thus undermining the Guidelines and the statutory requirement of consistency (and hence predictability) of awards. This was presciently recognised by Noonan J. in a pre-Guidelines appeal of *Griffin v. Hoare* [2021] IECA

329 when commenting on the developing caselaw on the importance of consistency and predictability of awards and the Book of Quantum:-

> "*The objective of achieving consistency and predictability in awards of general damages, now given statutory recognition in s.90(3)(d) of the Judicial Council Act 2019, would in large measure be frustrated if courts dealing with injuries in defined categories appearing in the Book of Quantum, and now the Guidelines, were free to disregard the stipulated bands on the basis that the defined injury had affected the particular plaintiff to a greater extent than might be so in other cases."*

29. Presumptively therefore the flexibility built into the Guidelines is limited to a figure within the band range prescribed for the injury. This is so even if there is a pre-Guideline court award that is a precedent for a significantly higher figure. The reason for this is that pre-Guideline awards in the Irish courts were analysed and taken into account in the preparation of the Guidelines, alongside the principles for the assessment of damages for personal injuries established by the superior courts. Thus if a court award in 2019 exceeds the Guideline band for the same or a similar injury that precedent cannot, in my view, be a justification for departing from the Guideline range. The Guidelines effectively replace all examples of awards in the pre-existing caselaw.

30. Similarly the Guidelines were systemically developed in a manner that in effect renders the Book of Quantum (2016) no longer relevant (save to the pre-24 April 2021 assessments to which it still expressly applies by virtue of the 2021 Act). The Committee decided not to have regard to the Book of Quantum as a starting point for a number of reasons set out in paragraphs 104-106 of its Report. These include that it did not consider the Book of Quantum had the level of detail necessary to allow the preparation of a comprehensive set of guidelines; that the Guidelines cover many injuries not covered by the Book of Quantum; and that "*other factors which may have influenced, particularly the lower brackets in the Book of Quantum which should not appropriately be replicated in the*

Guidelines" including that the Book of Quantum "*may to some extent factor in legal costs to incentivise settlement*", and that the bandwidths were in some instances were "*overly wide*".

31. Accordingly, I cannot see how a court could now use a greater bandwidth or greater value set out in the Book of Quantum for a particular injury to justify a departure from the Guidelines band appropriate to that injury – or to follow a higher pre-Guideline court award based upon the Book of Quantum. To permit that to be done would be to entirely undermine the basis for the Guidelines and the principles of proportionality and consistency. This view is lent support by the fact that under s. 22(1A) of the 2004 Act (as inserted by the 2021 Act) only claims assessed by PIAB prior to 24 April 2021, where the PIAB assessment was not accepted and proceedings issue, is the court expressly required to have regard to the Book of Quantum.

32. In the Statement of Grounds the appellant pleaded that the Guidelines:-

> *"lxxi ...fail to set out any clear statutory basis or criteria for departing from the guidelines. Further, this is so where, as a matter of statutory interpretation, such departure cannot be because the Judge merely disagrees with the content of the Guidelines."*

33. In their Statement of Opposition, the second, third and fourth respondents responded:-

> *"37. ...For the avoidance of doubt, the Second to Fourth Respondents will rely on the facility to depart from the sums in the Guidelines as part of their defence to all aspects of the Applicant's claim (and not merely the claim that personal rights have been interfered with). Regarding the final sentence of §71, it is not disputed that a Judge cannot depart from the guidelines because he/she "*merely disagrees*" with their content. In the event of further argument upon this point at the hearing however, the Second to Fourth Respondents reserve the right to note and to contend that the Applicant has been entirely vague regarding the scope of 'mere disagreement' in this regard."*

34. Before returning to the parties' submissions on this issue, it is appropriate to recall the trial judge's view, expressed in paragraphs 43-44 of the judgment:-

> *"**43.** The amended s.22 clearly permits a court to depart from the Guidelines. It does not set out the circumstances under which a court can do so, but states reasons must be given. It seems to me that if reasons are to be given those reasons must be rational, cogent and justifiable. I do not think the absence of the proviso has the effect of limiting the reasons. If a court departs from the Guidelines, it is having regard to matters other than the Guidelines."*
>
> [Emphasis added]

In paragraph 44 the trial judge quoted part of paragraph 47 of the Committee's report where it refers to departure in "*exceptional cases*", which I have quoted fully above, and he commented:-

> *"**44.** ... I think this is unduly restrictive and would prefer to rely on the simple wording of s. 22, which states that a court can depart from the Guidelines but must give reasons for doing so."*

35. I agree with these observations. Were a trial judge to attempt to depart from a Guideline band without *rational, cogent and justifiable* reason it is likely that the award would be struck down on appeal. However this does not assist in identifying the possible reasons that a judge might give for departing from the Guidelines, and which would potentially withstand scrutiny in an appellate court.

36. In the course of case management of the appeal the parties' written submissions on this issue were sought, and their respective positions were supplemented in oral submissions.

37. The Second to Fourth respondents argued that s. 22(1) merely required the judge to "*state the reasons*", and did not constrain the discretion to depart from the Guidelines, and therefore it was intended to "*afford considerable latitude*", and consequently the Guidelines did not have the character

of legislation. Thus there might be departure if "*the pain and suffering experienced by an individual plaintiff exceeds that which would normally be experienced by a plaintiff with similar injuries*".

38. It was submitted:-

> *"3. ...A court may even conclude that the figure allocated to a particular injury by the Guidelines is inappropriately high or low, and award higher or lower general damages on that account – although mere disagreement with the Guidelines would not suffice in the sense that reasons would have to be set out, which would be subject to review by an appellate court."*

39. It appeared at one point that it was common case that mere disagreement with the Guidelines would not be a reason for departure. Thus a judge's subjective view that the Guidelines are too low, or that a Book of Quantum band is to be preferred, could be a rational basis for departure. Indeed the appellant's written submission noted the acceptance in the Notice of Opposition by the Second to Fourth respondents that a departure from the Guidelines would not be lawful merely because a judge disagreed with the value set by the Guidelines. However some doubt was cast on this as the State's submission was developed.

40. In particular in his reply submissions counsel for the State respondents made reference to the Law Reform Commission observations on s. 99 of the 2019 Act to the effect that the mandatory obligation to have regard to the Guidelines coupled with the statutory requirement to give reasons for departing from the Guidelines would strengthen the position where previously there was no obligation on a court to explain departure from the Book of Quantum. Counsel (Day 1, p. 218 line 8) referred to the 2004 Act now allowing:-

> *"... for the possibility that a Judge could conclude that a particular injury has been miscategorised or undervalued. If a Judge feels that it could be contrary to the interests of*

justice to apply a particular figure well, then, of course a Judge must apply a different figure, if that involves a Judge disagreeing with the figure in the Guidelines, well then so be it. It is something that might arise only in exceptional circumstances and I don't differ from what the Personal Injury Committee said about that, for reasons that I think are clear…".

41. I am not persuaded by this submission. It seems to me that the power to depart is greatly circumscribed by the nature and objectives of the Guidelines, the underpinning principle of proportionality, the mandatory obligation to have regard to the Guidelines (in all their detail), and the statutory obligation to state reasons for departure which in my view must be rational and cogent.

42. It was further submitted by the State parties that a court's freedom to depart from the Guidelines would necessarily be affected by "*the ordinary principles relating to the rulings of the superior courts and the application of* stare decisis".

43. For reasons given earlier this argument cannot be correct in so far as it might suggest that the court could rely on pre-Guidelines court awards to justify a departure, because all such relevant caselaw was analysed and factored into the preparation of the Guidelines. In the course of the hearing it was put to counsel for the appellant by Hogan J. that if there was a pre-Guideline decision of the Court of Appeal awarding a far higher figure for an injury, that precedent could justify a Circuit Court, for example, departing from a much lower Guideline figure for a similar injury. Counsel responded that "*…that's absolutely not what these Guidelines say they're doing or intended to do. These Guidelines are intended to be mandatory…*", and in support counsel referred to page 5 of the Guidelines where it is stated that it is mandatory for the court to assess damages having regard to the Guidelines.

44. I agree with counsel for the appellant. In my view the Guidelines change the landscape for the assessment of damages for personal injury, and the entire premise behind them is that there is no

going backward in time such that reliance on pre-Guideline caselaw can no longer be a basis for departure.

45. The State parties then submitted a list of factors/materials formerly regarded as relevant by the courts which it suggested could be referenced by a judge giving reasons for departure, some of which were in stark contrast to the position previously put forward by the State. These included:-

(a) Evidence of inflation;

(b) Proportionality and fairness of the award in the specific circumstances of the case, and the need to ensure a rational relationship between damages and the suffering/inconvenience suffered by the particular plaintiff;

(c) The need to ensure that the award does not have a punitive impact;

(d) The court's own experience;

(e) The totality of the damages when general damages are considered alongside special damages.

46. As to inflation, it is hard to see how this could be a factor given that the Judicial Council is required by the 2019 Act to revise/update Guidelines every three years. Even if this were to be considered a possible rationale for departure, its effect would be minimal and might, at best, lift an injury a few percentage points or perhaps into the next bandwidth.

47. As to (b), the point has already been made that proportionality and fairness are principles that informed the preparation of the Guidelines. As regards the suffering of a particular plaintiff, this will usually be covered by a combination of medical evidence and a claimant's own evidence, and as the Guidelines make clear it will be for the trial judge to make findings which bring the claim within a particular bracket and level of severity. In other words the Guidelines allow for this possibility without a departure – it is, as counsel for the appellant put it, "*the bread and butter*" of an assessment.

48. As to point (d), the judge's "*own experience*", this was an entirely new suggestion. It is not clear what is referred to. Of course, a judge brings to bear his/her own experience as a lawyer and judge when hearing a case. But if this is a reference to awards made by that judge in cases that preceded the operation of the Guidelines then it cannot in my view – for reasons already given – be a rationale for departure. Equally the judge's own experience of a similar injury cannot be a substitute for the evidence before the court upon which the assessment of damages must be decided.

49. The State parties also suggest as "*relevant*" –

(a) Medical evidence e.g. concerning greater level of suffering than previously understood;

(b) The impact of departing from the Guidelines on other cases and awards;

(c) The impact of precedent and rulings of superior courts.

50. When pressed on this in response to the Court's questions the State went further and submitted that the only constraint on the power to depart was the obligation to state reasons. It was submitted that the scope to depart was wide and included circumstances *where a court considered that the band allocated for a particular injury was inappropriately low*, and, subject to stating its reasons, a court might properly award more than the Guidelines suggested. This, it was argued, could be subject to appellate review.

51. I cannot agree that the scope for departure is so open-ended. Firstly, I cannot see how a judge can be permitted to depart from the Guidelines simply because he/she disagrees with the "*appropriateness*" of the Guideline band. Nor does the existence of an appeal assist the State in its argument. On appeal the court will consider the reason given for departure, and if it is not "*rational, cogent and justifiable*" will presumably allow an appeal unless perhaps it feels that there is some other good reason not expressed by the trial judge.

52. Indeed it is that very scrutiny by an appellate court that is key to ensuring that the Guidelines are observed, and that the objectives of proportionality, consistency and predictability are achieved. "*[R]ational, cogent and justifiable*" is I believe the correct test by which a departure from the Guidelines must be justified, and while some of the matters relied upon by the State might give scope for departure, that scope is minimal, and in my view could do no more than justify an award in the next band up – a subject to which I will return.

53. The appellant's written submission noted that the Committee in its report regarded "*exceptionality*" as the test for departure, and that in the Guidelines at page 6 under the heading '*Use of Guidelines*' there is reference to a "*mandatory*" obligation on a judge to have regard to the Guidelines but that departure may occur "*should he or she consider that the justice of the case warrants*" a higher award in which case it was mandatory to state reasons for so departing. It was argued that in order for the discretion not to be arbitrary it must "*be governed or bounded by some ascertainable tests or standards*" (*Reg. v. Spicer; ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312), but "*an apparently broad discretion cannot be informed by the objects of the Act as here the discretion is in the context of a departure from the Guidelines and what the Respondents maintain are the objects of the Act.*" It was thus submitted:-

> *"2.11 In conclusion, the existence of a discretion which the State Respondents claim is an answer to almost all the argument advanced on behalf of the Appellant is [sic] a provision inimical to the rule of law and which places the decision maker in the words of Lord Justice Laws "above the law". To incorporate such into the legislative scheme renders the same incapable of Constitutional operation."*

54. It seems to me that this latter submission proceeds on the mistaken premise that the s. 22(1)(b) of the 2004 Act confers a discretion to depart from the Guidelines. That is not the case. To that extent I agree with Collins J. that the power to depart is a given, and that nothing in s. 22(1)(b)

purports to restrict the power substantively – other than the (critical) requirement that reasons be stated.

55. I also accept that there is, as such, no "*exceptional circumstances*" test for departing from the Guidelines. That is a phrase used in the Committee Report, but is not used in the 2019 Act and is not transposed into the Guidelines. I agree with Collins J. that what the Committee probably had in mind was that an award above the range provided in the Guidelines risks offending the principle of proportionality – to borrow his words: "*...either because it brings the award into the next damages bracket for that category of injury (e.g. from moderate to serious) or into a bracket reserved for a different injury which the Guidelines regard as intrinsically more serious.*"

56. There is no doubt that the principle of proportionality is integral to the Guidelines, and this presents a hurdle for any judge considering departure. In my view it is surmountable, but only for "*rational, cogent and justifiable*" reasons, and even then it is hard to see how there is scope for any *significant* departure from the guideline figure. If departure is warranted it is in my view difficult to conceive of it justifying any departure beyond one band above that which would normally apply to the injury.

57. This can be illustrated by the injury suffered by the appellant. PIAB in applying the Guidelines placed the injury in category "*(e) Minor foot injuries*", and within the bracket "*(iv) Where a substantial recovery is made within six months. €500-€3,000*". Even if PIAB or the court were ultimately persuaded that the recovery period was over six months, the next bracket up is "(*iii) Where a substantial recovery takes place without surgery between six months and one year. This bracket will also apply to very short-term acceleration and/or exacerbation injuries for six months to one year*", and the range is €3,000 - €6,000. This falls far below the indicative figures in the Book of Quantum (€18,000 - €34,900). No case was made to PIAB for departure from the Guidelines, although the plaintiff would be free to do so if and when court proceedings are heard. While it is

conceivable that by that time the medical and other evidence might bring the personal injuries into bracket (iii), it is hard to conceive of any new medical evidence that would bring her injuries within bracket (ii) ("*substantial recovery takes place without surgery between one and two years*" – range: €6,000 - €12,000) or justify any significant departure from the Guidelines. Neither the fact that the Book of Quantum indicative range is so much higher, nor that other awards for similar injuries made before the Guidelines were adopted may have been much higher (assuming that to the case), could in my view be relevant considerations or justify a departure into a higher bracket.

58. PIAB chose not to make any written submissions on the question of when departure might be justified. Perhaps this was because it was perceived that the issue of departure was peculiarly one for the State parties seeking to uphold the constitutionality of the Guidelines. It may, however, reflect the view which I hold, which is that the Guidelines represent a wholesale and systemic change in the substantive assessment of damages for personal injury, and that departure from a Guideline figure will be difficult to justify, and will at most result in a shift to a figure coming within the next bracket up in the Guidelines.

59. In summary, in my view in order for a departure to withstand appeal:-

(a) It is firstly mandatory that the court "*have regard to*" the Guidelines, and the court should make findings of fact that point to the category, bracket and band that would normally apply to the particular injury;

(b) the reasons given for departure from that band must then be stated;

(c) such reasons would need to be *rational, cogent and justifiable*;

(d) the reasons would need to justify not just departure from a band, but the *extent* of any departure, particularly if it resulted in a significant increase in the award;

(e) while *exceptional circumstances* is not the statutory test for departure, having regard to the comprehensive nature of the Guidelines, the use of recent Irish caselaw to inform

their preparation, and the principle of proportionality that underpins them, in practice it will only be in *exceptional circumstances* that a court could justifiably depart from them;

(f) it would not be legally permissible to base a departure from the Guidelines on the judge's own notion of what is appropriate compensation, in effective disregard of the Guidelines;

(g) it would not be good reason to base a departure on higher levels given in the former Book of Quantum, or any court award based on same, as they cannot be said to reflect the new norms for levels of compensation, and the Committee deliberately did not use them as a starting point, or point of comparison;

(h) equally it would not be appropriate to base departure on comparison with pre-Guidelines caselaw on quantum in similar cases – as that caselaw was taken into account by the Committee in preparing proportionate brackets/bands in the Guidelines, and has therefore already been factored in, and is now superseded by the Guidelines. The Guidelines would soon lose their integrity if judges could rely on earlier precedent to award higher amounts than the top of the indicated range, and the principle of proportionality of awards *inter se* and with the cap on damages would soon be eroded to nothing;

(i) the clear objectives of consistency and predictability militate against departure save in circumstances – probably exceptional – not contemplated or covered by the detail in the Guidelines;

(j) the principal of proportionality requires that the court would have to consider the effect of the departure on (a) injuries within the higher chosen band, and (b) the bands in respect of other injuries, and show why the integrity of the Guidelines would not be adversely or materially affected.

60. To this I would add that in many cases there may be no dispute as to the category and range within which the injury falls, and in such cases the only discretion afforded the judge will be to award a figure within the appropriate range. To wander outside that range in such cases would be to invite the appellate court to correct the award to bring it into line with the Guidelines. Even within that range, if the judge awards a figure at the top of the range which is not proportionate to the Guideline indicative figures for different injuries that are by their nature more serious, or by reference to the cap on damages, then the award may be the subject of appellate review and alteration.

61. In other cases the choice of the bandwidths may be in controversy, and the court will need to decide the appropriate band, based on the evidence and argument, and it may be advisable that the court give reasons that justify such choice. A judge who places an injury within a Guideline band which is clearly inappropriate will have their decision set aside on appeal. If a well-reasoned decision has been taken in favour of the higher of two possible bands the Guidelines again come into play in that the court must then decide where in that range the injury falls, and consideration of proportionality with other types of injury is likely to come into sharper focus.

62. The court's approach to '*Multiple injuries*' is covered in a section on page 6 of the Guidelines. Where there are *multiple injuries* the court should first decide which is the "*most significant*" injury, and identify the appropriate bracket and bandwidth. The court should then identify the other injuries and then decide on an appropriate figure by way of uplift in order to arrive at the ultimate award. This is to take into account any "*temporal overlap in the injuries*" and aims at adjusting the final figure to avoid over-compensating a claimant "*to the point that the award would be unjust to the defendant and disproportionate when compared with other awards commonly made for other greater or lesser injuries.*"

63. The correct approach in *multiple injury* assessments has already been considered in a number of cases, and they are a useful indication of how the Guidelines are applied in practice.

64. In *Lipinski (A Minor) v. Whelan [2022] IEHC 452* Coffey J. applied the Guidelines to a plaintiff who had suffered Post Traumatic Stress Disorder ('PTSD'), which he categorised as "*moderate*", scarring of the left thigh (12.5cm x 2cm) which he described as of "*relatively minor cosmetic*" effect, and several minor soft tissue injuries which settled after a short period. Of note is that Coffey J. refers in his judgment to the early parts of the Guidelines, including the "*procedure which the trial judge must have regard to when considering the effect of multiple injuries…*" (paragraph 14 but see generally paragraphs 8-14). He found that the PTSD, which he clearly regarded as the most significant of the injuries, on the medical evidence could not be classified as "*serious*" and he held that it fell to be classified as "*moderate*", for which the bandwidth was €10,000 - €35,000. As he found that the PTSD "*upended almost every aspect of the plaintiff's life*" and affected her school studies, and that she continued to suffer from it, he assessed it at the top end of moderate i.e. €35,000. He then addressed the other injuries and concluded:-

> *"22. To arrive at an overall figure which is proportionate and just and which ensures that the plaintiff is fairly and justly compensated for all her injuries, I will apply a further uplift of €25,000 for the scar and the plaintiff's other physical injuries."*

65. In *McHugh v. Ferol* [2023] IEHC 132 Murphy J. concurred with the analysis of Coffey J. in *Lipinski*. She was required to assess damages under the Guidelines in respect of an injury to the right foot, and "*other injuries*" which included PTSD, injury to the head and neck with possible mild concussion, injury to the lower back, and right hip, and a broken dental bridge. It was common case that the right foot injury was dominant, and the other injuries "*lesser*". Murphy J. categorised the right foot injury as "*serious*" and in the range €38,000 - €75,000, and within that range she assessed compensation at €60,000.

66. Murphy J. then recites in full the section of the Guidelines concerning assessment of multiple injuries, and at paragraph 18 notes that "*the guidelines do not provide advice as to the process a court*

should undertake when assessing the "uplift"". Having considered the legal argument, including the defendant's submission that the uplift could not exceed the value of the dominant injury, she opined:-

> *"**20.** "Uplift" simply means to raise. The rise in damages for pain and suffering arising from the non-dominant injury in any particular case, could well exceed the award of damages for the dominant or main injury. There is nothing in the Guidelines to suggest that the single uplift is restricted to a proportion of the damages awarded for the main injury. This Court can well envisage a circumstance in which a fair and proportionate uplift would exceed the general damages awarded for the dominant injury. …"*

Murphy J. then elaborated on an example where this could occur, and then stated:-

> *"**24.** It appears to me that a fair and transparent means of assessing what the uplift should be in any given case is to categorise each of the additional injuries according to the bracket that it would fall into were that the main injury and then discount the award to allow for the temporal overlap of the injuries. In this way, both parties can see precisely how the court arrived at its decision and the level of discount allowed for overlapping injuries. Any other method leaves the plaintiff and the defendant guessing as to how the court arrived at its decision."*

Murphy J. then assessed each of the "*other injuries*" as if each of them were the dominant injury: the PTSD at the upper end of "*moderate*" – €35,000; the neck injury as "*minor*" at €10,000; and the lower back and hips combined as "*minor*" at €20,000. She concluded:-

> *"**29.** Valued individually, the additional injuries would amount to €65,000. Taking into account the roll up factor and the overlap of injuries, the court considers that an uplift of €32,500, represents fair and just compensation for all the additional pain, discomfort and limitations arising from the plaintiff's lesser injuries. The Court therefore will grant a decree*

in favour of the plaintiff in the sum of €105,500, being General damages for pain and suffering to date and into the future of €92,500 together with special damages in the sum of €13,000."

67. In *Zaganczyk v. John Pettit Wexford Unlimited Company and another* [2023] IECA 223 (Noonan J., with whom Haughton and Allen JJ. concurred) the court was concerned with an appeal in respect of an assessment under the Guidelines where the plaintiff suffered injuries in a gas explosion. She suffered burns on the left side of her head, and in addition PTSD, an alcohol abuse disorder and an episode of depression. The High Court had treated the PTSD as the dominant injury and assessed it at €45,000, and then, separately, awarded a further €20,000 in respect of the alcohol abuse disorder and depression, and a further sum of €25,000 in respect of the burns and scarring – a total award of general damages of €90,000.

68. Noonan J. at paragraph 24 refers to the decision of Murphy J. in *McHugh,* noting that her view that the uplift could exceed the value placed on the dominant injury was *obiter* because she not required to decide the point in circumstances where the uplift awarded was substantially less that the award for the dominant injury. This led him to refrain from expressing a view on that issue until it arose for consideration in a future case. He then quotes Murphy J. paragraph 24 (recited above) as to the procedure for arriving at an uplift and states:-

"25. It seems to me that this approach has much to commend it and accords in a significant measure with the method of calculation adopted in England and Wales, with the important caveat that in that jurisdiction, it would appear that all of the injuries are discounted to factor in the overlap whereas here, the plaintiff will obtain full value for the dominant injury with the discount being applied, if it is to be applied, to the lesser injuries."

69. It is instructive that in *Zaganczyk* the court held that the trial judge erred in ascribing separate figures for the psychiatric injury – *viz.* as to firstly, the PTSD, and secondly, the alcohol abuse disorder

and depression. As Noonan J. reasoned, this was on the basis that "*[T]he Guidelines define PTSD as including mood disorder and undoubtedly, depression is a mood disorder*" (paragraph 34). The court also decided that the trial judge erred in finding that the PTSD fell into the "*serious*" category in circumstances where firstly "*the parties both agreed in submissions to the trial judge that the plaintiff fell into the "Moderate" category and counsel for the plaintiff very fairly accepted this at the hearing of the appeal and conceded that the judge had erred in placing the PTSD in the Serious category*" and secondly there was no evidence to sustain a finding that it was "*still likely to cause significant disability for the foreseeable future*", one of the requirements set out in the Guidelines at s. 4B(b) in respect of "*Serious PTSD*" (Noonan J. at paragraph 36).

70. The court allowed the appeal and assessed a single figure of €35,000 in respect of the PTSD (and related alcohol abuse and depression) but did *not* vary the uplift of €25,000 in respect of the burns/scarring, making a total award of general damages of €60,000.

71. Most recently in *Wolfe v. PIAB* [2023] IECA 245, the Court of Appeal (Binchy J., Whelan and Haughton JJ. concurring) in a judicial review addressed whether PIAB had given adequate reasons in its award following assessment of damages in a multiple injury case. The claimant had suffered injury at work when an oven fell on her, causing injuries to her left shoulder, lower back and right leg. PIAB assessed the "*dominant injury*" to be the back, and categorised it as "*minor*", and awarded €11,000 for that injury plus special damages of €575, making a total assessment of €11,575. No "*uplift*" for other injuries was evident on the face of the award. The claimant sought an order quashing the award essentially on the basis that inadequate reasons were given by PIAB. The High Court refused relief, but the appeal was successful. The Court of Appeal held that inadequate reasons were given in the assessment in relation to the treatment of the multiple injuries, and how the lesser injuries were taken into account, and indeed whether any "*uplift*" was included in the award. Binchy J. at paragraph 89 notes the decision of the Court of Appeal in *Zaganczyk* and the approval by Noonan

J. of the judgments in *Lipinski* and *McHugh* as to the correct approach to be taken in multiple injury cases.

72. These decisions illustrate the detailed way in which the courts, including the appellate court, currently comply with the obligation to "*have regard to*" the Guidelines, and they demonstrate the reasons why practitioners, PIAB and the courts are obliged in practice to consider the close detail in the Guidelines including the introductory and explanatory sections. A claimant seeking to bring their claim within a higher bracket than might seem appropriate at first glance will carry the onus of persuading PIAB/the court of cogent reasons for doing so/departing from the Guidelines, or indeed bringing a claim higher rather than lower within a given range.

73. In the draft judgment of Charleton J. which I have had an opportunity to read, he gives an example to illustrate his view that the Guidelines give flexibility and allow departure, and are not therefore substantive rules of law. The example is that of a person who suffers a whiplash or back injury; he compares a person suffering such injury who has a sedentary job and is able to get on with their life, with a farmer who in unable to cope with the physical demands of farming and suffers reactive depression. He opines that in such circumstance there is reason for departure from the Guidelines on the basis that what has happened to the farmer "*is beyond the experience to be expected*".

74. With the greatest of respect, I cannot agree that the farmer example gives rise to an occasion for departure. This is because the correct approach under the Guidelines is to treat it as a case of "*multiple injury*", to identify the most significant injury (which might be the whiplash, or might be the depression) and the band appropriate to that, and then to similarly address the other injury, and finally give an uplift that recognises any temporal overlap in suffering. That is the process that has been adopted in the High Court and approved by the Court of Appeal, and in my view it is mandated by the Guidelines.

75. I am forced to the conclusion that there are very real limits to the circumstances in which, and extent to which, a court may depart from the Guidelines and the bands that they establish, the nett effect of which is that they are much more than the word *guidelines* would normally signify. They are in effect comprehensive new rules that implement a systematic recalibration of damages, by reference to the cap of €550,000 and a largely new hierarchy of seriousness. They bring about a new dispensation, with significant reductions in the guideline values for many injuries in the minor to moderate ranges when compared with the Book of Quantum (2016). The Committee itself recognised this to be the case, noting at paragraph 18 of its Report:-

> *"18. Overall, this has resulted in a reduction in damages available in lower and middling injuries, while those suffering catastrophic injuries will receive a modest uplift in their award of general damages."*

The appellate courts are also mandated to have regard to the Guidelines, and this is required in order to preserve the overall integrity of the Guidelines, and to ensure that the principle of proportionality within the cap is observed. The Court of Appeal recognised this in *Zaganczyk* where at paragraph 27 Noonan J. states:-

> *"27. ... As the Guidelines suggest, some assistance may be derived from a consideration of how the overall award compares with other individual categories in the Guidelines. If an obvious mismatch emerges, this may suggest that the requisite proportionality has not been achieved. That is, in my view a useful exercise in the present case as appears further below and can provide a helpful "reality check"."*

76. This all leads me to the conclusion that any personal injury guidelines contemplated by s. 7(2)(g), and the Guidelines adopted in March 2021, are substantive new norms from which there is very limited scope for departure, and a form of subsidiary legislation. It is mandatory that PIAB/the

court have regard to the Guidelines, and that PIAB/the court state reasons for departing from the Guidelines; and there must be rational/cogent reasons to justify such departure, and the extent of the departure.

77. When Collins J. addresses the circumstances or reasons that might justify a court departing from the Guidelines he opines that "*...in no circumstances could the Guidelines require a court to make an award that it considers to be unjust*". As authority for this proposition he relies on statements of Lavan J. in *Greene v. Minister for Defence* [1998] 4 IR 464 and this court in *Hanley v. Minister for Defence* [1999] 4 IR 392, both cases in which the court was concerned with the meaning of the phrase "*have regard to*" used in s. 4 of the Civil Liability (Assessment of Hearing Injury) Act, 1998 which required a court hearing a claim for damages for hearing loss "*to have regard to*" certain materials known as the *Green Book*. Lavan J. held that that court must consider the approach adopted in the Green Book but was entitled to consider alternative approaches and this judicial discretion was not fettered by the 1998 Act. In *Hanley*, Keane J. (with whom Hamilton C.J. and Murphy J. agreed) held that every case fell to be considered on its own facts and the 1998 Act did "*no more than requir[e] the court to 'have regard' to the relevant sections of the Green Book*".

78. The Green Book was a science-based document concerned with assessing the extent of hearing loss, rather than the assessment of damages as such, and therefore the context in which Greene and Hanley considered the use of the phrase "*have regard to*" was materially different. The Guidelines are different in character in that they give the ranges for the damages to be awarded by PIAB or a court across fairly comprehensive categories of injury, and are further different in that there is a statutory requirement to give reasons if departing from them. This latter requirement is specific and statutory and distinguishes the status and effect of the Guidelines from other guidelines, such as the Green Book and those established under planning legislation (as discussed by Quirke J. in *McEvoy v. Meath County Council* [2003] 1 IR 208 and by this court in *Balz v. An Bord Pleanála* [2019] IESC 90), and indeed the Book of Quantum, where the decision maker must merely "*have*

regard to" the guidelines. The additional statutory requirement to give reasons for departure, and also the fact that the 2019 Act requires that the Guidelines be reviewed every three years, demonstrate the statutory intention that the Guidelines – notwithstanding that they are described as "*guidelines*" – are intended to have a higher status and importance in decision making, and are intended to dictate the direction of personal injury awards.

79. In any event, I find the argument that a court will be free to depart in order to do "*justice*" or "*avoid injustice*" is elusive and unhelpful. Section 99 of the 2019 Act required the Committee in preparing the Guidelines to have regard to existing principles for the assessment of damages. These included that damages should be fair (and therefore just) to a claimant and a defendant; that there should be proportionality in the hierarchy of awards; and to this was added "*the need to promote consistency*". As Collins J. puts it, these were "*the fundamental drivers of that exercise*" and "*...no court adjudicating on an individual personal injury action or appeal enjoys the benefit of having the overall perspective that the Committee enjoyed in carrying out its work.*" The resulting Guidelines are therefore intended to do "*justice*" between claimants and defendants, and to represent a just system having regard to the interests of wider society (including insurers and the insured). To say therefore that they can be departed from simply because a court considers it "*just*" or "*to avoid injustice*" is therefore contradictory and circular. Furthermore, it does not give any insight into what reasons for departing might be justifiable.

80. Collins J. in his judgment suggests as the threshold for departure that a court can depart if the award indicated by the Guidelines bears no just or reasonable proportion to the award that the court would otherwise consider it appropriate to make having regard to the evidence and submissions it has heard. That formulation seems to me to contradict the fact that the Guidelines were prepared by the Committee and adopted by the Judicial Council precisely because they are considered to be fair, just and proportionate, and of course the same presumption will apply to any revised Guidelines adopted in future. It suggests that a judge (or PIAB) adopt a deductive process which ultimately leaves as the

tipping point for departure the judge's subjective view of what is proportionate. Further the suggestion that they can be departed from if the award "*would fail to vindicate the personal rights of that plaintiff under Article 40.3*" may well be right, but, much like reliance on the concept of "*injustice*", it is vague and does nothing to demonstrate in real or practical terms the circumstances that would justify departure.

81. I also respectfully do not agree with the argument that s. 93 of the 2019 Act (which provides that nothing in the Act shall be construed as operating to interfere with "*(a) the performance by the courts of their functions, or (b) the exercise by a judge of his or her judicial functions*") saves the Guidelines from having substantive effect. This section appears to be addressed primarily to the role of judges when involved in the functions and duties of the Committee (composed of judges) in the preparation of draft guidelines, and of the Board of the Judicial Council (also composed only of judges) in the review and modification of such draft, and of the Judicial Council (which includes all judges in the State) in adopting the Guidelines. In any event it surely cannot lead to or support an interpretation of s. 22(1) of the 2004 Act that, contrary to the express words used, exonerate a judge or court assessing damages from the statutory requirement "*to have regard to*" the Guidelines, or the obligation to give cogent reasons for departing from the Guidelines. The argument based on s. 93 does not address the *effect* in practice of the Guidelines, which in my view is normative.

82. Although it is not in my view determinative, it was not contested that in the short time that they have been operated early indications are that the Guidelines have had the effect of lowering the level of damages generally in respect of personal injury assessments/awards, perhaps in the order of one third to one half. In the appellant's case PIAB assessed her damages for personal injury at €3,000, a sum that is dramatically less than what she could have expected if the Book of Quantum applied – her counsel's opinion of value pre-Guidelines was €15,000 to €17,500. This would surely be so even if a court departed from the Guidelines and positioned her claim in the next band up – and it is notable that departing from the Guideline band was something that PIAB, which regarded itself bound by

them, considered but found not to be "*necessary*". This reinforces my view that the Guidelines not alone have substantive legislative effect, but have in practice led to significant reductions in assessments, such as to warrant the description of its overall effect as a radical top-down recalibration of general damages for pain and suffering.

83. For the sake of completeness I should briefly address the so-called *Proviso*. This refers to the original amendment effected by s. 99 of the 2019 Act that included in s. 22 of the 2004 Act a further subsection that reads:-

> *"(2) Subsection (1) shall not operate to prohibit a court from having regard to matters other than those personal injuries guidelines when assessing damages in a personal injury action."*

Section 99 had not been commenced when the Judicial Council adopted the Guidelines on 6 March 2021. On 27 March 2021 the (uncommenced) s. 99 was amended by s. 30(a) of the Family Leave and Miscellaneous Provisions Act, 2021 with the effect that the *Proviso* would now only be applied to residual cases – where the court was required to have regard to the Book of Quantum – and not to cases governed by the Guidelines.

84. Whilst counsel for the appellant sought to make much of the motives for removal of the *Proviso* post adoption of the Guidelines, I agree with Collins J. that this court cannot speculate as to the reasons for its removal. I would observe however that had the *Proviso* remained in place it would have presented the State parties with some support for their arguments as to flexibility and the wider reasons ("*matters other than those personal injury guidelines*") that might justify a court in departing from the Guidelines. Correspondingly, its removal, in my view, lends support to the appellant's argument that the Guidelines are "*prescriptive*" in character and "*mandatory as a presumption*" and that there is very limited scope for departure – perhaps only in what might be termed "*exceptional*" circumstances.

85. In coming to these conclusions I have at all times borne in mind the presumption of constitutionality, and the possibility that a particular construction of the 2019 Act that might lead to a finding of unconstitutionality might be saved by the 'double construction' rule. I have noted in particular the reliance on this rule in the judgment being delivered by Hogan J. However that rule can only apply where there is some doubt or ambiguity as to the meaning of the statute. I do not entertain any doubts as to the normative nature of the s. 7(2)(g) guidelines that the Judicial Council is required to adopt, and the Guidelines that it has adopted, under the 2019 Act having regard to the provisions of s. 90(1), (2) and (3) setting out the requirements for the preparation of the guidelines, and the amended s. 22(1) of the 2004 Act which requires the court to have regard to the guidelines in force and to give reasons where it departs. As will be apparent from what precedes this, I cannot accept that the Guidelines are only *advisory*, and that PIAB/the courts once they have had regard to them have a wide margin of appreciation to depart. To treat them as only *advisory* would be to introduce into the legislation a materially different word or concept that is at variance with what in my view is the effect of the statutory provisions.

(2) The PIAB Issue

86. This concerns whether PIAB was correct to apply the Guidelines when assessing the appellant's application and, if so, whether it failed to act fairly. Subject to the issue of the constitutionality of s. 7(2)(g) of the 2019 Act, and hence the validity of the Guidelines, I agree with the reasoning and conclusions of Collins J. that as no assessment of her claim was made until 13 May 2021, by which time the Guidelines applied, PIAB was correct to apply the Guidelines. I also agree with his conclusion that no case is made out that PIAB failed to afford her fair procedures.

(3) The Legislative Power Issue

87. This concerns whether the relevant provisions of the 2019 Act effect an impermissible delegation of legislative power to the Committee, the Board and/or Council, in light of Article 15.2 of the Constitution.

88. I agree with the conclusion of Collins J. that s. 90(3) of the 2019 Act is not an abdication of by the Oireachtas of its Article 15.2.1° power to legislate. I agree that, in principle, it was open to the Oireachtas to delegate to a subordinate legislature the promulgation of personal injury guidelines, and that s. 90(3) contains sufficient "*principles and policies*" guidance (the test articulated by O'Higgins C.J. in *Cityview Press v. An Chomhairle Oiliúna* [1980] IR 381, at page 399, and followed and applied by this court in *McGowan & ors v. The Labour Court & ors* [2013] IESC 21, and amplified by Charleton J. in *Bederev v. Ireland* [2016] IESC 34).

(4) The *Vires* Issue

89. This issue is whether the Judicial Council acted *ultra vires* the 2019 Act in adopting the Guidelines. I agree with the conclusion of Collins J. that the *vires* challenge does not succeed.

(5) The Judicial Powers Issue

90. This issue asks whether imposing a mandatory obligation on judges to "*have regard to*" the Guidelines involves an impermissible usurpation or invasion of the judicial power. It relates to the obligation placed on individual judges, or panels of judges sitting as a court, and is not to be confused with the next issue, which concerns judicial independence.

91. I agree with Collins J. that the imposition by the Oireachtas on courts of the obligation to "*have regard to*" personal injury guidelines was within its legislative competence.

(6) The Judicial Independence Issue

92. This raises the issue as to whether, in imposing the function on the judiciary of preparing and adopting the Guidelines, the 2019 Act offends the principle of separation of powers and infringes the independence of the judiciary.

93. The essential argument made by the appellant is that the combined effect of Article 6, Article 15.2.1°, Article 34 and Article 35 of the Constitution is such that the judicial and legislative functions should generally be kept separate, and that s. 7(2)(g) of the 2019 Act, in requiring the judiciary, through the Judicial Council, to adopt the first personal injury guidelines that would be binding on all courts assessing damages crosses the dividing line between legislative and judicial power and impermissibly encroaches on or interferes with the independence of the judiciary.

94. The State parties' response was that there is no necessary constitutional impediment to the legislature conferring such non-judicial functions on the judiciary. It was submitted that support for this was to be found in *Mistretta v. United States* 488 U.S. 361 (1989) where the U.S. Supreme Court upheld as constitutional binding Sentencing Guidelines promulgated by the U.S. Sentencing Commission established under statute "*as an independent commission in the judicial branch*" having seven members, including at least three serving federal judges.

95. In approaching this issue for the reasons given earlier I regard the Guidelines as having the effect of substantive laws, and therefore a form of subordinate or delegated legislation for the purposes of Article 15.2.2°. The starting point is therefore that by virtue of s. 7(2)(g) of the 2019 Act the Oireachtas required the adoption of the first personal injury guidelines by the Judicial Council as a subordinate legislature.

96. The issue of independence of the judiciary is intimately connected to the separation of powers. Although the separation of powers is not expressly provided for in the Constitution it is undoubtedly a cornerstone of the constitutional architecture. Thus Article 6 provides:-

"1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according the requirements of the common good.

2. These powers of government are exercisable only by or on the authority of the organs of the State established by this Constitution."

Article 15 provides for the powers and functions of the Oireachtas, and the primary provision is Article 15.2.1° which vests "*the sole and exclusive power of making laws for the State*" in that organ of State. Article 28 then addresses the executive power which is to be exercised by Government (Article 28.2) which is "*responsible to Dáil Eireann*" (Article 28.4).

97. Article 34.1 then assigns the unique adjudicative role to the judicial organ of the State:-

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

Thus, the appellant argues, "*the framers [of the Constitution] expressly intended that there should be a bright or at least clear dividing line between the legislative and the judicial powers.*"

98. In *T.D. v. Minister for Education and ors* [2001] IESC 101, the court had to consider the constitutional legitimacy of an order of the High Court directed to two Ministers to "*facilitate*" the building of 11 high support or special care units for minor offenders, and ultimately struck down the order as trespassing on the functions of the legislature. Hardiman J. in his judgment addresses the origins and nature of the separation of powers and observes:-

"87. It is perhaps natural that much legal thinking on the separation of powers has as its primary focus the immunity of the judiciary from improper pressure or interference from the

other organs of government. This case brings into sharp focus the fact that the spheres of those other organs are also constitutionally mandated and that the division of powers is in itself a high constitutional value directed at the preservation of the people from the accumulation of excessive power by any one organ or its members. History, ancient and modern, amply demonstrated the necessity for this protection."

99. In *Sinnott v. Minister for Education* [2001] 2 IR 545, 702, Hardiman J. again emphasised the importance of the principle of separation of powers in the following passage:-

"… the constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution."

100. Turning to the independence of the judiciary, this is provided for in Article 35.2:-

"2. All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

This is buttressed by Article 35.3 which provides that judges cannot "*be eligible to be a member of either House of the Oireachtas or to hold any other office or position of emolument*"; by Article 35.4.1° that provides that superior court judges can only be removed from office "*for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal*"; and by Article 35.5 that generally prevents the reduction of judges' remuneration during their continuance in office.

101. An independent judiciary is fundamental to ensuring the observance of the rule of law when resolving disputes between citizens, or between citizens and the State, and also exercising review of the exercise of power by other organs of the State, whether in the context of judicial review or

constitutional challenge. As O'Higgins C.J. stated in *Cityview Press*,[3] in the context of Article 15.2.1°:-

> "*...the ultimate responsibility rests with the Courts to ensure that constitutional safeguards remain, and that the exclusive authority of the National Parliament in the field of law-making is not eroded by a delegation of power which is neither contemplated nor permitted by the Constitution.*"

102. In *T.D.*[4] Hardiman J. made the following observation on the relationship between the separation of powers and judicial independence:-

> *"75. There is sometimes a tendency to confuse the separation of powers with the independence of the judiciary. The latter is an essential aspect of the former but it is an aspect only. The Virginian formulation*[5] *emphasises the mutual independence of the different powers of government. It is right that the judiciary, within their constitutional sphere, should be quite independent of the legislature and the executive, but it is no less right that these, within their respective constitutional spheres, be independent of the judiciary."*

103. That judicial independence is a fundamental Constitutional value has been recognised by this Court on numerous occasions. In *Curtin v. Dáil Éireann* [2006] 2 IR 556, at page 617 Murray C.J. speaking for a unanimous court stressed the importance of the principle:-

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[3] *Cityview Press Limited and another v. An Chomhairle Oiliúna, The Minister for Labour and the Attorney General* [1980] IR 381, at 399.
[4] *Ibid.*
[5] The Constitution of the State of Virginia, 1776:
> *"The Legislative, Executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of mor than one of them at the same time, except that the justices of the County Courts shall be eligible to either House of Assembly".*

"It is inherent and essential for the performance of these functions that the independence and integrity of the courts be guaranteed and respected…"

Having recited Articles 35.2, 35.3 and 35.5, Murray C.J. continued:-

"By these important provisions, the Constitution declares unambiguously the principle that courts and judges are independent of both the government and the legislature. Not content with that declaration, the Constitution gives concrete effect to the principle of judicial independence in the provisions cited, most pointedly in Article 35.4.1 itself. The principle of judicial independence does not exist for the personal or individual benefit of the judges, even if it may have that incidental effect. It is a principle designed to guarantee the right of the people themselves from whom, as Article 6 proclaims, all powers of government are derived, to have justice administered in total independence free from all suspicion of interference, pressure or contamination of any kind. An independent judiciary guarantees that the organs of the State conduct themselves in accordance with the rule of law."

The importance and breadth of the principle was recognised by this court most recently in *Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34 where the court stated:-

*"163. The Court readily accepts that judicial independence is a foundational constitutional requirement, "*the lynchpin of the constitutional order*" as it was characterised by O'Donnell J (as he then was) in Zalewski v Adjudication Officer [2021] IESC 24, [2022] 1 IR 421 at para. 37. The Court also agrees that judicial independence encompasses and protects the independence of judges and courts from external interference – what is sometimes referred to as external independence - as it does internal independence (judicial impartiality) (for a discussion of the external/internal distinction see e.g. Case C-126 LM EU:C:2018:586 §§63-65, which was cited by counsel against the Bill). A core element of external independence is*

*that judges should be free to make decisions in individual cases without being subject to actual or perceived external pressures or influence (adjudicative independence). But the principle of judicial independence is broader in scope. As the Supreme Court of Canada explained in Valente v The Queen [1985] 2 SCR 673, it also encompasses "*a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees*" (p. 685) and involves "*the institutional independence of the court or tribunal over which [a judge] presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government*" (page 687), an "*essential condition*" of which is "*the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function*" (page 708)."*

104. The independence at issue in this appeal is concerned primarily with the *institutional* independence of the judiciary, and whether that essential independence is impermissibly compromised by the statutory requirement that the Judicial Council adopt personal injury guidelines that govern the exercise of the judicial function. However it also implicates the individual judges or courts insofar as the Guidelines will govern their decision making. In both these aspects it is bound up with the reasonable expectation of litigants that the judiciary collectively and as individuals are independent, and should be seen to be independent. It is of note that in s. 7(1) of the 2019 Act, the functions imposed on the Judicial Council include promoting and maintaining:-

"(e) respect for the independence of the judiciary, and

(f) public confidence in the judiciary and the administration of justice."

105. The concept of an independent judiciary is of longstanding, and may have its origins in the Hebraic tradition. It informed thinkers such as Montesquieu who recognised "*judicial power as an*

entity in itself",[6] and this inspired the early U.S. state constitutions and, in 1789, the principle was enshrined in Article III, Section 1 of the Constitution of the United States, which in turn influenced the drafters of our Constitution.

106. It is a principle that is now an international norm. The United Nations enacted fundamental principles on the independence of the judiciary in 1985, the *Basic Principles on the Independence of the Judiciary*, and in 1994 appointed a Special Rapporteur on the independence of judges and lawyers with a mandate to, amongst other functions, monitor States' progress in ensuring judicial independence and make recommendations. The principle of judicial independence has been enshrined in a number of international human rights law instruments, such as the *Universal Declaration of Human Rights* (Article 10) and the *International Covenant on Civil and Political Rights*. On a regional level, organisations such as the Council of Europe and the European Union have also incorporated the principle in their legal instruments and guidance, and it has evolved over time. The *Magna Carta of Judges (Fundamental Principles)* adopted by the Consultative Council of European Judges during its 11th plenary hearing from 17-19 November 2010[7] includes the following:-

> *"**Judicial Independence***
>
> *...*
>
> *3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence*

[6] Jack N. Rakove, "The Original Justifications for Judicial Independence" (2007) 95(4) The Georgetown Law Journal 1061, 1063.Charles Louis de Secondat, Baron de Montesquieu, *De l'Esprit des Loix* (1748).
[7] At which the Irish judiciary were represented by (now retired) Supreme Court Judge John MacMenamin.

Guarantees of independence

...

10. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law... ."

107. While these instruments do not have the force of law in Irish domestic law, they inform our modern understanding of the breadth and importance of the principle.

108. The International Association of Judges, which, as its name suggests, is an association of judges from across the globe, and on which the Irish judiciary are represented, has developed its own set of guidelines, the *Universal Charter of the Judge*, which reinforce the importance of judicial independence. The *Universal Charter* as updated in 2017[8] sets out the "*minimal guarantees required*". Article 1 sets out general principles of independence of the judge, but Article 2 is particularly relevant:-

"Article 2 – External Independence

Article 2-1 – Warranty of the independence in a legal text of the highest level

Judicial independence must be enshrined in the Constitution or at the highest possible legal level.

Judicial status must be ensured by a law creating and protecting judicial office that is genuinely and effectively independent from other state powers.

[8] At which time Edwards J. represented Irish judges and was a Vice President of the I.A.J.

The judge, as holder of judicial office, must be able to exercise judicial powers free from social, economic and political pressure, and independently from other judges and the administration of the judiciary."

109. In 2002, the United Nations Judicial Group on Strengthening Judicial Integrity, a group composed of senior judges from around the world, agreed a set of principles of judicial conduct known as *The Bangalore Principles*, which were endorsed by the United Nations Human Rights Commission at Geneva in April, 2003. The first Bangalore Principle is that of judicial independence, the others being impartiality, integrity, equality, propriety, competence and diligence. The principle of judicial independence was further elaborated in *Resolution 2006/23* of the Economic and Social Council in "Value 1: Independence".

110. The *Bangalore Principles* are familiar to the Irish judiciary as materials to which they are referred on appointment, or which feature in judicial conferences or training programmes. The *Bangalore Principles*, along with the wording of *Resolution 2006/23*, were recently taken as the basis for new '*Guidelines for the Judiciary on Conduct and Ethics*' ("*the Ethical Guidelines*") adopted, unanimously as it happens, by the Judicial Council with effect from 1 June 2022. These principles are the ethical guide for all Irish judges, and any admissible complaints of judicial misconduct now fall to be considered in the light of these principles. "*Principle 1: Independence*" is worded thus:-

*"**Principle:***

As recognised by the Constitution, judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free from any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free from such things.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence."

[Emphasis added]

111. I cannot emphasise enough that this principle, in all its detail, has been adopted unanimously by the body of Irish judges. I have added emphasis to the duty of judges to uphold judicial independence in its *institutional aspect*, a concept affirmed by this court in passage quoted earlier from *Re Article 26.* I have also highlighted text in paragraphs 1.2 and 1.3 which has particular

resonance with these proceedings which concern Guidelines prepared by judges and adopted by the body of judges, to which statutory effect is given, and which thereafter are guidelines by which all judges assessing compensation for personal injuries must abide, or if departing, must give reasons.

112. Another way of stating the appellant's argument is that the Guidelines impermissibly encroach on the need for the judiciary to be independent from "*society in general*", and that the mandatory judicial involvement in preparing and adopting the Guidelines oblige the judiciary to cross the invisible line to "*inappropriate connections with, and influence by, the executive and legislative branches of government*" such that judicial independence is unconstitutionally compromised. In my view the requirement that the Judicial Council adopt personal injury guidelines does cross that line.

113. It is of course the case that the separation of powers under the Constitution is not absolute. As O'Donnell J. (as he then was) observed in *Pringle v. Ireland* [2013] 3 IR 1:-

> *"…the late Professor Kelly was wont to observe, that the form of separation of powers adopted in the Constitution was not the hermetically sealed branches of government posited by Montesquieu, but rather involved points of intersection, interaction and occasional friction between the branches of government so established."*

I fully accept that there is no general prohibition on the conferring of non-judicial functions on judges, and that there are instances where this has occurred. It is necessary to address some of the examples that featured in submissions or are discussed in the judgments to be delivered by other members of the court.

114. *Haughey v. Moriarty* [1999] 3 IR 1 is authority for the proposition that a judge may be appointed as sole member of a Tribunal of Inquiry, and neither Geoghegan J. in the High Court nor this court saw anything unconstitutional in such appointment. Geoghegan J. considered that a judge would be suited to such a position because of his "*professional training and independence*". Such

appointments or judges, as a member or sole member, have occurred frequently under the Tribunals of Inquiry (Evidence) Acts, 1921-2002 and the Commissions of Investigations Act, 2004. This is understandable given the essential fact-finding nature of such tribunals or commissions of inquiry, and it is hard to see how such appointments could ever encroach on the independence of a particular judge, still less on the judiciary as a body. A critical distinction is that such appointments will not be made unless the judge proposed to be appointed is willing and had agreed to be appointed.

115. Judges sit on the various Rules Committees established to make rules for courts at all levels. As Collins J. sets out in his judgment, the Chief Justice and President of the Court of Appeal and High Court are *ex officio* members of the Superior Courts Rules Committee by virtue of s. 67 of the Courts of Justice Act 1936 (as amended). On a narrow view it could be said that these three *ex officio* members are not given a choice in the matter, but taking a broader view such leaders of their respective courts will be well aware of the burdensome committee work coming their way when applying for and electing to take up appointment, and in that sense *ex officio* committee membership is not thrust upon them without informed consent.

116. The same applies to the judges required by the Judicial Appointments Commission Act, 2023 to sit *ex officio* on that Commission (the Chief Justice and the President of the relevant court, and two other judges nominated by the Judicial Council), although in that particular instance it can be said that there were other obviously good reasons why judges should be members of such a body part whose function is to ensure that only properly qualified and suitable candidates are put forward "*on merit*" for judicial office. Moreover, the function of the Commission is "*to select and recommend*" to the Minister for Justice persons (three persons for a vacancy and two additional persons for each second or subsequent vacancy) for appointment to judicial office; the actual decision on whom to appoint is taken by Government from amongst the recommended individuals. This contrasts with s. 7 of the 2019 Act where the assembly of judiciary sitting as a subordinate legislature must adopt guidelines, which are of substantive effect.

117. Undoubtedly the Rules of Court can have far reaching effect, as O'Donnell J. found in *DPP v. District Judge McGrath* [2021] 2 ILRM 345. For example, the Rules of the Superior Courts provide for dismissal of proceedings for delay or failure of pleadings to disclose a cause of action, and a successful motion in that regard will lead to dismissal; and the Rules set out the parameters within which discovery may be obtained. I also agree that rules of this sort make choices, for instance in dictating time limits for certain steps to be taken that are intended to speed up the process. But the laws created by such rules retain their essentially procedural character in that they regulate court processes – how claims are to be initiated and pursued, how and when discovery is to take place, what case management may apply, *et cetera*, and the degree to which they make political or policy choices is limited. Article 36iii of the Constitution expressly mentions these "*matters of procedure*" as requiring to be regulated "*in accordance with law*". Such procedural laws are required to facilitate the day-to-day work of judges in administering justice, but do not speak to the substantive determination of a dispute. To borrow a phrase from Blackmun J. in *Mistretta*, such rules are required to ensure "*the fair and efficient fulfilment of the responsibilities that are properly the province of the judiciary*". This is what differentiates them from the personal injury guidelines, which concern substantive laws and determine, within ranges, what may be awarded as damages in respect of particular injuries.

118. Both parties relied on the decision in *Mistretta* where the opinion of the court was delivered by Blackmun J. (and a sole dissenting judgment was delivered by Scalia J.). One of the arguments considered was that the integrity and independence of the judiciary was unconstitutionally eroded by requiring judges to sit on the Commission, by requiring that those judges share their rulemaking with non-judges, by subjecting the Commission's members to appointment and removal by the President, and "*by co-opting federal judges into the quintessentially political work of establish sentencing guidelines*". Blackmun J. noted that the Sentencing Commission is "*unquestionably a peculiar institution within the framework of our Government*", and that although placed in the "*Judicial*

Branch" it was not a court and did not exercise judicial power, and was an "*independent*" body of seven with at least three judges. He states, at page 385:-

> *"...we observe that Congress' decision to create an independent rulemaking body to promulgate sentencing guidelines and to locate that body within the Judicial Branch is not unconstitutional unless Congress has vested in the Commission powers that are more appropriately performed by the other Branches or that undermine the integrity of the Judiciary."*

In a similar vein at page 388 he states:-

> *"...consistent with the separation of powers, Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."*

In concluding on this issue Blackmun J. at pages 390-391 states:-

> *"In light of this precedent and practice we can discern no separation-of -powers impediment to the placement of the Sentencing Commission within the Judicial Branch. As we described at the outset, the sentencing function long has been a peculiarly share responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch."*

119. I am conscious in considering *Mistretta* that s. 7(2)(h) of the 2019 Act also requires the Judicial Council to adopt sentencing guidelines, and the preparatory work on draft guidelines is, I understand, ongoing. I am equally conscious that such sentencing guidelines as may be adopted in due course may be the subject of a constitutional challenge similar to the present challenge to the Guidelines. If that occurs it will be a matter for another court, and no comment that I make now can

or should be seen as predetermining any such challenge, particularly as it is possible to identify what *may* turn out to be material differences between sentencing guidelines and personal injury guidelines.[9]

120. In my view the decision in *Mistretta* does not assist the State. First, it concerns a very different body, composed of lay persons as well as judges – and there is no compulsion on any particular federal judge to take up an appointment to the Commission.

121. Secondly, one of the reasons given by Blackmun J. for concluding that Commission does not undermine the integrity of the Judicial Branch is that it "*…is not controlled by or accountable to members of the Judicial Branch*" (page 393). As he observes, the members of the judiciary on the Commission may be in a minority, and it was set up as "*an independent agency*", and "*is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it seem fit either within the 180-day waiting period, or at any time*" and "*the Commission's members are subject to the President's limited powers of removal*". This is in stark contrast to the 2019 Act, which imposes an obligation on a corporation sole comprised of the entire body of judges and does not have similar provisions in relation to accountability.

122. Thirdly *Mistretta* shows that different considerations *may* apply to sentencing guidelines. This emerges from the observation of Blackmun J. that "*the sentencing function long has been a peculiarly shared responsibility amongst the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch*". What he meant by this is made clear when he later refers to the "*the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress*". He characterises the task of the Commission as "*an essentially neutral endeavour and one in which judicial participation is peculiarly appropriate*".

[9] For instance, it may be of importance that the while the composition of the Personal Injuries Guidelines Committee is seven judges (s. 19 of the 2019 Act), the Sentencing and Information Committee responsible for drafting sentencing guidelines is compose of eight judges and also five government appointed lay members.

123. It is no different here: primary legislation creates criminal offences and establishes maximum – and in some cases also minimum – sentences, or a range within which the sentence is to fall, and frequently identifies criteria that are relevant to sentencing; legislation also addresses the court within which a prosecution is to be brought, depending on the seriousness of the charged offence. This is the implementation of policy at the legislative level, and it is at least arguable that sentencing guidelines developed by a delegated body are less concerned with policy and more concerned with achieving fairness and consistency in sentencing. In that sense the responsibility is shared by the legislative branch with the judicial branch. Arguably there is also a strong societal interest in the legislative and governmental branches – the latter having responsibility for 'law and order' including policing and the prison and probation services – involving the judiciary in the development of sentencing guidelines.

124. The same considerations do not in my view apply to awards of damages in personal injury cases. Heretofore this has been solely the *responsibility* of individual courts, and decided on a case-by-case basis, based on principles and precedents developed piecemeal or incrementally by the courts. While courts were required "*to have regard*" to the two Books of Quantum compiled pursuant to the PIAB Act, 2003 – the first in 2004 and the second in 2016 – these were prepared by or on behalf of PIAB (who commissioned "*international consultants Verisk Analytics Limited*" to prepare the 2016 Book of Quantum) and were not considered or adopted by any legislative process. I do not for one moment suggest that the legislature is precluded from promulgating personal injury guidelines – far from it. The point is that the requirement of s. 7(2)(g) of the 2019 Act must therefore be viewed in the context in which the legislature did not, unlike sentencing, involve itself in or take any "*responsibility*" for the assessment of damages in personal injury cases.

125. Nor is there the same societal interest in the judiciary, at least not the judiciary as a whole sitting as a quasi-legislative assembly, setting personal injury guidelines which have the force of law

and have the effect of bringing about extensive changes. This, it seems to me, is more properly within the domain of the legislative branch, or perhaps some other subordinate legislature.

126. There are many different ways in which such personal injury guidelines could have been developed and adopted, with some input or involvement of serving judges. For instance, the research and development of guidelines could have been referred to the Law Reform Commission, on which there is existing judicial representation, to provide recommendations for consideration by the legislature. Another alternative would have been to establish a dedicated commission for the purpose with representation from interested sectors such as the legal professions, the insurance industry, employer groups and trade unions, as well as the judiciary or retired members of the judiciary. In either instance the involvement of individual judges would be consensual, not imposed by statute. Such methods of developing guidelines could have the benefit of public participation in a consultative process, and if adopted by the Oireachtas there would be democratic approval and accountability – something that is singularly lacking in respect of the Guidelines as promulgated under the 2019 Act.

127. This addresses the proportionality test articulated in *Heaney v. Ireland* [1994] 3 IR 593 by Costello J. at page 606:-

> *"The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-*
>
> *(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
>
> *(b) impair the right as little as possible, and*
>
> *(c) be such that their effects on rights are proportional to the objective... .*"

128. Albeit that the *Heaney* test is more usually addressed to laws encroaching on the exercise of constitutional rights of citizens, it is a public law doctrine. Moreover, I do not see any principled reason for not applying it to s. 7(2)(g) of the 2019 Act, particularly where personal injury guidelines relate to the assessment of damages to which, it must be assumed, a claimant has proved a right to compensation, and where the separation of powers and the independence of the judiciary, fundamental constitutional principles, are engaged by the method of adopting guidelines imposed by the section.

129. In this regard in my view there was no justification for taking the extraordinary step of compulsorily requiring the Judicial Council, of which body all judges,[10] are members, to adopt the Guidelines. There were other and more democratic means by which the (laudable) objective of promulgating personal injury guidelines could have been achieved, without impairing the independence of the judiciary at all, or breaching the separation of powers.

130. The appellant's submission on this is lent support by the approach taken in the High Court of Australia in *Grollo v. Palmer* (1995) 131 ALR 225, one of series of decisions commencing with the decision in *R v. Kirby; Ex parte Boilermaker's Society of Australia* (1956) 94 CLR 254, referred to in argument and addressed more fully by Collins J. in his judgment at paragraphs 220-225. These cases concerned a recognised exception to the separation of powers, namely the conferral of non-judicial functions on individual judges, *persona designata,* in a personal capacity. In their joint judgment in *Grollo* Brennan C.J., Deane, Dawson and Toohey JJ. (McHugh J. dissented) upheld the issuing of telephonic interception warrants by a designated judge as being a permissible non-judicial function because such function was necessarily intrusive and clandestine and by its nature not open to judicial review. Accordingly it was appropriate that a judge undertake that task to maintain the

[10] Section 9(5) of the 2019 Act sets a quorum of not less than half of all judges, and further provides that at least a quarter of the complement of each court must be present. Section 9(4) provides that every question must be determined by a simple majority of those present and voting, with the Chairman having a second or casting vote.

balance between law enforcement agencies on the one hand and criminal suspects or informers on the other. The joint majority identified two conditions on the conferral of non-judicial functions on judges as designated persons, stating at page 235:-

> *"The conditions thus expressed on the power to confer non-judicial functions on judges as designated persons are twofold: first, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent; and, secondly, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions, or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power (the incompatibility condition). These conditions accord with the view of the Supreme Court of the United States in* Mistretta*..."*

131. As to the first of these conditions, *a fortiori* non-judicial functions should not, in principle, be thrust by the legislature upon the body of the judiciary without their consent. Any person or body in authority, from a teacher to an employer to a legislature, instructing or directing a pupil or employee or other party to do something, restricts that other party's freedom to act, or freedom to do nothing, and therefore their independence. To be clear this is what s. 7(2)(g) does – the legislative mandate that the Committee prepare guidelines and that the body of judges assembling as the Judicial Council adopt guidelines encroaches on the independence of the institution of the judiciary. This simple criticism of s. 7(2)(g) was not in my view answered by the State.

132. As to the incompatibility condition, the joint majority in *Grollo* elaborated in a passage quoted by Collins J. that bears repeating:-

> *"Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a Judge that the further performance of substantial judicial functions by that Judge is not practicable. It might consist in the performance of non-*

judicial functions of such a nature that the capacity of the Judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual Judge to perform his or her judicial functions with integrity is diminished. Judges appointed to exercise the judicial power of the Commonwealth cannot be authorised to engage in the performance of non-judicial functions so as to prejudice the capacity either of the individual Judge or of the judiciary as an institution to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth. So much is implied from the separation of powers mandated by Chs I, II and III of the Constitution and from the conditions necessary for the valid and effective exercise of judicial power" (at page 365).

[Emphasis added]

In his dissent McHugh J. at page 244 also emphasised the need for "*public confidence in the independence or impartiality of a federal judge to carry out judicial functions*" opining that "*the appearance of independence and impartiality is as important as its existence*".

133. This need for there to be public confidence in the integrity of the judiciary as an institution is relevant to the present appeal, and in my view is seriously undermined if the legislature can impose on the body of judges the task of effectively legislating, without democratic accountability, on personal injury guidelines that have, or may have, a wide ranging and profound effect on the levels at which awards for personal injuries are to be assessed.

134. There are further good reasons why imposing this obligation on the judiciary should not have been done. It was always going to be the case that the content of guidelines would be the subject of controversy between judges, whose views on *quantum* would differ widely notwithstanding the established jurisprudence on assessing damages. This would, divisively, pit judge against judge at

the adoption stage, and it is no secret that the adoption of the Guidelines was not unanimous. Those judges who disagreed with the Guidelines are presently bound by s. 22 of the 2004 Act to apply the Guidelines thus imposed on them by the body of judges. This is most undesirable, and demonstrates why judges should generally not be required to legislate in this manner. Judges are constitutionally bound by their declaration of office to "*uphold the Constitution and the laws*", but in making that declaration judges cannot have anticipated that they would be required to uphold and apply laws promulgated in a quasi-legislature composed of the body of judges – laws that they may have voted against. Suitably qualified and fit persons apply for judicial office with the expectation that they will be administering justice, in the sense that they will be applying the laws of the land while sitting as judges, not that they will be collectively with other judges legislating to create a body of new legal norms without any democratic mandate.

135. Further the question may be asked, "*if the Oireachtas can impose this law-making function on the body of judges, where does this stop?*". Indeed this question was asked at the hearing by Hogan J. who wondered could the legislature require judges to adopt guidelines in family matters, for example related to child custody, or, it might be added, access. Counsel for the State responded "*possibly, yes*" but accepted that there was, as Hogan J. put it, "*an outer orbit*" to be drawn somewhere, but contented himself with saying that personal injury guidelines did not cross that line because they were sufficiently "*tethered to the judicial power*". But, with respect to Counsel, that could be said of almost every area of law in which the courts are regularly asked to determine disputes and have or develop a familiarity if not some expertise in the area. The question remains, "*if the court does not draw the line in this case to strike down section 7(2)(g), where is the line to be drawn?*". In my view the inappropriateness of imposing this particular legislative task on the judiciary, crosses the line. It is true that the novelty of the provision is not in itself a reason to condemn it, but it is the far-reaching nature and effect of it, combined with the fact that it is not necessary, that primarily lead me to the conclusion that it is inappropriate.

136. Another feature of s. 7(2)(g) that is problematic and brings into focus the inappropriateness of the provision is the requirement that the adopting of guidelines take place "*as soon as practicable, and in any event no later than 12 months*" after submission of the draft guidelines by the Committee to the Board. This timeline was later pushed out to 31 July 2021. As it happens the Judicial Council adopted the Guidelines before that date, but what was to be the position if no vote took place, or the Judicial Council voted against adoption, or refused to adopt guidelines at all? Nothing in the 2019 Act addresses this possibility, and counsel for the appellant suggested that if the judiciary did not adopt guidelines "*...they are in breach of statutory duty and the Minister could presumably look for mandamus requiring the statutory corporation to adopt guidelines by a certain date*", noting, correctly, that the Judicial Council is a corporation sole that can sue and be sued in its own name. That seems to me to be correct. As counsel further observed, if the Minister sought *mandamus* that application would have to be heard by a sitting judge who is a member of the Judicial Council, and possibly by this court on appeal, and were *mandamus* to be granted it would be ordered nominally against the Judicial Council but would in effect be directed to the institution of the judiciary who could then have found themselves under a fresh obligation, imposed by court order, to attend and vote at a quorate meeting and to adopt guidelines perhaps within an extended timeframe. That s. 7(2)(g) could potentially have resulted in such a collision of government with the judiciary demonstrates most forcibly the inappropriateness of the statutory obligation placed on the judiciary.

137. The result in my view is that s. 7(2)(g) impermissibly encroaches on judicial independence – "*the lynchpin of the constitutional order*" – and integrity, and offends the separation of powers by entangling the institution of the judiciary unnecessarily and inappropriately in a legislative process.

138. I should add that since writing this judgment I have read in draft the judgment of Faherty J. and I find myself in complete agreement with her analysis and reasoning on the *Judicial Independence Issue*.

(7) The Personal Rights Issue

139. This addresses whether the Guidelines infringe any of the appellant's personal constitutional rights – the right to bodily integrity, the right of access to the courts/right to litigate, property rights, and equality – including by reason of what is said to be their retrospective effect. For the reasons given by Collins J., I agree with his conclusion that the appellant's personal constitutional rights are not infringed. I address the issue of retrospective effect more fully later in this judgment.

The Issue of Confirmation/Ratification of the Guidelines by virtue of The Family Leave and Miscellaneous Provisions Act, 2021 ("the 2021 Act")

140. This part addresses whether the enactment of ss. 30(a) and (b) of the 2021 Act, which were commenced on 24 April 2021, and substituted the new s. 99 and inserted s. 100 in the 2019 Act respectively, and thereby further amended s. 22 of the PIAB Act, had the effect of the legislature confirming or ratifying the Guidelines which the Judicial Council had adopted on 6 March 2021. If the 2021 Act had that effect it would not alter my conclusion that s. 7(2)(g) of the 2019 Act is unconstitutional, but it would mean that the 6 March 2021 Guidelines were legislatively approved/adopted by the Oireachtas and therefore effective from 24 April 2021.

141. I have had the benefit of reading Part V of the judgment to be delivered by Hogan J. which is carefully argued and in which, with "*considerable hesitation*", he comes to the conclusion that "*in order to give these provisions of the 2021 Act real meaning it is possible to infer that the Oireachtas has thereby approved the guidelines and that it has thereby given them statutory effect*". While this appears to be the conclusion of the majority of this court, I have no hesitation in dissenting from that view.

142. I do agree with Hogan J. on two preliminary aspects. Firstly I agree that this court should address this issue notwithstanding that it was not previously advanced by the State as legal

justification for the Guidelines. Secondly, I agree that based on the decision of this court in *Crilly v. Farrington* [2001] 3 IR 251 the court should not have regard to Dáil Debates or ministerial comment as an aid to interpreting the 2021 Act. Instead this argument falls to be decided on the basis of interpreting words actually used by the Oireachtas in the 2021 Act.

143. For ease of reference in Appendix 1 I have set out s. 22(1) of the 2004 Act as first amended by s. 99 of the 2019 Act; as enacted this amendment was never brought into effect before it was further amended by the 2021 Act. In Appendix 2 I have set out s. 30(a) and (b) of the 2021 Act which substituted in the new ss. 99 of the 2019 Act, and inserted s.100 respectively, and also s. 31 of the 2021 Act which substituted in a new s. 20 of the PIAB Act of 2003 relating to PIAB's assessment of claims on or after 24 April 2021.

144. The issue of ratification was considered by this court in *McDaid v. Sheehy* [1991] 1 IR 1. In the High Court Blayney J. found s. 1 of the Imposition of Duties Act, 1957 invalid as it provided for an impermissibly wide delegation of power in breach of Article 15.2.1° of the Constitution, but he went on to hold that an order made under that Act, the Imposition of Duties Order 1975, was saved because it had been confirmed and re-enacted by s. 46 of the Finance Act, 1976 which provided:-

> *"The Orders mentioned in the table to this section are hereby confirmed."*

Blayney J. said:-

> *"There can be no doubt that the intention of the Oireachtas was that the Order should be part of the law of the State. The confirmation of the Order was a clear expression of that intention. At the time it was believed that the order was valid but that confirmation was necessary so that it would continue to have statutory force after the end of 1976. It would have ceased to have effect at the end of that year if it were not confirmed. So the intention in confirming it was to give it the status of a permanent statutory provision deriving its validity as from the*

end of 1976 from s.46 and it seems to me to be perfectly reasonable to interpret s.46 as giving effect to that intention."

The Supreme Court (Finlay C.J., Griffin J., Hederman J., McCarthy J. and O'Flaherty J.) was unanimous in finding that Blayney J. was correct in so holding.

145. In *Leontjava v. DPP* [2004] 1 IR 591 similar issues arose as to the capacity of the Oireachtas to retroactively validate orders deemed invalid in light of the decision in *Laurentiu v. Minister for Justice* [1999] 4 IR 26 which had struck down deportation orders made under s. 5(1) of the Aliens Act, 1935 which the court concluded was inconsistent with the Constitution. Following the decision in *Laurentiu* s. 2 of the Immigration Act, 1999 was passed and provided that:-

"(1) Every order made before the passing of this Act under section 5 of the Act of 1935 other than the orders or provisions or orders specified in the Schedule to this Act shall have statutory effect as if it were an Act of the Oireachtas.

(2) If subsection (1) would, but for this subsection, conflict with a constitutional right of any person, the operation of that subsection shall be subject to such limitation as is necessary to secure that it does not so conflict but shall be otherwise of full force and effect."

This saving provision was considered by this court in its second judgment in *Leontjava* (Keane C.J., delivered on 23 June 2004, with Murray J., McGuinness J., Fennelly J. and McCracken J. concurring). Keane C.J. approved the passage from the judgment of Blayney J. in *McDaid* which I have quoted earlier, noting that his view of the law had been unanimously upheld by the Supreme Court. In his conclusion Keane C.J. stated:-

"It is manifest from what has already been said that the Constitution affords a strikingly wide latitude to the Oireachtas in adopting whatever form of legislation it

considers appropriate in particular cases. Under Article 15 it enjoys the sole and exclusive power of making law for the state and where, as here, it has expressed its clear and unequivocal intention that particular instruments should have the force of law in the State, it is difficult to see on what basis it can be asserted that it has exceeded or abuse its exclusive legislative role. In the view of the court, the choice by the Oireachtas to incorporate the instruments in question by reference rather than by setting out their text verbatim in the body of the Act was one which they were entitled to make, unless it can clearly be established that the result was in conflict with specific provisions of the Constitution."

Keane C.J. considered that this conclusion was supported by the decision in *McDaid.*

146. In principle therefore the Oireachtas can by later legislation give validity to particular instruments of no, or doubtful, validity when first adopted *provided* there is a *clear expression of the intention* to confirm or ratify an instrument. I therefore have difficulty with the concept of *implicit ratification*, in other words that the court can undertake an analysis of the wording used in the statute to draw an inference of confirmation or ratification. In my view it is an essential requirement of legislation relied on to confirm an order or instrument that is believed to be valid but where confirmation is thought to be necessary, that the intention to confirm or ratify must be expressly made clear. This is leant support by Bailey and Norbury, *Bennion on Statutory Interpretation* (7th ed, Butterworths 2017, page 91) where it is stated:-

"A later Act may of course, ratify, and thereby validate, an ultra vires instrument. Here it must be clear that Parliament had the ultra vires point in mind, and did not merely continue the instrument, assuming it to be valid."

147. Even if I am wrong in this, and the court can seek to interpret the legislation for implicit confirmation, in my view it cannot go so far to draw an inference of confirmation that is contra-indicated by other wording in the same piece of legislation.

148. Does the 2021 Act manifest a clear intention to give the Guidelines statutory effect? The State argues that "*endorsement*" by the Oireachtas emerges firstly from the Long Title to the 2021 Act which refers *inter alia* to an Act:-

> *"…to amend the Judicial Council Act 2019 and the Personal Injuries Assessment Board Act 2003 to make further provision in relation to the operation of personal injuries guidelines adopted by the Judicial Council".*

However s. 30(b) of the 2001 Act, which inserts s. 100 into the 2019 Act, relates to amendments to the personal injury guidelines that may in the future be adopted by the Judicial Council pursuant to s. 7(2)(g)(ii) of the 2019 Act. Thus the 2021 Act relates to both to guidelines adopted and *"in force"* and to personal injury guidelines that may in the future be adopted. Accordingly the inference cannot be drawn from the reference in the Long Title to *guidelines adopted by the Judicial Council* that the Long Title relates to the Guidelines adopted on 6 March 2021 – it clearly relates to *all* personal injury guidelines that may be adopted by the Judicial Council.

149. The State more persuasively relies on wording in s. 30(a), which inserts the new s.99 in the 2019 Act, and refers in the further amended s. 22(1)(a) of the 2004 to "*the personal injuries guidelines (within the meaning of [the 2019 Act]) in force*" and in s. 22(1)(b) to "*those guidelines*" (emphasis added).

150. I agree that this can only be read as an intended reference to the Guidelines adopted by the Judicial Council on 6 March 2021, even though, in my judgment, the Guidelines were unconstitutional and not therefore *in force* in any legal sense. There can be no doubt but that the

Oireachtas had in mind the March 2021 Guidelines when passing the 2021 Act. Moreover, as the former s. 99 had not been commenced by 24 April 2021, the effect of this new s. 99 was that it became the statutory basis for the obligation of the court to have regard to the Guidelines, and it had effect from 24 April 2021.

151. However, this wording on a plain reading makes it clear that the Oireachtas *assumed* that the Guidelines adopted on 6 March 2021 were lawfully adopted by the Judicial Council. It is, to use the words of *Bennion*, merely continuing the instrument *assuming* it to be valid. It is not apparent that the Oireachtas was aware of any legal infirmity. It is certainly not an express ratification of the Guidelines, and uses none of the language of confirmation that is exemplified by the confirmatory legislative provisions that feature in *McDaid* and *Leontjava* where the court was left in no doubt as to the legislative intention.

152. Moreover, when s. 30(a) is read in conjunction with s. 30(b), which is concerned with future amended guidelines, it becomes clear that the words "*in force*" and "*those guidelines*" in s. 30(a) have only been used descriptively to distinguish them from the amended guidelines which are the subject matter of s. 30(b).

153. Hogan J. in his judgment states:-

> *"…in order to give these provisions of the 2021 Act real meaning it is possible to infer that the Oireachtas has thereby approved the guidelines and that it has thereby given them statutory effect. It has, admittedly, only done so impliedly and indirectly."*

154. I respectfully cannot agree, because in my view the primary legislative purpose behind the amendments introduced by s. 30(a) of the 2021 Act was otherwise, and is clear: s. 30(a) further amended s. 22 of the 2004 Act to ensure that the *Proviso* (which would have allowed a court to have regard *to matters other than the personal injury guidelines* had it ever come into effect) would be

removed from the statute book and would not apply to any assessment of damages by the court where it was mandated to have regard to the Guidelines. The new s. 22(1A) and s. 22(2) were consistent with this purpose, being of only temporal/transitional application to residual cases; thus where the action was commenced before 24 April 2021 or where the PIAB assessment was made prior to 24 April 2021, the court was still required to have regard to the Book of Quantum and was not prohibited "*from having regard to matters other than the Book of Quantum*". Parallel with this, and confirming the legislative purpose that I have identified, s. 31 amends s. 20 of the PIAB Act 2003 and ensures that PIAB in assessing damages *after* 24 April 2021 must have regard to the Guidelines, and where departing state reasons for such departure.

155. It follows that the amendments effected by the 2021 Act are already vested with real meaning and effect, directed at the purpose that I have identified, and do not warrant being construed with the additional meaning inferred by Hogan J. in order to render them meaningful.

156. Further, any inference of confirmation is contra-indicated by s. 30(b) of the 2021 Act which inserts s. 100 into the 2019 Act that relates to amendments to the personal injury guidelines that may be adopted *in futuro* by the Judicial Council pursuant to s. 7(2)(g)(ii) of the 2019 Act. If, as Hogan J. (and other members of the court who share his view) holds, the 2021 Act confirms the Guidelines, it follows that any future amendment of the Guidelines (or any future personal injury guidelines) will also require an Act of the Oireachtas to give them force and effect. That is the effect of the decision of this court in *Quinn v. Ireland* [2007] 3 IR 395 (Denham J.). As Hogan J. puts it:-

> *"…While it is true that s.100 of the 2019 Act (as amended) envisages that any existing guidelines can be amended by some future resolution of the Judicial Council alone, it follows in light of these conclusions that this provision is to that extent inoperative. Any attempt to utilise the s.100 procedure in this manner would raise the self-same constitutional issues which have been identified in this judgment."*

157. However, it would have been entirely illogical for the Oireachtas to have enacted s. 30(a) with new wording for s. 22 for the purpose of confirming the legal validity of the March 2021 Guidelines, whilst simultaneously in s. 30(b) inserting s. 100 into the 2019 Act establishing a position that future amended guidelines would, on adoption by the Judicial Council, automatically and without further legislative intervention supersede the Guidelines. That cannot have been the intention of the legislature. This reinforces my view that the true intention of the legislative in passing ss. 30 and 31 of the 2021 Act had nothing to do with confirming or ratifying the Guidelines, whether expressly, or by implication or inference, or with curing unconstitutionality, and I cannot agree that the Guidelines ever became legally binding or had the force of law by virtue of the 2021 Act.

Retrospective Application of the Guidelines

158. In his judgment Hogan J., having come to the view that the 2021 Act confirms the Guidelines and gives them legal effect, then considers whether s. 22(1A)(b) of the 2004 Act (as substituted by s. 99 of the 2019 Act, and in turn substituted by the 2021 Act with effect from 24 April 2021) could constitutionally apply the Guidelines "*retrospectively*" to the appellant's assessment given that she applied to PIAB long before 24 April 2021.

159. Applying principles established in *Hamilton v. Hamilton* [1982] IR 466 and *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] IESC 7, Hogan J. finds that the appellant had a right to sue in respect of a justiciable wrong; that this was a chose in action and therefore a species of property right; and that this was materially affected by the retrospective application of the Guidelines to her pending claim by s. 22(1A)(b). He finds that this was unjust and arbitrary and failed to vindicate the appellant's right to sue and her property right. He therefore concludes, as I understand his judgment, that this transitional provision is unconstitutional to the extent that it purports to apply new law to the appellant's pending claim before PIAB, and that she was entitled to have her claim assessed by PIAB by reference to the old law as it existed prior to 24 April 2021.

160. Of course I have earlier in this judgment come to the conclusion that the Guidelines adopted by the Judicial Council were not confirmed by the 2021 Act, and never had legal effect, and accordingly on my analysis no issue of retrospectivity arises. Notwithstanding that, it is necessary that I too express a view on this issue because a clear majority of the court are holding that the Guidelines were independently confirmed by the Oireachtas by the 2021 Act, and because members of the Court have expressed differing views on the consequences of that finding such that the issue of retrospectivity has become critical to the outcome of this appeal for the appellant.

161. This issue concerns the nature and extent of the right to litigate, and the constitutional protection of property rights. These issues have been addressed more fully by Collins J. in his judgment in the section headed "*(7) The Personal Rights Issue*", and in particular within that under subheadings "*Access to the Courts/Right to Litigate*", and "*Property Rights*". I find myself broadly in agreement with the legal authorities that he reviews, and his conclusions. In particular, I agree that:-

(1) None of the authorities cited to this court under the heading of Right to Litigate concern the assessment of damages, and none appear to provide any basis for contending that the right to litigate encompasses a right to a particular level of damages in a personal injuries action.

(2) The presumption is that retrospective legislation affecting vested rights is *prima facie* unjust: *Hamilton v. Hamilton*.

(3) However, *Minister for Social Welfare v. Scanlon* [2001] 1 IR 64 is authority for the proposition that retrospective legislation is not necessarily unjust. In *Re Health (Amendment) (No. 2) Bill 2004* the court emphasised that in every case the nature of the rights affected and the nature of the legislative interference had to be considered in order to determine whether there was any "*unjust attack*" on those rights.

(4) In *Re Health (Amendment) (No. 2) Bill 2004* the Bill proposed the extinction of the rights in question without qualification or compensation, and that was held to be an "*abrogation of property rights*". I agree with Collins J. that the circumstances considered in that case are very different to the circumstances presented by this appeal where the appellant remains free to pursue her claim against Waterford County Council, and if she succeeds she will be entitled to a remedy in damages.

As Collins J. notes, the appellant herself did not go so far as to contend that she had any "*vested right*" to damages at any particular level. This in my view is of critical importance.

162. Undoubtedly the appellant has a right to sue/litigate to seek to recover from Waterford County Council such compensation as she may be entitled to arising out of the accident which befell her on 12 April 2019. Her claim, for the purposes of the PIAB Act, is defined in s. 9 as a "*relevant claim*". It is true that because of the PIAB Act the appellant could not simply issue court proceedings – under s. 11 she had first to apply to PIAB for assessment of her "*relevant claim*", and s. 12 prohibited her from commencing court proceedings until authorised by PIAB. Under s. 14 of the PIAB Act following the consent of Waterford County Council PIAB was required to make an assessment of damages to which the appellant was "*entitled in respect of the claim on the assumption that the respondent or respondents are fully liable to the claimant in respect of the claim*" – the wording used in s. 20(1) of the PIAB Act, which is not altered by the 2021 Act – on the same basis as the court hearing a personal injury claim.[11] At that point it could be said that the appellant had a vested right to an assessment of damages for her personal injury by PIAB (whether or not her claim could succeed on liability). But it was still not a vested right to have damages assessed at any particular level. It could be said that the vested right went further – on notification of PIAB's assessment the appellant could either accept the damages as so assessed within 28 days (s. 30), in which case the assessment

[11] Unless forming the opinion that it was not appropriate to assess the claim, in which case PIAB would have to issue an authorisation under s. 32 of the PIAB Act – but that did not apply in this instance.

would have become binding on her and on Waterford County Council (s. 33(1)), or decline to accept, as happened. But again that right speaks to her entitlement to accept the figure assessed for damage, *whatever that might be*, and not to any particular figure. At the point of declining (or failing) to accept the appellant was entitled to receive a PIAB authorisation allowing her to institute court proceedings.

163. Thus while the appellant must apply to PIAB and go through that statutory process, her constitutionally protected right to litigate in court is preserved. I agree with Collins J. that this is not a right to a particular level of damages for pain and suffering, and that the appellant has no such "*vested right*", and no property right to a particular level of damages for pain and suffering. This is so even though it can be said, as a matter of probability, that her damages for pain and suffering would have been assessed at a higher level under the law as it existed prior to 24 April 2021, in particular having regard to the Book of Quantum, than the €3,000 assessed by PIAB. The appellant did not have any constitutional (or even statutory) right to damages in the region of €18,000 - €34,900, the range indicated in the Book of Quantum. Notwithstanding my view that the Guidelines are binding new norms, and that it is difficult to envisage the circumstances that would justify departure from the Guidelines, I have to accept that for *rational, cogent and justifiable* reasons PIAB/the court can depart, and consequently the appellant cannot assert that she is necessarily pegged back to the €3,000 at which PIAB assessed her general damages.

164. In his judgment Hogan J. considered that the retrospective application of the Guidelines only to those claims which had not yet been disposed of by PIAB as of 24 April 2021 "*had an arbitrary quality to it*", and constituted "*materially different treatment*" of old claims which had been pending before PIAB prior to 24 April 2021 but whose claims were then subsequently assessed on the one hand and claims which were assessed just before the operative date of 24 April 2021, leading to a "*clear lack of equality before the law in the manner required by Article 40.1*".

165. Collins J. addresses this in his judgment under the heading "*Equality*", and analyses it under the framework as set out by O'Malley J. in *Donnelly v. Minister for Protection* [2022] IESC 31 at paragraphs 188 - 194. These are quoted fully by Collins J, and I don't propose to do the same here. Suffice it to say that the statutory distinction must be for a legitimate legislative purpose; that it will not be legitimate if it is arbitrary, capricious or irrational when viewed objectively; that the equality guarantee allows the State to have "*due regard*" to differences of physical and moral capacity and of social function; and the court will engage in a greater degree of scrutiny where the differentiation involves what may be termed one or more "*suspect*" grounds.

166. I agree with the following reasoning of Collins J. in his judgment:-

> *"There is no question here of any 'suspect' classification - the distinction drawn by the legislature is not based on any personal characteristics or personal injury claimants but rather on differences of timing and process. Is that distinction rational or arbitrary? In my view, there is a rational distinction between the PIAB process and court proceedings. That distinction is reflected in, and rooted in, the Constitution itself. There is a compelling constitutional basis for treating court proceedings differently. PIAB is not a court and it does not determine issues of liability or make orders which are otherwise enforceable. Its processes are essentially consensual in so far as any assessment made by it becomes binding only if accepted by the relevant parties. Furthermore, in terms of the application of the Guidelines, some temporal cut-off point was required."*

I therefore agree with Collins J. that the appellant has not established that the distinction at issue is inconsistent with Article 40.1.

167. It follows in my view that the retrospective application of Guidelines by virtue of the 2021 Act to the appellant's pending claim before PIAB did not abrogate any of her constitutional rights and was a permissible retrospective application. In reaching this conclusion I emphasise that my

primary finding is that the 2021 Act did not have the effect of confirming the Guidelines or giving them any legal effect, and my conclusion in this part is given, as it were, in the alternative and only because the majority of the court find that the Guidelines were confirmed by the Oireachtas.

Conclusion

168. (a) While section 7(2)(g) of the 2019 Act enjoys the presumption of constitutionality, I am satisfied that unconstitutionality is clearly established on the facts and in the arguments advanced on behalf of the appellant, for the reasons given earlier.

(b) I am also satisfied that the Guidelines adopted by the Judicial Council in March 2021 were not confirmed or given legislative effect by the 2021 Act.

(c) However, on the assumption that the Guidelines were confirmed by the 2021 Act – that being the view of the majority of the court – my view on the retrospectivity issue is that the application of the Guidelines by PIAB to the appellant's claim by virtue of the 2021 Act did not abrogate her constitutional rights and was not unconstitutional.

(d) Accordingly, I would allow the appeal to the extent that I would grant a declaration that the provisions of s. 7(2)(g) of the Judicial Council Act, 2019 are invalid having regard to the provisions of Bunreacht na hÉireann and in particular Articles 6, 15.2, 34 and 35.

APPENDIX 1

Section 22 of Civil Liability and Courts Act 2004 as amended by section 99 of the Judicial Council Act, 2019 ***(as section 99 was originally enacted but never brought into effect)***

"22. (1) The court shall, in assessing damages in a personal injuries action -

(a) have regard to the personal injuries guidelines (within the meaning of section 2 of the Judicial Council Act 2019), and

(b) where it departs from those guidelines, state the reasons for such departure in giving its decision.

(2) Subsection (1) shall not operate to prohibit a court from having regard to matters other than those personal injuries guidelines when assessing damages in a personal injury action."

[Subsection (2) was referred to in argument as "the Proviso"]

APPENDIX 2

Sections 30 of the Family Leave Miscellaneous Provisions Act 2021 amending section 99 of the Judicial Council Act 2019 (further amending s.22 of the Civil Liability and Courts Act, 2004), and inserting section 100 in the Judicial Council Act 2019

"30. The Judicial Council Act 2019 is amended by—

(a) the substitution of the following section for section 99:

"Amendment of section 22 of Civil Liability and Courts Act 2004

99. Section 22 of the Civil Liability and Courts Act 2004 is amended by—

(a) the substitution of the following subsection for subsection (1):

'(1) Subject to section 100 of the Act of 2019 and subsection (1A) (b), the court shall, in assessing damages in a personal injuries action commenced on or after the date on which section 99 of that Act comes into operation—

(a) have regard to the personal injuries guidelines (within the meaning of that Act) in force, and

(b) where it departs from those guidelines, state the reasons for such departure in giving its decision.',

(b) the insertion of the following subsection after subsection (1):

'(1A) The court shall have regard to the Book of Quantum in assessing damages in a personal injuries action where the action is commenced—

(a) before the date on which section 99 of the Act of 2019 comes into operation, or

(b) on or after the date on which that section comes into operation in relation to a relevant claim where—

(i) an assessment was made under section 20 of the Act of 2003 in relation to that claim before the date of such coming into operation, and

(ii) that assessment was not, or was deemed not to have been, accepted in accordance with that Act.',

(c) in subsection (2)—

(i) the substitution of 'Subsection (1A)' for 'Subsection (1)', and

(ii) the substitution of 'in a personal injuries action to which that subsection applies' for 'in a personal injuries action', and

(d) the substitution of the following subsection for subsection (3):

'(3) In this section— 'Act of 2019' means the Judicial Council Act 2019; 'assessment' has the same meaning as it has in section 20(1) of the Act of 2003; 'Book of Quantum' means the Book of Quantum that, immediately before the coming into operation of section 99 of the Act of 2019, stands published by the Personal Injuries Assessment Board under the Act of 2003; 'relevant claim' has the same meaning as it has in section 9 of the Act of 2003.'.",

and

(b) the insertion of the following section after section 99:

“Consideration of personal injuries guidelines as amended in certain circumstances

100. (1) Where the Council adopts amendments under section 7(2)(g)(ii) to the personal injuries guidelines, for the purposes of section 22(1) of the Civil Liability and Courts Act 2004 the court shall continue to have regard to the personal injuries guidelines in force immediately prior to the adoption of the guidelines as amended in assessing damages in a personal injuries action where the action is commenced—

(a) before the date on which the guidelines as amended are adopted, or

(b) on or after the date on which the guidelines as amended are adopted in relation to a relevant claim where—

(i) an assessment was made under section 20 of the Act of 2003 in relation to that claim before the date of such adoption, and

(ii) that assessment was not, or was not deemed to have been, accepted in accordance with that Act.

(2) In this section—

‘Act of 2003’ means the Personal Injuries Assessment Board Act 2003;

‘assessment’ has the same meaning as it has in section 20(1) of the Act of 2003;

‘relevant claim’ has the same meaning as it has in section 9 of the Act of 2003.”.”

Section 31 of the Family Leave and Miscellaneous Provisions Act 2021 amending section 20 of the Personal Injuries Assessment Board Act 2003

"31. Section 20 of the Personal Injuries Assessment Board Act 2003 is amended by—

(a) in subsection (4), the substitution of "Subject to subsection (5), an assessment shall be made" for "An assessment shall be made", and

(b) the insertion of the following subsection after subsection (4):

"(5) In making, on or after the date of coming into operation of section 99 of the Judicial Council Act 2019, an assessment in relation to a relevant claim of the amount of damages for personal injuries the claimant is entitled to, assessors shall—

(a) have regard to the personal injuries guidelines (within the meaning of that Act) in force, and

(b) where they depart from those guidelines, state the reasons for such departure and include those reasons in the assessment in writing under section 30(1).".