AN CHÚIRT UACHTARACH

THE SUPREME COURT

Charleton J.

Hogan J.

Murray J.

Collins J.

Whelan J.

Faherty J.

Haughton J.

BETWEEN

BRIDGET DELANEY

Applicant

AND

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

Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 9 April 2024

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BACKGROUND

1. This is not the first significant constitutional action to come before this Court that has its origins in an apparently unremarkable slip and fall on a public footpath. As was the case in *Byrne v Ireland* [1972] IR 241, an unfortunate but commonplace accident has given rise to a far-reaching constitutional claim, one involving a sweeping challenge to the personal injuries guidelines adopted by the Judicial Council on 6 March 2021 ("*the Guidelines*") and the legislative framework in which they were adopted and operate, and raising important constitutional issues relating to (*inter alia*) the separation of powers and the independence of the judiciary.

2. The background must be set out in some detail if the legal issues presented are to be properly identified and understood.

3. On 12 April 2019, the Plaintiff (hereafter "*Ms Delaney*" or "*the Plaintiff*") was injured when she fell on a public footpath in Dungarvan, Co. Waterford. She grazed her knee and, more significantly, suffered an undisplaced fracture of the tip of her right lateral malleolus (a small bone on the inner side of the ankle). As a result, she to wear a walker boot for approximately four weeks and was advised that she would have swelling in her ankle for approximately six to nine months. She was advised by her orthopaedic surgeon that she would have no significant long-term *sequelae*.

4. Ms Delaney believed that her fall had been caused by a defect in the footpath. She consulted a solicitor and was advised that she had grounds for bringing a claim for

damages for personal injuries against the local authority, Waterford City and County Council ("*the Local Authority*"). However, because of the provisions of Part 2, Chapter 1 of the Personal Injuries Assessment Board Act 2003 ("*the PIAB Act*"), Ms Delaney could not simply issue proceedings against the Local Authority. Rather, she was first required to apply to the first respondent, the Personal Injuries Assessment Board ("*PIAB*")[1] for an assessment of her claim. Ms Delaney duly sent in an application for assessment to PIAB on 29 May 2019, which was received by it on 4 June 2019.

5. Part 2, Chapter 2 of the PIAB Act sets out how claims are to be assessed by PIAB. PIAB does not consider issues of liability and so section 20(1) requires it to assess damages on the *assumption* that the respondent is fully liable to the claimant. As for the basis for assessing damages, section 20(4) of the PIAB Act, as it stood in May/June 2019, provided that an assessment was to be made "*on the same basis and by reference to the same principles governing the measure of damages in the law of tort and the same enactments as would be applicable in an assessment of damages were proceedings to be brought in relation to the relevant claim concerned*." In other words, PIAB was required to make its assessment on the same basis as a court hearing a personal injuries action.

6. One of PIAB's statutory functions was "*to prepare and publish a document (which shall be known as the "Book of Quantum") containing general guidelines as to the amounts*

[1] PIAB was renamed the Personal Injuries Resolution Board by section 2 of the Personal Injuries Resolution Board Act 2022 which commenced on 12 December 2023 (SI 626/2023). However, all of the parties referred to it as PIAB and I follow that usage in this judgment.

that may be awarded or assessed in respect of specified types of injury": section 54(1)(b) of the PIAB Act. Section 22(1) of the Civil Liability and Courts Act 2004 ("*the 2004 Act*") – once again as it stood in May/June 2019 – provided that a court "*shall, in assessing damages in a personal injuries action, have regard to the Book of Quantum*". Section 22(2) of the 2004 Act must also be noticed, given the emphasis placed on it in argument. As enacted, it provided that subsection (1) – the requirement to have regard to the Book of Quantum – "*shall not operate to prohibit a court from having regard to matters other than the Book of Quantum when assessing damages in a personal injuries action*."

7. Although section 22 of the 2004 Act made no reference to PIAB, the effect of section 20(4) of the PIAB Act was to apply section 22 to PIAB so that, in making an assessment, PIAB too was obliged "*to have regard*" to the Book of Quantum but was entitled to have regard to other matters also.

8. The version of the Book of Quantum in place when Ms Delaney applied to PIAB for assessment of her claim was that published in 2016. In respect of "*minor*" fractures of the foot (a category said to include "*non-displaced fractures to a single bone in the foot with no joint involvement which have substantially recovered*") the Book of Quantum indicated that the applicable range for general damages was €18,000 - €34,900, whereas the range indicated for "*moderate*" injuries (described as including "*displaced fractures to a single bone in the foot, or nondisplaced fractures to multiple bones with a full recovery expected with treatment*") was €34,000 - €61,200.

9. For a number of reasons, including the Covid-19 pandemic, PIAB's assessment of Ms Delaney's claim took a considerable time to finalise. The assessment was ultimately made on 14 May 2021 and her solicitor received notification of it on 17 May 2021 ("*the PIAB Assessment*"). The assessment was in the amount of €3,000 (plus €937 in respect of fees and expenses incurred by Ms Delaney).

10. As will be obvious, the PIAB Assessment was significantly outside the range of damages indicated by the Book of Quantum. I shall shortly explain the basis for the PIAB Assessment and also identify the legal issues that it gives rise to but, in essence, the lower amount resulted from the fact that, in making the assessment, PIAB had regard to the Guidelines rather than to the Book of Quantum.

11. Ms Delaney was not obliged to accept the PIAB Assessment and did not in fact do so. The PIAB Act provides that, where an assessment is not accepted, PIAB must issue an "*authorisation*", authorising the bringing of personal injuries proceedings in court. PIAB issued such an authorisation in respect of Ms Delaney's claim and she then commenced proceedings against the Local Authority. Those proceedings have yet to be determined. That is significant, in at least two respects. First, the issue of the liability (if any) of the Local Authority to Ms Delaney has yet to be decided. It follows that Ms Delaney's entitlement (if any) to recover *any* damages is uncertain. Secondly, on the assumption that the Local Authority is found to be liable to compensate Ms Delaney, there has been no *judicial* determination of the general damages appropriate to award to her. These are important matters which I will come back to discuss.

The 2019 Act and the Adoption of the Guidelines

12. The statutory framework is intricate and, unfortunately, it cannot readily be condensed or simplified.

13. The Judicial Council Act 2019 *(*"*the 2019 Act*") was enacted on 23 July 2019. It provided for the establishment of the Judicial Council ("*the Council*"), a new body comprising all serving judges in the State. Councils of the judiciary "*are, in accordance with Council of Europe standards, independent bodies that seek to safeguard the independence of the judiciary and of individual judges in order to promote the efficient functioning of the judiciary in dealing with matters, such as appointments, disciplinary measures and education with the judiciary*". The establishment of such a council in the State had long been advocated by bodies such as the Group of States Against Corruption (Greco).[2] The Council was therefore established as a vehicle for the protection and promotion of judicial independence in the State, as is reflected in the fact that its statutory functions include promoting and maintaining "*respect for the independence of the judiciary*" (section 7(1)(e)) and "*public confidence in the judiciary and the administration of justice*" (section 7(1)(f)).

[2] See *Fourth Evaluation Round, Evaluation Report Ireland* (Greco Eval IV Rep (2014) 3E (published 21 November 2014), at paras 124-124 (citing Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities). This international context was considered in some detail, in the context of judicial appointment, in this Court's judgment in *Re Article 26 and The Judicial Appointments Commission Bill 2022* [2023] IESC 34.

14. The 2019 Act confers various functions on the Council. It is required to adopt (and has in fact adopted) the guidelines concerning judicial conduct and ethics to which Haughton J refers in his judgment (section 7(2)(d)). In similar terms, the Act requires the Council to adopt "*personal injuries guidelines*" (section 7(2)(g)). The Act provides for the preparation of draft guidelines by the personal injuries guidelines committee (a committee of the Council provided for by section 18 of the 2019 Act) ("*the Committee*") and for the review and, if appropriate, modification of such draft guidelines by the Board of the Judicial Council (section 11 of the 2019 Act). However, the function of *adopting* such guidelines is conferred on the Council as a whole. As enacted, section 7(2)(g) required the Council to adopt the first guidelines (provision is made separately for the amendment of existing guidelines) "*as soon as practicable, and in any event not later than 12 months, after*" the submission of draft guidelines by the Committee to the Board (similar to the timeframe for the adoption of the conduct guidelines). However, that subsection was subsequently amended so as to require the adoption of the guidelines not later than 31 July 2021.[3]

15. Section 90(1) of the 2019 Act provides that personal injuries guidelines adopted by the Council "*shall contain general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries*" (my emphasis) and goes on to specify particular matters on which the guidelines *may* include "*guidance*", including "*(a) the level of damages for personal injuries generally*" and "*(c) the range of damages to be considered for a particular injury or a particular category of injuries*." Section

[3] By the Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Records, and Another Matter, Act 2020.

90(2) and (3) then set out matters to which the Committee *shall* have regard in preparing draft guidelines and to which the Council's Board *may* have regard in reviewing such draft guidelines (a difference emphasised by the Plaintiff). Section 90(3) is central to this appeal and so I shall set it out in full:

> *"(a) the level of damages awarded for personal injuries by*
>
> *(i) courts in the State, and*
>
> *(ii) courts in such places outside the State as the Committee or the Board, as the case may be, considers relevant;*
>
> *(b) principles for the assessment and award of damages for personal injuries determined by the High Court, the Court of Appeal and the Supreme Court;*
>
> *(c) guidelines relating to the classification of personal injuries;*
>
> *(d) the need to promote consistency in the level of damages awarded for personal injuries;*
>
> *(e) such other factors that the Committee or the Board, as the case may be, considers appropriate including factors that may arise from any records, documents or information received, consultations held, research conducted or conferences, seminars or meetings organised (as referred to in section 18(7)).*"

16. Section 99 of the 2019 Act sets out the effect of the personal injuries guidelines once adopted. Again, this section is of fundamental importance for the resolution of this appeal and was the subject of detailed attention in argument. As originally enacted, section 99 proposed to make a number of amendments to section 22 of the 2004 Act so that the amended section would provide as follows:

> *"(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 injuries action."*

Subsection (2) above was referred to in argument as "*the Proviso*" and I will use that language also. According to Ms Delaney, by making it clear that courts could have regard to matters other than the guidelines, the *Proviso* made it clear that courts were not bound to follow the guidelines.

17. The 2019 Act did not make any material amendment to the PIAB Act.

18. Draft personal injuries guidelines were duly prepared by the Committee, accompanied by a detailed report ("*the Report*"). The Board approved the draft guidelines without modification and they were then submitted to the Council. As already noted, the Council voted to adopt the draft guidelines on 6 March 2021. Further reference is made below to the Committee's Report, as well as to the Guidelines themselves.

19. At the time the Guidelines were adopted on 6 March 2021, section 99 of the 2019 Act had not been commenced. Subsequently, on 27 March 2021, the Oireachtas enacted the Family Leave and Miscellaneous Provisions Act 2021. Section 30(a) of that Act amended the (then uncommenced) section 99. Section 30(a) came into operation on 24 April 2021.[4] The amended section 99 in turn amended section 22(1) of the 2004 Act by the substitution of the following subsection for it:

> *"(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*

[4] SI 180/2021.

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

20. The amended Section 99 also inserted a new subsection (1A) into section 22 as follows:

"(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."

21. Section 99 (as so amended) also amended section 22(2) of the 2004 Act by substituting for the reference to sub-section (1), a reference to sub-section (1A).[5] As a result of that amendment, the *Proviso* in section 22 applies only to those residual cases which continue to be governed by the Book of Quantum. In cases governed by the Guidelines, the *Proviso* has no application. That, according to Ms Delaney, indicates that a court is effectively precluded from having regard to matters other than the Guidelines when assessing damages in a personal injuries action pursuant to section 22(1) of the 2004 Act. That is a matter of significant dispute.

22. The full text of section 22 (as amended) is set out in Annex 1 to this judgment. I draw attention to the fact that the amendments to that section made by section 99 of the 2019 Act (as amended by the Family Leave and Miscellaneous Provisions Act 2021) were made by the Oireachtas *after* the adoption of the Guidelines and those amendments must, in my view, be taken to have been made in the knowledge of what the Guidelines provided.

23. The Family Leave and Miscellaneous Provisions Act 2021 also amended section 20(4) of the PIAB Act (set out in paragraph 5] above) so as to provide that its provisions were subject to section 20(5) and also by inserting a new subsection (5) as follows:

[5] So that section 22(2) of the 2004 Act reads "*(2) Subsection (1A) 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*."

"(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)"

These amending provisions also came into operation on 24 April 2021. Section 20 as so amended is set out in full in the Annex 1. The effect of these amendments was to apply the already-adopted Guidelines directly to the PIAB assessment process. Again, the fact that the Oireachtas elected to apply the Guidelines to PIAB in this way is significant.

24. Section 99 of the 2019 Act (as amended) also came into operation on 24 April 2021.[6] As of that date, the amended section 22 of the 2004 Act (in the form set out in the Annex) came into force, as did amended section 20 of the PIAB Act (again, in the form set out in the Annex). So, at the time that these amended provisions were enacted and

[6] SI 182/2021

commenced, the Guidelines had already been adopted by the Council and the provisions took effect by reference to the Guidelines as thus adopted.

25. The Assessment issued on 14 May 2021. In assessing the Plaintiff's application, PIAB had regard to the Guidelines and not to the Book of Quantum. That was the basis for the assessment of general damages at €3,000. PIAB proceeded in that way because it took the view that the Plaintiff's claim did not come within the transitional provisions in section 22(1A) of the 2004 Act and therefore fell to be assessed by reference to the Guidelines. Whether PIAB was correct to take that approach is an issue in this appeal. In any event, applying the Guidelines, PIAB through its assessors took the view that the injury Ms Delaney had suffered was a "*minor*" ankle injury involving a "*less serious, minor or undisplaced fracture*" where a substantial recovery had been made within six months. The Guidelines indicate a range between €500 - €3,000 for that type of injury. Ms Delaney's injury was placed at the top of that range or bracket. The evidence of PIAB's assessors is that they considered whether to depart from the Guidelines but determined that it was not necessary to do so.[7]

26. As already noted, Ms Delaney did not accept the Assessment and subsequently issued proceedings against the Local Authority. These remain pending.

[7] Affidavit of Suzanne Hill sworn on 2 December 2021, at para 11.

THE PROCEEDINGS AND THE GROUNDS ADVANCED

27. These proceedings issued in July 2021. Different grounds are advanced against the different Respondents. In broad summary, Ms Delaney makes the following case against each Respondent:

(A) The Case Against PIAB

28. Ms Delaney says that PIAB erred in assessing her claim by reference to the Guidelines. On her case, the assessment of her claim took place – or at least had commenced and was actively underway – prior to 24 April 2021 (when the Guidelines came into force and new section 20(5) of the PIAB Act came into operation) and therefore (so it is said) the assessment ought to have been carried out by reference to the Book of Quantum. Secondly, Ms Delaney says that PIAB's procedures were unfair in that, even if (contrary to her first contention) her claim properly fell to be assessed by reference to the Guidelines, she ought to have been given an opportunity to make the case that PIAB should depart from the Guidelines, as it was entitled to do under section 20(5).

(B) The Case against Ireland and the Attorney General ("the State")

29. As against the State, Ms Delaney asserts the unconstitutionality of the relevant provisions of the 2019 Act on a number of grounds.

30. *First*, Ms Delaney contends that those provisions involved the delegation of law-making power to the Committee, the Board and the Council in a manner repugnant to Article 15.2 of the Constitution. On her case, the provisions of the 2019 Act do not contain any sufficient statement of "*principles and policies*" to delimit the powers delegated under the Act and effectively confer unfettered discretion, on the Council and its organs, without any oversight or control being retained by the Oireachtas.

31. *Second*, Ms Delaney contends that the Guidelines constitute an invasion of the judicial power, of the kind condemned in *Buckley v Attorney General* [1950] IR 67 and *State (McEldowney) v Kelleher* [1983] IR 289. In that regard, Ms Delaney places significant reliance on the amendment to section 99 of the 2019 Act made after the adoption of the Guidelines. The effect of that amendment was to remove "*the Proviso*" in section 22(1) of the 2004 Act (as it was proposed to be amended by section 99 of the 2019 Act) for the purpose (so the Plaintiff says) of restricting the scope for judges to depart from the Guidelines. The essence of the Plaintiff's case here is that the Guidelines operate as an improper fetter on judges in awarding appropriate compensation to claimants in personal injury actions.

32. *Third*, Ms Delaney contends that the provisions of the 2019 Act relating to the adoption of personal injury guidelines, and in particular the involvement of the judiciary in that process, violate fundamental principles of the separation of powers and the independence of the judiciary. According to Ms Delaney, the 2019 Act effectively co-opts and/or conscripts the judiciary and enmeshes it in complex and controversial

political, social, and economic issues regarding the appropriate level of awards in personal injuries litigation in a manner which undermines judicial independence.

33. The *fourth* broad ground advanced against the State is that the 2019 Act, in providing for the making of the Guidelines and prescribing their effect, amount to an unconstitutional interference with Ms Delaney's personal rights to bodily integrity, property, right of access to the courts and equality. On her case, the Guidelines depart substantially from what had previously been determined by the courts to be the appropriate "*scale*" of damages and did so in an impermissible manner, having regard to the proportionality test set out in *Heaney v Ireland* [1994] 3 IR 593 (which, the Plaintiff says, is the appropriate test to apply rather than the test in *Tuohy v Courtney* [1994] 3 IR 1 which she criticises as being overly deferential to the legislature).

34. The *fifth* and final ground of challenge *vis-à-vis* these Respondents (which is closely connected to the fourth ground above) relates to retrospection/retrospective effect. Ms Delaney contends that, on the date of her accident, she acquired a right to sue for damages in respect of her injuries. She acquired an additional vested statutory right to have her claim assessed by PIAB in accordance with the ordinary principles governing tort damages at the latest on 9 March 2020 (when PIAB proceeded to assess her claim in the absence of any response from the Council). Any interference with those rights arising from a retrospective application of the 2019 Act requires justification and, according to Ms Delaney, the State has failed to identify any adequate justification for the interference here.

(C) The Case Against the Judicial Council

35. The case against the Council is that in exercising its statutory functions under the 2019 Act it (and/or the Committee and the Board) acted *ultra vires* by (i) wrongly proceeding on the assumption that the purpose of the Act was to reduce the level of damages in the State; (ii) having regard to irrelevant considerations by adopting guidelines intended to align damage for personal injuries in the State with other jurisdictions (and also acting in an unreasonable manner in the selection of the relevant foreign comparators) and (iii) failing to have proper regard to the Book of Quantum and court awards (and wrongly limiting its assessment to decisions from courts between 2017-2020).

36. All of these claims were vigorously disputed by the respective Respondents.

THE HIGH COURT JUDGMENT

37. Following a 7-day hearing, the High Court (Meenan J) gave judgment on 2 June 2022 ([2022] IEHC 321) in which he refused all of the reliefs sought by Ms Delaney.

38. Meenan J considered the principles that the courts had applied in assessing awards of general damages in personal injury actions, referring (*inter alia*) to the judgment of Irvine J in the Court of Appeal in *Nolan v Wirenski* [2016] IECA 56, [2016] 1 IR 461 to which further reference will be made below. He also referred the Report of the Law Reform Commission (LRC) Report entitled *Capping Damages in Personal Injuries Actions*[8] (hereafter "*the LRC Capping Report*") and set out in detail the relevant provisions of the 2019 Act as well as referring to the Guidelines. While noting the need to treat with caution the general statement that the Guidelines had considerably reduced the level of damages, given the comparatively limited type of injury that had been provided for in the Book of Quantum, Meenan J did note that the values placed on a considerable number of "*mid-range*" injuries in the Guidelines were reduced from the values for similar injuries in the Book of Quantum (para 18).

39. The Judge then addressed the case against the State. As to the argument that there had been an impermissible delegation of the law-making power to the Judicial Council under the 2019 Act (which he referred to as the "*Principles and Policies*" ground), the Judge discussed *Cityview Press v AnCo* [1980] IR 381, *Bederev v Ireland* [2016] IESC

[8] LRC 126-2020.

34, [2016] 3 IR 1, *Naisúnta Leictreacht (NECI) v Labour Court* [2021] IESC 36, [2022] 3 IR 515, [2021] 2 ILRM 1, as well as the decision of the United States Supreme Court in *Mistretta v United States* (1989) 488 US 361. The Judge then looked at section 90 of the 2019 Act which has been set out above. In his view, the provisions of section 90(3) and in particular (3)(a) & (b), laid down the "*basic, discernible rules of conduct or guidelines which the subordinate body must observe*" and the Committee were not at large to develop new principles for the award of damages nor were they without specific direction or guidance in drawing up the Guidelines (para 34). Looking at the breadth and detail of the various injuries and their classification in the Guidelines, it was, he said, difficult to see how any more detailed guidance could have been given by the Oireachtas (para 35). The need to promote consistency (section 90(3)(d)) was a further "*principle and policy*" (para 36). Overall, the Judge was satisfied that section 90 set out in sufficient detail the "*principles and policies*" for the drawing up of the personal injuries guidelines under the Act (para 37).

40. Meenan J next addressed the argument that the relevant provisions of the 2019 Act were unconstitutional as being contrary to the constitutional protection of the independence of the judiciary. He noted that section 22 of the 2004 Act, as amended by the 2019 Act, referred to the personal injuries guidelines and imposed a new requirement for a court to state its reasons for departing from the guidelines. While no such requirement to state reasons had applied where a court was departing from the Book of Quantum, the Judge noted that in *McKeown v Crosby* [2020] IECA 242 the Court of Appeal had indicated that it was desirable for the court to provide reasons when it did so. The Judge then addressed the argument based on the disapplication of the "*Proviso*" and the implication

said to follow for the entitlement of courts to depart from the Guidelines. He noted that the amended section 22 clearly permitted a court to depart from the Guidelines and did not limit the circumstances in which it could do so but required reasons to be given. Reasons had to be "*rational, cogent and justifiable*" but were not limited by the absence of "*the Proviso*". Courts could have regard to matters other than the Guidelines (para 43). The Judge did not agree with the view expressed by the Committee that "*exceptional circumstances*" were required in order to depart from the Guidelines. That was, in his view, "*unduly restrictive*" and he preferred to rely on the wording of section 22 stating that a court can depart from the Guidelines but must give reasons for doing so (para 44).

41. Other aspects of the judicial independence issue were addressed by the Judge within the rubric of the case against the Judicial Council and are discussed to in that context below.

42. As to retrospection, the Judge accepted that, if Ms Delaney proceeded to court, any damages would be assessed by reference to the Guidelines rather than the Book of Quantum and that would mean that she would undoubtedly receive a lesser award than she would if the Book of Quantum applied (para 46). But in the Judge's view, Ms Delaney only had the right to have her damages assessed in accordance with law and did not have any right to any particular award as might be provided for in the Book of Quantum (para 47). Awards of general damages varied over time and, in contrast to the position in *Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105,

no right to damages enjoyed by Ms Delaney had been extinguished either by the 2019 Act or the Guidelines (para 49).

43. Finally, Meenan J considered Ms Delaney's contention that there had been an unconstitutional interference with her personal rights to bodily integrity, property, right of access to the courts and equality (referred to by him as the *"Proportionality/Rationality*" ground). He noted that Ms Delaney relied on *Tuohy v Courtney.* Having cited a passage from the judgment of the Supreme Court (given by Finlay CJ), the Judge stated that it was clear from the principles that apply to the award of general damages that the interests of society were involved as well as the particular interests of the plaintiff and defendant. It followed that the rights of an individual plaintiff might have to give way to the rights of many. The Judge cited *Yun v Motor Insurers' Bureau of Ireland* [2009] IEHC 318 – where the court had regard to "*prevailing and anticipated economic conditions*" in setting the "*cap*" on general damages – as illustrating that proposition. In his view, the reduction in the amounts that may be awarded under the Guidelines could not be said to be so "*contrary to reason and fairness as to constitute an unjust attack"* on Ms Delaney's constitutional rights (para 50). As for the test of proportionality referred in *Heaney*, proportionality did not arise because Ms Delaney had had no right to the award indicated by the Book of Quantum. In any event, a court assessing damages under the Guidelines could depart from them on giving reasons (para 51).

44. The Judge then turned to the case against the Council. He noted that there was an overlap between that case and the case being made against the State. Noting the

provisions of Article 35.2 and 35.3 of the Constitution, the Judge noted that judges could undertake non-judicial functions and functions not involving the administration of justice (citing *McDonald v Bord na gCon* [1965] IR 217, per Kenny J at 230) (para 54). The framers of the 2019 Act were clearly conscious that some of the functions and duties of the Council might be perceived as an encroachment on judicial independence and thus had enacted section 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*"). That section was not one of limited application as Ms Delaney had suggested in argument (para 55). Judges' independence, allied to their professional knowledge and experience in assessing and making awards for personal injuries, made them particularly suitable for the task of drawing up guidelines for personal injuries (para 56).

45. The Judge then addressed and rejected a series of specific complaints as to the manner in which the Council and its constituent bodies had gone about drawing up the Guidelines. First, he rejected a suggestion that the Council and the Committee had proceeded on the basis that the purpose of the Guidelines was to reduce the level of damages. Insofar as the Guidelines provided for reduced awards, that was the result of the Committee complying with the criteria in section 90 of the 2019 Act (paras 60 and 61). Second, the Council and the Committee had not unlawfully sought to bring awards of damages in this jurisdiction "*into kilter*" with awards in other jurisdictions. Section 90(3)(a) specifically referred to levels of damages awarded outside the State as the Committee considered relevant and the Committee was entitled to consider awards in Irish courts in the context of other jurisdictions which they considered relevant and to

set the level of awards accordingly (para 64). He saw no force in the complaint that judges from the District and Circuit Courts should not have been permitted to vote on the levels of award outside the jurisdiction of their respective courts (para 65). Finally, the Committee's decision to focus on awards in the period 2017 – 2021 was not irrational or unreasonable as that constituted the most up-to-date information (para 66) and it had not erred in its treatment of the Book of Quantum, which it had considered but which it decided not to use as a starting point, a decision which was within its lawful discretion (para 67).

46. Finally, Meenan J addressed the case against PIAB. In his view, PIAB had made its assessment on 13 May 2021, not on any earlier date and, as of the date of that assessment, section 20(5) of the Act required PIAB to carry out its assessment by reference to the Guidelines, not the Book of Quantum. In his view, the arguments to the contrary would, if accepted, conflate the distinction in the Act between "*application*" and "*assessment*". The Judge was satisfied that Ms Delaney had no statutory entitlement to have her claim assessed under the Book of Quantum nor any constitutional or legal right to such (para 77). As regards the fair procedures issues, Meenan J was of the view that the Personal Injuries Assessment Board Rules 2019 (SI 140/2019) were broad enough to permit a claimant to make the case to PIAB that the Guidelines ought not to be followed in their particular case. Thus, Ms Delaney had had an opportunity to make her case to PIAB (para 79).

47. By Order of the High Court made 29 July 2022 (perfected on 16 August 2022) the proceedings were dismissed.

THE ISSUES ON APPEAL

48. The Court granted leave for a direct appeal from the High Court (Determination of 25 November 2022 ([2022] IESCDET 133).

49. Detailed written submissions were delivered on behalf of all parties and the Court heard oral submissions from the parties over two days.

50. While the Court was in the process of finalising its decision on the appeal, it decided to request the parties to address an issue which had been raised at the hearing of the appeal but which had not been the subject of any detailed submissions. That issue was whether the amendments to section 99 of the 2019 Act and section 20 of the PIAB Act contained respectively in sections 30 and 31 of the Family Leave and Miscellaneous Provisions Act 2021 amounted to an effective *post-hoc* ratification or confirmation by the Oireachtas of the Guidelines adopted on 6 March 2021. The Court received written submissions from the Plaintiff and the State directed to that issue and counsel for those parties also made oral submissions at a further hearing held for that purpose.

51. In light of the pleadings and the submissions, it appears to me that the following issues require to be addressed, in the order indicated:

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

(2) Whether PIAB was correct to apply the Guidelines when assessing Ms Delaney's application and, if so, whether it failed to act fairly ("*the PIAB Issue*").

(3) Whether the relevant provisions of the 2019 Act effect an impermissible delegation of legislative power to the Committee, the Board and/or the Council, in light of Article 15.2 of the Constitution ("*the Legislative Power Issue*").

(4) Whether the Council acted *ultra vires* the 2019 Act in adopting the Guidelines ("*the Vires Issue*").

(5) Whether imposing a mandatory obligation on judges hearing personal injury cases to "*have regard to*" the Guidelines involves an impermissible usurpation or invasion of the judicial power ("*the Judicial Power Issue*").

(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*").

(7) Whether the Guidelines infringe any of the Plaintiff's personal constitutional rights, including by reason of what is said to be their retrospective effect (the "*Personal Rights Issue*").

and, in light of the further issue raised by the Court,

(8) Whether the effect of sections 30 and 31 of the Family Leave and Miscellaneous Provisions Act 2021 was to ratify or confirm the Guidelines adopted on 6 March 2021 and, if so, what was the effect of that ratification or confirmation ("*the Confirmation Issue*")

52. In my view, the status and effect of the Guidelines impacts significantly on all the other issues and it therefore seems sensible to address it first. The PIAB issue is addressed next as, if Ms Delaney is successful on that issue, it may not be necessary to address the constitutional issues (in accordance with the rule of self-restraint identified in decisions of this Court such as *Murphy v Roche* [1987] IR 106, *McDaid v Sheehy* [1991] 1 IR 1 and *Carmody v Minister for Justice* [2010] 1 IR 635). Issues (3) – (6) are directed to the fundamental validity of the Council's power to adopt the Guidelines and/or to the validity of the Guidelines themselves. In contrast, issue (7) as it was argued is primarily directed to whether the Guidelines apply and/or can properly apply to persons in the particular position of the Plaintiff here, i.e. persons who had suffered an injury and who had made an application for assessment in accordance with the PIAB Act *before* the Guidelines came into operation.

53. As regards the Confirmation Issue, *McDaid v Sheehy* [1991] 1 IR 1 suggests that it should in fact be addressed *before* issues (3) – (6), on the basis that, if the effect of the 2021 Act was to indeed to confirm the Guidelines (as a majority of the Court has in fact concluded), then it might be possible to avoid those issues. But the position here is rather different from that in *McDaid v Sheehy*. In *McDaid v Sheehy* this Court held that the High Court had been wrong to address the Article 15.2 issue in circumstances where

the State had argued – and the High Court agreed – that the impugned order had been confirmed. Here, in contrast, the issue of confirmation was not raised in the High Court and there can therefore be no suggestion that the Judge erred in addressing the constitutional issues. There is a High Court judgment that decides those issues. That being so, and having regard to the significance of the constitutional issues and to the fact that those issues will inevitably present themselves again – given that the 2019 Act requires the adoption of amended personal injury guidelines from time to time and also requires the Council to adopt sentencing guidelines which are liable to challenge on precisely the same basis as the challenge to the Guidelines here – the rule of self-restraint must yield to the necessity to provide certainty. In any event, my colleagues address the constitutional issues in their judgments and in the circumstances I am compelled to do so also. I will therefore deal with the Confirmation Issue last.

ANALYSIS

54. Before further considering the issues just identified, I propose to discuss (1) the presumption of constitutionality and (2) the principles governing the assessment of damages for personal injuries in this jurisdiction and, against that backdrop, to say something more about the Guidelines and their adoption.

The Presumption of Constitutionality

55. That the 2019 Act enjoys the presumption of constitutionality is not in dispute. In *Pigs Marketing Board v Donnelly* [1939] IR 413, Hanna J stated that "*it must ... be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established*" (at 417). The principle was affirmed the following year by this Court in *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470 (at 478) and affirmed in many subsequent decisions.

56. A fundamental aspect of that presumption is that it is to be presumed that the provisions of the 2019 Act will not be administered or applied in a way which will infringe constitutional rights: see, for example, the decision of this Court in *McMahon v Leahy* [1984] IR 525, *per* Henchy J at 541. That presumption encompasses all "*proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed*" by the Act (*East Donegal Co-Operative v Attorney General* [1970] IR 317)

which, in the circumstances here, includes the functions of the Committee, the Board and the Council relating to the adoption of personal injury guidelines under the Act.

57. A further aspect of the presumption is a post-1937 enactment will not be declared invalid where it is possible to construe it in accordance with the Constitution. This, the "*double construction rule*", was considered at length in this Court's recent decision in *A, B, and C (a minor) v Minister for Foreign Affairs and Trade* [2023] IESC 10, [2023] 1 ILRM 335.

The Principles Governing the Assessment of Damages for Personal Injuries

58. While the Oireachtas has legislated to regulate procedural aspects of personal injury claims (as with the 2004 Act and the PIAB Act) and also to restrict the circumstances in which certain claims may be maintained (as for instance with the Occupiers Liability Act 1995 (as amended)) and/or to limit the amount of recoverable damages in certain circumstances (as with section 49 of the Civil Liability Act 1961), it has not, at least to date, legislated to regulate or prescribe the level of general damages in personal injury actions (though legislative proposals to do have been made from time to time).[9] Such damages are determined by judges on a case-by-case basis (as least since the abolition of juries by the Courts Act 1988) on the basis of general principles which have themselves been identified and developed by the courts. In other words, this area of the

[9] See for example the Civil Liability (Capping of General Damages) Bill 2019 which proposed to confer on the Minister for Justice the power to make regulations prescribing the maximum level of general damages which may be awarded to a claimant who has suffered personal injury.

law is entirely judge-made. The legislature has, it seems, been content to leave the assessment of general damages for personal injury to judges. That is highly significant in considering the Plaintiff's contention that the provisions of the 2019 Act mandating the adoption of personal guidelines by the judiciary collectively (in the form of the Judicial Council) and/or the Guidelines actually adopted by the Council lack "*democratic legitimacy*" or trespass into an area of exclusive legislative competence.

59. General damages (often referred to as damages for pain and suffering) are distinct from special damages, which are intended to compensate a claimant for actual or anticipated pecuniary loss or expense resulting from the personal injuries sustained by them, such as loss of earnings, medical and related expenses and, in cases of serious injury, the cost of personal care.[10] As a matter of principle – subject to any issue of remoteness or contributory negligence – such losses and expenses are fully recoverable from the wrongdoer. General damages are over and above such indemnity for any proven financial loss and expense. That important point has been consistently emphasised in cases from *Reddy v Bates* [1983] IR 141, through *Sinnott v Quinnsworth* [1984] ILRM 523 to *Morrissey v HSE* [2020] IESC 6. These proceedings, and this appeal, are concerned only with general damages/damages for pain and suffering and nothing in the Guidelines affects the entitlement of a successful personal injury plaintiff to full recovery of past and future financial loss.

[10] While older usage treats compensation for *future* financial loss as an element of *general* damages – *British Transport Commission v Gourley* [1956] AC 185, at page 206 – modern usage is to describe such compensation as *special* damages. Thus the "*cap*" on general damages has no application to damages for future financial loss or expense nor do guidelines adopted under section 7 of the 2019 Act have any application to such damages.

60. General damages for personal injury "*are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life which the injury has caused and will cause to the plaintiff*": *Sinnott v Quinnsworth* at 523 (per O' Higgins CJ). While the animating principle is that of *restitutio in integrum*, as has often been observed, it is difficult, if not impossible, to meaningfully translate pain and suffering into a monetary amount: "*there is no standard by which pain and suffering, facial disfigurement or, indeed, any continuing disability can be measured in terms of money*" (*Foley v Thermocement Products Ltd* (1956) 90 ILTR 92, at 94 (per Lavery J)). As the Court of Appeal (per Irvine J) aptly observed in *Nolan v Wirenski*, "*[t]he assessment of damages in personal injury cases is not a precise calculation; it is not precise and it is not a calculation*" (para 26). For that very reason, the assessment of general damages presents significant challenges in terms of achieving consistency, predictability and fairness. Even so, the importance of those objectives has been repeatedly emphasised by our courts.

61. Significantly, the courts have consistently recognised that the assessment of damages involves interests beyond the private interests of the parties concerned and implicates important societal interests also. Thus, in *MN v SM (Damages*) [2005] IESC 17, [2005] 4 IR 461, this Court (per Denham J, as she then was) identified the following factors to be considered when assessing the level of general damages:

> *"Thus an award of damages must be proportionate. An award of damages must be fair to the plaintiff and must also be fair to the defendant. An award should*

> *be proportionate to social conditions, bearing in mind the common good. It should also be proportionate within the legal scheme of awards made for other personal injuries. Thus the three elements, fairness to the plaintiff, fairness to the defendant and proportionality to the general scheme of damages awarded by a court, fall to be balanced, weighed and determined."* (para 38)

Later in her judgment, Denham J emphasised that "*there should be a rational relationship between awards of damages in personal injuries cases*" (para 44).

62. In *Kearney v McQuillan* [2012] IESC 43, [2012] 2 ILRM 377, this Court (per McMenamin J) referred to *MN v SM* and stated it was important to recollect the "*criteria of social conditions and common good*", emphasising that:

> *"These are not just empty words. The resources of society are finite. Each award of damages for personal injuries in the courts may be reflected in increased insurance costs, taxation, or, perhaps, a reduction in some social service. We are living in a time where ordinary people often find it difficult to make ends meet. The weight to be given to each of these factors must always be a consideration in the balance."* (page 387)

63. These are important statements, which are paralleled in the approach adopted by courts in other common law jurisdictions to the quantification of such damages: see for example, the very recent decision of the UK Supreme Court in *Hassam v Rabot* [2024] UKSC 11 in which Lord Burrows (speaking for the court) stated that "*the scale of values*

represents what the judges consider to be the fair, just and reasonable sums to award for [pain, suffering and loss of amenity]" and that "*[t]he determination of what is fair, just and reasonable takes into account the interests of claimants, defendants and society as a whole*" (at para 11). Such statements make it clear that economic factors such as increased insurance costs and the impact of awards on public resources are, as a matter of principle, relevant factors in the assessment of general damages by the courts. That was also explicitly stated by the Court of Appeal in *McKeown v Crosby* [2020] IECA 242, referred to below. That flatly contradicts a persistent theme of the Plaintiff's case, namely that such considerations fall outside the proper scope of *judicial* assessment and are solely matters for *political* judgment and that, insofar as the Committee and the Council had regard to such factors in drafting and adopting the Guidelines, they were impermissibly engaging in socio-economic policy-making (in fact the "*cap*" cases all avowedly involve consideration of socio-economic factors also – that is perhaps most clearly illustrated by *Yang*, where Quirke J heard expert evidence as to Ireland's economic history between 1984 and 2009 and as to social and economic outlooks).

64. The establishment of the Court of Appeal in 2014 provided an opportunity for a more systematic appellate review of how general damages are assessed and that court has subsequently given a number of significant judgments in this area.

65. In *Payne v Nugent* [2015] IECA 268, the court (per Irvine J; Ryan P and Peart J agreeing) emphasised the need for proportionality: while damages for pain and suffering "*must be reasonable having regard to the injuries sustained they must also be proportionate to the awards commonly made to victims in respect of injuries which are*

of significantly greater or lesser import" (para 19). While noting that it could not be stated that there was a "*cap*" on general damages for pain and suffering, Irvine J observed that there was at least a perception "*that the very upper range for compensation of this type*" rested in or around the €400,000 mark. Assessing an award for a lesser kind of injury against that level of award could provide a "*benchmark by which the appropriateness of the award made may helpfully be evaluated*." She continued:

> *"18 For my part I fear there is a real danger of injustice and unfairness being visited upon many of those who come to litigation seeking compensation if those who suffer modest injuries of the nature described in these proceedings are to receive damages of the nature awarded by the trial judge in this case. If modest injuries of this type are to attract damages of €65,000 the effect of such an approach must be to drive up the awards payable to those who suffer more significant or what I would describe as middle ranking personal injuries such that a concertina type effect is created at the upper end of the compensation scale of personal injuries. So for example the award of general damages to the person who loses a limb becomes only modestly different to the [] award made to the quadriplegic or the individual who suffers significant brain damage and in my view that simply cannot be just or fair."*

Ultimately, the total award for pain and suffering made by the High Court was reduced by nearly half, from €65,000 to €35,000.

66. The award made by the High Court was again significantly reduced on appeal in *Nolan v Wirenski*. Again, the Court of Appeal's judgment was given by Irvine J (Ryan P and Peart J agreeing). She identified the purpose of an award of damages for personal injuries as being to provide "*reasonable compensation*" for past and anticipated future pain and suffering. The process of assessment was objective and rational but also personal to the particular plaintiff. While it was reasonable to look for consistency as between awards in similar cases, the same kind of injury could impact differently on different persons and, therefore, the court should not have the aim of achieving "*a standard figure*" (para 27). Later in her judgment, she stated that:

> *"33. Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes everything from the most minor to the most serious injuries.*
>
> *34. It can however generally be said that insofar as cases which involve catastrophic or life changing injury have come before the courts in recent years, the level of general damages awarded in respect of injuries of this type has generally been somewhere in or around €450,000. That is not to say that €450,000 is a maximum. There has been the rare case in which a sum in excess of that figure has been awarded."*

Irvine J then addressed – and rejected as being incorrect in principle – the suggestion that the "*notional maximum award of €450,000 in cases of extreme or catastrophic injury*" was less than would otherwise be the case because the plaintiff in such a case would also receive a very large sum in respect of special damages, emphasising that general damages fell to be "*assessed entirely separately*" from the calculation of special damages (para 34). She continued:

> *"40. Moving back to the present case, the essential point is that it is reasonable to seek to measure general damages by reference to a notional scale terminating at approximately the current maximum award endorsed by the Supreme Court which is in or about €450,000. That is the figure generally accepted by senior practitioners and judges alike as the appropriate level for compensation for pain and suffering in cases of extreme or catastrophic injury. In the exercise [of] its wardship jurisdiction the High Court regularly approves settlements for injuries of this type at this level of compensation.*
>
> *41. When it comes to assessing damages I believe it is [] useful to seek to establish where the plaintiff's cluster of injuries and sequelae stand on the scale of minor to catastrophic injury and to test the reasonableness of the proposed award, or in the case of an appeal an actual award, by reference to the amount currently awarded in respect of the most severe category of injury. Such an approach should not be considered mandatory and neither does it call for some mathematical calculation; what is called for is judgment, exercised reasonably in light of the case as a whole. Not every case will be suitable for such an analysis and that is where the trial court will want to explain the reasons why*

that approach may not be suitable in the particular circumstances. However, the fact that this yardstick is not absolute and may not be of universal application in all cases does not diminish its value generally."

Nolan v Wirenski is also notable for its identification of a number of factors and features intended to guide judges in assessing the seriousness of any given injury (at para 40).

67. Similar observations were made by Irvine J (Hogan and Mahon JJ agreeing) in *Shannon v O' Sullivan* [2016] IECA 93. Again, the awards made by the High Court for general damages in favours of the two plaintiffs (a married couple involved in a road traffic accident) were very significantly reduced on appeal. Irvine J reiterated her view "*that it is reasonable to view the plaintiff's injuries in the context of the entire spectrum of personal injury claims where, at the outer end, a plaintiff might expect to recover damages somewhere in the region of €450,000*", though she accepted that there might be specific cases where a judge might rightly decide to exceed that sum (para 41). In her view that was the "*outer end*" of general damages awards and that was so whether or not the plaintiff was also entitled to significant special damages. It could not be correct in principle that a plaintiff should have their general damages reduced on the basis that they were also entitled to a very large sum in respect of special damage "*an injured person is entitled to be compensated in full for all losses flowing from the injuries he sustains. Special damages represent the calculation of actual losses, past and future, which leaves the matter of general damages to be assessed entirely separately*" (para 37).

68. Lastly, as regards decisions of the Court of Appeal, there is *McKeown v Crosby* [2020] IECA 242. It also involved a road traffic accident. Again, the award for general damages made by the High Court was significantly reduced on appeal (from €70,000 to €35,000). Noonan J gave the sole judgment (Whelan and Power JJ agreeing). He noted that damages were, at least in theory, restitutional. Where financial loss was involved, calculation was straightforward. However, where non-financial loss was concerned – as in the case of personal injuries – no calculation was possible and no award of monetary compensation could be restitutional in the true sense. Damages could be reckoned "*by the award of a conventional sum, that is to say a sum which by convention and experience society considers to be fair and just compensation for injury*" (para 17). The assessment of such damages was not amenable to scientific analysis. Having referred to the "*notional 'cap' on general damages*" introduced in *Sinnott v Quinnsworth* [1984] ILRM 523, and having also referred to *MN v SN* and *Nolan v Wirenski,* Noonan J continued:

> *"21. The concept of proportionality in awards of damages for personal injuries falls to be considered therefore in two particular respects, first against the yardstick of the cap for the most serious injuries and where in the hierarchy of damages the injury under consideration fits. Secondly, the award must be considered in the light of awards given by courts for comparable injuries. More generally however, proportionality falls to be considered in the Sinnott context under which regard is had to prevailing societal factors. In the [modern] context, such factors undoubtedly include the cost of liability insurance be it motor, public or employer's liability. The cost of such insurance is for most*

ordinary people and businesses, a significant outgoing. The extent to which awards by courts influence that cost is, in recent times, a matter of widespread public discourse, debate and dispute. Whatever the reality may be, it is clear that awards made by the courts have an impact on society as a whole and the courts are mindful of that fact. Ultimately each member of society must bear the cost of a compensation system whether through the payment of insurance premia in the case of private defendants or taxes in the case of public defendants. Society thus has a direct interest in the level of awards."

69. In Noonan J's words, consistency and predictability is "*fundamental to these concepts and to fairness in the operation of any system of monetary compensation for personal injuries*" (para 22). He noted that other jurisdictions seek to achieve those goals by utilising tools akin to the Book of Quantum. The importance of consistency was, he said, a major factor underlying the passage of the 2019 Act and the Guidelines set to be introduced under the Act. He noted that the court would have the "*same obligation*" to have regard to the Guidelines as it did in respect of the Book of Quantum, subject to the additional requirement to provide reasons if it departed from the Guidelines. Even in the absence of a requirement to state reasons when departing from the Book of Quantum, Noonan J expressed the view that it would be very helpful to an appellate court to be told the reasons for that departure. While recent judgments of the Court of Appeal had considered the appropriate level of awards for particular injuries "*it cannot be the function or objective of an appellate court to ensure precise streamlining of awards by tinkering at the margins*" (para 34).

70. Finally, there is this Court's decision in *Morrissey v HSE* [2020] IESC 6 (which was in fact decided before *McKeown v Crosby*). A number of issues arose in *Morrissey*. For present purposes, its significance lies in the discussion of the so-called "*cap*" on damages and, in that context, the requirement for proportionality in awards. The High Court had awarded €500,000 in general damages to the plaintiff and one of the defendants appealed against that award on the basis that it exceeded what was said to be the established maximum award for general damages of €450,000. It was also said that the award was not proportionate when assessed against the level of damages commonly awarded in other cases.

71. Clarke CJ (with whose judgment O' Donnell, McKechnie, Dunne and O' Malley JJ agreed) began his analysis by addressing an issue of terminology. A limit that operated as a strict "*cap*" would "*operate as an artificial limitation reducing the damages which might otherwise properly be awarded to fully compensate an injured party*". Alternatively, a limit could be seen as "*the current view of the appellate courts as to the damages which should be awarded in cases of the most serious injuries*" (para 14.6). Clarke CJ then referred to the earlier decisions on the cap/limit, beginning with *Sinnott v Quinnsworth* and also looked briefly at the position in Northern Ireland, England and Wales, and Germany. On the basis of that exercise, he thought it was reasonable to place the current limit at €500,000. Significantly, he considered the proper approach to the limit for damages for pain and suffering was one which viewed that limit "*as the appropriate sum to award for the most serious [injuries]*"[11]. It followed that:

[11] Para 14.28. The judgment of Clarke CJ refers here to the "*most serious damages*" but that is clearly a typographical error.

"This is therefore the sum by reference to which all less serious damages should be determined on a proportionate basis, having regard to a comparison between the injuries suffered and those which do, in fact, properly qualify for the maximum amount. The point which I have sought to make, however, is that the type of injuries which do properly qualify for the maximum amount may nonetheless come into different categories. While it is not possible to conduct a precise mathematical exercise in deciding whether particular injuries are, for example, half as serious as others, nonetheless it seems to me that respect for the proper calibration of damages for pain and suffering requires that there be an appropriate proportionality between what might be considered to be a generally regarded view of the relative seriousness of the injuries concerned and the amount of any award. But those very same considerations also recognise that it may be possible to regard injuries of very different types as being broadly comparable. That consideration applies equally to injuries of the most serious type and, thus, it is appropriate to consider the injuries suffered by Ms. Morrissey to be of that most serious type, even though they differ in character from other types of injuries which can also properly be characterised as being of the most serious type" (para 14.28).

In his conclusions, Clarke CJ stated that "*[h]aving analysed the relevant case law, I express the view that €500,000 now represents the appropriate maximum damages to be awarded for pain and suffering in personal injury cases*" (at para 16.9).

72. The approach adopted by this Court in *Morrissey* is, in essence, the same as the approach suggested by the Court of Appeal in the decisions to which I have referred, involving, for injuries other than the most serious, a scaling down from the upper "*limit*" (it not being strictly accurate to describe it as a "*cap*", though that is how it is often referred to in the case-law) with the objective of arriving at a proportionate and fair award. That is not a straightforward exercise. There is no obvious mathematical ratio between different categories of personal injury. Furthermore, in the context of any given personal injury action, the court will be concerned only with a particular injury (or combination of injuries), constituting only a small part of the spectrum of possible injuries. Relative assessment – achieving "*a 'rational relationship' between awards of damages in personal injuries cases*" (per Noonan J in *McKeown v Crosby* at para 19) – is very difficult in such circumstances. That is, I believe, what Noonan J was getting at when he suggested that it was beyond the power of the court to ensure "*precise streamlining of awards by tinkering at the margins*" (para 34). A court hearing a personal injuries action can articulate general principles and can apply those principles to the particular claim before it. It cannot, however, give global guidance as to what is the appropriate and proportionate award, or range of awards, for every category of injury. The exercise of structuring and calibrating personal injuries awards generally so as – as far as practicable – to ensure proportionality *inter se* (or, as it put by the Committee in its Report, "*internal proportionality*") is not one that can readily be undertaken by a court within the confines of an individual personal injuries action or appeal.

73. As is apparent from Clarke CJ's judgment in *Morrissey*, Ireland is not unique in applying a "*cap*"/"*limit*" on general (non-pecuniary) damages in personal injuries actions. The LRC Capping Report refers to a series of decisions of the Supreme Court of Canada given on the same day in 1978, the effect of which was to impose a "*rough upper limit*" – effectively a cap – on general damages in catastrophic cases.[12] The factors that led the Canadian Supreme Court to impose such a cap – including "*the social burden of large awards*" and the absence of any "*objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms*"[13] – have obvious resonance in this jurisdiction also. A number of other jurisdictions that apply some version of a "*cap*" or "*limit*" are referred to in the Report of the Committee.

74. The "*cap*" cases – both Irish and international – further illustrate how different in character general damages for personal injuries are compared to other categories of damages that reflect actual and quantifiable financial loss, such as damages for breach of contract or, indeed, special damages in personal injury claims.

75. The issue of whether the "*cap*" on general damages applies to all personal injury actions or applies only to those cases with significant levels of special damages is one which has arisen from time to time. In *Gough v Neary* [2003] 3 IR 92, Geoghegan J expressed

[12] At para 2.13 and following, referring to *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229, *Thornton v School District No 57* [1978] 2 SCR 267 and *Arnold v Teno* [1978] 2 SCR 287 (collectively known as the Damages Trilogy Cases). These cases predate the adoption of the Canadian Charter of Rights and Freedoms but it appears that subsequent Charter-based challenges to the cap have failed: *LRC Capping Report* at 2.20.

[13] *Andrews* at 261 per Dickson J (for the Court).

the view that "*there is no compulsory 'cap' if there is no 'omnibus sum' or in other words, if the special damages are low*" though that did not mean that the "*cap*" figure should not be taken into account "*in a general way*" in a non-cap case (at 134). Geoghegan J's comments were clearly *obiter* and the issue was not addressed by the other members of the court. Similarly, in *Yun v MIBI* [2009] IEHC 318, the High Court (Quirke J) stated that *"[w]here the award is solely or largely an award of general damages for the consequences of catastrophic injuries there will be no "cap" placed upon the general damages awarded*" (page 9). Similar views have been expressed in other cases. The implication of such an approach is that, in cases with large special damages, general damages are liable to reduction. As already noted, in *Nolan v Wirenski* and *Shannon v O' Sullivan* the Court of Appeal rejected any suggestion that general damages could be reduced by reference to the level of special damages, emphasising that general damages are assessed separately and serve a different function to special damages. The point is well-made in McMahon & Binchy, *Law of Torts* (4th ed; 2013). The authors correctly observe that a plaintiff is entitled to damages for past and future economic loss resulting from injury. A large special damages award should not be seen as a windfall or profit; rather, the "*largeness of the amount merely reflects the economic damage which the plaintiff will sustain*". They go on to refer to Article 40.1 of the Constitution and observe that it is "*hard to see why two plaintiffs who have suffered identical devastating injuries should receive different amounts of compensation for the pain and suffering caused by these injuries simply because the quantum of the economic loss that each suffers – and for which full compensation is due – is not identical*" (at 44.238-239). I agree. In my view, there is no basis in logic, law or justice for any such distinction or differential treatment.

76. *Morrissey* was a case in which the court awarded an "*omnibus sum*" (in the sense in which that phrase was used by Geoghegan J in *Gough v Neary*) – damages totalling in excess of €2,000,000 had been awarded to the plaintiff by the High Court. However, there is nothing in the judgment of Clarke CJ suggesting that he considered that the "*cap*" of €500,000 applied only to such cases. On the contrary, he characterised that sum as the "*appropriate sum to award for the most serious [injuries]*" and "*the appropriate maximum damages to be awarded for pain and suffering in personal injury cases*", without any evident qualification or exception. Even so, it has been suggested that there continues to be a category of "*non-cap*" cases that is not subject to the *Morrissey* maximum.[14] That issue was not debated before us and accordingly it is neither necessary nor appropriate to express any concluded view on it. What is clear, in any event, is that the Guidelines do not draw any distinction between "*cap*" and "*non-cap"* cases.

77. It was common case that the recent jurisprudence of this Court and of the Court of Appeal has, in many instances, led to reductions – in some cases, significant reductions – in general damages awards. These reductions do not simply affect the litigants involved in the particular action or appeal. Rather, they affect – and are intended to affect – awards generally. As the Committee stated in its Report "*the jurisprudence of the Court of Appeal in recent years has led to significant reductions in many of the*

[14] See the discussion in the *LRC Capping Report*, paras 2.45 – 2.61.

awards made by the High Court at first instance."[15] Where the Court of Appeal (or this Court) gives a decision setting out guidance as to the appropriate award (or range of awards) for a particular category of injury that involves a *decrease* in the relevant award, that guidance controls the assessment of all such awards thereafter, including in pending actions (and appeals) arising from accidents pre-dating the decision. Thus, downward adjustments in awards can – and do – have retrospective effect. That is true also of decisions that result in an *increase* in awards for particular categories of injury.

78. Therefore, a plaintiff is always at risk of receiving an award materially lower than the level prevailing at the time he or she suffered injury or commenced proceedings (or applied to PIAB). Conversely, a defendant is at risk of being subject to an award materially higher than the level of award prevailing at the time of his or her wrongful conduct or the time he or she was first sued. Again, that was common case. As it was put in the Plaintiff's written submissions "*[c]ourt rulings interpreting legal principles are always declaratory of the law and can have retrospective and prospective effect*."[16] However, the Plaintiff says, *legislative* acts having retrospective effect fall to be treated differently. Again, that is disputed by the State.

79. It will be evident from the discussion above that, while general damages are necessarily assessed on a case-by-case basis, that assessment takes place within a prescriptive framework of general application. That framework derives not from legislation enacted by the Oireachtas but from decisions made by judges performing their constitutional

[15] Para 32.

[16] At para 7.4.3.

function. The framework explicitly has regard to socio-economic factors and to considerations of the public interest, in addition to the interests of litigants. It involves a generally applicable upper "*limit*" on general damages – a constraint that, functionally, has all the hallmarks of legislation – and requires that all awards should be proportionate to that limit. The level of awards is subject to periodic – and significant – adjustment, not just in individual cases but more generally (including in respect of pending cases). All of these features are characteristic of law-making. That, it seems, is a *permissible* exercise of judicial power.

80. If that is so, it is difficult to understand how it could be said that to confer on the judiciary (collectively, in the form of the Council) the function of adopting guidelines affecting the assessment of general damages awards is impermissible because the Judicial Council is not "*democratically accountable*" and/or that the exercise of any such power by anyone other than the Oireachtas necessarily breaches Article 15.2 of the Constitution (or, as is also suggested, Article 5). If, as is suggested, the effect of those provisions is to reserve to the Oireachtas, and to the Oireachtas alone, the power to make the law relating to the assessment of general damages in personal injuries actions, how can that be reconciled with what the courts have been doing both before, and more particularly since, the adoption of the Constitution? Equally, in light of that established practice, I do not understand how it can plausibly be suggested that conferring the function of adopting such guidelines on the *judiciary* (in the form of the Council) undermines, or could reasonably be perceived to undermines, *judicial* independence, as a majority of this Court concludes.

The Guidelines

81. Section 19 of the 2019 Act prescribes the membership of the Personal Injuries Guidelines Committee. On its establishment, it comprised a judge of the Supreme Court (who was appointed as chairperson), a judge of the Court of Appeal, two judges of the High Court, two judges of the Circuit Court and a judge of the District Court, all having significant experience in personal injuries litigation. The Committee produced a detailed Report in December 2020 which set out its approach. The Report contained a discussion of the principles governing the assessment and award of damages for personal injuries, referring (*inter alia*) to *MN v SM* and *Morrissey*, as well as the decision of the Court of Appeal in *Payne v Nugent*. It noted that, as the Committee was obliged pursuant to section 90(3)(b) of the 2019 Act to have regard to the principles determined by the Superior Courts for the awarding of general damages "*the Guidelines have been constructed around an internal proportionality*" (para 44). The Report explained the consideration given by the Committee to fixing the maximum award for the most catastrophic injuries (para 59 and following) culminating in a recommended figure of €550,000 and also explained the process by which awards for less serious injuries were calibrated by reference to the recommended maximum award.

82. The Report also acknowledged the "*discretion*" to depart from the bands set out in the Guidelines "*if there are exceptional circumstances*" warranting such departure. The Committee considered that the exercise of such discretion had to be limited to "*exceptional cases*" because "*the principle of proportionality would otherwise be offended*". If courts were too quick to depart from the Guidelines, awards for minor

injuries could soon overtake awards for moderate injuries and awards for moderate injuries those for severe injuries. Thus, the Committee concluded, "*proportionality also affects the width of brackets as well as the jurisdiction of the courts to deviate from them*."[17] The Plaintiff placed much emphasis on the statement that courts can depart from the Guidelines only if there are "*exceptional circumstances*", though, as already noted, Meenan J regarded it as "*unduly restrictive*".

83. The Board reviewed the draft Guidelines without making any modification to them and, in turn, they were adopted by the Council on 6 March 2021. The Guidelines provide detailed guidance as to the appropriate award for general damages (expressed as a range) for many different categories of injury from the most serious – injuries resulting in foreshortened life expectancy, injuries involving quadriplegia and paraplegia, head injuries involving severe brain injury – for which awards of up to €550,000 are indicated, all the way down to minor injuries such as minor injuries to the leg or foot, for which awards starting at €500 are indicated. They cover psychiatric/psychological injuries as well as physical injuries (in contrast to the Book of Quantum). They also address the assessment of damages in cases of multiple injuries (an aspect of the Guidelines considered in a number of recent decisions of the Court of Appeal including *Zaganczyk v John Pettit* [2023] IECA 223 and *Wolfe v PIAB* [2023] IECA 245 which are discussed by Haughton J in his judgment and to which I will return).

[17] Report, para 47.

84. The Introduction to the Guidelines stated that "*it is widely accepted that the making of an award of general damages for pain and suffering is a somewhat artificial task*", involving as it does the conversion of the pain and suffering of a claimant into a monetary award, a difficult task "*which has historically led to judges making widely varying awards of damages in respect of relatively comparable injuries, a result which not only offends the principle of equality before the law but results in unnecessary appeals*."[18] The Guidelines, it was said, sought to promote a better understanding of the principles governing the assessment and award of damages for personal injuries with a view to achieving greater consistency in awards. Those principles "*require awards of damages to be fair and reasonable to both claimant and defendant*" and awards "*must be proportionate to the injuries sustained and must also be proportionate when viewed in the context of awards of damages commonly made in cases involving injuries of a greater or lesser magnitude*" (citing *MN v SM* and *Morrissey v HSE*).[19] These statements accurately reflect established principles of assessment and ought not to be controversial.

85. The Introduction noted that "*the Court retains its independence and discretion when it comes to making an award of general damages*", while also stating that it was mandatory that the court 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*."[20] Having

[18] Page 5.

[19] Page 6.

[20] Ibid.

heard the evidence, the trial judge should reach his or her findings concerning the injury and then proceed to consider how, in light of those findings and the submissions made, the Guidelines should impact on the award. The obligation on 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*." [21] In argument, Counsel for the Plaintiff appeared to suggest that these statements overstated the status and effect of the Guidelines and implied a mandatory obligation to comply with the Guidelines. In my view, however, they accurately set out the position under the 2019 Act. It *is* mandatory for courts to "*have regard to*" the Guidelines when making an award and it *is* mandatory for courts to "*state the reasons*" for departing from such Guidelines. Those obligations do not, of course, arise from anything stated in the Guidelines or in the Report of the Committee but from the express provisions of the 2019 Act as enacted by the Oireachtas.

86. The Guidelines are not set for once and for all. Section 18(5)(a) of the 2019 Act requires the Committee to review the Guidelines within 3 years of their adoption and thereafter at least once every 3 years. Where the outcome of that review leads the Committee to recommend amendments, it is tasked with drafting such amendments and submitting them to the Board for its review: section 18(6). Thereafter, the process involved in the initial adoption of guidelines is replicated, namely the Board submits the proposed amendments, with or without modification, for adoption by the Council: section

[21] Ibid.

11(d)(ii) and section 7(2)(g)(ii). Thus, in the event that difficulties arise in practice with the operation and application of the Guidelines – if for instance it were to appear that a particular injury or category of injury was wrongly classified – that can be addressed in the review process.

(1) THE GUIDELINES ISSUE

The Arguments of the Parties

87. That, as a matter of principle, a court hearing an action for personal injuries is not obliged in all cases to comply with the Guidelines and may depart from them (subject to stating its reasons for doing so), ultimately does not appear to be in any controversy. Nevertheless, there were significant differences, both of substance and emphasis, between the Plaintiff and the State as to the circumstances in which a court may depart from the Guidelines and the matters to which the court could properly have regard in considering whether or not to do so in a given case.

88. In her submissions, the Plaintiff stressed the removal of the *Proviso*. That, it was said, must have had some legislative purpose (and, by implication, some legislative effect). The *Proviso* had been included in the 2004 Act to ensure that the status of the Book of Quantum was not misunderstood and that the judicial power was not unconstitutionally invaded by the legislature. Its "*unexplained*" and "*unflagged*" disapplication (subsequent to the adoption of the Guidelines) was, it was said, intended to underpin the objective that the Guidelines should only be departed from in "*exceptional circumstances*" and to avoid judges being "*tempted*" to apply the jurisprudence of the Superior Courts when assessing damages in personal injury cases.[22] According to the Plaintiff, section 22(1) of the 2004 Act says nothing about the circumstances in which

[22] Written submissions, para 2.4.5.

a judge may actually depart from the Guidelines, though she observed that in the High Court the State had accepted that a judge cannot depart from the Guidelines merely on the ground that he or she does not agree with the level of damages set by them.[23] The High Court Judge's findings that "*exceptional circumstances*" were not required to warrant a departure from the Guidelines and that the reasons for departure from the Guidelines must be "*rational, cogent and justifiable*" are criticised as being merely "*adjectival*", shedding no light on the basis on which a judge could properly depart from the Guidelines in any given case. It is said that the disapplication of the *Proviso* and the failure to prescribe the circumstances where a judge can depart from the Guidelines and the reasons for doing so "*corrals the court into the bandwidths set out in the guidelines, not knowing when and in what circumstances they can lawfully depart from same*". [24]

89. The Plaintiff also stressed that the Guidelines were *prescriptive* in character and were intended to set out the damages that ought to be awarded for any particular injury and were not intended to be merely *descriptive* of the awards that were typically made for that injury. In that regard, it was said, there was a significant difference between the Guidelines and the Judicial College guidelines in England and Wales. The Guidelines

[23] 2.3.3F. In her Statement of Grounds (§ e 1xx), the Plaintiff pleaded *inter alia* that section 20 of the PIAB Act and section 22 of the 2004 Act failed to set out any clear criteria for departing from the Guidelines and that, as a matter of statutory interpretation, "*such departure cannot be because the Judge merely disagrees with the content of the Guidelines*". In response, the State Respondents pleaded that the facility to depart from the guidelines was "*an important safeguard*" which was relevant to all aspects of the Plaintiffs. They did not dispute that a Judge cannot depart from the guidelines because he/she "*merely disagrees with them*", though they also suggested that the Plaintiff had been "*entirely vague*" regarding the scope of "*mere disagreement*" in this context (Statement of Opposition, §71).

[24] 5.3.7.2-5.3.7.3

also involved an evaluative political, social and economic judgment as to the level of awards that should apply and went much further than the legitimate goal of promoting consistency between awards and entered into the substantive question of how much an individual should be compensated in Irish society when injured. While a court was well equipped to perform that function in respect of a particular case, it was an entirely different matter to create rules of general application through a legislative or quasi-legislative process.

90. In the course of case management of the appeal, the Court asked the parties to address specifically the scope of the power to "*depart*" from the Guidelines and to identify the factors and/or material by reference to which that power falls to be exercised. In her response, the Plaintiff suggested that the failure of the State to identify any test for departure meant that she was hampered in engagement with that issue. However, she said, any "*entirely unfettered discretion*" to depart from the Guidelines would render section 22(1) unconstitutional and would be "*inimical to the rule of law*".

91. Before coming to the Plaintiff's oral submissions, it is appropriate to refer to the position adopted on this issue by the State in its written submissions and, in particular, in its response to the questions raised by the Court in case management.

92. In its written submissions, the State stressed that the fact that the courts can depart from Guidelines is "*relevant to almost all issues in this case*". Even so, the issue was addressed very briefly. Noting the Plaintiff's point that section 22(1) of the 2004 Act says nothing about the circumstances in which a judge can depart from the Guidelines,

the State questioned how that assisted the Plaintiff's case and asserted that the fact that the Act was "*silent*" on this point "*suggests that the courts have considerable latitude*" to depart from the Guidelines.[25] Any suggestion that the courts are "*corralled*" was, the State said, manifestly inconsistent with the terms of the 2019 Act. As regards the "*Proviso*", the State suggested that it was excluded (as regards the Guidelines) because it was no longer necessary, in light of the introduction of an obligation to give reasons for departing from the Guidelines. According to the State, nothing in section 22(1) of the 2004 Act purports to confine the court to considering the Guidelines and any such restriction would be inconsistent with its clear power to depart from the Guidelines (albeit for stated reasons). In this context, the State also relied on section 93 of the 2019 Act (which provides that nothing in that Act is to be construed as operating to interfere with "*(a) the performance by the courts of their functions and (b) the exercise by a judge of his or her judicial functions*").

93. In its response to the Court's questions, the State went a good deal further. It submitted that there were *no* substantive constraints on the court's power to depart from the Guidelines; the only constraint was a procedural one, namely the obligation to state reasons for doing so. The scope to depart from the Guidelines was wide and even encompassed circumstances where a court considered that the figure allocated to a particular injury by the Guidelines was inappropriately low (or high) and, subject to stating its reasons (which would be subject to appellate review), a court might properly award more (or less) than the Guidelines suggested. The factors/material that the court

[25] Written submissions, at para 40.

could take into account in this context included evidence of inflation, income levels and socio-economic conditions, proportionality and fairness of the award, and the "*court's own experience*". Medical evidence (such as evidence that a particular caused greater levels of suffering than had previously been understood) might also be relevant, as would the "*impact of precedent and rulings of superior courts*" and the impact of departing from the Guidelines in other cases and awards. Overall, the State says, "*courts enjoy considerable, but not unlimited, power to depart from the Guidelines, by reference to a range of relevant factors/materials*."

94. In oral argument, Mr McDonagh SC (for Ms Delaney) understandably characterised this as a very dramatic change of position on the part of the State. The approach now adopted by the State was, he said, inconsistent with the Guidelines and with the Report of the Committee. The State had, he said, "*cut the Committee loose*". Again, Mr McDonagh emphasised the disapplication of the *Proviso*, submitting that the "*mission of the Guidelines*" – the reduction of damages in personal injuries actions – could not have been fulfilled unless the *Proviso* was removed. Its removal could not be explained by the introduction of a requirement to give reasons when departing from the Guidelines, as the amendments to section 22 contemplated by the 2019 Act retained the Proviso while also imposing a duty to give reasons. Mr McDonagh acknowledged that section 22 did not use the language of exceptionality and did not suggest that the language of that section precluded a court from having regard to matters other than the Guidelines. Even so, he said, the Guidelines were "*crystalline*" rather than "*fluid*" in nature (whatever that may mean). The Guidelines were "*mandatory as a presumption*" and "*presumptively effective*" and even if they did not have a "*determinative effect*" in

every case, they were intended to have, and did have, an effect on the assessment of damages in the State.

95. For the State, Mr McCullough SC began by observing that the effect of the Guidelines, and the circumstances in which a court could depart from them, fell to be assessed by reference to the relevant statutory provisions, rather than anything said by the Committee. The application of the Guidelines to Ms Delaney's case had not really arisen yet because her claim had not yet been heard. In argument, Mr McCullough adopted as his own a number of passages from the LRC Capping Report, including one which characterised section 22 of the 2004 Act as imposing an obligation to "*comply or explain*".[26] Pressed as to whether a judge could properly depart from the Guidelines simply because he or she disagreed with them, Mr McCullough indicated that such might be the case, but the judge would have to have regard to the principle of proportionality and to the proposed award's place in the category of awards as a whole and in practice that, he suggested, could make it difficult to depart from the Guidelines. However, if a judge considered that an award within the range indicated by the Guidelines would not provide a just measure of compensation to the plaintiff, he must be entitled to depart from the Guidelines. What was required was an "*exercise of overall assessment*", in which the court had regard to the Guidelines as well as to anything else that appeared relevant. Mr McCullough stressed that, in the period prior to the adoption of the Guidelines, it was not the case that there was a "*free for all*" or that judges were simply "*at large*". This Court and the Court of Appeal had established the principle of

[26] LRC Capping Report, para 2.96.

proportionality and comparability *inter se* of awards and, he said, the task that had been given to the Council was "*in the same space*" as the task previously undertaken by judges *qua* judges – to try to fit all injuries in the scale between the "*cap*" and zero – but with the benefit of being able to look at the "*global picture*". As to the removal/disapplication of the *Proviso*, section 22(1) was clear that the court could depart from the Guidelines. It necessarily followed (so it was said) that the court could have regard to matters other than the Guidelines.

96. There was some discussion during the hearing about the precise legal character of the Guidelines. Ultimately, it appeared to be common case that the Guidelines were a statutory instrument as that term appears in the definition section of the Interpretation Act 2005 (which defines statutory instrument as including "*guidelines … made, issued, granted or otherwise created by or under an Act*": section 2) but not for the purposes of the Statutory Instrument Act 1947 (which defines statutory instrument as "*an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute*": section 1).

Assessment

97. I agree with Mr McCullough that status and effect of the Guidelines must be determined by reference to the relevant provisions of the 2019 Act, rather than on the basis of statements in the Committee's Report or in the Introduction to the Guidelines.

98. While the primary focus of the parties was on section 22(1) of the 2004 Act, in my view the proper starting point is section 90(1) of the 2019 Act. That provides that guidelines adopted by the Council under section 7 "*shall contain general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries and without prejudice to the generality of the foregoing, the guidelines may include guidance on any or all of the following:*

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

99. That guidelines are to contain "*general guidelines*" as to the level of damages (language previously used in section 54(1)(b) of the PIAB Act) and that such "*guidelines*" may include "*guidance*" on any of the specific matters in paragraphs (a) to (d) appears clearly to indicate that the Guidelines are not intended to be mandatory in character, in the sense of requiring compliance with them in all circumstances.

100. That is reinforced by a consideration of section 22(1) of the 2004 Act, both as enacted and in its amended form. As enacted, section 22(1) obliged a court, in assessing damages in a personal injuries action, to "*have regard to the Book of Quantum*." As amended by section 99 of the 2019 Act, Section 22(1)(a) now obliges the court to "*have regard to the personal injuries guidelines … in force*." Where the court "*departs from those guidelines*" it shall "*state the reasons for such departure in giving its decision*" (section 22(1)(b)). That the court may depart from the guidelines, and that the reasons for doing so are not legislatively circumscribed, underlines the essential flexibility of the statutory regime.

101. The language of "*have regard to*" has frequently been employed by the legislature. Thus section 4 of the Civil Liability (Assessment of Hearing Injury) Act 1998 required a court hearing a claim for damages for personal injury to "*have regard to*" certain identified material (colloquially referred to as the "*Green Book*") "*in determining the extent of the injuries suffered*." The nature and extent of that obligation was considered by the High Court (Lavan J) in *Greene v Minister for Defence* [1998] 4 IR 464. In his judgment, Lavan J referred to a number of authorities from England and Wales and New Zealand in which the "*have regard to*" language had been considered, in all cases being interpreted as requiring consideration of the specified matters, without excluding the discretion of the decision-maker in the exercise of their functions (at 488). Lavan J was satisfied that section 4 required that the Green Book should be considered and taken into account. In a passage subsequently endorsed by this Court, he stated:

"The requirement to 'have regard to' the Green Book does not however impose a duty upon the court to adhere strictly to its terms. Therefore, while the court must consider the approach adopted in the Green Book, it reserves the right to consider alternative approaches. The court may then determine which is the most appropriate solution in each individual case. In the absence of a more appropriate alternative solution, which has been established to the satisfaction of the court, the statutory formula should be applied. The circumstances in which the statutory formula is not applied may in fact transpire to be as limited as the defendants submissions suggest. However, this will be a matter for the determination of the court in the circumstances of each individual case" (at 492).

102. Lavan J noted that no constitutional challenge had been brought by the plaintiff but observed that, in any event, he did not interpret the provisions of the 1998 Act as placing a fetter on the exercise of judicial discretion. The Act provided for a fair and reasonable method for assessing hearing disabilities but in any given case the court could deem the statutory formula inappropriate if the evidence established that it ought not to be applied (at 492-493).

103. The status of the Green Book was considered by this Court in *Hanley v Minister for Defence* [1999] 4 IR 392. Keane J (as he then was) (with whom Hamilton CJ and Murphy J agreed) gave the principal judgment. He identified the objective of the 1998 Act as being to ensure that, while those who had suffered hearing loss as a result of negligence were fairly compensated, the amount of compensation should, so far as

possible, be assessed by courts in a manner which reflected the basic principle that like cases should be treated alike. However, while it was the duty of the courts to give effect to that legislative policy, every case had to be considered on its own fact and, in his view, that was implicitly acknowledged by the 1998 Act which did "*no more than requir[e] the court to 'have regard' to the relevant sections of the Green Book*" (409). The scope of that obligation had been considered in *Greene* and Keane J was satisfied that the passage set out in para 100 above was a correct statement of the applicable law (409). The Green Book, and the scale of damages proposed by the Minister based on it, could not "*be applied rigidly in all cases without some risk of injustice*" (415).

104. In her separate judgment in *Hanley*, Denham J (as she then was) emphasised the fundamental importance that the administration of justice be fair. Fairness in this context included consistency in the determination of damages. It was appropriate to adopt guidelines in relation to damages in order to promote consistency. However, she continued, courts retained the power at common law and under the Constitution "*to make a fair decision for each particular case*". Damages were intended to represent fair and reasonable monetary compensation for pain, suffering, inconvenience and loss of pleasures of life caused by injury in the particular case and a "*formula is a guide line for a judge in similar cases from which a judge may depart in a particular case if the specific circumstances so require to achieve a just result*" (399).

105. Finally, Lynch J also gave a separate judgment in which he expressed the view that the recommendations and provisions of the Green Book should be "*adopted by the courts unless there is a reason of substance for departing from them*" (420).

106. There was no equivalent to the *Proviso* in the 1998 Act, but the High Court in *Greene* and this Court in *Hanley* clearly did not take the view that the trial judge was limited to considering the Green Book. The fact that the Act did not prescribe the circumstances in which the court could depart from the Green Book clearly did not raise any concern either: the court could and should do so where the justice of the case required it to do so. Finally, even in the absence of any express requirement to give reasons for departing from the Green Book, the judgments *Greene* and *Hanley* suggest that reasons ought to be given for such a departure.

107. Although the Green Book was concerned with assessing the extent of hearing loss, rather than the assessment of general damages (though of course the extent of hearing loss was central to such an assessment), *Greene* and *Hanley* are clearly relevant when considering the nature and extent of the statutory obligation to "*have regard to*" the Guidelines under section 22(1) of the 2004 Act and the circumstances in which a court may properly depart from those Guidelines.

108. A quite different statutory scheme was at issue in *McEvoy v Meath County Council* [2003] 1 IR 208. Section 27(1) of the Planning and Development Act 2000 (the "*PDA*") obliged a planning authority to "*have regard*" to strategic planning guidelines made by the Minister for the Environment when adopting a development plan. In *McEvoy*, the High Court (Quirke J) had to determine the nature and extent of the obligation. Following a review of the authorities, including the decision of this Court in *Glencar Exploration plc v Mayo County Council (No. 2)* [2002] 1 IR 84 (in which this Court,

per Keane CJ, made it clear that the fact that planning authority were obliged to "*have regard to*" Government or Ministerial policies and objectives did not mean that, in every case, they were obliged to implement such policies and objectives: had the Oireachtas intended to impose such an obligation "*it would have said so*": at 142) Quirke J stated:

> *"I am satisfied that the duty or obligation imposed by s. 27(1) of the Act of 2000 upon a planning authority when making and adopting a development plan is to inform itself fully of and give reasonable consideration to any regional planning guidelines which are in force in the area which is the subject of the development plan with a view to accommodating the objectives and policies contained in such guidelines.*
>
> *Whilst reason and good sense would dictate that it is in the main desirable that planning authorities should, when making and adopting development plans, seek to accommodate the objectives and policies contained in relevant regional planning guidelines, they are not bound to comply with the guidelines and may depart from them for bona fide reasons consistent with the proper planning and development of the areas for which they have planning responsibility."* (at 224)

109. The decision in *McEvoy* has been cited and applied in many subsequent decisions of the High Court and the Court of Appeal. In *Brophy v An Bord Pleanála* [2015] IEHC 433, Baker J (then a judge of the High Court) had to consider the status of Ministerial guidelines under section 28 PDA and, in particular, their interaction with the development plan. At para 36, Baker J stated that "*the ministerial guidelines are what*

they are described to be, namely guidelines, and while they cannot by statute be ignored, and indeed while the obligation to have regard to them is one stated in positive terms, they are not prescriptive or mandatory in the sense in which a development plan is" explaining that the development plan was "*binding on the local authority and in respect of which it is not merely mandated as a matter of law, but also required as a matter of both public and private law, to frame its deliberations*."

110. While *McEvoy* does not appear to have been considered by this Court, the decision in *Balz v An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 367 is entirely consistent with it. *Balz* concerned Wind Energy Development Guidelines (WEDG) issued under section 28 PDA. O' Donnell J (as he then was) (with whom Clarke CJ and McKechnie, Charleton and Irvine JJ agreed) noted that the PDA permitted the issuing of guidelines with which the addressees were obliged to comply,[27] but that, as regards the WEDG, the obligation on ABP "*was merely to 'have regard' to them*" (para 4). When such guidelines were issued, "*then a planning authority and/or the Board must have regard to them, and can legitimately take them as the starting point, and in most cases the finishing point, of any consideration of the technical issue covered in the guidelines*" (para 48).

[27] Thus section 28(1C) permits the Minister to issue guidelines containing specific planning policy requirements *"with which planning authorities, regional assemblies and the Board shall, in the performance of their functions, comply*" (my emphasis). A similar obligation applies to Ministerial policy guidelines issued under section 29 of the PDA.

111. The "*have regard to*" formula was, of course, also used in section 22(1) of the 2004 Act in relation to the Book of Quantum. There was no suggestion in argument that the statutory obligation to "*have regard to*" the Book of Quantum ("*containing general guidelines as to the amounts that may be awarded or assessed in respect of specified types of injury*") made it mandatory to comply with it or precluded a court from making an award either above or below the level indicated by it. Of course, section 22 as it applied (and continues to apply) to the Book of Quantum included the *Proviso* on which Mr McDonagh places such weight. But, as I shall explain, the *Proviso* appears to me to be a red herring, the presence or absence of which has no material bearing on the proper interpretation of section 22(1) of the 2004 Act, either in the terms in which it was originally enacted or as it now stands.

112. Ultimately, what is presented here is an exercise in statutory interpretation. The approach to be taken in carrying out that exercise has been considered in a number of recent decisions of this Court, including *Dunnes Stores v Revenue Commissioners* [2019] IESC 50, [2020] 3 IR 480; *Bookfinders Ltd v Revenue Commissioners* [2020] IESC 60; *People (DPP) v AC* [2021] IESC 74, [2021] 2 ILRM 305; *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313 and, most recently, *A, B & C v Minister for Foreign Affairs* [2023] IESC 10, [2023] 1 ILRM 335. In his judgment in *A, B & C v Minister for Foreign Affairs* (Dunne, Charleton and Woulfe JJ agreeing), Murray J stated that the caselaw puts beyond doubt that language, context and purpose are potentially at play in every exercise in statutory interpretation, with no element ever operating to the complete exclusion of the other (para 73). He continued:

"The starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words."

113. Thus, the "*starting point*" (or, as it is put in *Heather Hill*, the "*focal point*") for the exercise here is the language of those provisions of the 2019 Act that address the status and effect of guidelines adopted by the Council pursuant to section 7 of that Act and the plain and ordinary meaning of that language is the "*predominant factor"* in identifying the effect of those provisions. I have set those out already. But *A, B & C* also makes it clear that the words used by the legislature must be construed "*having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute*".

114. It follows that, while the "*have regard to*" formula is often found in the statute book, its precise interpretation and application must be determined in its particular statutory context. Thus, an obligation on a planning authority to "*have regard to*" Ministerial planning advice in adopting its development Plan (*McEvoy*) does not necessarily mean precisely the same thing as the obligation on a court to "*have regard to*" the Green Book (*Greene & Hanley*) or – as here – the obligation to "*have regard to*" the guidelines adopted under section 7 of the 2019 Act. The statutory context may be highly significant in assessing the extent of the obligation. That context includes the nature and expertise of the body responsible for adopting the instrument to which regard is to be had, the process (if any) prescribed for its adoption, the nature and scope of the instrument to which regard is to be had, the nature of the functions to which that obligation is directed and the purpose of imposing such an obligation.

115. Here, the Council is empowered to adopt "*general guidelines*" that give "*guidance*" on awards that judges must "*have regard to*" but which they are entitled to depart from. In my opinion, none of this language is apt to impose any form of binding legal *obligation* on judges to *comply with* and thus *apply* the guidelines in all cases.

116. Section 22(1)(b) of the 2004 Act confirms that interpretation. That provision does not purport to confer a discretion to depart from section 7 guidelines (from which it follows that the Plaintiff's complaint that it confers an unfettered and unstructured discretion is misplaced). Rather, it takes the court's power to depart as a given ("*where [the court] departs from those guidelines*") and does not purport to restrict or condition that power in any substantive way. Rather, it requires only that the court should "*state the reasons*"

for doing so. I do not mean to suggest that that requirement is not meaningful – it clearly is – but it cannot sensibly be suggested that requiring a court to state its reasons for departing from guidelines is tantamount to mandating *compliance* with them.

117. That interpretation receives further support from the provisions of section 93 of the 2019 Act which, it will be recalled, provides that nothing in the Act is to be construed as interfering with "*(a) the performance by the courts of their functions, or (b) the exercise by a judge of his or her judicial functions*". This is an important recognition and reminder of the wider context in which the 2019 Act was enacted and falls to be interpreted, namely the constitutionally guaranteed independence of the judiciary and the necessary protection that courts and judges enjoy from interference in the exercise of their judicial functions. The assessment of damages in personal injury actions continues to be a judicial function. That is not altered by anything in the 2019 Act.

118. In truth, insofar as Ms Delaney argued that the Guidelines had some greater status and/or binding effect than that allowed by the State, that argument did not rely on the language of either section 90(1) of the 2019 Act (with which she did not engage) or of section 22(1) of the 2004 Act (as amended by the 2019 Act). Rather, it was the language that was *not* there – the absent *Proviso* – that was the primary focus of her attention. Mr McDonagh SC invited the Court to speculate as to the motivation of the Oireachtas in disapplying the *Proviso*. That is not a legitimate part of the interpretive exercise. The court is concerned only with the objective effect (if any) of the removal of the *Proviso* on the proper interpretation of section 22(1) and, in particular, whether its removal

points to an interpretation of that provision different from that suggested by its language and context.

119. It is difficult to discern the purpose of the *Proviso* and it appears to have been included in the 2004 Act *ex abundanti cautela*. As enacted, section 22(1) of the 2004 Act was not, in my view, capable of being interpreted as requiring a court to have regard only to the Book of Quantum, to the exclusion of any other matter. Such a significant limitation on the judicial function would require clear and unambiguous language. Section 22(1) simply required the court to have regard to the Book of Quantum, in addition to the other matters to which the court could properly have regard in discharging its adjudicative functions in this context. What was implicit in section 22 as enacted – that the court could depart from the Book of Quantum – is now, as regards the Guidelines, explicitly recognised in the amended section 22(1).

120. So, as to the critical issue of the status and effect of the Guidelines, the removal/disapplication of the *Proviso* has no interpretive significance in my view. The provisions of the 2019 Act are clear – courts must *have regard to* the Guidelines but are entitled to depart from them, though they must state their reasons for doing so. There is no statutory requirement to *comply* with the Guidelines (in contrast to the position under section 28(1C) PDA). It follows that the Guidelines are not "*prescriptive or mandatory*" in the sense of obliging a court to make an award within the range indicated in the Guidelines. The Oireachtas has clearly elected not to impose such an obligation. Furthermore, it is in my view clear that courts can – and must – have regard to matters other than the Guidelines in discharging their function of assessing damages in personal

injury actions. That was expressly accepted by the State. The Guidelines do not exclude from consideration by a court undertaking such an assessment any matters which are, in that court's view, otherwise relevant to such assessment.

121. The statutory scheme enacted by the Oireachtas clearly has important mandatory elements (a judge or court *shall* have regard to the Guidelines and *shall* state its reasons for departing from them) but the entitlement of that judge or court to depart from the Guidelines – and the absence of any *substantive* limitations on doing so – are also significant features of the scheme. In these circumstances, I do not think it accurate or useful to label the scheme by reference to a binary test of whether they are either "*mandatory*" or "*advisory*". It clearly has elements of both.

122. The circumstances in which, and the reasons for which, a court might depart from the Guidelines in a specific case was the subject of considerable discussion at the hearing. The discussion was necessarily abstract and hypothetical in character. While Ms Delaney complains that PIAB failed to afford her an opportunity to argue for a departure from the Guidelines in her case, she has never sought to identify any particular basis for such an argument, other than the fact that the range of awards indicated by the Guidelines for the injury she suffered is materially lower than the range previously indicated by the Book of Quantum. Notably, Ms Delaney did not argue that an award at the level recommended by PIAB (which she has rejected in any event) was otherwise unfair or disproportionately low, either by reference to the specifics of the injury that she suffered and its consequences for her or by reference to the level of awards indicated by the Guidelines for other categories of injury. Equally – and, again, significantly –

Ms Delaney did not contend that an award at that level would be "*unjust*", in the sense that if she was limited to such an award (for general damages) that would or might constitute a failure on the part of the State to defend and vindicate her Article 40.3 personal rights, including her person and bodily integrity.[28]

123. In the ordinary way, questions as to the weight to be given to the Guidelines and the types of factors that might warrant departing from them would be addressed and clarified on a case-by-case basis, by reference to concrete facts and circumstances, in the manner characteristic of the common law. Faherty J makes essentially that point at para 22 of her judgment and I agree with her. But the issue arises here and is significant for the resolution of this appeal and so cannot be avoided. Even so, the limitations of such an exercise, in the circumstances presented here, should be clearly understood. Personal injury claims arise in a myriad of circumstances. Similar accidents can produce very different consequences, both in terms of the nature of the resulting injuries and the impact of those injuries on the individual concerned. No two cases are identical. This Court, hearing a constitutional action, is clearly not in a position to be prescriptive as to the application of the Guidelines in all circumstances and to attempt to do so would be at odds with the flexibility that the Oireachtas has deliberately built into the statutory scheme.

[28] See in this context the discussion in the *LRC Capping Report*, at 3.13 – 3.33 as well the authorities referred to there, including *Sweeney v Duggan* [1997] 2 IR 531, *Hanrahan v Merck Sharp & Dohme Ltd* [1988] ILRM 629 and *Blehein v Minister for Health* [2018] IESC 40, [2020] 2 IR 164

124. Subject to that important caveat, a number of general observations may be made. The first – and fundamental – point in this context is that the courts retain responsibility for the assessment of general damages in personal injury actions. In every such action, it is the court – not the Committee or the Council who respectively drew up and adopted the Guidelines – that has the power and duty of making an appropriate award. In no circumstances do the Guidelines require a court to make an award it considers to be unjust. That proposition was accepted by the State in argument. It is, in any event clear as a matter of first principle. If authority is needed for it, it is supplied by *Greene* and *Hanley* and reinforced by the provisions of section 93 of the 2019 Act. That point is, in my view, of the utmost importance in assessing Ms Delaney's challenge to the constitutionality of the 2019 Act.

125. But judges are not – and, prior to the adoption of the Guidelines, were not – at large in the assessment of general damages in personal injury actions. Whether such an action is tried in the District Court, the Circuit Court or the High Court, every award of general damages made by a court is subject to review, and if appropriate, revision, on appeal. As already noted, the principles governing such awards have been explained and developed in many recent decisions of the appellate courts. Those principles operate to constrain, to a significant extent, the assessment of general damages in personal injury actions. The Guidelines do not *alter* those principles. Rather, they constitute a serious and important exercise in giving concrete and practical *effect* to those principles. They are the considered product of the exercise contemplated by this Court in *Morrissey*, aiming for "*the proper calibration of damages for pain and suffering*" by seeking to identify "*an appropriate proportionality between what might be considered to be a*

generally regarded view of the relative seriousness of the injuries concerned and the amount of any award." In light of *Morrissey* and the other Supreme Court and Court of Appeal authorities referred to earlier in this judgment, the legitimacy and value of such an exercise is indisputable (as indeed all members of the Court appear to accept).

126. Furthermore, the Committee in formulating the Guidelines (and the Council in adopting them) brought particular experience and expertise to their task and, in contrast to a judge or court adjudicating on an individual action or appeal, could take a wide-angle view, encompassing the universe of personal injuries, physical and/or psychiatric, so as to give guidance aimed at ensuring "*a rational relationship between awards of damages in personal injuries*" generally. Insofar as the Guidelines are influenced by personal injuries awards outside the State – as clearly they are and, in my view, permissibly so – again the Committee had the opportunity to carry out a much more systematic review than could readily have been undertaken by a judge or court hearing an individual action or appeal.

127. All of this suggests that, in requiring courts to "*have regard*" to the personal injury guidelines adopted under section 7, and requiring any departure from them to be reasoned, the Oireachtas contemplated that such guidelines should have more than merely hortatory effect and should instead have significant effect in the assessment of awards for general damages in personal injury actions. The procedures prescribed for the adoption of such guidelines – the powers given to the Committee and the involvement of the Council – in themselves indicate serious intent. It is also critical that the Oireachtas specifically highlighted the "*promotion of consistency in the level of*

damages awarded for personal injuries" as an objective of such guidelines (in section 90((3)(d) of the Act). If the guidelines could be readily departed from, the objective of consistency would obviously be undermined. The imposition of an express requirement that a court must state its reasons for departing from the Guidelines is both novel and meaningful, emphasising that any such departure must have a reasoned basis. That reason must be "*a reason of substance*" (in the words of Lynch J in *Hanley*), and thus one that justifies the decision to depart. Otherwise, the statutory injunction to "*have regard to*" the Guidelines, the product of such elaborate and expert consideration in accordance with the procedures prescribed by the Oireachtas, would be rendered entirely hollow.

128. An award in accordance with the Guidelines ought to be the presumptive starting point. In many if not most cases, that will also be the end point. However, if in the particular circumstances of an individual case, the relevant court is satisfied that such an award would not represent just compensation for the particular injury at issue – if, in the language of Denham J in *Greene*, such would not be a "*fair decision*" or a "*just result*" – the court may and indeed must depart from the Guidelines to the extent that it considers necessary to avoid injustice. But that, without more, is a statement of a (significant) constitutional backstop rather than a useful practical standard. A standard founded solely on slippery and elusive ideas such as "*justice*" and "*fairness*" is not, on its own, capable of practical application in a manner consistent with achieving the objectives of consistency and predictability in personal injury awards in the State. Something more is required in my view.

129. Clearly, if a court was to be persuaded that an award within the range indicated by the Guidelines was so low that it would not vindicate the personal rights of a plaintiff under Article 40.3, the court could and should depart from the Guidelines in such circumstances. But that very high threshold is not one which the Plaintiff suggests is met here, either by reference to her particular injury or more generally, and it is difficult to envisage circumstances in which it would. In my view, to approach the Guidelines on the basis that they should not be departed from unless such a threshold was met would be much too restrictive, having regard to the language used by the Oireachtas.

130. Otherwise, if a court (or PIAB which is, of course, under a similarly worded obligation to "*have regard to*" the Guidelines) considers that an award within the range indicated by the Guidelines would not be consistent with any reasonable application of the principles governing the assessment of general damages, such that, in the court's (or PIAB's) view, such an award would not represent just and/or proportionate compensation for the injury sustained in that case, the court (or PIAB) may depart from the Guidelines. I emphasise that this is also a significant threshold, involving as it must a finding that there is no reasonable proportion between the award indicated by the Guidelines on the one hand and the award that the court considered it appropriate to make, applying the principles governing the assessment of general damages and unconstrained by those Guidelines, on the other. The caselaw gives valuable guidance as to the application of that standard: see the decision of this Court in *Rossiter v Dun Laoghaire* [2001] IESC 85, [2001] 3 IR 578 and the authorities referred to there. A clear

standard of that kind is necessary to ensure the consistent and effective application of the Guidelines by PIAB and the courts.

131. Previous awards may be relevant in this context, as the State ultimately accepted in argument. But pre-Guideline awards must nonetheless be treated with circumspection. The wide-ranging exercise undertaken by the Committee (and endorsed by the Council) is one which no court has (or could have) undertaken previously. While the fundamental drivers of that exercise – most significantly, perhaps, the principle of proportionality but also including the important interests of fairness and consistency – all derive from decisions of the Superior Courts, no court adjudicating on an individual personal injury action or appeal has the benefit of the overall perspective that the Committee enjoyed in carrying out its work.

132. It follows, in my view, that an award within the range indicated by the Guidelines for a particular injury should not be considered inappropriate simply because a different award or range of awards for that injury was previously indicated in the Book of Quantum or because a higher (or lower) award was previously given by a court.

133. In argument, the question was posed as to how a court should treat the Guidelines where, for instance, there was a recent Court of Appeal decision indicating what the appropriate award for injury X was and where the Guidelines indicated a lower award – perhaps a significantly lower award – for the same injury. Absent the Guidelines, it was said, the court would follow the guidance given by the Court of Appeal and a question arose as to how that court should proceed in such a scenario. Such a scenario

is unlikely to arise frequently. While the Court of Appeal has been very active in the area of personal injury awards, it is the case that there are only a relatively small number of Court of Appeal judgments in this area and it is not the case that, for all or most categories of injury, there is any available Court of Appeal "*precedent*". Indeed, as the Committee explained in its Report (para 83 and following) there are only a relatively limited number of considered decisions, from all court level, addressing personal injury awards. Furthermore, even where the headline injury is the same, there may be significant variances between different cases. It is for that reason (*inter alia*) that an award made in an previous case does not operate as a precedent in the same way that a previous decision on a point of law does.

134. Ultimately, a court may depart from the Guidelines where it is of the view that 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. In making that assessment, the court may have regard to relevant previous awards and there may be cases where, on that basis, the court concludes that the threshold for departing from the Guidelines is met. Beyond that, this Court should not venture in this appeal. The issue does not arise here in any concrete way (Ms Delaney has not pointed to any previous court decision involving a higher award for the injury that she suffered than is indicated in the Guidelines) and, in this respect as with the application of the Guidelines more generally, only the practical application of the Guidelines in concrete cases by courts, with the possibility of appellate review and guidance, will resolve some of the questions raised in this appeal.

135. Where a court does depart from the Guidelines, it must give its reasons for doing so and, in the event of an appeal, those reasons, and any associated findings of fact, can be considered. Having regard to the test as I have proposed it, that requires the court to explain precisely why it has concluded that the award yielded by the guidelines does not bear a reasonable proportion to the award the court would otherwise consider appropriate. An appellate court may take a different view of the appropriate level of award when applying the same test, but will clearly afford the trial court's assessment of the award some deference in accordance with established principles. Where an appellate court upholds an award made in accordance with the Guidelines (or sets aside/reduces an award made in excess of the Guidelines) the capacity of a lower court to depart from the Guidelines in the future will necessarily be constrained. Conversely, where an appellate court makes an award above (or below) the range indicated by the Guidelines or upholds such an award by a lower court that too will be an important point of reference for subsequent application of the Guidelines. That process of decision and appeal will give concrete and specific guidance as the proper approach to the Guidelines and the circumstances in which they may be departed from, as well as identifying areas where the Guidelines may need amendment.

136. Any award above the range indicated in the Guidelines gives rise to a risk that the award will offend against the principle of proportionality, 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. That is, I believe, what the Committee had in mind when suggesting that the bands in the Guidelines could be departed from only in "*exceptional*

circumstances." The Committee was well aware that no such threshold was provided for anywhere in the 2019 Act. The point being made by the Committee was, I think, a different one and one which Mr McCullough SC echoed in his submissions, namely that given that the Guidelines are themselves fundamentally premised on the principle of proportionality (both as within categories of injury and between different categories of injury), then if the Committee has done its job well, it should only be in exceptional circumstances that a higher (or, indeed, a lower) award would be justified.

137. The fundamental point is that if a court considers that, in the particular circumstances presented to it, the application of the Guidelines would lead to injustice or unfairness because the award yielded by the Guidelines does not bear a reasonable proportion to the award the court would otherwise consider appropriate (in the sense indicated above), then the court is entitled to depart from them to the extent necessary to avoid such justice or unfairness.

138. In her judgment, Faherty J states her agreement with much of the analysis above but nonetheless concludes that, while the *power* of an individual judge or court to depart from the Guidelines has not been fettered by the Oireachtas, the *actual scope* for departure is significantly limited (judgment, at para 14). That, in her view, follows from the fact that the Guidelines have brought about a "*sea-change*" in the level of general damages in personal injuries litigation which was expressly sanctioned by the Oireachtas in the manner in which they legislated to give effect to the Guidelines (judgment, at para 17). Because the Guidelines must be presumed to encapsulate the pre-Guidelines jurisprudence, as well as the principle of proportionality, my colleague

concludes that it would be difficult for a judge to justify a departure from the indicated award (or range of awards) in any given case.

139. However, as I have already made clear, the Committee was not infallible nor are the Guidelines produced by it required to be so regarded. The Committee has endeavoured to place every injury somewhere between zero and the "*cap*" so as to identify the proportionate award/range of awards for each such injury. If, as Faherty J appears to be suggesting, it will be difficult in practice to justify a departure from the level of awards indicated in the Guidelines, that would in turn appear to indicate that the Committee has done its job well. Otherwise, it is difficult to understand how it could be said that there is little or no *scope* to depart from the Guidelines, even if there is a *power* to do so (as Faherty J expressly accepts). If in any given case the indicated award is not a fair and proportionate award for the injury or injuries sustained (in the sense already indicated), the court is entitled to depart from the Guidelines. If, in practice, that is a difficult threshold for plaintiffs to meet, that follows from the very nature of general damages awards (which are not a matter of calculation but of assessment and where, as a result, it is not possible to identify the "*right*" award in any given case). That is, of course, one of the main reasons for adopting the Guidelines regime in the first place: the promotion of consistency and predictability. But, more fundamentally, it suggests that if, as Faherty J says, the adoption of the Guidelines have effected a "*sea-change*" in the assessment of general damages in personal injury actions in the State, that has not resulted in any tangible injustice to plaintiffs.

140. To illustrate, by reference to the facts here: if the Plaintiff is not in a position to establish that, in her case, the appropriate award for general damages – the award produced by the proper application of the relevant principles of assessment – is or ought to be materially higher than the award indicated by the Guidelines (and that question has yet to be determined by a court), whether the level of award/range indicated in the Book of Quantum or some other higher award, what complaint can she legitimately have about the Guidelines and how can she maintain that any right of hers has been affected by the application of the Guidelines to her?

141. In his judgment, Haughton J refers to a number of recent judgments of the High Court and the Court of Appeal which have considered the Guidelines in the context of assessing damages in cases of multiple injuries, suggesting that they illustrate the "*granular way*" in which practitioners, PIAB and the courts are obliged to engage with the Guidelines. That may be so, but those cases also appear to illustrate courts making awards in accordance with the Guidelines without any suggestion of being constrained to make awards that they considered to be disproportionately low or that were otherwise unjust to the claimants concerned.

142. Haughton J goes on to suggest that the statement that the Guidelines can be departed from where a court considers it "*just*" to do so is "*contradictory and circular*" because the Guidelines themselves are intended to do "*justice*" between claimants and defendants and to represent a just assessment system. That is no doubt so but, again, neither the Committee that drew up the Guidelines nor the Council that adopted them, was omniscient or infallible. In any exercise as ambitious and challenging as was

involved in the adoption of comprehensive and detailed personal injury guidelines covering all injuries from the most serious to the most minor and addressing complex issues such as the assessment of damages in cases of multiple injuries, there is the possibility of error. The severity of a category of injury may be under- or over-estimated. New insights may emerge as to the severity and/or duration of the consequences of an injury category. The entitlement of the assessing court to depart from the Guidelines where justice requires such a departure – and that was the language adopted by this Court in *Greene* – is an important constitutional backstop. It means that no judge or court can ever be obliged by the Guidelines to make an award that, in their assessment, would involve an injustice. I have explained above the approach that should be taken in making such an assessment. If, having regard to the terms of the Guidelines, it does not seem likely that such a threshold will often be met in practice (as Haughton J appears to suggest), that does not, in my view, indicate a problem with the Guidelines but rather the opposite. If the awards indicated by the Guidelines have generally been considered by the courts and judges whose task it is to apply them to be fair and proportionate, again that suggests that the Committee did its work well.

143. Finally, I come back to the Plaintiff's argument that an "*entirely unfettered discretion*" to depart from the Guidelines would render section 22(1) unconstitutional and would be "*inimical to the rule of law*". Far from conferring "*unfettered discretion*" on courts as regards the assessment of damages, the Guidelines instead aim to achieve greater consistency and predictability. As for the supposed "*discretion*" to depart from the Guidelines, as I have already said I do not think that section 22(1) confers any such "*discretion*" on courts; rather it proceeds on the basis that courts are entitled to depart

from the Guidelines, subject to giving their reasons for doing so. But, whether regarded as a "*discretion*" or an "*entitlement*", it is not "*unfettered"* either. It is bounded by the fundamental duty of judges and courts to exercise their judicial functions in accordance with the Constitution and the law and to ensure that persons who suffer personal injuries as a result of the negligence of others should recover no less than, but also no more then, fair and proportionate compensation for such injuries. That, as I have explained, prompts the conclusion that the guidelines may be departed from where the court concludes that the award yielded by the guidelines in a particular case does not bear a reasonable proportion to the award the court would otherwise consider appropriate. As I have observed, that is a formula of words which has been applied, developed and explained in similar contexts (*Rossiter v Dun Laoghaire* [2001] IESC 85, [2001] 3 IR 578).

144. In his judgment, Charleton J approaches the question of the effect of the Guidelines from a somewhat different starting point. He characterises the Guidelines as advice rather than law. But Charleton J's analysis of the weight to be given to the Guidelines and the circumstances in which a departure from the Guidelines may be justified is, in my view, consistent with the analysis above. Charleton J suggests that departure from the Guidelines should be rare. I agree. He acknowledges that departure would be justified where the award indicated by the Guidelines would not represent just compensation for the claimant. I agree with that statement as a matter of general principle but for the reasons set out above, it does not in itself set out a workable standard. However, the examples given by Charleton J of circumstances where a departure from the Guidelines might be justified all appear to be premised on there

being no reasonable proportion between the award indicated by the Guidelines and the award that the court would otherwise consider to be appropriate and I agree that in such circumstances departure from the Guidelines would be justified.

145. In his judgment, Hogan J characterises the Guidelines as "*soft law*" rather than "*hard law*" (at least prior to the enactment of the 2021 Act which, on his analysis, has significantly altered the status of the Guidelines). Those labels convey different meanings in different contexts and to different people and in my view they do not assist here. The status and effect of the Guidelines is to be discerned from the provisions of the 2019 Act. As I read his judgment, my colleague's conclusion that the Guidelines have "*a form of advisory status*" largely follows from his view that to allow the Guidelines any more prescriptive status would involve an infringement of Article 5, 15.2 and 34 of the Constitution. As will appear, I respectfully, but firmly, disagree with that view. But that disagreement aside, it is wholly unclear what, in practice, would be the effect of guidelines with such "*advisory status"* and how such guidelines could meaningfully contribute to the objectives of consistency, legal certainty and predictability that the Guidelines are clearly intended to promote.

146. Finally, I come back to the Plaintiff's argument that an "*entirely unfettered discretion*" to depart from the Guidelines would render section 22(1) unconstitutional and would be "*inimical to the rule of law*". Far from conferring "*unfettered discretion*" on courts as regards the assessment of damages, the Guidelines instead aim to achieve greater consistency and predictability. As for the supposed "*discretion*" to depart from the Guidelines, as I have already said I do not think that section 22(1) confers any such

"*discretion*" on courts; rather it proceeds on the basis that courts are entitled to depart from the Guidelines, subject to giving their reasons for doing so. But, whether regarded as a "*discretion*" or an "*entitlement*", it is not "*unfettered*" either. It is bounded by the fundamental duty of judges and courts to exercise their judicial functions in accordance with the Constitution and the law and to ensure that persons who suffer personal injuries as a result of the negligence of others should recover no less than, but also no more then, fair and proportionate compensation for such injuries.

(2) THE PIAB ISSUE

The Argument

147. Ms Delaney's case against PIAB raises two broad points: (i) whether on a proper construction of the statutory provisions PIAB was wrong to assess her claim by reference to the Guidelines rather than the Book of Quantum and, if not, (ii) whether in any event PIAB was obliged to permit her to make submissions as to why it ought to depart from the Guidelines.

148. In relation to the first point, Ms Delaney argues that an assessment is a process that occurs over time (and which began here on 9 March 2020) and that the Board was wrong to take the view that the assessment took place on a single day (here, on 13 May 2021). Her submissions refer to a number of provisions of the 2003 Act, including sections 11, 17, 18(3)(b), 19, 20 and 49(1), which she says support her argument. Ms Delaney submits that the assessment under PIAB Act was active and underway *before* the adoption of the Guidelines and – of most importance – prior to date on which section 20(5) of the Civil Liability and Courts Act 2004 took effect. Accordingly, she says, the assessment was (or ought to have been) unaffected by the new subsection and therefore should have been carried out by reference to the Book of Quantum. She placed particular emphasis on the reference in section 17(1) to the possible *discontinuance* of an assessment in certain circumstances and also on the reference in section 18(3)(b) (which deals with issues of capacity) to "*steps in the making of a reference*" and the further reference to "*steps*" in section 49(1) (duty to make assessments expeditiously)

which, it was suggested, referred to steps in the making of an assessment. The "*steps*" that may be taken by the assessor(s) included seeking further information from either the claimant or the respondent(s) "*as they consider necessary for the making of the assessment*" (section 23), requesting the claimant to submit to medical examination in certain circumstances (section 24) and requesting information from third parties (sections 26-28). These, said the Plaintiff, were all steps in an ongoing assessment process. The assessment of the Plaintiff's application had commenced prior to 24 April 2021 insofar as steps had been taken to have her medically examined by Mr Kapoor and a medical report obtained from him. Therefore, the Plaintiff said, the assessment of her claim had begun prior to the amendment of section 20 of the PIAB Act and, in such circumstances, it was to be presumed that the amendment was not intended to affect the assessment or the basis on which it was to be conducted.

149. In relation to the second point, Ms Delaney submits that there was a particular failure on the part of PIAB to apply fair procedures to her prior to conducting its assessment. In support of this, Ms Delaney relies on *O'Brien v PIAB* [2009] 3 IR 243 where this Court observed that the process before PIAB may conclude with an assessment and as such "*is a critical part of the Applicant's claim*" (para 45). She cites *Dellway Investments v NAMA* [2011] 4 IR 1 as to the right of persons affected by the exercise of statutory powers to make representations. Ms Delaney says that she was affected by PIAB's decision as to whether or not to depart from the Guidelines. Second, her constitutional rights are engaged during the PIAB process. Third, there were no countervailing public policy considerations which may justify the restriction of fair procedures being afforded to Ms Delaney. In her submission, all of these factors pointed

to the conclusion that she should have had been given an opportunity to make "*short submissions*" explaining why PIAB's discretion should have been exercised in her favour.

150. In response, PIAB examined in detail the statutory framework in the PIAB Act. It says that the process of assessment under the Act has four phases: (i) the making of an application for an assessment; (ii) the arranging for an assessment to be made; (iii) the making of an assessment; and (iv) steps consequent upon the making of an assessment. When making an assessment after 24 April 2021, after the coming into operation of section 99 of the 2019 Act, there was no basis upon which the Board or its assessors could have regard to the Book of Quantum. Section 22(5) of the Civil Liability and Courts Act 2004 (inserted by section 99) unambiguously required that any assessment after 24 April 2021 had to have regard to the personal injuries guidelines and that displaced any presumption against retrospective effect that might otherwise arise. The decision of this Court in *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 IR 64 was said to be clear authority for that proposition.

151. As regards the making of submissions, PIAB refers to an Affidavit sworn by Ms Delaney's solicitor, Mr David Burke, in which he avers that "*there are no factors present in this case apparent to [counsel] that would justify a Judge from departing from the Guidelines*". There was, PIAB says, common ground between the Plaintiff and PIAB that there was no basis for departing from the Guidelines and on that basis the Plaintiff's complaint was moot and should not be entertained. No "*exceptional circumstances*" existed such as might justify a departure from the general rule against

the determination of moots. Without prejudice to that objection, PIAB said that the assessment process did not breach any rights of the Plaintiff. PIAB had properly applied the Guidelines and had considered all of the documentation submitted on the Plaintiff's behalf. There was nothing preventing the Plaintiff and/or her legal representatives from submitting further correspondence, whether as regards the Guidelines or otherwise and no basis for suggesting that any such correspondence would not have been considered. As for the suggestion that PIAB ought to have notified the Plaintiff and/or her legal representatives of the date on which the Guidelines were to come into operation, PIAB referred to correspondence with the Plaintiff's solicitors from which it is evident that they were aware of the Guidelines as of the 29 March 2021.

Assessment

152. Section 20(5) of the PIAB Act provides that "*[i]n making, on or after [24 April 2021] 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 … 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)*."

153. The first question that arises here, accordingly, is when the *assessment* was made by PIAB and, in particular, whether it was made before 24 April 2021. "*Assessment*" is defined in section 20(1) of the PIAB Act as "*an assessment of the amount of damages the claimant is entitled to in respect of the claim on the assumption that the respondent*

or respondents are fully liable to the claimant in respect of the claim". That suggests that the assessment is made when PIAB, by its assessor(s), determines the amount of damages the claimant is entitled to. In other words, the assessment is a monetary amount. That is consistent with section 21(3) and (4). It is that assessment that is to be reduced to writing and served on the claimant and the respondent(s) in accordance with section 30(1) and it is that assessment that may be accepted or rejected by the parties and that becomes binding in the circumstances set out in section 33 and which may be enforceable under section 38. It is that assessment – the monetary amount – that requires approval under section 35 where the claimant is a minor or where otherwise the settlement of a claim would require court approval (and note in this regard the reference in section 35(5) to "*the amount of the assessment the subject of the application for approval*"). It is that assessment – again, the monetary amount – that is inadmissible in evidence by virtue of section 51 and which is relevant for the purposes of section 51A (inserted by the Personal Injuries Assessment Board (Amendment) Act 2007). Section 51A provides that a claimant's failure to accept an assessment may have adverse costs consequences where the claimant fails to recover damages exceeding "*the amount of the assessment*". Section 49 of the PIAB Act is also significant in this context. Section 49(2) imposes a general duty on the Board to ensure that "*every assessment is made*" within a period of 9 months (the date on which that period starts to run depends on the number of respondents and when consent to assessment was given). Section 49(4) permits that period to be extended when it appears to the Board that it would not be possible or appropriate "*to make an assessment*" within those 9 months. In those circumstances, the Board must serve a notice specifying the date "*before which the Board intends that the assessment shall be made.*" Section 49(5) would then demand

that the Board take all steps open to it "*to ensure that the assessment is made before the date specified in the notice*" and, "*[i]f the assessment is not made before that date*", section 49(6) requires the Board to issue an authorisation unless the claimant consents to the Board continuing to deal with the matter.

154. PIAB's evidence here – which was not disputed – was that the assessors responsible for making the assessment on foot of the Plaintiff's application had her claim assigned to them in the week commencing 10 May 20221 and met for the purpose of discussing the claim on 13 May 2021. It was at that meeting that the assessment of €3,000 for general damages was made. It was that assessment that the Plaintiff declined to accept.

155. Undoubtedly – and unsurprisingly – the PIAB Act envisages a process leading from application for assessment under section 11 to assessment under section 20. The Oireachtas could have provided that PIAB should have regard to the Guidelines only in respect of applications made after the coming into operation of section 99 of the 2019 Act (i.e. 24 April 2021). That would have been a clear cut-off. However, that was not the choice made by the Oireachtas: so much is clear from section 20(5). Any intermediate position – such that the Guidelines would apply to some but not all applications pending before the Board on 24 April 2021, depending on whether or not the Board and/or its assessors had begun to process the applications (or as, the Plaintiff would have it, the assessment process had started) – would certainly not have provided any clear cut-off point and, for that reason, it would have been surprising if the Oireachtas had adopted such an approach. In any event, it is not what the Oireachtas did. The cut-off chosen by the Oireachtas was the *making* of an assessment. Having

regard to the provisions of the PIAB Act, it is, in my view, clear that an assessment is made only at the point when the assessor(s) make an assessment of the damages that the claimant is entitled to. On the undisputed evidence here, that occurred *after* 24 April 2021 and accordingly the Board's assessors correctly applied the Guidelines in making the assessment. Even if it can be said that the assessment process had commenced at that point, I agree with the Board that the clear words of section 20(5) displace any presumption against retrospective effect that might otherwise be said to arise. *Minister for Social, Community and Family Affairs v Scanlon* is, as the Board submits, authority for that proposition.

156. That interpretation of section 20(5) of the PIAB Act is reinforced by a consideration of section 22(1A) of the 2004 Act (which, like section 20(5), ultimately derives from the provisions of the Family Leave and Miscellaneous Provisions Act 2021). Section 22(1A) provides that a court assessing damages in a personal injuries action shall have regard to the Book of Quantum (rather than the Guidelines) where either (a) the action was commenced prior to the commencement of section 99 of the 2019 Act (i.e. 24 April 2021) *or* (b) the action was commenced after the 24 April 2021 but "*an assessment was made under section 20 … in relation to that claim before [24 April 2021]*" and the assessment was not, or was deemed not have been, accepted in accordance with the PIAB Act.

157. These provisions are intended to operate coherently and consistently. Where PIAB makes an assessment *after* 24 April 2021, that assessment is to be made by reference to the Guidelines, not the Book of Quantum, and if that assessment is not accepted, the

court also applies the Guidelines in assessing damages. As regards an assessment made before 24 April 2021, PIAB makes that assessment by reference to the Book of Quantum and, where it is not accepted, the court also applies the Book of Quantum when assessing damages. In each scenario, the same basis of assessment is applied by PIAB and the court.

158. In this case, no assessment was made under section 20 prior to 24 April 2021. The only assessment capable of being accepted or rejected was made on 13 May 2021. That means that it is the Guidelines, rather than the Book of Quantum, that apply to the proceedings brought by the Plaintiff and it also means that the Board correctly assessed her application by reference to the Guidelines.

159. For completeness – though it was not relied on by the Plaintiff – I have considered the provisions of section 27 of the Interpretation Act 2005 in this context. Section 27(1) provides that where an enactment is repealed, the repeal does not "*(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment*" or "*(e) prejudice or affect any legal proceedings (civil or criminal) pending at the time of the repeal in respect of any such right, privilege, obligation, liability…*" That provision was considered by this Court in *Minister for Justice v Tobin* [2012] IESC 37, [2012] 4 IR 147. As the Court explained, section 27(1) is subject to section 4 of the Act so that what appears to be a hard-edged rule in fact operates as a presumption which will be displaced where "*the contrary intention appears*" in the enactment.

160. There are, I think, a number of significant obstacles to any reliance on section 27(1) here. The amendment here was to the PIAB Act and the Plaintiff had not, in my view, acquired or accrued any right or privilege under that Act that was affected by the amendment. Her right of access to the court was unaffected (though that right of access was, and continued to be, subject to the requirement to obtain an authorisation from the Board). The Plaintiff had a right to have her application determined in accordance with the PIAB Act (which might or might not involve the Board making an assessment) but she had no right to an assessment of any particular amount, whether by reference to the Book of Quantum or otherwise (and no right to receive whatever assessment that PIAB might make in any event, that being contingent on the assessment being accepted by the Local Authority). Even if it could be said that, on making her application, she acquired a right to have an assessment made "*on the same basis and by reference to the same principles governing the measure of damages in the law of tort and the same enactments as would be applicable in an assessment of damages were proceedings to be brought in relation to the relevant claim concerned*" (the language of section 20(4) of the PIAB Act), the enactment of section 20(5) did not affect that right. That continues to be the fundamental framework for the assessment of damages in personal injuries actions in the State, albeit that regard must now be had to the Guidelines in carrying out that exercise. In any event, even if (contrary to the preceding analysis) any section 27(1) presumption arose here, it was displaced by the "*contrary intention*" clearly evident from the terms of section 20(5) of the PIAB Act.

161. Of course, the Plaintiff argues that the application of the Guidelines to her claim – whether by PIAB or by the court – is unconstitutional, *inter alia* because that

impermissibly gives retrospective effect to the Guidelines and/or impermissibly discriminates between claimants who are otherwise in the same circumstances (claimants who suffered an injury prior to 24 April 2021 and who applied to the Board under the PIAB Act prior to that date) on the basis of the happenstance of when the Board made its assessment on their claim and when, accordingly, the claimant was in a position to institute proceedings. That argument is addressed later in this judgment and, as I shall explain, I am not persuaded by it.

162. The second aspect of the Plaintiff's case under this heading relates to the alleged failure of PIAB to afford her fair procedures. I see no merit in this complaint. It is apparent from their letter of 29 March 2021 that the solicitors for the Plaintiff were aware of (and apprehensive of) the imminent legislative application of the Guidelines. There was nothing to prevent the Plaintiff, through her solicitors, from making a submission to PIAB at that stage to the effect that, if her application came to be assessed by reference to the Guidelines, there were particular grounds on which PIAB should depart from those Guidelines in making its assessment. Secondly, and in any event, there is a decidedly artificial character to this complaint, given that at no stage in the proceedings has any concrete ground for departing from the Guidelines been identified by the Plaintiff. Thirdly, if there is any such ground or grounds, the Plaintiff will be free to rely on it in the court proceedings she had since initiated. In these circumstances, there does not appear to be any substance or reality to this complaint.

163. I would therefore reject the Plaintiff's challenge to PIAB's assessment and dismiss her appeal on this issue.

164. But for his view that the Guidelines were confirmed by the 2021 Act, Hogan J would have concluded that PIAB erred in its assessment by giving excessive weight to the Guidelines and treating them as binding "*hard*" law. As will be evident from the discussion of the Guidelines above, I disagree with that conclusion. The unchallenged evidence of the assessors is that they had regard to the Guidelines, as mandated by section 20(5) and also considered whether to depart from the Guidelines in this case but saw no basis for doing so. I discern no error in that approach nor can I see any parallel with *Balz* or *Tristor*.

(3) THE LEGISLATIVE POWER ISSUE

The Argument

165. The Plaintiff refers to many well-known authorities dealing with Article 15 of the Constitution, including *Cityview Press*, *Laurentiu v Minister for Justice* [1999] 4 IR 26, *Bederev*, *NECI* and *DPP v McGrath* [2021] 2 ILRM 345, which she says have developed certain tests and identified certain trends relevant to the inquiry as to whether or not an enactment breaches Article 15, including the "*principles and policies*" test set out in *Cityview Press* (which principles and policies, the Plaintiff emphasises, must be found in within the enactment itself, citing *Bederev*), the extent to which the Oireachtas retains legislative oversight, such as by retaining the power of review or annulment (citing *Bederev* and *NECI*) and the extent to which the subordinate body has policy options (citing *DPP v McGrath*).

166. The Plaintiff says that the Judge misapplied these principles. She says, firstly, that the Guidelines engage Article 15 because they are rules of general application which are to be applied by both PIAB and the courts for all future personal injury actions and thus display the classic indicia of a law. Second, she says that the Board and the Council were subject to no or no meaningful limitation as to how to exercise their statutory functions. In voting on the draft Guidelines, the Council was effectively engaging in a policy debate as to the desirability of the Guidelines and was, in practical terms, "*sitting as a legislative assembly*". Third, the Oireachtas did not retain any legislative oversight of either the process or the end result. The Guidelines did not have to be placed before

either House to have them ratified or annulled. The Oireachtas has thus (according to the Plaintiff) engaged in a "*wholesale and permanent delegation*" of responsibility for creating rules of general application governing the award of damages. Section 90 of the 2019 Act fails to set out any meaningful "*principles or policies*", conferring "*unfettered discretion*" to the Committee and the Board (section 90(3)(e) is cited as an example of such discretion) and giving them a right to decide what social and/or economic policy is to be implemented. Instead of providing for a narrow set of choices that left a small set of options to the delegated body, the structure of the 2019 Act "*leaves essentially every policy decision up to the Committee, Board and the Council*", with the Board and the Council being left without guidance. That is said to be exemplified by an averment in an affidavit sworn on behalf of the State Respondents to the effect that the State had not anticipated the effect of the Guidelines.

167. The State fundamentally disputes this analysis. It says, firstly, that Article 15.2.1 is not actually engaged here because the Guidelines are not the product of the exercise of any power of a legislative nature. The Guidelines are merely guidance and the fact that they can be departed from by their addressees – PIAB and the courts – illustrates that they do not have the character of "*legislation*" or the "*force of law*". In any event, even if the Guidelines do constitute legislation, "*ample principles and policies*" are set out in the 2019 Act and in particular section 90 and there was no unlawful delegation of a power to legislate. They say the Constitution permits broad latitude to be afforded (citing *Bederev, O' Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751 and *NECI*). The fact that the Committee or the Board had a discretion did not give rise to any constitutional difficulty given that (as per *Morrissey*) there is necessarily a significant

subjective element to the assessment of general damages. Other legislation providing for wide delegations have withstood challenge (citing *NECI*, as well as *Leontjava v DPP* [2004] 1 IR 591). Developing detailed guidelines for the awards of general damages was not an appropriate exercise for the Oireachtas to undertake (citing *Bederev* and *NECI* which, it is suggested, chime with observations made by Blackmun J in *Mistretta* where, speaking of the process of developing sentencing guidelines, he stated that it was "*precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate*" (at 379)). Review by the Oireachtas was not a constitutional requirement and in any event the Oireachtas can intervene if not content with the Guidelines.

Assessment

168. The discussion here should be read in conjunction with the discussion below in relation to the *Vires* Issue.

169. The permissible limits of legislative delegation under Article 15.2 of the Constitution and the approach to be taken where legislation is challenged on the basis of exceeding those limits, are comprehensively considered and authoritatively and finally settled in a number of recent decisions of this Court, including *Bederev*, *O' Sullivan, NECI* and *McGrath*. This Court's earlier decision in *McGowan v Labour Court* [2013] IESC 21, [2013] 3 IR 718 is also relevant.

170. These authorities make it clear that the ultimate issue that arises under Article 15.2 is whether (as it was put by McMenamin J for the Court in *NECI*) "*there has been a usurpation, arrogation, or trespass on the legislative power of the Oireachtas*" (at para 61) or (as it was put by O' Donnell J (as he then was) for the Court in *McGrath*), "*whether the Oireachtas has abdicated its function under Art 15.2.1*" (at para 69). The "*principles and policies*"/"*filling in the details*" test articulated in *Cityview Press* may be helpful in making that assessment but "*cannot be considered an infallible guide*" (*McGrath*, at para 68). The breadth of the delegation is a significant consideration: an apparently wide delegation may be limited by principles and policies clearly discernible in the parent legislation whereas a very narrow area of delegation may require very little in terms of principles and policies (*O' Sullivan*, at para 41; *NECI* at para 65; *McGrath* at para 70). The subject matter of the delegation – "*the area in which the subordinate has freedom of action*" – is also relevant.

171. That the delegate is given some discretion or choice does not of itself point to any impermissible delegation. As this Court stated in *Bederev*,"*[e]very delegation of legislative authority involves, of necessity, a power to do something or to refrain from doing something*" (at para 44). The "*entire concept of subordinate depends upon and contemplates decisions being made between a range of options. Any decision involves consideration of what the decision maker considers is the best solution in the circumstances. The question is the scope of the decision-making left to the subordinate rule maker"* (*O' Sullivan*, at para 40). Similarly, in *NECI*, this Court observed that it was "*inevitable*" that delegates would have to make choices, some of which may *"depend on expertise*" and involve areas of decision-making in which "*the Oireachtas*

itself would not be the appropriate forum" to make the choices involved (per McMenamin J at para 70). The Oireachtas must be permitted a "*degree of legislative flexibility*" (*ibid;* see also per Charleton J at para 31). However, a subordinate body cannot be "*vested with an absolute and untrammelled discretion*" (*NECI*, per McMenamin at para 64).

172. One further relevant factor identified in the caselaw is whether and to what extent the Oireachtas retains a supervisory role. In *Cityview Press*, the statutory provision at issue (section 21 of the Industrial Training Act 1967) provided that levy orders made by ANCO were subject to annulment by either House of the Oireachtas. That, the Court noted, retained a measure of control, if not in the Oireachtas as such, at least in the two Houses and was a "*safeguard*": page 399. In *Bederev*, similarly, the Court gave weight to the fact that all additions to the list of scheduled drugs were required to be laid before the Houses and could be annulled, thus retaining control by the legislature: para 49.

173. However, while undoubtedly a relevant factor (and in some cases – as in *NECI* – a very significant factor), the presence or absence of some such supervisory mechanism is not determinative in itself: see per Charleton J in *NECI,* at paras 24-28. None of the cases suggest that an otherwise permissible delegation of rule-making authority by the Oireachtas might be invalidated by the absence of such a mechanism. Notably, rules of court are not subject to any form of supervision (positive or negative) by either House of the Oireachtas. The Courts of Justice Act 1924 vested the power to make rules in the Minister for Justice, with the concurrence of the relevant rules committee and section 101 of that Act provided that such rules would not come into operation unless and until

approved by resolution of both Houses. The provisions of the 1924 Act gave rise to significant difficulties in practice and were restructured by the Courts of Justice Act 1936.[29] That Act vested the power to make rules directly in the relevant rules committee (subject to the approval of the Minister for Justice) and repleaded section 101 of the 1924 Act. There is no suggestion in *McGrath* that the removal of any supervisory mechanism cast doubt on the rule-making powers in the 1936 Act. On the contrary, O' Donnell J clearly considered that those provisions validly conferred broad powers on the rule-making committees to decide the content of the rules, extending to the adoption of rule changes which "*introduced novel procedures and concepts which have significant effects on litigation*" and embodied "*some conception of policy in relation to the fair and efficient processing of the myriad claims that come before a court*" (at para 73). The difficulty in *McGrath* was that not that the particular rule at issue - Order 36 – involved a choice *per se* but rather that "*the underlying choice here goes beyond any question properly consigned to the rule-making authority as to practice and procedure including costs, and involves a broad ranging policy decision which lies within the function of the Oireachtas under Art. 15.1.*2" and one which might be said to require "*democratic justification rather than technocratic expertise*" (at para 78).

174. *Mistretta* was relied on by both the Plaintiff and the State in this context. It concerned a challenge to sentencing guidelines adopted under the Sentencing Reform Act 1984 which established an independent body, the United States Sentencing Commission, within the judicial branch with power to promulgate binding sentencing guidelines

[29] See *Tangney v District Justice for County Kerry* [1928] IR 358.

establishing a range of determinate sentences for all categories of federal offenses. As the Opinion (delivered by Blackmun J) explains, the guidelines effected a radical recasting of federal sentencing law and practice, moving from largely indeterminate sentencing (where judges had a large measure of discretion as to the nature of the sentence to impose and where prisoners were routinely released on parole, remaining subject to supervision after release) to a system of determinate sentences. The guidelines were mandatory and could only be departed from in limited circumstances (page 367). One of the grounds of challenge was that the Act had delegated excessive legislative power to the Commission. The applicable test established by US law was whether the parent legislation lays down "*an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform*" (page 372, bracketed text in original). Although acknowledging that the Commission enjoyed significant discretion in formulating guidelines and in determining the relative severity of federal crimes and the relative weight to be given to the offender characteristics identified by Congress, involving a "*need to exercise judgment on matters of policy*", the court harboured "*no doubt"* that the legislative delegation satisfied the constitutional requirements and more than met the requirement to set out an "*intelligible principle*". In its view, developing proportionate penalties for hundreds of different crimes was "*precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate"* (at 378-9). Those observations have an obvious resonance here.

175. As already observed, the essential question identified in the recent caselaw as determinative in this context is whether the provisions of the 2019 Act providing for

the adoption of the Guidelines by the Council involved an abdication by the Oireachtas of its legislative functions under Article 15.2.1 of the Constitution. In my view, that question admits of only one answer– the impugned provisions are a valid *exercise* of the legislative competence of the Oireachtas, not an *abdication* of it.

176. The starting-point is to consider the status of the Guidelines. That, of course, has been determined by the Oireachtas itself. It is the Oireachtas – not the Committee or the Council – that has determined (by way of the amendments to the 2004 Act and the PIAB Act respectively) that the courts and the PIAB must "*have regard to*" the Guidelines while also being entitled to depart from them for stated reasons. As to the function of the Council, that is limited to the making of "*guidelines*" containing "*general guidelines as to the level of damages to be awarded or assessed in respect of personal injuries*" giving "*guidance*" on the matters set out in section 90(1)(a)-(d). I have already considered the status and effect of such guidelines. They undoubtedly constrain courts in assessing general damages in personal injury cases but do not otherwise create rights or impose liabilities or penalties. In that respect, they differ significantly from the types of delegated legislation considered in the case-law. *Bederev* concerned a provision of the Misuse of Drugs Act 1977 that empowered the Government by order to declare a substance to be a controlled drug for the purposes of the Act. Possession of such a substance and/or possession of it with intent to supply constituted serious criminal offences, punishable by significant periods of imprisonment. The effect, quite obviously, of such an order was to "*change*" the "*substantive law*": possession of a substance the subject of such an order was lawful before the order was made, but a serious criminal offence following its promulgation. While *O' Sullivan* did not involve

the creation of criminal offences, the statutory instrument at issue created a new regulatory regime in relation to sea fisheries that could potentially lead to the forfeiture of the sea-fishing boat licence of a delinquent trawler. *NECI* concerned a statutory power to make Sectoral Employment Orders which, when made, gave rise to enforceable legal rights and liabilities as between employers and employees in the employment sector concerned, in substitution of what may have been agreed by way of contract between them. *McGrath* involved a provision of the District Court Rules 1997 (Order 36, Rule 1) that exempted the DPP and Gardaí acting in discharge of their official duties from the possibility of a costs order being made against them in cases of summary jurisdiction, whatever the circumstances. These authorities (which are not challenged) leave no doubt whatsoever that the Oireachtas may entirely properly validly and constitutionally delegate to another agency a function which may result in a "*change*" to the "*substantive law*".

177. The State argues that the status of section 7 guidelines is such that they do not come within the scope of Article 15.2 at all. I do not agree. Such guidelines are the product of the exercise of a power formally conferred by the Oireachtas, exercisable within specific parameters determined by the Oireachtas and, even if they do not have precisely the same binding character as the particular instruments at issue in cases such as *Bederev*, *O' Sullivan*, *NECI* and *McGrath* (which was also characteristic of the instruments at issue in cases such as *Cityview Press, Laurentiu*, *John Grace Fried Chicken Ltd v Catering JLC* [2011] IEHC 277, [2011] 3 IR 211 and *McGowan v Labour Court* [2013] IESC 21, [2013] 3 IR 718) the guidelines are of general application and are clearly intended to have a significant effect on the assessment of general damages

in personal injuries actions in the State. That being so, they must in my view be regarded as a species of "*law*". But to characterise them in that way is not to suggest that they are constitutionally impermissible; rather it merely engages the application of Article 15.2. The critical question is whether the provisions of the 2019 Act providing for the making of such guidelines are within the limits of permissible delegation under Article 15.2.1.

178. There is a further (and significant) restriction on the delegation here. It is narrow as to its subject-matter, relating as it does to one aspect of the assessment of damages (general damages) in a single category of legal actions, personal injuries actions.

179. Thirdly, the Committee that has the statutory responsibility for drafting guidelines is not left at large by the Oireachtas. In drafting guidelines, it is required to have regard to the matters set out in section 90(3). These include the level of damages awarded by courts in the State *and* by courts in such places outside the State as the Committee considers relevant (section 90(3)(a)) (and section 18(7)(c)(i) confers an express power on the Committee to conduct research as to the level of awards both within and outside the State). In directing the Committee to have regard to awards in courts outside the State, the Oireachtas necessarily contemplated that such awards might influence the guidelines ultimately adopted. This point is discussed at greater length below, in addressing the Plaintiff's *vires* challenge to the Guidelines. The key point is that by directing the Committee to have regard to the levels of damages awarded by courts outside the State, the Oireachtas made it clear that it intended that any guidelines would be something more than a synthesis of Irish awards or (as it was put in argument) "*a*

more sophisticated Book of Quantum." By necessary implication, the Oireachtas clearly mandated the Committee to adopt guidelines departing from the "*going rate*" for damages, as reflected in the Book of Quantum. Otherwise, section 90(3)(a)(ii) would be entirely redundant. Indeed, if all that the Oireachtas had contemplated was a "*more sophisticated Book of Quantum*", it is doubtful that the elaborate procedures set out in the 2019 Act for the drafting and adoption of guidelines would have been considered necessary at all.

180. However, and critically, the Oireachtas also directed the Committee to have regard to the "*principles for the assessment and award of damages for personal injuries determined by the High Court, the Court of Appeal and the Supreme Court*" (section 90(3)(b)). That is a particularly significant factor as it effectively incorporates all of the principles discussed and applied in the case-law considered earlier in this judgment, including the fundamental requirements that personal injuries awards should be proportionate, fair to both sides and objectively reasonable. In my view, and contrary to the argument made by Counsel for the Plaintiff, these principles were functionally incorporated into the Committee's mandate as fully and as effectively as if they had been set out *seriatim* in the text of section 90(3). As the Judge correctly observed, the Committee was not free to develop new principles of assessment (and did not purport to do so). Accordingly, I cannot, with respect, agree with the suggestion made by Hogan J in his judgment that the Committee or the Council here was given a power to remake the law in relation to personal injuries awards.

181. The need for consistency is a further factor specifically identified by the Oireachtas (subsection (3)(d)) and the Committee was also required to have regard to "*the classification of personal injuries*" (subsection (3)(c)). These operated as further constraints on the exercise to be undertaken by the Committee.

182. In the circumstances, the Plaintiff's contention that Section 90 fails to set out any meaningful "*principles or policies*" and that it confers "*unfettered discretion*" on the Committee, the Board or the Council and the Board is, in my view, implausible. The Oireachtas has prescribed the fundamental parameters of the exercise to be undertaken by those bodies and the factors to be taken into account in undertaking that exercise. Of course, these factors do not prescribe the output of the exercise and leave a significant element of judgment to the bodies involved. Section 90 does not "*dictate the outcome*" but, as this Court observed in *O' Sullivan*, that is not a requirement of Article 15.2. If it was, the entire concept of subordinate regulation, which depends upon choices being made between options, would be negated. In the context of giving guidance as to the assessment of general damages, an area where there are no objectively "*correct*" values, it is inevitable that a certain freedom of action would be conferred on the Committee in the first instance (and on the Board and the Council exercising their respective statutory functions in relation to the guidelines). The Oireachtas clearly anticipated – and was entitled to anticipate – that the Committee, the Board and the Council would all bring particular experience and expertise to the discharge of their respective functions and it was entitled to take the view that "*the Oireachtas itself would not be the appropriate forum*" to undertake the exercise involved (*NECI*). The Oireachtas is, of course, competent to legislate directly in this area but, historically, it has not done so and the

exercise here was, in the words of Blackmun J in *Mistretta*, "*precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate*". It is indeed very difficult to see how the Oireachtas might have set about the exercise at issue here.

183. That analysis is not altered by the provisions of section 90(3)(e) which refers to "*such other factors that the Committee or the Board, as the case may be, considers appropriate including factors that may arise from any records, documents or information received, consultations held, research conducted or conferences, seminars or meetings organised (as referred to in section 187(7))*." That, says the Plaintiff, serves to confer an unbounded discretion on the Committee as to what factors to take into account. I do not agree.

184. It follows from this Court's decision in *Bederev* that section 90(3)(e) must be construed in context, which here includes the other provisions of the 2019 Act, especially the earlier provisions of section 90(3) itself, as well as the Constitution and in particular Article 15.2: per Charleton J at paras 38-40. Understood in context, section 90(3)(e) is intended to ensure that the Committee can have regard to information obtained by it from the sources identified in section 18(7). For instance, the Committee is entitled to conduct research on settlements of claims for personal injuries (section 18(7)(ii)) and, where appropriate, it could have regard to the result of that research even though settlements are not expressly referred to in section 90(3). Similarly, section 90(3)(e) would permit the Committee to have regard to the views of PIAB following consultation with it under section 18(7)(b). Section 90(3)(e) does not, however, alter the parameters

of the exercise to be undertaken by the Committee or to disregard the factors identified in section 90(3)(a)-(d).

185. Having regard to the narrow scope of the delegation, the fact that it is significantly constrained by the factors identified in section 90(3) of the 2019 Act and taking into account also the status and effect of the guidelines adopted under section 90, the suggestion that the Oireachtas has abdicated its Article 15.2 functions here is, in my view, wholly unpersuasive.

186. That conclusion is not altered by the fact that the 2019 Act does not require that guidelines adopted by the Council be laid before the Houses of the Oireachtas or provide either that they be the subject of positive resolutions of approval or be liable to annulment. As already explained, rules of court – which, as O' Donnell J observed in *McGrath*, may have very significant effects on litigants – are not subject to such a mechanism either (they do require Ministerial approval but that does not involve any form of supervision or oversight by the Oireachtas or the Houses). It seems reasonable to infer that the Oireachtas takes the view that, where judges are conferred with the function of adopting "*rules*" (using that term broadly, to include guidelines adopted by the Council under the 2019 Act), it would not be appropriate to subject such rules to its supervision in that manner, having regard to considerations of judicial independence. In any event, the absence of such a mechanism does not make impermissible a delegation that is otherwise within permissible limits, as the delegation here is in my view.

187. It does not follow, of course, that the 2019 Act involves any "*permanent delegation*" of the Oireachtas' legislative competence in this area, as the Plaintiff suggested in argument. In the first place, the Guidelines are subject to review in the manner provided for in the 2019 Act. Secondly, and significantly, the competence of the Oireachtas to legislate in this area is not in any way circumscribed either by the provisions of the 2019 Act or by the Guidelines adopted pursuant to it. The Oireachtas may legislate to regulate the assessment of general damages in personal injuries actions, whether by way of amendment to the 2019 Act or otherwise, to the same extent now as was the case prior to the enactment of the 2019 Act and the adoption of the Guidelines and if the Oireachtas is dissatisfied with the Guidelines, or with guidelines adopted in the future, it has ample power to intervene and give effect to its views (subject to any relevant Constitutional constraints).

188. In his judgment, Hogan J reaches a different view on this issue. The essence of his rationale is, as I understand it, that the power to make personal injury guidelines having any normative effect involves the exercise of "*primary legislative functions*" that Article 15.2.1 (and, it seems, Article 5) exclusively reserve to the Oireachtas: paragraphs 36-37, 40 & 46. My colleague goes so far as to suggest that legislation conferring on an "*unelected judiciary*" the function of making guidelines having the force of law would be "*unconstitutional on its face as violating an express provision of the Constitution*" so that such legislation would not enjoy any presumption of constitutionality (*ibid*).

189. I respectfully disagree. Whether it is permissible to delegate the function to the judiciary (in the form of the Judicial Council) is a separate question which I address in detail below. The Article 15.2 issues presented here would arise even if the power to make guidelines was vested in some other body and, in my opinion, conflating these issues is apt to lead to confusion. The (related) Article 15.2 issues that arise are (a) whether, as a matter of principle, the Oireachtas was constitutionally competent to delegate to another body the function of adopting personal injury guidelines having the effect provided for by the 2019 Act and the 2021 Act and the amendments made by those Acts to the 2004 Act and to the PIAB Act and (b) whether, if so, the 2019 Act complies with the constitutional conditions regulating such a delegation.

190. I have no doubt that, at level of principle, the Oireachtas was entitled to delegate that function and that it did so in a constitutionally effective manner here, that did not involve any abdication of its legislative competence and which did not leave the delegate impermissibly at large.

191. Characterising the power to make guidelines as a power to make "*law*" does not lead to any different conclusion. Secondary legislation is "*law*", as is concretely demonstrated by the authorities to which I have referred. As such, it can – and does – alter the existing law in some respect or another. That is its purpose. Thus, by way of example, the purpose and effect of the 2011 Order impugned in *Bederev* was to make unlawful (and liable to severe penalty) the possession and supply of a drug – methylethcathinone – that was, prior to the making of the Order, legally available in the State. But for the 2011 Order, any prosecution of Mr Bederev for the possession or supply of

methylethcathinone would not have been "*in due course of law*" in accordance with Article 38. It was the 2011 Order that provided the essential basis in law for that prosecution. In the view of the Court of Appeal, the power to make such an order was, for that very reason, invalid as an impermissible delegation of the legislative power of the Oireachtas. However, this Court disagreed. In its view, Article 15.2 did not exclude the delegation of law-making powers but, rather, the delegation of "*undefined and unlimited powers of law-making*" to the delegate. Whether the 2019 Act provides for the making of guidelines that "*change the law*" is not the touchstone of constitutionality validity in this context and Hogan J's analysis is, in my respectful view, at odds with this Court's disposition of the appeal in *Bederev* and with the other decisions to which I have referred.

192. The Guidelines here are clearly a form of secondary legislation, adopted pursuant to procedures prescribed by the Oireachtas, addressing matters prescribed by the Oireachtas and having a status and effect determined by the Oireachtas. As such, they have a quite different character to the non-statutory guidelines discussed in *Crawford v Centime Limited* [2005] IEHC 328, [2006] 2 IR 106. Less still are they akin to the "*statements by the executive branch of government ... which purport to restrict the personal rights of individuals in the absence of primary or secondary legislation and under threat of compulsion*" at issue in *Ryanair DAC v An Taoiseach* [2020] IEHC 461, [2021] 3 IR 355 (at para 41, my emphasis). As is evident from the judgment of Simons J in that case, the gravamen of the applicant's case was precisely that there was no legislative basis for the travel "*advice*" issued by the Government and that, while the Minister for Health was authorised to make regulations for the purpose of preventing

the spread of Covid-19, including by imposing travel restrictions, no such regulations had been made: paras 30-31. There is no parallel on the facts here.

193. *Mistretta* is not of course a binding authority on Article 15.2 and, in any event, there are doubtless many differences between the statutory scheme here and that at issue in *Mistretta*. Nevertheless, *Mistretta* provides significant support, by analogy, for the proposition that the function of adopting personal injury guidelines is, in principle, one that may be delegated by the legislature to an expert body without breach of the non-delegation principle and for the further proposition – considered further below – that such delegation can be made to judges, or a body partly composed of judges, without violating the separation of powers or trenching upon judicial independence. In his judgment, Hogan J emphasises the absence from the 2019 Act of the "*safeguards*" in the Sentencing Reform Act considered in *Mistretta*. I have addressed this point above in general terms. I do not consider the absence of any formal supervisory role for the Oireachtas to be determinative in the particular circumstances here and the authorities do not appear to me to provide any support for the contention that such a mechanism is a *sine qua non* of permissible delegation under Article 15.2. It does not follow that the Oireachtas cannot revoke or amend guidelines adopted under the 2019 Act: it retains its competence to legislate in this area.

194. As to the comparison with the rules committees, no doubt the remit of such committees is limited to making procedural rules but the precise line of demarcation between the *procedural* and the *substantive* in that context is rather imprecise. There is "*no clear line between issues of simple process and some considerations of policy*": per O'

Donnell J in *McGrath* (at para 73). In any event, as this Court acknowledged in *McGrath*, such rules may have significant consequences for litigants, including as to costs (see, for example, the provisions of Order 22 RSC relating to payments into court and tenders). The rules determine when proceedings may be served out of the jurisdiction (Order 11). Failure to comply with the procedural requirements imposed by the rules may lead to the dismissal of proceedings. Rules relating to matters such as discovery (including non-party discovery) have huge consequences for parties in terms of the cost and burden of litigation and the formulation of such rules necessarily involves making policy choices (e.g should non-parties be subject to the obligation to make discovery? what should be the rules as regards the costs of such discovery?). Order 63A RSC, which established the Commercial list – effectively a new division of the High Court with its own procedural code – is yet another example of rules having very significant effects. Furthermore, as is also apparent from *McGrath*, the power to make rules is statutorily conferred in notably broad terms. The Oireachtas established that there should be rules and identified what was to be covered by them ("*pleading, practice and procedure generally*" and "*questions of costs*") but was other content that the substantive content of the rules should be decided by a body with expertise and that the decisions to be made were not within the exclusive legislative competent of the Oireachtas: *McGrath*, at para 71. Finally, as already observed, the Oireachtas – or more correctly the Houses – no longer exercises any direct supervision or control over rules of court. It can, of course, legislate to override any rules of court of which they disapprove but that is equally true of personal injury guidelines made under the 2019 Act.

195. Rules of court are "*law*" (even if of a procedural rather than substantive nature) and are law made by judges (or at least by rules committees on which judges are in a majority). When new rules are made, or existing rules amended, the law is altered to that extent. That, it should be said, is entirely consistent with Article 36iii which requires that all "*matters of procedure*" shall be regulated "*by law*". The Oireachtas has, from time to time, legislated directly to prescribe "*matters of procedure*." The 2004 Act provides a notable example. But such "*matters of procedure"* are generally regulated by rules of court made pursuant to powers conferred by the Oireachtas on the various rules committees. That regime dates back to the enactment of the Courts of Justice Act 1924, based on the recommendations made by the Judiciary Committee, chaired by former Lord Chancellor Lord Glenavy in its 1923 Report. Such regulation is clearly "*in accordance with law*" for the purposes of Article 36iii and that has been the understanding since the adoption of both the present Constitution and the Free State Constitution adopted in 1922.

196. More generally, the suggestion that the adoption of guidelines as to personal injury awards is a *primary* legislative function that can only be exercised by the Oireachtas is a surprising one. With the exception of section 49(1)(b) of the Civil Liability Act 1961 – which places a cap on the damages for mental distress that may be awarded in an action for fatal injuries under section 48 – it is difficult to identify *any* instance of the Oireachtas legislating in this area, either as to the principles to be applied or as to level of awards to be made That has been left to the courts. No doubt the Oireachtas could legislate directly in this area by enacting as primary legislation a statutory equivalent of the Guidelines at issue here. On the basis of the arguments advanced in this appeal and

the authorities cited to us, I have not been able to identify any obstacle in principle to the Oireachtas deciding to delegate that function to another body. Nor can I identify any basis on which it might be suggested that, as a matter of principle, the issue of personal injury awards is somehow non-delegable. If delegable, there is no principle of which I am aware that requires that the delegate be itself an elected body. Democratic accountability is, in this context, satisfied by ensuring that the power of the delegate is properly delimited by the democratically elected legislature so that the delegate is not impermissibly left at large. So much is evident from *Bederev*, the authority of which is not to be undermined by clothing the same argument rejected in that case in the language of "*democratic accountability*" or "*constitutional identity*."

197. There is, it must be said, something paradoxical about unelected judges invoking democratic accountability as a basis for striking down legislation duly enacted by the democratically elected legislature. That is particularly so when, as here, that is done on the basis that such legislation wrongly confers on "*the unelected judiciary*" the power to make rules for the assessment of general damages in circumstances where that is said to be a function that can only be exercised by the legislature itself. Ever since the foundation of the State, the rules for the assessment of general damages have been made by judges. Conferring on the judiciary collectively a power to adopt rules in this area does not in my view involve any violation of Article 15.2 or any offence against any principle of "*democratic accountability*" or "*constitutional identity*".

198. A further aspect of my colleague's analysis in this context must be mentioned. It relates to Article 5 of the Constitution, which provides that "*Ireland is a sovereign,*

independent and democratic state." It appears that he considers that Article 5 entitles a court to strike down legislation enacted by the Oireachtas on the basis that it breaches "*the State's commitment to democracy … as an inviolable constitutional fundamental*" (para 46; see also para 62). That is a novel and startling proposition which, were it to be accepted, would inevitably involve a wholesale transfer of power from elected legislature to unelected judges (paradoxically – and ironically – in defence of democratic accountability). Nothing *in Costello v Government of Ireland* [2022] IESC 44, or any of the limited number of authorities which have considered Article 5, provides any support for such an approach. It is therefore unsurprising that Article 5 was not relied on in this way by the Plaintiff. This aspect of her challenge to the Guidelines was squarely based on Article 15.2. For the reasons I have set out, there is no breach of Article 15.2 here.

199. I would therefore reject this ground of challenge to the 2019 Act and dismiss the Plaintiff's appeal on this issue.

(4) THE VIRES ISSUE

200. The issue here is whether the Council acted *ultra vires* the 2019 Act in adopting the Guidelines.

The Argument

201. Ms Delaney's case against the Council is based on three principal arguments: (i) that the Council (and its constituent bodies) failed to act within the confines of the 2019 Act, (ii) the inappropriate selection of foreign countries as comparators and (iii) the fact that the Council (and its constituent bodies) disregarded the Book of Quantum and Irish jurisprudence when arriving at its conclusion.

202. In relation to the first point, Ms Delaney submitted that the law is clear in circumstances where a statutory body misdirects itself as to its statutory purpose and that the result is that any actions taken pursuant to this are *ultra vires* (*Nurendale v Dublin City Council* [2013] 3 IR 417 is cited in support of this proposition). Here, she said, the Council misdirected itself by addressing itself to issues of adequacy of damages and engaging in an evaluative assessment of awards in Ireland and elsewhere for the express purpose of achieving a reduction in awards in personal injuries actions. That, the Plaintiff submits, was not a purpose of the 2019 Act.

203. In relation to the second point, Ms Delaney submits that the selection of foreign compactors was fundamentally flawed. Only countries that responded to the

Committee's inquiries were included as comparators, for the purpose of assessing catastrophic injuries. Only a sub-set of those comparators were used for the purpose of assessing non-catastrophic injuries. It then set out to draft Guidelines by reference to a "*cap*", guided by only two comparators (Northern Ireland and England and Wales). The Committee had thus acted irrationally and in an unreasonable manner and gave too much weight to the foreign comparators relied on by it, to the exclusion of Irish court decisions, and ultimately set Irish damages somewhere between Northern Ireland and England and Wales.

204. In relation to the third point, Ms Delaney says that the Committee did not have sufficient regard to Irish Court awards and Irish principles relating to the assessment of damages, as it was required to do by section 90(3)(a) and (b) of the 2019 Act. She referred to the awards made in a number of decisions for the purpose of demonstrating that the Guidelines depart significantly from awards previously made. All comparisons showed a significant reduction in the amount that would be awarded which, according to the Plaintiff, further illustrated the fact that the Committee had misunderstood its function under the Act.

205. The Plaintiff also contended that the Council, the Committee and the Board unduly narrowed its consideration of past awards by looking only at the 2017-2020 period and had wrongly disregarded the Book of Quantum.

206. The submissions of the Council in response relied extensively on the '*detailed*' nature of the Report of the Committee. According to the Council, the Committee had not

proceeded under any "*misunderstood purpose*", the selection of foreign jurisdictions was fully appropriate and was not "*irrational and unreasonable*" and Irish judgments had not been "*disregarded*" or not given "*sufficient regard*". Very significant regard had been given to the Irish jurisprudence and, in any event, the weight to be given to that factor was "*quintessentially a matter*" for the Committee (citing *Scrollside v Broadcasting Commission of Ireland* [2007] 1 IR 166).

207. The Council made further points, including the fact that the Committee had had the benefit of "*highly experienced*" advice in terms of identifying suitable foreign comparators. It suggested that the comparison of awards undertaken by the Plaintiff was unreliable and involved cherry-picking. It disputed that the Committee wrongly disregarded the Book of Quantum or that it was not permissible to have regard to foreign guidelines. Furthermore, the Committee did not confine its consideration to awards made between 2017 and 2020 but was entitled to regard such awards as being of particular relevance.

Assessment

208. Section 90(1) sets out the basic mandate of the Council in this context in terms of adopting guidelines containing "*general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries*" which may include guidance on any or all of the matters set out at paragraphs (a) – (d). These include guidance on the level of damages, whether generally (paragraph (a)) or by reference to particular injuries or categories of injuries (paragraphs (b) & (c)).

209. Section 90(3) of the 2019 sets out a number of matters to which the Committee was bound to have regard ("*shall have regard to*") in preparing draft guidelines. Where (as here) a statute expressly states the considerations to be taken into account, an issue may arise as whether those enumerated factors are exhaustive or merely inclusive: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*. (1986) 162 CLR 24, per Mason J at pages 39-40 (considered and applied by the Divisional Court in *Dellway Investments Ltd v National Asset Management Agency* [2010] IEHC 264, [2011] 4 IR 1). Here, it is apparent from the terms of section 90(3)(e) ("*such other factors that the Committee or the Board, as the case may be, considers appropriate*") that the Oireachtas did not intend the factors set out in subsection (3)(a) – (d) to be strictly exhaustive of the matters that the Committee can have regard to. However, as explained above, section 90(3)(e) is narrower in its scope than its language might at first glance suggest.

210. As for the relative weight to be given to the various matters set out in section 90(3), in the absence of any statutory indication otherwise, it is for the Committee, not a court, to determine the appropriate weight to be given to them matters in exercising its statutory functions: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.

211. One of the matters which the Committee was required to consider (and the Board was expressly entitled to consider) was the level of damages awarded for personal injuries by "*courts in such places outside the State as the Committee or the Board, as the case may be, considers relevant*" (section 90(3)(a)(ii)). The Committee was also given an express power to conduct research on such damages (section 18(7)(c)(i)). These provisions were clearly enacted for a purpose and, in my view, it is beyond argument

that the Oireachtas intended that one of the inputs into the guidelines should be the level of damages awarded for personal injuries outside the State. It follows that the Oireachtas intended that the guidelines should be something more than "*a more sophisticated Book of Quantum*" (as Counsel for the Plaintiff suggested in argument) and also more than a synthesis of the practice and pattern of personal injury awards made by the Irish courts. If that is what the Oireachtas had intended, then the relevant provisions of the 2019 Act would have been drafted in significantly different terms.

212. Turning to the specific complaints advanced by the Plaintiff, it is said that the Committee saw its function as achieving a reduction in damages and that, it is said, was outside its statutory remit and in conflict with the position of the Minister. In this context, reliance was placed in an averment in an affidavit sworn on behalf of the State to the effect that neither the Government nor the Oireachtas has "*sought or directed that the level of damages in personal injuries be reduced in order to reduce the cost of insurance*." That, it is suggested, is evidence that the Minister did not intend that the legislation would be interpreted as providing a mandate to the Committee to lower damages for that purpose. That is a surprising argument. If a Departmental official had indeed purported to express an opinion as to the intention and/or proper interpretation of the 2019 Act, that would of course be wholly inadmissible in this context. In any event, it seems perfectly clear that Mr McGrath (the deponent) was making a quite different point – namely that the Government and the Oireachtas had not sought to dictate or predetermine the outcome of the statutory process leading to the adoption of the Guidelines.

213. As for the supposed evidence that the Committee saw its function as being "*to lower Irish damages for personal injuries actions*", that appears to rest on a misreading of certain statements in its Report. Paragraph 10 of the Report does not state that the Committee liaised with PIAB in an attempt to ascertain what level of damage are adequate. Rather, it states that, with the exception of PIAB, the Committee had not met with any outside group or body. A reason for taking that approach was the Committee's view that "*to establish what levels of damages are adequate, even in generalised form is a task which the judiciary must perform independently*" and the Committee could not be seen to be influenced by any interest group. That was plainly a correct approach for the Commission to take. As for meeting with PIAB, PIAB is not, of course, an interest group and the 2019 Act clearly envisaged that the Committee would consult with it (section 18(7)(b)). But the underlying premise of this complaint – that it was outside the Committee's statutory function to consider "*what levels of damages are adequate*" – is in any event absurd. The Committee was tasked with drafting guidelines as to the level of damages that should be awarded, having regard to the factors set out in section 90(3), including the "*principles for the assessment and award of damages*" determined by the Superior Courts. That being so, the Committee was duty bound to consider the adequacy of the awards or ranges of awards in the draft guidelines.

214. It is next said that the Committee expressly stated in paragraphs 18 and 21 of its Report that its approach resulted in the reduction of damages for most injuries and, in particular, expressed the hope that the reduction of damages would help in reducing legal costs. The Report indeed refers to a reduction in damages for lower and middling injuries but the reference is to the *effect* of the draft guidelines not, as suggested, to the

Committee's understanding of its function. Further – and surprisingly – the Committee's reference to reduced legal costs is also mischaracterised. The Committee was there making the point that the more detailed guidance in the draft guidelines would give greater certainty as to what could be recovered for a particular injury and that should lead to more cases settling early, with costs savings for both claimants and defendants.

215. Next it is said that the Report makes it clear that the Committee considered that it should address whether and how Irish awards might require "*adjustment*". That, it is said, is indicative that the Committee saw itself as being at large to "*recalibrate*" Irish damages. The Committee was in this part of its Report (paras 52-58) setting out its general approach and explaining why it was not possible to create a reliable "*catalogue*" of Irish personal injuries awards. The Report as a whole makes it abundantly clear that the Committee understood that its function was to draft *guidelines* and that, in carrying out that function, it was required to have regard to all of the factors in section 90(3). Those factors included the level of damages awarded outside the State. That clearly indicated – and the Committee correctly understood – that, in drafting guidelines, the Committee was, in principle, free to depart from the "*going rate*" for damages in the State (insofar as that could be reliably ascertained) subject of course to the other matters in section 90(3). Otherwise, the requirement to have regard to foreign awards would be entirely otiose.

216. The final part of the Report identified in support of this aspect of the *vires* challenge to the Guidelines is its final paragraph (para 112) where the Committee states that in respect of every injury detailed in the Guidelines, it believed that it had proposed brackets designed to ensure awards that will be proportionate and fair to both claimant and defendant and "*in line*" with awards made for similar injuries in those comparator countries most closely aligned to Ireland in terms of the standard of living. The Committee went on to state that the Guidelines will promote predictability and consistency in awards. It is not evident to me that this reflects any misunderstanding on the part of the Committee of the purpose of the 2019 Act or its function under it. The Committee was plainly entitled to inform itself of the level of awards in other jurisdictions. It was also plainly entitled to form a view as to which jurisdictions were appropriate comparators (section 90(3)(a)(ii), it will be recalled, refers to "*courts in such places outside the State as the Committee … considers relevant*"). The Oireachtas clearly intended that the Committee could and should do something with such information in formulating guidelines, subject to the Committee having regard also to the other matters set out in section 90(3).

217. There is no basis in the material before the Court to sustain the Plaintiff's repeated assertions that the Committee understood its statutory function as being to recommend reductions in awards in personal injuries actions here or that it set about its task with such an objective. That may well be the *effect* of the Guidelines drafted by the Committee and adopted by the Council but, if so, that is a function of the Committee's consideration and application of the factors set out in section 90(3). As for the Plaintiff's complaint that the Committee engaged in an "*evaluative assessment*" of awards in

Ireland and elsewhere, such an assessment was plainly mandated by section 90(3)(a) and insofar as the Plaintiff complains that the Committee had regard to socio-economic factors in carrying out its assessment, such factors clearly came within the scope of the principles to which the Committee was required to have regard under section 90(3)(b).

218. The next argument made by the Plaintiff in support of this ground of challenge relates to the Committee's choice of comparator jurisdictions. It is said that the Committee acted irrationally in its selection of some jurisdictions and the exclusion of others. In my view, there is nothing in this point. Section 90(3)(a)(ii) gave significant discretion to the Committee in deciding what comparators to rely on. It sought the advice of an experienced Senior Counsel and relied on the advice given by her and its Report adequately explains its choices and the reasons for them.

219. The final argument advanced by the Plaintiff in this context is to the effect that the Committee wrongfully disregarded Irish court precedents and the Book of Quantum. She refers to 5 decisions of the Court of Appeal where, it is said, the Court awarded damages significantly higher than the awards indicated in the Guidelines for the equivalent injuries.

220. Again, I see no force in this argument. Section 90(3) of the 2019 Act does not in fact identify the Book of Quantum as one of the matters to which the Committee was required to have regard. Even so, section 90(3)(e) clearly entitled (and indeed obliged) the Committee to have regard to it to the extent that it considered it to be an appropriate factor. However, the Committee clearly did not consider it appropriate to have regard

to the Book of Quantum, for the reasons set out in its Report (paras 105-106, and also 103). As for the Irish jurisprudence, the Report clearly identified and discussed the "*principles for the assessment and award of damages*" arising from the jurisprudence of the Superior Courts (at paragraphs 33 – 47) and separately considered the caselaw on the "*cap*" (at paragraphs 61-67). As regards the *awards* made by Irish courts, the Report clearly explains the exercise undertaken by the Committee and the steps taken by it to overcome limitations on the data on awards made (paragraphs 83 – 94). In reality, the complaint made by the Plaintiff is not that the Committee failed to have regard to Irish court precedents but that it failed to give decisive weight to them in formulating the draft Guidelines. That is simply another variant of the Plaintiff's fundamental – and fundamentally mistaken – contention that the Oireachtas mandated the Committee to draft a more sophisticated Book of Quantum, based solely on Irish awards. The Oireachtas could have imposed such a limited mandate but it clearly did not in fact do so.

221. Accordingly, I would therefore reject the *vires* challenge to the Guidelines and dismiss the Plaintiff's appeal on this ground.

(5) THE JUDICIAL POWER ISSUE

222. The essential issue here is whether imposing a mandatory obligation on judges hearing personal injury cases to "*have regard to*" the Guidelines involves an impermissible usurpation or invasion of the judicial power under the Constitution.

The Argument

223. The Plaintiff says that the assessment of evidence and of the *quantum* of damages in a personal injuries action is a classic example of the exercise of the judicial power to determine a justiciable controversy. Any measure or legislative act that interferes with that power has therefore to be closely scrutinised. She cites *Buckley v Attorney General* and *State (McEldowney) v Kelleher* as instances where attempts by the Oireachtas to direct how a justiciable controversy should be decided by a court had been held to be an impermissible interference with the judicial function. Similarly, the Oireachtas could not dictate the appropriate sentence in any given criminal trial: *Deaton v Attorney General* [1963] IR 170 and *Ellis v Minister for Justice* [2019] 3 IR 511.

224. Overall, the Plaintiff submits that the manner in which the Guidelines impact on the judicial power amounts to an unconstitutional invasion of the judicial power in breach of Articles 6 and 34 of the Constitution.

225. The State disputes that the 2019 Act constitutes an interference with the judicial power. Citing O' Dalaigh CJ in *Deaton*, it says that there is nothing unconstitutional with a

"*general rule*" as to applicable penalties or, in the context here, "*a general range of damages*". Moreover, there is no question of anyone other than the court "*selecting*" as among the range of penalties/remedies (in contrast to *Deaton*). *Buckley* and *State (McEldowney) v Kelleher* are not on point because the Guidelines do not have the effect of directing a certain outcome and do not even compel an outcome as to *quantum*, because a court may depart from them. According to the State, the Oireachtas could constitutionally have "*gone further*" and made the awards set out in the Guidelines mandatory, citing *State (O' Rourke) v Kelly* [1983] IR 58, though the Oireachtas could not go so far as to rob courts of all discretion (referring to *Maher v Attorney General* [1973] IR 140). Section 49(1)(b) of the Civil Liability Act 1961 and section 115(3)(a) of the Residential Tenancies Act 2004 are given as examples of where the Oireachtas has placed hard limits on certain awards of damages.

Assessment

226. The starting point is the decision in *Buckley*. In the words of Gavan Duffy P it involved a "*constitutional issue of transcendent importance*" involving a direct challenge to "*the primacy of the law in the legal domain*" (at page 69). That challenge arose from the enactment by the Oireachtas of legislation – the Sinn Féin Funds Act 1947 – the avowed purpose of which was to dictate to the High Court how to adjudicate on certain proceedings pending before it, including as to the costs order to be made, without the Court even hearing from the parties. Unsurprisingly, in the President's view such legislation involved a clear breach of the separation of powers: "*[t]his Court cannot, in deference to an Act of the Oireachtas, abdicate its proper jurisdiction to administer*

justice in a cause whereof it is duly seized" (at page 70). On appeal, *this* Court relied primarily on the private property provisions of the Constitution in finding that the Act was constitutionally repugnant it but it also considered that the Act was "*clearly repugnant*" as constituting "*an unwarrantable interference by the Oireachtas with the operations of the Courts in a purely judicial domain*" given that its substantial effect was that the dispute whose determination the Constitution assigned to the judicial organ of the State "*is determined by the Oireachtas and the Court is required and directed by the Oireachtas to dismiss the plaintiffs' claim without any hearing and without forming any opinion as to the rights of the respective parties to the dispute*" (page 84).

227. It is important to appreciate the limits of this aspect of the holding in *Buckley*. Buckley was concerned with legislation that purported to direct the outcome of a particular pending action. As helpfully explained in Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (1997), the principle underpinning *Buckley* is that the legislature cannot legislate in "*a direct attempt to settle the result in a court case or, more indirectly, [in] an attempt to change the law in a way which (because of its timing or its ad hominem nature) is considered to be illegitimate*" (at page 136). Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (2009) refers to this as "*the direction principle*" which usefully captures its essence: the legislature cannot usurp the judicial function by directing the court how to decide a pending case.

228. But it does not follow that legislation that affects litigation pending on its enactment will breach the separation of powers. Legislation of general application may not breach the direction principle, even though it may have a decisive effect on pending litigation.

That is evident from this Court's decision in *Application of Camillo* [1988] IR 104. in *Camillo* the applicant had applied for a new gaming licence pursuant to Part III of the Gaming and Lotteries Act 1956. His application was refused by the District Court and he appealed to the Circuit Court. While that appeal was pending Dublin Corporation adopted a resolution rescinding its adoption of Part III. The effect of that resolution was that the Circuit Court had no power to grant the applicant a licence. The applicant contended that the rescission resolution could not validly exclude the grant of a licence to him as that would constitute an unconstitutional invasion of the judicial process. A case was stated to this Court by the Circuit Court judge. Griffin J (Walsh and Hederman JJ agreeing) held that *Buckley* was clearly distinguishable. The resolution applied to "*the entire community in the whole of the county borough*" and to all pending or intended licence applications. The resolution could not therefore be "*regarded as an intervention by the City Council in a particular application then before the Circuit Court on appeal from the refusal of the District Court*" (at 109). That was in contradistinction of the position in Buckley which had involved a "*direct intervention by the Oireachtas in the action then before the courts*" (at 108).

229. While I note that Gwynn Morgan, *op cit*, expresses some uncertainty on the point (at 141) the principle in *Camillo* must, in my view, apply equally to Acts of the Oireachtas and to secondary legislation made pursuant to such Acts. That is consistent with the approach taken in the United States and Australia, considered in detail in Gerangelos, *op cit.*

230. That is not to say that legislation that purports to be of general application may not, on analysis, offend against the "*direction principle*" or otherwise constitute an impermissible interference in pending proceedings: see the discussion in Gerangelos, *op cit*, at 177-180 and there may be cases in which it may be difficult to draw the dividing line. This is not such a case however.

231. There may also be circumstances where a legislative measure that does not satisfy the *Buckley* test may nonetheless constitute "*an unwarrantable interference"* with pending proceedings. Such was the case in *Gorman v Minister for the Environment* [2001] 2 IR 414. In *Gorman*, the High Court had quashed certain regulations relating to the licensing of taxis. While an appeal from that decision was pending before this Court, the Minister revoked the regulations. The revocation was challenged on *Buckley* grounds. While the High Court (Carney J) held that the *Buckley* test had not been met, he nonetheless considered that in the "*unique circumstances*" the revocation instrument should be quashed because it had the effect that, in the event that the appeal succeeded, the normal consequence – that the regulations would revive by operation of law – would not follow: at page 424. But nothing of that kind arises here.

232. *Buckley* was cited in *State (C) v Minister for Justice* [1967] IR 106 in which this Court held that section 13 of the Lunatic Asylums (Ireland) Act 1875 was inconsistent with the Constitution. Section 13 (as adapted) vested in the Minister for Justice the power to direct the committal to an asylum of any person remanded by a District Justice who appeared to be of unsound mind. That power was, in this Court's view, an interference with the exercise of the judicial power. In the hearing and determination of a case within

its jurisdiction, the District Court was exercising the judicial power and the "*doing of any act or the taking of any step by any non-judicial authority in the State, which interferes with, restricts or prevents the District Court from deciding the particular case before it in accordance with the law applicable to it, is an infringement of the judicial power"* (per Walsh J, at page 122).

233. *Buckley* and *State (C) v Minister for Justice* were in turn cited by this Court in *Maher v Attorney General,* in which it struck down a provision of the Road Traffic Act 1968 purporting to make a certificate of blood alcohol "*conclusive evidence*" of blood alcohol concentration for the purposes of any legal proceedings. In the Court's view, the administration of justice, which in criminal matters is confined exclusively to the courts and judges established under the Constitution, "*necessarily reserves to those courts and judges the determination of all the essential ingredients of any offence charged against an accused person*" and "*[i]n so far as the statutory provision in question here purports to remove such determination from the judges or the courts appointed and established under the Constitution, it is an invalid infringement of the judicial power*" (at page 146)

234. *Buckley, State (C) v Minister for Justice* and *Maher* were considered in *State (McEldowney) v Kelleher.* There the impugned statutory provision required the District Court hearing an appeal from a refusal to grant a collection permit to dismiss the appeal if a member of An Garda Síochána not below the rank of Inspector stated on oath that they had reasonable grounds for believing that the proceeds of the intended collection would be used for the benefit of an unlawful organisation. The High Court (Costello J) took the view that, having regard to this Court's decision in *State (O' Rourke) v Kelly*

[1983] IR 58, that was a permissible limitation on the jurisdiction of the District Court in relation to such appeals. However, this Court took a different view, considering that the case fell squarely within the principles enunciated in *Buckley*, *State (C) v Minister for Justice* and *Maher* on the basis that the "*statute creates a justiciable controversy and then purports to compel the court to decide it in a particular way upon a particular statement of opinion being given upon oath as to whether or not a statutory reason for refusing the permit exists, whatever opinion the court may have formed on the issue in question, or might have formed if it had heard any evidence upon it*" (per Walsh J for the Court, at page 306). Referring to the High Court's reliance on *State (O' Rourke) v Kelly,* Walsh J stated that *O' Rourke* would be an apt authority had the Act provided that the District Justice must dismiss the appeal on being satisfied that the facts were as deposed by the objecting Garda witness. However, it was not authority for the proposition that a District Court, in the exercise of its judicial functions, must adjudicate in a particular way upon the issues in dispute irrespective of the opinion, if any, which the District Justice had formed on the issues before him (page 307).

235. The subsequent decision of the High Court (Barron J) in *Cashman v District Justice Clifford* [1989] IR 121 involved a provision of the Betting Act 1931 limiting the persons who could give evidence in an appeal to the District Court from a refusal of a certificate of suitability for use of a premises as a bookmakers' shop. While the provision did not dictate the outcome of the appeal, Barron J nonetheless took the view that it was an impermissible interference with the judicial power by restricting the evidence the court could hear in relation to a *lis* before it.

236. As regards sentencing, *Deaton v Attorney General* [1963] IR 170 leaves no doubt but that the imposition of a sentence is a judicial function which "*cannot be committed to the hands of the Executive*" (per Ó Dálaigh CJ at 183). But that principle does not necessarily exclude the Oireachtas from prescribing a fixed or mandatory sentence for a particular offence, subject to there being a rational relationship between the sentence and the requirements of justice with regard to the punishment of that offence and it was competent for the Oireachtas to prescribe a mandatory life sentence for murder: *Lynch & Whelan v Minister for Justice* [2010] IESC 34, [2012] 1 IR 1. But the fixing of a mandatory sentence (or a mandatory minimum sentence) for offences less grave than murder may nonetheless give rise to constitutional difficulty, at least where it applies to some but not all persons convicted of that offence, as is evident from this Court's later decision in *Ellis v Minister for Justice* [2019] IESC 30, [2019] 3 IR 511.

237. There is no question here of any invasion or usurpation of the judicial power such as was condemned in *Buckley*. So far from dictating how pending personal injuries actions should be decided, the 2019 Act makes it clear that the obligation on courts to have regard to the Guidelines applies only to actions commenced on or after the day on which section 99 of the Act came into operation (24 April 2021): section 22(1) & (1A) of the 2004 Act. That is fatal to any "*pure*" *Buckley* point.

238. But that is not the only difficulty with the Plaintiff's arguments on this issue. As previously explained, the assessment of *quantum* in personal injuries actions was, prior to the enactment of the 2019 Act, a judicial function and, post the enactment and coming into operation of the Act, it remains such a function. There is therefore no analogy with

Deaton (quite apart from the fact that, in any event, *Deaton* concerned the imposition of criminal penalties rather than the assessment of civil compensation). The Guidelines do not have the effect of removing any justiciable controversy from the courts (as was the case in *State (C) v Minister for Justice*) or dictating how any justiciable controversy must be determined (as in *Buckley* and *State (McEldowney) v Kelleher*) or dictating how an intrinsic element of the judicial function should be performed (as in *Cashman v District Justice Clifford).*

239. Nor, in my view, can the Guidelines be sensibly equated with a mandatory penalty regime. In the light of this Court's decision in *Ellis v Minister for Justice*, it may be the case that there are limits to the competence of the Oireachtas to legislate for mandatory penalties, but it is unnecessary to explore that question here. The Guidelines do not impose any obligation on courts analogous to the obligation to impose a particular sentence or minimum sentence on conviction for a particular offence. The obligation under section 20 of the 2004 Act is to *have regard to* the Guidelines in the manner explained earlier. The function of assessing damages in personal injury actions continues to be a judicial function. It remains a matter for the courts to determine what evidence should be heard in that context and the assessment of that evidence, and the resolution of any evidential conflicts, continues to be wholly within judicial control.

240. Obliging the courts to have regard to the Guidelines cannot sensibly be suggested to amount to an invasion of the judicial domain or an usurpation of the judicial power. The Oireachtas has broad legislative competence in this area. It may, in principle, legislate to create new causes of action (the Liability for Defective Products Act 1991 being an

example). It may legislate to abolish existing causes of action (for instance, the abolition of the torts of criminal conversation, enticement and harbouring of a spouse by section 1 of the Family Law Act 1981) and/or regulate (and restrict) existing causes of action (an example being the enactment of the Occupiers' Liability Act 1995 and its recent and significant amendment by Part 6 of the Courts and Civil Law Miscellaneous Provisions Act 2023, the effect of which is to significantly limit the tortious liability of occupiers of premises and land). In addition, the Oireachtas has a broad competence to prescribe limitation periods for the bringing of proceedings (and to alter those limitation periods as it did in 2004 when it reduced the basic limitation period for personal injuries actions from 3 years to 2 years: section 7 of the Civil Liability and Courts Act 2004). The Oireachtas may also legislate to alter the rules of evidence (as it did in Part 3, Chapter 3 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020). The exercise of such powers necessarily affects – often fundamentally - the business of the courts and the exercise of the judicial function but it does not involve any breach of Article 34 of the Constitution.

241. Against that backdrop, the imposition by the Oireachtas of an obligation to "*have regard to*" the Guidelines was, in my view, clearly within its legislative competence. Such an obligation cannot plausibly be characterised as an undue interference with the administration of justice or the independence of the courts in the performance of judicial functions. That does not, of course, preclude a challenge to the 2019 Act and/or the Guidelines on the grounds that they violate the personal rights of litigants such as the Plaintiff. An argument to that effect is indeed advanced by the Plaintiff, particularly on the basis of what is said to be the retrospective application of the Guidelines to causes

of action which arose prior to 24 April 2021. That argument is considered (and rejected) later in this judgment. However, the issue under this heading is whether the *prospective* application of the Guidelines constitutes an impermissible interference with the administration of justice by the courts. In my view, it clearly does not.

242. It is not necessary for the purpose of deciding this appeal to determine whether, as the State argued, the Oireachtas could permissibly have gone further and, for example, legislated to impose a tariff of permissible awards. The Oireachtas has clearly refrained from adopting any such model here and, in the circumstances, it would be inappropriate to engage in a hypothetical discussion of the limits of its legislative competence when that issue does not arise in any concrete way. Nor is it necessary to consider whether it would have been permissible for the Oireachtas to legislate to require courts to have regard to the Guidelines in respect of actions commenced before 24 April 2021 and pending at that date. That issue does not arise.

243. I would therefore reject this ground of challenge to the 2019 Act and dismiss the Plaintiff's appeal on this issue.

(6) THE JUDICIAL INDEPENDENCE ISSUE

244. The issue here is 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 Argument

245. In this context, the Plaintiff refers to Article 15.2.1, Article 34 and Article 35.2 – .4 of the Constitution as indicating that there is a constitutional requirement to keep the judicial and legislative functions separate from each other and that there ought to be a bright or at least clear dividing line between the legislative and judicial powers. Having referred to a number of authorities, including *O' Byrne v Minister for Finance* [1959] IR 1, *Curtin v Dáil Éireann* [2006] 2 IR 556 and *Garda Representative Association v Minister for Public Expenditure and Reform* [2016] IECA 18, the Plaintiff suggests that the 2019 Act amounts to "*an unprecedented intermingling of the judiciary with the other branches of government,*" requiring the judiciary (in their capacity as members of the Council) to deal with matters of political, social and economic issues entirely outside of their normal remit and expertise and to do so without evidence being tested by those affected. Citing *Mistretta*, the Plaintiff argued that such "*conscription*" of the judiciary involved the political branches impermissibly borrowing the judiciary's reputation for impartiality and non-partisanship "*to cloak their work in the neutral colo[u]rs of judicial action*." Although the challenge to the Sentencing Commission in *Mistretta* had failed, the Plaintiff invited the Court to distinguish between the Sentencing Commission in *Mistretta* and the role of the Council in adopting the

Guidelines. In adopting the Guidelines, it was said, the Council had rejected the range of damages which the judiciary (present and former) had awarded to claimants and instead chose to set damages in accordance with a foreign jurisdiction. While Blackmun J in *Mistretta* had referred to the "*disinterestedness of the Judicial Branch*" in public affairs, the adoption of the Guidelines had undermined the disinterestedness of the Judiciary and instead created a perception that the result had been influenced by a high-profile and public campaign by actors in the insurance industry (and certain political actors also) advocating for "*insurance reform*". The Plaintiff also relied in this context on decisions of the High Court of Australia in *Hilton v Wells* (1985) 157 CLR 57, and, especially, *Grollo v Palmer (Commissioner of Australian Federal Police)* (1995) 184 CLR 348 which are discussed further below.

246. The Plaintiff emphasised that all judges were members of the Council and were collectively required to participate in the adoption of the Guidelines and were obliged to apply them even if they disagreed with them and/or had voted against them.

247. In response, the State noted that the Plaintiff was not contending that the adoption of the Guidelines amounted to the administration of justice. On the State's analysis, apart from the contention that the adoption of the Guidelines involved the impermissible exercise of legislative power (addressed separately in argument and in this judgment) the gravamen of the Plaintiff's argument appeared to be that the Constitution prohibited the conferral of non-judicial functions on judges. According to the State, there is no necessary constitutional impediment to conferring additional (non-judicial) functions on judges, at least where those functions are not inconsistent with Article 35.3. *Haughey*

v Moriarty [1999] 3 IR 1 was cited as authority supporting that proposition. The State says that judges frequently exercise non-judicial functions, as for instance in the making of court rules (which have the status of subordinated legislation) by Rules Committees. The State suggests that *Mistretta* is "*a highly persuasive authority*" in its favour. The challenge to the Sentencing Commission, on grounds similar to the grounds relied on by the Plaintiff here, was rejected by all members of the Supreme Court, bar Justice Scalia. In his opinion, Justice Blackmun had observed that the Commission did no more than what had previously been done by the judicial branch as an aggregate, namely deciding what the appropriate sentence was "*albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations*". Congress had placed the Commission in the judicial branch "*precisely because of the Judiciary's special knowledge and expertise*". That reasoning, it was said, was equally applicable to the role of the Council, the Board and the Committee as regards the Guidelines.

Assessment

248. Judicial independence is a fundamental value in our constitutional order. Article 35 of the Constitution "*declares unambiguously the principle that courts and judges are independent of both the government and the legislature*": *Curtin v Dail Eireann* [2006] IESC 14, [2006] 2 IR 566, 617 per Murray CJ for the Court. That principle is "*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." (*ibid*)

249. As this Court stated in its recent decision in *Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34:

> *"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)."

Later in that judgment, the Court again stressed the importance of the principle of judicial independence as "*core constitutional value*", encompassing a requirement that the judiciary be independent from both the Government and the Oireachtas "*given that the role of the courts is, in accordance with the doctrine of separation of powers, inter alia, to act as a meaningful 'check and balance' and constrain in respect of the activities of those branches of government*" (at para 194).

250. The independence of the judiciary is thus a vital aspect of the separation of powers envisaged by the Constitution. But that separation is functional rather than absolute: the judicial branch does not occupy "*its own watertight compartment*" any more than the legislative and executives branches do: *Lynham v Butler (No 2)* [1933] IR 74, per Johnston J at 112. The Constitution provides for "*an interaction and interdependence between the branches*" and "*there are areas which move between the branches*": *Zalewski v Adjudication* Officer [2021] IESC 24, [2022] 1 IR 421, per O' Donnell J (as he then was) at 480 (para 90). The same judge observed in *Pringle v Government of Ireland* [2012] IESC 47, [2013] 3 IR 1 that "*the form of separation of powers adopted in the [Irish] 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*."

251. Thus judges are *appointed* by the President on the advice of the Government. The appointment process will of course change significantly when the Judicial Appointments Commission Act 2023 comes fully into operation. That Act usefully illustrates how areas "*may move between the branches*", involving as it does significant *legislative* regulation of an appointment process that was previously largely a prerogative of the *executive* branch and providing for significant *judicial* involvement in the appointment process though their representation on the Judicial Appointments Commission: the judiciary currently have a role in *screening* applications for judicial office through their representation on the Judicial Appointments Advisory Board but, under the 2023 Act, the judiciary will have a significant role in the *selection* of persons for appointment. Those significant reforms are nonetheless consistent with the constitutional separation of powers: *Re Article 26 and the Judicial Appointments Commission Bill 2022*. During the reference of the Bill, it was not suggested in argument that there was any constitutional difficulty in requiring members of the judiciary (including the Chief Office *ex officio*) to undertake a function previously regarded as an executive prerogative. Indeed, an important element of the Court's reasoning in upholding the Bill was that, by constraining the appointment power of the executive, the Bill *enhanced* the independence of the judiciary.

252. As the Court noted in its decision on the reference, the Oireachtas has a very significant role in relation to the courts, encompassing their establishment (Article 34.1), the removal of judges (a power vested in the two Houses by Article 35.4) and the broad legislative competence arising under Article 36: para 195. The legislative competence of the Oireachtas under Article 36 extends to "*all matters of procedure*." As is evident

from *McGrath*, the Oireachtas has largely left matters of procedure to be regulated by rules of court made by the relevant rules committees. That sharing of competence is, in my view, entirely consistent with the principle of judicial independence and the broader principles of the separation of powers. It involves the judiciary (through their representatives on the various rules committees including, in the case of the Superior Courts Rules Committee, the Chief Justice and the Presidents of the Court of Appeal and High Court *ex officio*) exercising a rule-making power. That does not offend the separation of powers (and none of the parties suggested that it did) precisely because the function of making such rules is closely related to the judicial function and the administration of justice. Far from undermining judicial independence, conferring such a rule-making power on the judiciary enhances its independence.

253. Of course, quite apart from its legislative competence under Article 36, the Oireachtas has extensive competence to regulate the day to day business of the courts. It may create new causes of action and abolish existing ones. It can legislate to confer additional jurisdictions and functions on courts. A recent example of that is the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 which confers new functions on the High Court. The Oireachtas may abolish an existing jurisdiction, as it did when it enacted the Assisted Decision Making (Capacity) Act 2015, which abolished the wardship jurisdiction of the High Court (and conferred significant new jurisdiction on the Circuit Court). The Oireachtas can – and frequently does – legislate to create new criminal offences. The exercise of such legislative competence significantly affects what it is that courts and judges actually do. Significantly, the exercise of such legislative competence is not conditional upon the

prior consent of the judiciary, nor could it be suggested to involve the impermissible "*conscription*" of the judiciary in violation of the principle of judicial independence.

254. Many other instances of the permeability of the boundary between the legislature and the judiciary can readily be identified. The Oireachtas may, within the limits of Article 37 of the Constitution, legislate to confer on a non-judicial body functions which constitute the administration of justice: *Zalewski*. While the Oireachtas may not legislate to reverse a judicial adjudication, it may legislate in a manner that deprives such an adjudication of practical effect: *Howard v Commissioner of Public Works (No 3)* [1994] 3 IR 394 (the Oireachtas could not validly alter or reverse a prior finding by the High Court that the OPW had lacked the power to construct a visitor centre but could confer such a power on it prospectively).

255. The Oireachtas is also competent to legislate in the area of judicial conduct. In fact, that was one of the principal purposes of the 2019 Act. It is, perhaps, worthy of emphasis that the Act, in section 7(2)(d) *obliges* the Council to adopt "*guidelines concerning judicial conduct and ethics*." That obligation is imposed in precisely the same terms as the obligation to adopt personal injury guidelines *(*"*... the Council shall ... adopt...*"). The procedure for the production of such guidelines closely mirrors the procedure for producing personal injury guidelines. The Judicial Conduct Committee were mandated by section 43(3)(d) to prepare "*draft guidelines concerning judicial conduct and ethics, which guidelines shall include guidance as to the matters a judge should consider when deciding whether he or she should recuse himself or herself from presiding over legal proceedings*". These were then submitted to the Board and ultimately adopted by the

Council on 1 June 2022. The guidelines did not require the approval of either House of the Oireachtas before coming into effect nor were they subject to annulment. As Haughton J observes at para 110 of his judgment, these guidelines are potentially very significant in terms of the assessment and resolution of complaints against judges. Unlike the assessment of general damages in personal injury claims, judges do not generally have any function in making assessment about judicial conduct and ethics. The regulation of judicial conduct and ethics – even by way of guidelines – is unquestionably a very significant matter in any constitutional democracy based on the rule of law. It necessarily involves a significant element of policy choice and any such choice inevitably has the potential to be controversial.

256. The Oireachtas clearly made a judgment that to require judges (collectively, in the form of the Council) to adopt such guidelines protects rather than undermines judicial independence. No one in these proceedings suggested that such judgment was wrong and, given the reliance that he places on the conduct guidelines, it seems that Haughton J sees no difficulty with it (and, to be clear, I have no difficulty with that legislative judgment either). But if it was competent for the Oireachtas to *oblige* the judiciary collectively to adopt conduct guidelines of general application (in the sense that they apply to *every* judge in the State in respect of *all* aspects of the judicial function, as well as in respect of aspects of their private/non-judicial conduct), it is difficult to understand why *obliging* the judiciary to adopt personal guidelines should, in contrast, be regarded as impermissibly infringing judicial independence. At a minimum, one needs to be very cautious about giving decisive effect to labels such as "*conscription*" and "*co-option*"

in this context or of framing the issue of independence in overly simplistic terms, where "*voluntary*" is always good and "*mandatory*" is necessarily bad.

257. Since the establishment of the State, judges have frequently been tasked with non-judicial functions. As O' Donnell J observed in *Zalewski* (at 480) the Oireachtas sometimes provides for courts to perform functions which are essentially administrative rather than strictly judicial, such as licensing. Arguably, the granting of search warrants falls into that category: see my judgment in *Corcoran v Commissioner of An Garda Siochana* [2023] IESC 15, at para 16.

258. Outside the courtroom, as in *Haughey v Moriarty*, judges act as members, or sole members, of tribunals established under the Tribunals of Inquiry (Evidence) Acts 1921 – 2002. Tribunals of inquiry graphically illustrate how, in the real world, executive, legislative and judicial powers intertwine. The Government may inquire into matters of public interest as part of the exercise of its executive powers: see *Goodman International v Hamilton* [1992] 2 IR 542, per Costello J at 554. However, for such an inquiry to be clothed with compulsory powers, the mechanisms provided for Tribunals of Inquiry (Evidence) Acts (involving resolutions of the Houses and a Ministerial order) must be adopted. While not required by the Acts, such tribunals have, historically, generally consisted of a judge or judges. Typically, such tribunals are established to inquire into matters of public controversy and the proceedings of such tribunals are themselves the frequent subject of controversy and litigation. Even so, in *Haughey v Moriarty,* this Court saw "*no constitutional or legal objection to a judge being a member, or the sole member, of such a tribunal provided he or she is willing to serve*

and provided his or her absence from his or her normal duties does not impose an undue strain on the work of his or her court and has the approval of its President" (at page 64).

259. Judges also act as members, or sole members, of commissions of investigation established under the Commissions of Investigations Act 2004. They sit on the various Rules Committees established to make rules for the courts (and, as already noted, in the case of the Superior Court Rules Committee, the Oireachtas has designated the Chief Justice, the President of the Court of Appeal and the President of the High Court as *ex officio* members of the Committee: section 67 of the Courts of Justice Act 1936 (as amended)). The Chief Justice and the President of each of the other courts are *ex officio* members of the Judicial Appointments Advisory Board established by Part IV of the Courts and Court Officers Act 1995 and will also participate – again by virtue of express legislative designation – in the Judicial Appointments Commission to be established under the Judicial Appointments Commission Act 2023, along with two additional judges nominated by the Council: see Part 2 of that Act. The Chief Justice and the Presidents of each of the other courts are all *ex officio* members of the Judicial Conduct Committee established by Part 5, Chapter 2 of the 2019 Act.

260. Judges also exercise significant supervisory functions under legislation such as the Interception of Postal Packets and the Telecommunications Regulation Act 1995 (as amended) and the Communications (Retention of Data) Act 2011 (as amended). Thus, under the 2011 Act, a designated judge of the District Court is responsible for determining applications for authorisations to access retained data (section 12J) and a

designated judge of the High Court is responsible for keeping the Act under review, with broad powers of investigation for the purpose of ensuring that the provisions of the Act are being complied with (section 12). As already noted, Judges also issue search warrants under various enactments.

261. Reference must also be made in this context to the Courts Service Act 1998 which established the Courts Service to carry out the functions set out in section 5 of that Act (including the management of the courts and the provision, management and maintenance of court buildings). Section 11 of that Act provides for the membership of the Courts Service Board, a majority of which are judges (including the Chief Justice and the President of each of the other courts or a judge of that court nominated by them).

262. That such a variety of extra-judicial functions has been statutorily conferred on judges is not, of course, necessarily determinative of the issue here. But it certainly indicates that, since the foundation of the State, it has not been understood that there is any *general* prohibition on conferring such functions on judges. The absence of any such *general* prohibition is of course confirmed by *Haughey v Moriarty*. But what is also apparent is that such functions are connected – and in many cases, intimately connected – to the exercise of judicial functions and the administration of justice. That is obviously true of the function of making rules of court. Such rules have a direct and significant connection to the administration of justice and the function of making such rules enhances judicial independence by giving the judiciary – and not any other body – day to day control over court procedures. Conferring on judges, or a committee of judges, a function to make statutory rules regarding, for example, health and safety on

construction sites would obviously be an entirely different matter. The validity of the conferral cannot be determined in the abstract, by asking only whether it involves the conferral of a "*rule-making power*" on the judiciary. It is the nature and purpose of the conferral and the connection to the judicial function that are the key considerations.

263. Similarly, requiring judges to participate in the management and administration of a statutory corporation that, in contrast to the Courts Service, was unconnected to the administration of justice, would obviously raise significant separation of powers issues. But the Courts Service discharges functions which, while largely executive in nature, impact directly and significantly on the organisation and operation of the courts and the procedural machinery by which justice is practically administered. The institutional independence of the judiciary therefore requires that that body should be under the ultimate control of judges.

264. All of the above serves both to illustrate and emphasise that any theory of the separation of powers that is premised on there being bright-line boundaries between the executive, legislative and judicial branches would be wholly unworkable. It is therefore unsurprising that this Court's jurisprudence has never proceeded on the basis of purely formalistic distinctions between those branches. That is not to deny that the doctrine has a *"high constitutional value*". But in seeking to give effect to that value, this Court's cases are properly understood as implementing a functional approach to the separation of powers, directed not to the crude question of whether a particular function is '*legislative*' and thus entirely outside the competence of the judiciary, '*executive*' and thus immune from legislative incursion or judicial involvement, or '*judicial*' and thus

operating within a space from which the legislature and executive are, for that reason alone, completely excluded. Instead, it is necessary in every case to look at the particular characteristics of an impugned measure and ask not what descriptor should be attached to it but *why* it is said to be constitutionally impermissible to for one branch or another to undertake the function at issue. Central to that analysis is whether or not the impugned measure impairs a core function of another branch.

265. *Buckley* provides an illustration of an impermissible legislative incursion into the judicial function, with the legislature purporting to dictate the exercise of the core judicial function of adjudicating on a pending case. But, as we have seen, the Constitution does not preclude any exercise of the legislative power in a way that impacts on pending litigation: *Camillo. TD v Minister for Education* [2001] IESC 101, [2001] 4 IR 259 is an example going the other way, in which an order made by the High Court trespassed into a core function of the political branches to whom the Constitution allocates responsibility for the appropriation of the public revenues. But it does not follow from *TD* that courts are *a priori* excluded from making *any* order that impacts on public revenues. If there was any such inflexible rule, courts could not properly discharge their functions.

266. In my view, there is nothing in the 2019 Act that impairs a core function of the judicial branch or which can plausibly be said to trespass upon the independence of the judiciary. As the cases show, the principle of the separation of powers precludes the impairment of the functions of one organ of State by the intrusion of another: it does not prevent collaboration between them, and it should be deployed to assist, not to

obstruct, the effective operation of the (many) areas in which the spheres of operation of the judicial, legislative and executive branches overlap, where (in O' Donnell J's words in *Pringle*) there can be "*intersection*" and "*interaction*" between different branches. The provisions of the 2019 Act relating to personal injury guidelines afford, in my view, an example of the separation of powers in operation, not a violation of that principle: rather than dictating to the judicial branch how its power to determine awards for pain and suffering should be exercised, the Oireachtas has put in place a legislative mechanism to obtain greater consistency in such awards (as it was entitled to do), but deliberately left to the judiciary the function of deciding how that objective should be best achieved within the parameters set out in the Act.

267. In my view, it is implausible – indeed wholly paradoxical – to suggest that, in conferring on the *judiciary* (collectively, in the form of the Council) the function of adopting personal injury guidelines, in circumstances where the assessment of damages for pain and suffering has historically been (and will continue to be) a *judicial* function, and where (as all members of the Court agree) the guidelines do not trespass on the adjudicative independence of judges and courts, the Oireachtas has impermissibly trespassed upon *judicial* independence. The function conferred on the judiciary here is, in my view, so closely connected to its day to day judicial functions that the Oireachtas was entitled to take the view that the judiciary should undertake it and, having made that judgment, it was entitled to take the view that the task should be undertaken not by committee of judges or a committee comprising judges and third parties but by the judiciary collectively.

268. Both parties relied on *Mistretta* as supportive of their respective positions on this issue. The decision is discussed at length by my colleagues. As already noted, there are a number of differences between the legislative scheme at issue in *Mistretta* and the relevant provisions of the 2019 Act. It is, I think, important not to get lost in the detail of those differences or lose sight of the central holdings in that case. The US Supreme Court considered that it was consistent with the separation of powers for Congress to delegate to the judicial branch non-adjudicatory functions that did not trench on the prerogatives of another branch of Government and which were "*appropriate to the central mission of the Judiciary*" (Opinion, page 388). The Commission's functions, like the Court's function in promulgating procedural rules, were "*clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch*" (Opinion, page 391). That is equally the case here, in my view. The assessment of general damages in personal injury actions has, historically, been (and under the Guidelines, will continue to be) part of the judicial function (or "*mission*")

269. But the court in *Mistretta* was careful to acknowledge that the legislature's capacity to confer extrajudicial duties on the judiciary was not absolute. The "*ultimate inquiry*" was "*whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch*" (page 404). Posing that question here, it permits of only one answer in my view. The functions conferred on the judiciary by the 2019 Act respect rather than undermine the integrity of the judicial branch. This is not a case where the judiciary's reputation for impartiality and non-partisanship has been "*borrowed by the political Branches to cloak their work in the neutral [colours] of judicial action*" (Opinion, page 407). Although the Oireachtas undoubtedly has competence to legislate

in this area, it has not done so historically and it would be perverse, in my view, to characterise the 2019 Act as borrowing the judiciary to "*cloak*" the work of the political branches. The assessment of damages has, historically, been *judicial* work (and the 2019 Act does not alter that position). Furthermore, and critically, the 2019 Act did not dictate to the judiciary what guidelines to adopt. Although the judgment "*was not without difficulty*", the court in *Mistretta* concluded that the participation of judges on the Sentencing Commission did not threaten the impartiality of the Judicial Branch, either in fact or in appearance. Its reasoning warrants extended quotation:

> *"We are drawn to this conclusion by one paramount consideration: that the Sentencing Commission is devoted exclusively to the development of rules to rationalize a process that has been, and will continue to be, performed exclusively by the Judicial Branch. In our view, this is an essentially neutral endeavor and one in which judicial participation is peculiarly appropriate. Judicial contribution to the enterprise of creating rules to limit the discretion of sentencing judges does not enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalized or the executive business of enforcing the law. Rather, judicial participation on the Commission ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business — that of passing sentence on every criminal defendant. To this end, Congress has provided, not inappropriately, for a significant judicial voice on the Commission"* (Opinion, pages 407-408).

270. Here, of course, the Oireachtas has done more than provide for a "*significant judicial voice*" in the adoption of personal injury guidelines under the 2019 Act. It has, rather, given the function of adopting such guidelines to the judiciary and to the judiciary alone. In my view, the reasoning of the court in *Mistretta* applies *a fortiori* here.

271. There was considerable discussion of a number of decisions of the High Court of Australia in this context and these are also discussed in detail by my colleagues. It is important to point out that, unlike *Mistretta*, none of these decisions involved anything resembling the circumstances presented here. The constitutional context in Australia is also quite different, with a much more rigid concept of the parameters of the judicial power (see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (the *Boilermakers' Case*)). One therefore needs to be cautious about lifting statements in those decisions out of their specific context and applying them here as if they have canonical force.

272. *Hilton v Wells* and *Grollo* both involved challenges to statutory provisions providing for the interception of telephone communications on the authority of a warrant issued by (*inter alia*) any judge of the Federal Court of Australia. In each case, the challenge failed. In their joint judgment in *Grollo*, Brennan CJ, Deane, Dawson and Toohey JJ identified two conditions or qualifications on the conferral of non-judicial functions on judges as designated persons: *first*, no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent and, *second*, no function can be conferred that is incompatible either with the judge's performance of his or her functions or with the proper discharge of the judiciary's responsibilities as an institution

exercising judicial power (what they referred to as "*the incompatibility condition*"). These conditions accorded with the approach taken in *Mistretta*. As for the incompatibility condition, it might arise in a number of different ways:

> *"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).

273. Those judges did not consider that the impugned provisions were incompatible with the separation of powers. McHugh J (on whose judgment Counsel for the Plaintiff placed particular reliance) took a different view, emphasising the importance in this context of

the appearance and perception of judicial independence and impartiality. The secret nature of the judge's work as an "*eligible judge*", forming part of the criminal investigative process, caused him serious concern and in his view the function was incompatible with the constitutional separation of powers. The factors animating the approach of McHugh J in *Grollo* have no application here. The remaining judge, Gummow J, came close to that conclusion but ultimately sided with the majority. In his view, judicial involvement in policy-making, criminal law enforcement and the like could give rise to "*an appearance of institutional partiality*". Citing *Mistretta*, Gummow J expressed concern about the "*depletion of the capital of the judicial system*" but also noted that the transfer of what may be politically difficult choices to persons who are selected by reason of their current occupancy of judicial office and who, as such, were insulated from political pressures could have other consequences, such as inhibiting public debate as to the choices that the legislative and executive branches should make (at page 392). Again, those factors have no application here. Judges already make the "*choices*" involved in the assessment of damages for pain and suffering in personal injury cases and, as we have seen, policy factors are an important element of that assessment.

274. In argument, Mr McCullough accepted the principle stated at page 404 of *Mistretta*, namely that the "*ultimate inquiry*" was "*whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.*" That is also the essence of the approach taken in the Australian cases. In my view, the substantive considerations and concerns identified in *Mistretta* and in *Hilton v Wells* and *Grollo* apply here also. Here, as in the United States and Australia (and elsewhere), judicial independence is an

entrenched and fundamental constitutional value. The constitutional necessity for a sharp separation of the judiciary from the political branches was emphasised by this Court in *Re Article 26 and the Judicial Appointments Commission Bill 2022*. As McHugh J emphasised in *Grollo*, the appearance and perception of judicial independence is as important as its actuality in this context. Any public perception of improper judicial entanglement with the political branches – any perception that the judicial branch has been "*borrowed by the political Branches to cloak their work in the neutral [colours] of judicial action*", as it was put in *Mistretta* – would undermine the integrity of the judicial branch, erode judicial independence and (in the words of Gummow J in *Grollo*) deplete the capital of the judicial system. Legislative or executive action having such an effect would violate the Constitution.

275. But here I am satisfied that the 2019 Act has no such effect, for the following reasons:

(1) While the structures and processes established by the 2019 Act undoubtedly have novel elements, not least the collective involvement of the judiciary in the form of the Council, the relevant provisions of the Act are nonetheless presumed to be constitutional and their unconstitutionality must be "*clearly established*".

(2) There is a long-established practice of conferring a broad variety of extrajudicial functions on judges in this jurisdiction. These include functions involving issues of political/social controversy, as with the appointment of judges as members/sole members of tribunals of inquiry and commissions of

investigation. Even so, in *Haughey v Moriarty*, this Court rejected a challenge to the involvement of a judge as sole member of the Moriarty Tribunal.

(3) These established functions include the exercise of (secondary) legislative functions in the form of making rules of court which have the force of law and which, as this Court observed in *McGrath*, have the potential to impact significantly upon litigation and litigants.

(4) The scope of the functions conferred by the 2019 Act is narrow and specific, relating only to the assessment of general damages in one category of action. The assessment of such damages has, historically, been a judicial function. Critically, that continues to be so under the 2019 Act and the Guidelines.

(5) While it may not be correct to characterise the assessment of general damages as the exercise of a "*discretion*" strictly speaking, it does involve a significant element of judgment and (as this Court noted in *Morrissey*) "*a significant subjective element*". That gives rise to significant issues of consistency, certainty and predictability. Furthermore, the principles of proportionality, fairness and reasonableness are challenging to apply within the confines of an individual case. This is, therefore, an area where the appropriate discharge of the judicial function of assessing general damages is liable to be significantly assisted by detailed and comprehensive guidelines, based on the systematic classification of possible injuries.

(6) Given that such assessment is a *judicial* function, conferring the function of adopting such guidelines on the members of the judiciary (albeit acting in a non-judicial capacity), rather than on some other body or agency, would appear to be consistent the preservation and protection of judicial independence rather than an action undermining such independence. This is a crucial consideration in my view.

(7) Although *Mistretta* was concerned with sentencing guidelines, the "*paramount consideration*" identified by the majority for reaching the conclusion it did is applicable in this context also. The relevant provisions of the 2019 Act are intended to "*rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch"* and judicial participation in that process "*ensures that judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business*." So understood, the close analogy with court rules is clear. While the making of such rules – whether "*the rules*" set out in the Guidelines or the rules in Rules of the Superior Courts or other court rules – is not a judicial function, it is nonetheless closely and inextricably bound up with the judicial function.

(8) The guidelines provided for by the 2019 Act are not mandatory and (as all members of the Court agree) respect the ultimate adjudicative independence of the judge or court making the assessment.

(9) The 2019 Act excludes any legislative or executive interference in the process of adopting guidelines under the Act. The Oireachtas has identified the factors to be taken into account in section 90 and thereafter it is a matter for the Committee, the Board and the Council to assess those factors and determine the contents of the guidelines. In performing their respective functions they operate independently and are free from any form of Ministerial direction or instruction (this was identified as a relevant factor in *Wilson*). In contrast to the position in *Mistretta* – where under the Sentencing Act judges could find themselves in a minority on the Sentencing Commission – all decisions in relation to personal injury guidelines are made by judges alone (the position regarding sentencing guidelines under the 2019 Act is somewhat different in that the sentencing guidelines committee has non-judicial members but the judicial members are in a majority and the Board and Council obviously comprise judges only). The absence of any mechanism for legislative supervision/review of the guidelines once adopted is also a relevant factor in this context.

(10) As for the "co-*option*"/"*conscription*" of the entire judiciary point, there is no doubt but that the function of adopting personal injury guidelines is one conferred, in mandatory terms, on the Council. That is indeed a novelty but, as already noted, the Oireachtas has, from time to time, legislated to impose significant non-judicial duties on particular judges, particularly on the Chief Justice and on the Presidents of the other courts. As Haughton J observes in

his judgment, it may be said that such functions are an incident of the office but the fact remains that, since the establishment of the State, onerous extra-judicial functions have been imposed on particular judges by the legislature (including under the recently enacted Judicial Appointments Commission Act 2023). The legislature has also legislated to require the judiciary to adopt conduct guidelines. What links (and justifies) these mandated functions is their close connection to the core judicial function and the administration of justice.

(11) It would not, in my view, be permissible for a judge to be appointed as a member of a tribunal of inquiry or commission of investigation without their prior consent. Indeed so much was said in *Haughey v Moriarty* (at para 64). Equally, it would not be permissible to appoint a High Court judge as the "*designated judge*" for the purposes of the 1993 and 2011 Acts without their agreement (the position of authorising judges under those Acts may be somewhat different).

(12) However, in my view the function of adopting personal injuries guidelines (and/or sentencing guidelines) cannot sensibly be equated with functions such as conducting a tribunal of inquiry or commission of investigation. Those functions are not "*incidental to the judicial function*" in the way that the functions conferred by the 2019 Act are. There is in fact no requirement placed on individual judges to participate in the adoption of the guidelines. Provided only that there is a quorum (not less than half of the total

membership and no less than one-quarter of the membership of each court: section 9(5) of the 2019 Act), decisions of the Council are made by simple majority of those in attendance and voting.

(13) Judges who attend are, of course, free to vote as they wish. Voting is by secret ballot and, accordingly, individual judges cannot be associated with the collective decision taken by the Council and cannot be identified as being either in favour of or against the guidelines.

(14) Furthermore, there is no question of individual judges being answerable to the executive or to the legislature in respect of the exercise of their functions under the 2019 Act nor, in contrast to *Mistretta*, is there any power vested in the executive either to select or remove the members of the Committee, the Board or the Council. These are, in my view, important factors in terms of the actuality and perception of judicial independence.

(15) In my view, therefore, the involvement of all judges, in the form of the Council, is certainly not a factor which, in itself, leads to the conclusion that the exercise here is one which undermines the integrity of the judiciary.

(16) Finally, on the "*conscription*" of the judiciary point, it can hardly be suggested that, while it would have been permissible for the Oireachtas to provide for the adoption of personal injury guidelines by a committee of volunteer judges, or by the judiciary as a whole if only they were given a

discretionary power to do so rather than being subject to a statutory obligation – and that appears to be the logic of my colleagues' position – it was impermissible to proceed as the Oireachtas did here. That would involve the sort of formalistic approach eschewed in the authorities.

276. The question is, ultimately, one of overall appreciation. In my view, the critical considerations are, firstly, that the adoption of guidelines relating to the assessment of general damages in personal injuries actions, while a non-judicial or extra-judicial function, is very closely related to the exercise of assessing such damages, which is undoubtedly a judicial function; secondly, by reason of their expertise and experience in carrying out that function, the judiciary are particularly well-placed to formulate such guidelines and, thirdly, the nature of the assessment exercise – involving, as it does, a significant degree of subjective judgment, giving rise to significant issues of consistency, certainty and predictability and involving the application of principles of assessment that, inherently, are challenging to apply within the confines of an individual case – is such that guidelines are liable to assist in its proper performance, without usurping the functions and responsibilities of the judge or court.

277. This constellation of factors is exceptional. The resolution of most legal issues – including, in most circumstances, the assessment of damages – involves hard-edged legal adjudication by the application of substantive rules of law (whether common law or statutory), not any form of "*discretionary*"/quasi-discretionary assessment. In my view, it would not be permissible for the Oireachtas to legislate to require the judiciary to adopt guidelines as to (by way of example) the constituent elements of or scope of

the tort of misfeasance, or as to the scope of the defence of undue influence in contract law or as to the proper interpretation and application of Article 40.1 of the Constitution or express its collective view on the constitutional validity of a specific or proposed enactment. These are matters for judicial determination (and/or, within the competence of the Oireachtas, legislative prescription) and such legislation would involve the conferring of advisory functions on the judiciary in a manner incompatible with its essential function of administering justice and determining disputes. That the judiciary could be said to have expertise in those areas would not, in my view, be any sufficient answer. Expertise is not a sufficient criterion in itself. Otherwise the judiciary might be mandated to give guidance on every area of the law. That would not be constitutionally permissible. What is, in my view, determinative here is that the assessment of damages involves a quasi-discretionary judgment which allows room for, and indicates the utility of, structured and systematic guidance *and* that the judiciary are particularly well-placed to formulate such guidance for the very reason that such assessment has traditionally been its "*own business*". That is true also of sentencing (though, historically, the Oireachtas has played a greater role in relation to sentencing, at least to the extent of prescribing maximum sentences) and it is perhaps not surprising that the 2019 Act also provides for the adoption of sentencing guidelines by the Council. Apart from these two specific areas, which are arguably *sui generis*, there would appear to be very limited if any scope for the Oireachtas to treat the 2019 Act as a legislative blueprint that could properly be extended to other areas.

278. Accordingly, I conclude that the relevant provisions of the 2019 Act do not violate the independence of the judiciary, either as a matter of actuality or perception. I do not

believe that conferring on members of the judiciary the function of formulating guidelines on the assessment of damages in personal injuries actions, structured in the manner that function is in the 2019 Act, undermines the integrity of the judiciary or would be perceived by the public to do so. A reasonably informed member of the public, aware of the fact that the assessment of general damages has historically been the preserve of the judiciary would not, in my review, regard the provisions of the 2019 Act as undermining judicial independence or entangling the judiciary in matters properly the province of the political branches. The distinction between judges acting as such and judges acting extra-judicially is, of course, legally and constitutionally important but it is not necessarily one that is to the forefront of public consciousness and it seems to me that the public would be most surprised indeed to have it suggested that, in refraining from intervening directly as to the level of personal injury awards and instead legislating to give power to adopt guidelines on that issue to *judges*, the Oireachtas had thereby violated the independence of the *judiciary*.

279. In his judgment, Haughton J addresses the issue of judicial independence at length and ultimately comes to a different conclusion to that I have reached on it. I respect his views. There is no difference between us as to the vital importance of the principle judicial independence in all its aspects. As we both note, that has recently been restated in trenchant terms by this Court in *In re Article 26 and the Judicial Appointments Commission Bill 2022.* I do not understand Haughton J to suggest that the 2019 Act interferes with the operational/adjudicative independence of judges when hearing personal injury cases. His concerns relate to institutional independence, actual and perceived.

280. The Bangalore Principles are undoubtedly an important statement of the principles of proper judicial conduct which, as Haughton J observes, formed the basis for the *Guidelines for the Judiciary in Conduct and Ethics* adopted by the Judicial Council under the 2019 Act (adopted, as I have explained, pursuant to a mandatory *obligation* to do so imposed by section 7). But their primary focus is on giving conduct guidance to individual members of the judiciary rather than addressing broader issues of institutional independence. However, taking the guidance set out there in the terms in which it is given, I respectfully disagree that the 2019 Act compromises the judiciary's independence from "*society in general"* or involves "*inappropriate connections with, and influence by, the executive and legislative branches of government."* The 2019 Act gives to the judiciary the function of adopting guidelines in respect of a subject or issue – the assessment of general damage in personal injuries cases – that, in this jurisdiction, has historically been a judicial function. It identifies the matters to which the Committee must (and the Board may) have regard in drawing up such guidelines but, otherwise, the Committee, the Board and the Council are entirely free from the control of, or interference from, the executive or legislative branches in carrying their functions under the Act. In those circumstances, there is in my view no basis for suggesting as a fact that the 2019 Act exposes the judiciary collectively, or the individual judges involved, to "*inappropriate connections with, and influence by, the executive and legislative branches of government*".

281. In considering *Mistretta* in this context, it is important firstly to emphasise that many of the grounds on which the Sentencing Reform Act was challenged do not arise here. Members of the Committee, the Board and the Council are not subject to removal and

cannot be sanctioned in any way for the manner in which they carry out their functions as such. Nor are they required to share their rule-making powers with non-judges (as earlier referred to, the sentencing guidelines committee has lay members but judges are in the majority and the Board and the Council comprise only judges). It is also the case that the particular structure of the Sentencing Commission (an agency within the judicial branch) is unknown in this jurisdiction. Haughton J adverts to these differences in his judgment but, with respect, appears to draw the wrong conclusion from them. Put simply, were the Council to be answerable to the Oireachtas or the Executive in the manner that the Sentencing Commission was, or if the Oireachtas could simply rewrite the guidelines after their adoption by the Council, those features would significantly strengthen (not diminish) the argument that the 2019 Act violates the principle of judicial independence.

282. As for the issue of compulsion, I have addressed that above. The 2019 Act does not compel judges to participate in the Committee or on the Board. While the Act does impose a collective obligation on the Council to adopt guidelines, that does not, in fact, involve the imposition of any obligations on individual judges and, at most, requires them to consider the draft guidelines, attend a meeting(s) of the Council and vote on the draft. An obligation of that limited kind, which does not interfere with the capacity of a judge to carry out their judicial functions (in contrast, for example, to the involuntary imposition on an individual judge of non-judicial functions such as acting as a tribunal of inquiry or commission of investigation) cannot be regarded as determinative in my view.

283. I therefore respectfully disagree that the issue presented in *Mistretta* was materially different to the issue here or that the decision does not assist the arguments of the State. The "*paramount conclusion*" that led to the majority conclusion in *Mistretta* applies with (at least) equal force here. The relevant provisions of the 2019 Act relating to the adoption of personal injury guidelines are concerned with the "de*velopment of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch*." "*Judicial participation is peculiarly appropriate*" because it ensures that "*judicial experience and expertise will inform the promulgation of rules for the exercise of the Judicial Branch's own business*", that "*business*" being here the assessment of general damages awards in personal injury actions.

284. Nor can I agree with Haughton J that, in this context – the judicial independence issue – the personal injury guidelines and the sentencing guidelines may fall to be assessed differently. There are, no doubt, some differences between the respective statutory regimes but those differences do not suggest that the sentencing guidelines regime may be constitutional permissible even if the personal injuries guidelines regime is not. As Haughton J emphasises the assessment of damages has historically been the sole responsibility of the courts. But that is a factor that tends to *contradict* the case that conferring a guideline-making function on judges (*qua* Judicial Council) undermines judicial independence. In contrast, the Oireachtas has been much more active in the area of sentencing, in terms of fixing maximum sentences, providing for non-custodial sentences (community service orders), legislating for suspended sentences and, more recently, providing for mandatory consecutive sentences and mandatory/minimum sentences. Involving the judiciary in the adoption of sentencing guidelines therefore is

more likely to be perceived as involving an impermissible blurring of the lines between the judiciary and the political branches.

285. No doubt, as Haughton J states, there are other ways in which personal injury guidelines might have been adopted and other bodies to whom the function of doing so could have been given. But the Oireachtas must surely have a significant measure of latitude in making that determination. No such body would have the same expertise, experience and objectivity as the judiciary. In any event, it seems a curious complaint to make in the name of judicial independence that, instead of giving a power to make guidelines to some other body (which guidelines would then presumably be binding on the judiciary in the performance of its functions), the Oireachtas instead elected to give that power to the judiciary itself.

286. I do not accept that there is any basis for applying the *Heaney* proportionality test in this context. That test relates to measures interfering with personal rights. Judicial independence is a fundamental constitutional value that cannot be abrogated on the basis of any proportionality test. Such an approach would be to devalue and imperil judicial independence. To be clear, my conclusions on this issue rest on my view that the relevant provisions of the 2019 Act do not interfere with judicial independence, not that they so in some proportionate or permissible way.

287. I readily understand Haughton J's concern at the prospect of the 2019 Act being used as a blueprint for future legislation but I have explained why, in my view, personal awards and sentencing are effectively *sui generis*.

288. Finally, Haughton J refers to the statutory timetable for the adoption of the guidelines and poses the question what would have been the position if the Council failed to adopt guidelines by the statutory deadline. That issue did not of course arise but Haughton J identifies legitimate concerns about this aspect of the statutory regime. It might have been better had the Oireachtas not provided for a hard deadline in the terms it did. But the Oireachtas was entitled to expect that the Council would seek to comply with that deadline. As to the (hypothetical) circumstances in which the Council might have failed to adopt guidelines by the statutory deadline, I cannot see how any question of *mandamus* could arise. Absent the necessary support from the members of the Council, no guidelines could (or can) be adopted and *mandamus* could not issue. The arguments made by the Plaintiff may well have highlighted a lacuna in the 2019 Act but that is a far cry from providing a basis for holding the relevant provisions of the Act unconstitutional.

289. Faherty J also addresses the issue of judicial independence at length in her judgment and also comes to a different conclusion to that I have reached. The concerns animating that conclusion closely reflect the concerns of Haughton J and I mean no disrespect to my colleague if I do not address her judgment in the same detail. Her analysis accepts many of the points made above but she ultimately concludes that the relevant provisions of the 2019 Act violate judicial independence because of "*the effective conscription of the entire judiciary for the task*" of adopting the Guidelines (para 81; also para 87). As will be evident, I do not agree that this feature of the legislative regime is or ought to be determinative in this context. That looks at the issue through too narrow a lens and

fails to give proper weight to the substantive factors which I have identified above (and which, it seems, Faherty J accepts). The Oireachtas was, in my view, entitled to take the view that the task was so closely related to the judicial function that it should be entrusted to the judiciary as a whole and that the guidelines would be more effective if they were the product of the collective judgment of the judiciary, rather than of a committee comprising a small number of individual judges.

290. Accordingly, I would reject this ground of challenge to the 2019 Act and dismiss the Plaintiff's appeal on this issue.

(7) THE PERSONAL RIGHTS ISSUE

The Argument

292. In her written submissions, the Plaintiff maintained that the Guidelines and the 2019 Act amount to an unconstitutional interference with her personal rights to bodily integrity, property, right of access to the courts and equality. The Guidelines adversely affected her accrued cause of action arising from her accident (and additional rights which she says she acquired once she made her application to PIAB) impacting on her constitutional right under Article 40.3.1 and 40.3.2 to have her right to bodily integrity protected and vindicated by the State, her unenumerated right to litigate and to have an effective remedy, her property rights under Article 40.3 and Article 43 (the right to sue being a chose in action and therefore a property right) and her right to equality (it being said that the Plaintiff is being treated differently to others whose cause of action arose at the same time as hers but who were in a position to issue proceedings before 24 April 2021).

293. The Plaintiff's submissions address in some detail why the proportionality test articulated in *Heaney* is the appropriate test to apply here, citing (*inter alia*) *Donnelly v Minister for Social Protection* [2022] IESC 31, [2022] 2 ILRM 185 and *O' Doherty v Minister for Health* [2022] IESC 32, [2022] 1 ILRM 421. The "*balancing of rights*" test in *Tuohy v Courtney* is, she says, so deferential as to make "*any meaningful analysis impossible*". Applying the *Heaney* test, the Plaintiff says that the only relevant objective

of the 2019 Act was to increase consistency in personal injuries awards and that the Act had nothing to do with the lowering of insurance costs, economic conditions in society or the extent to which injuries should be compensated. No "*pressing and substantial*" concern had been identified capable of justifying the impact of the Guidelines on the Plaintiff's rights and the impugned provisions could not be said to be "*rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations*". The effect on the Plaintiff's rights was "*radically disproportionate*" to any objective capable of being identified from the Act. The provisions therefore did not pass the *Heaney* test. As regards her property rights, the Plaintiff invoked *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* which, she said, suggests that a four stage analysis needs to be undertaken. Applying that analysis, the Plaintiff said that the restrictions on her property rights cannot be justified.

294. Finally, as regards Article 40.1, the Plaintiff said that she had been treated "*radically differently*" to others who were injured on the same date as her or who lodged their applications with PIAB on the same date as she did, whose applications were assessed prior to 24 April 2021. Such discrimination was not based on any difference of capacity or function within the permissible scope of Article 40.1 and was constitutionally unjustified.

295. As this aspect of the Plaintiff's appeal was developed in oral argument, it became clear that its essential focus was on the application of the Guidelines to the assessment of her claim, in circumstances where those Guidelines were adopted subsequent to her accident and subsequent to her application being made to PIAB. No argument was

ultimately advanced by the Plaintiff to the effect that, absent those factors, the 2019 Act and/or the Guidelines nonetheless infringed on her personal rights under the Constitution. The Plaintiff accepted that there was no general prohibition on legislation having retrospective effect. Determining where the line is to be drawn between a constitutionally legitimate retrospective effect and the opposite is a matter of degree. But, she said, where retrospective legislation affected vested rights, it had to be regarded as *prima facie* unjust (citing *Hamilton v Hamilton* [1982] IR 466). Ms Delaney submitted that she clearly had such a vested right. While courts in the past had increased or decreased the cap on damages, that was declaratory of the law and could have retrospective effect. Legislative acts were "*qualitatively different*". The Plaintiff had more than a bare right to sue – she had a right to sue for damages in accordance with the principles of tort law in legislation and in the caselaw. *A fortiori,* she had that right when she entered the PIAB process. Assuming that the Plaintiff had vested rights that were impacted by the Guidelines, the Court had to ask itself what countervailing factors were at play that might justify it. The evidence relied on by the State fell short of establishing any pressing need to apply the Guidelines to cases that were already in the PIAB process or to causes of action that had already accrued. Delay in the coming into effect of the Guidelines was not sufficient and the State's justification was "*simply insufficient*" according to the Plaintiff.

296. In response, the State says that the Plaintiff put the cart before the horse. Before any question of proportionality arises, the Plaintiff had to first identify a constitutional right of hers which has been interfered with, which she had not done. While the Plaintiff had a right to sue, that did not involve any right to any particular level of damages and was,

the State said, unaffected by the Guidelines. Limits on general damages have been recognised as appropriate and necessary (citing *Sinnott v Quinnsworth* [1984] ILRM 523 and *Morrissey v HSE*). Apart from upper limits, the authorities recognised the need for proportionality in all awards (citing, *inter alia*, *Nolan v Wirenski*). If that was so, the State said, there could be no objection to the proportionality of awards being achieved though the statutory process of adopting guidelines, rather than through the "*tunnel vision*" of specific litigation. The Plaintiff was effectively asking the Court to second-guess the Committee's detailed analysis and, in the absence of any proof, to conclude that the sums in the Guidelines were "*somehow too low*".

297. As regard the test to be applied, the State submitted that the Court had not been invited to overrule *Tuohy* and this was not, it was said, an appropriate case in which to reconsider it. But even if the *Heaney* test applied, it was satisfied. If there has been any impairment of rights – and the State says that there has not – it was "*extremely minimal*", given the fact the Guidelines can be departed from. The Courts already required limits on damages (citing *MN v SM* [2005] 4 IR 461 and *Kearney v McQuillan (No 2)* [2012] IESC 43. No rights had been extinguished and consistency and certainty in awards was in the interests of the common good.

298. As to the Plaintiff's equality arguments, the State said that the situation she is faced with did not involve any discrimination or differentiation on any "*ground related to a person's human personality*". That, it was said, is the essence of Article 40.1. The right to equality is triggered by "*impermissible differentiations*" based on human personality (*Burke v Minister for Education* [2022] IESC 1, [2022] 1 ILRM 73) which is not present

here. Any discrimination claim based on a comparison with the treatment of tortfeasors was inapt as tortfeasors are clearly not appropriate comparators for the purposes of Article 40.1. As for the alleged discrimination *vis-à-vis* other claimants whose claims were assessed and/or who had issued court proceedings prior to 24 April 2021, the drawing of distinctions based on factors such as time was common and could not be said to be irrational (citing *Donnelly*). A "*perfectly reasonable, rational cut-off point*" had been legislated for by the Oireachtas. A commencement date had to be specified and the Oireachtas was entitled to consider that the changes should be brought in as soon as possible.

299. According to the State no constitutional difficulty arises from the application of the Guidelines to the Plaintiff because she had no vested right, other than a right to sue (which she still had and which she has exercised). Applying to PIAB did not give rise to any vested right to any particular level of award. The Plaintiff was, in any event, free to reject the PIAB recommendation. In truth (so the State says) the Plaintiff's retrospectivity argument added nothing to her general charge that the sums in the Guidelines interfered with the rights because they were "*too low*".

Assessment

300. For the purposes of assessing this aspect of the Plaintiff's case, it is necessary to identify the rights asserted by her, the scope of those rights and the extent to which any such rights have been interfered with and/or are liable to be interfered by the 2019 Act and/or the Guidelines.

301. The Guidelines do not affect the Plaintiff's entitlement to pursue her claim against the Local Authority or her right to full recovery of all financial loss that she has incurred (and any financial loss she may incur in the future) in the event that she succeeds in that claim. Nor do the Guidelines affect the Plaintiff's entitlement to have her claim to general damages assessed by an independent judge in accordance with law (and reviewed by an independent judge or judges on appeal).

302. The Plaintiff has not in my view identified any basis on which she can assert a constitutional or legal right to receive any particular award for general damages, whether by reference to the levels of award indicated in the Book of Quantum or otherwise. If she succeeds in her claim, she will at that point be entitled to an award of general damages assessed by the trial judge in a manner consistent with the principles applicable to the assessment of general damages in the State (principles which have not been altered by the 2019 Act or the Guidelines) and which is proportionate, fair and objectively reasonable, having regard to the injury she suffered and the consequences for her. Should the court be satisfied that the proper application of those principles demand that a higher award should be made than is indicated by the Guidelines – in other words, if the threshold for departure from the Guidelines identified earlier is met – the court can (and, it is to be assumed, will) make that award.

The Right to Bodily Integrity

303. The Plaintiff says that the State must vindicate her right to bodily integrity. Citing *Hanrahan v Merck Sharp & Dohme Ltd* [1988] ILRM 629 and *Grant v Roche Products (Ireland) Ltd* [2008] 4 IR 679, she says that the State may do this by providing for a law of tort which permits her to bring a claim in tort.

304. The difficulty from the Plaintiff's point of view is that the State has indeed provided a legal framework – the law of negligence – within which she may bring (and has in fact brought) a claim against the alleged tortfeasor. If she succeeds in that claim, then she will be entitled to recover damages, including general damages, from the Local Authority.

305. In *Sweeney v Duggan* [1991] 2 IR 274, the High Court (Barron J) held that there was nothing in Article 40.3.2 to assist the plaintiff in that case as it gave "*no more than a guarantee of a just law of negligence, which in the circumstances exists*" (at page 285). Unless tort law is "*basically ineffective*" to protect constitutional rights, a claimant is normally confined to the limitations of that tort: *Hanrahan v Merck Sharp & Dohme Ltd,* at 636, per Henchy J.

306. In principle, it may be the case that, if general damages for personal injuries were fixed at a very low level, whether for all injuries or for particular categories of injury, it could then be said that the law of negligence was, to that extent, "*unjust*" or "*basically ineffective*" to protect and vindicate the person of a claimant and/or their right to bodily

integrity. However, as noted already, the Plaintiff did not in fact contend that an award at the level recommended by PIAB (which she in any event declined to accept) would be "*unjust*" or "*basically ineffective*" to vindicate her rights. That is, of itself, fatal to this aspect of the Plaintiff's case but there is a more fundamental difficulty in her argument, namely the fact that the Guidelines are not mandatory and may – and must – be departed from if a court considered that an award within the parameters of the Guidelines would bear no reasonable proportion to the award that should otherwise be made. It necessarily follows that the Guidelines neither require or permit a court to make an award that is "*unjust*" or "*basically ineffective*" to vindicate the rights of the claimant. Thus, as a matter of hypothesis, the Guidelines neither permit nor compel a court to make a constitutionally inadequate award.

307. Insofar as the Plaintiff may have invoked a constitutional right to an "*effective remedy*" that right does not, in this context, take her argument any further. Here, for the reasons set out in the preceding paragraphs, the Plaintiff clearly has an effective remedy against the Local Authority.

Access to the Courts/Right to Litigate

308. In *Tuohy v Courtney* [1994] 3 IR 1, this Court (per Finlay CJ) drew a distinction between the right of access to the courts and the right to litigate. In his view, the Statute of Limitations 1957 (section 11 of which was at issue in *Tuohy v Courtney*) did not interfere with the plaintiff's right of access to the courts because the expiration of the applicable limitation period did not preclude the institution of proceedings but simply

gave the defendant the right to defeat the claim by invoking a limitation defence. It did, however, implicate the right to litigate, defined by Finlay CJ as "*the right to achieve by action in the courts the appropriate remedy upon proof of an actionable wrong causing damage or loss as recognised by law*" (at 45). That right was a personal right within the scope of Article 40.3.1 of the Constitution and the Court did not consider it necessary to determine whether it was also a property right within Article 40.3.2 because that would not result in a greater degree of constitutional protection.

309. Referring to that part of the analysis in *Tuohy v Courtney* in *Brandley v Deane* [2017] IESC 83, [2018] 2 IR 741, McKechnie J (*nem diss*) explained that it was not necessary in that case to consider further the issue of whether the right to litigate found protection as an aspect of the property rights protected by the Article 40.3.2. (at para 45) while at the same time emphasising that "*there can be no doubting but that access to the courts, an aspect of which is the right to sue, to litigate or to bring proceedings, is an unenumerated personal right guaranteed by Article 40.3.1° of the Constitution*". That was a fundamental right of every person in the jurisdiction, whether a citizen or not and was "*the primary vehicle by which both personal and all fundamental constitutional rights can be articulated and given effect to*" (para 48.).

310. *Tuohy v Courtney* and *Brandley* both involved the Statute of Limitations, the effect of which was to bar – defeat – a claim brought outside the applicable limitation period, thereby precluding a plaintiff from establishing an actionable wrong or obtaining any remedy. *White v Dublin City Council* [2004] IESC 35, [2004] 1 IR 545 was another limitation case where, again, the applicant's right to bring proceedings was at issue.

However, nothing in the 2019 Act and/or the Guidelines bars the Plaintiff's claim against the Local Authority here in a way analogous to a limitation statute. The Plaintiff is free to proceed with that claim and, if her claim succeeds, she will be entitled to an award of damages, including general damages, against the Local Authority.

311. None of the authorities cited to the Court under this heading concerned the assessment of damages and none appears to provide any basis for contending that the right to litigate encompasses a right to a particular level of general damages in a personal injuries action or, indeed, that the right to litigate/the right of access to the courts carries with it any guarantee of an entitlement to any particular remedy .

312. With respect, that fundamental point is, in my view, insufficiently addressed in the judgment that my colleague delivers today.

Property Rights

313. There is authority that the right to litigate is itself a property right, as well as authority to the contrary: see *Kelly: The Irish Constitution* (5th ed 2018) at 7.8.37 – 7.8.40. As is evident from the discussion above, however, recent jurisprudence has tended to see the right to litigate through the prism of Article 40.3.1 rather than Article 40.3.2/Article 43. However, particular rights of action may be property within those provisions. Whether that is so depends on the rights and interests underlying the right of action and which it is intended to vindicate.

314. *Buckley*, *Hamilton v Hamilton* [1982] IR 466 and *In re the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 all illustrate that proposition.

315. *Buckley* has already been discussed. It is sometimes overlooked that in this Court the principal ground on which the Sinn Féin Funds Act 1947 was struck down was not that it invaded the judicial domain but rather that it effectively deprived the plaintiffs of the property rights they were seeking to vindicate in the proceedings – their claim to the trust monies the subject of the dispute, which the Act directed should be paid into the High Court for the benefit of the State. *Hamilton v Hamilton* also involved interference with property rights. I shall discuss that decision further below. *In re the Health (Amendment) (No 2) Bill 2004* similarly concerned legislative interference (variously described by this Court as "*extinction*", "*expropriation*" and "*abrogation*") with the property rights of nursing home residents. The affected persons were persons of modest means whose property was deserving of particular protection (para 120; see also para 123) and those who had paid the unlawfully imposed charges were entitled, as of right, to recover those charges and that right of action was a property right, which was capable of assignment and which would, on the death of the persons concerned, devolve on their estates (para 121). The relevant provisions of the Bill proposed "*the extinction of the rights in question*" without qualification or compensation (para 129). Such "*expropriation of property solely in the financial interests of the State*" could not be regarded as "*regulating*" the exercise of property rights and was not at all comparable to the type of balancing legislation in contemplating in cases such as *Tuohy v Courtney* (para 130). The provision thus constituted an "*abrogation of property rights*" in contravention of Article 40.3.2 and Article 43.

316. There are obvious and very significant differences between the circumstances in *Buckley* and *In re the Health (Amendment) (No 2) Bill 2004* and the circumstances presented in this appeal. On no view could it be suggested that the 2019 Act and/or the Guidelines adopted under it effected the "*extinction*", "*expropriation*" or "*abrogation*" of any rights of the Plaintiff. She remains free to pursue her claim against the Local Authority and, if successful, will be entitled to a remedy in damages against it, a remedy which, for the reasons I have explained, will as a matter of law amount to an effective remedy. That remedy includes a right to recover in full any proven financial loss sustained by her as a result of her injury.

317. More importantly, the Plaintiff's claim here – at least so far as her claim to damages for pain and suffering is concerned – differs significantly from the claim in *Buckley* and the potential claims at issue in *Health (Amendment) (No 2) Bill 2004*. The plaintiffs in *Buckley* asserted ownership of the trust fund. The potential claims in *Health (Amendment) (No 2) Bill 2004* – whether characterised as claims for restitution, claims arising from a mistake of law or claims for monies had and received – were essentially claims for debt. In each case the right of action can properly characterised as a property right because its purpose was to vindicate the claimant's property rights – rights arising prior to, and independently of, the ultimate adjudication of the claim.

318. Here, in contrast, the Plaintiff's claim to general damages cannot properly be characterised as a property right. It is not a claim to property such as was at issue in *Buckley*; neither is a claim akin to the claims for debt considered in *In re Article 26 and*

the Health (Amendment) (No 2) Bill 2004. Claims for general damages were and are inherently uncertain and contingent in character. They involve, at most, a form of contingent property right that crystallises only at the point of assessment, when the court assesses their value in accordance with law. Only at that stage is the contingent claim translated into property in the form of an enforceable money judgment. Were the position otherwise, the principles governing the award of such damages could never be changed by judicial decision (upwards or downwards) unless that decision operated only prospectively (and therefore had no effect on the actual case in which the decision was made). If, on that theory, a *plaintiff* has a right to damages for pain and suffering determined in accordance with the law applicable as of the date of their injury (as appears to be suggested), then it must follow that the *defendant* has the converse right. But decisional practice – including relating to the '*cap*' on awards for damages for pain and suffering in personal injury claims – clearly demonstrates that this is not the case.

319. While a cause of action for personal injuries survives on death pursuant to the provisions of Part II of the Civil Liability Act 1961 (as amended), the damages recoverable do not include "*damages for any pain or suffering or personal injury*" (section 7(2) of the 1961 Act). In other words, the surviving action is essentially one for special damages only. Furthermore, it appears very unlikely that a claim for personal injuries can effectively be assigned: *SPV Osus Ltd v HSBC Institutional Trust Services Ltd* [2018] IESC 44, [2019] 1 IR 1. These considerations all serve to emphasise the significant difference between the claims at issue in the *Health (Amendment) (No 2) Bill 2004* (and in *Buckley*) and the Plaintiff's general damages claim here. The provisions of section 22(2)(e) of the Courts Act 1981 (which exclude the awarding of

interest on damages for non-pecuniary loss in personal injuries actions) serves to further illustrate the different character of such damages.

320. Hogan J acknowledges these differences but suggests that they do not make any material difference to the nature of the constitutionally protected right at issue, at least so far as the issue of retrospectivity is concerned. With respect, that cannot be correct as a matter of principle. The nature of the rights at issue is surely critical to any assessment of the permissible boundaries of legislative intervention in this context. Nor is the point addressed by the fact that the claim in *Buckley* and the potential claims at issue in the *Health (Amendment) Bill* can be said to have been contingent, in the sense that the claims might not be successful. All litigation claims, if contested, are dependent on adjudication. That is true of Ms Delaney's claim as it was true of the claim in *Buckley*. But if the claim in *Buckley* succeeded, it followed that the plaintiffs had (and always had) a property right in the disputed fund and the remedy that they would have been entitled to would follow from that declaration of rights. That is also true of personal injury claims so far as special damages are concerned but it is certainly not true of general damages/damages for pain and suffering. Conflating these two distinct forms of damages under the rubric of damages for personal injuries is, in this context, apt to confuse. A plaintiff who succeeds in a claim for personal injuries does not thereby establish a right to any particular level of damages for pain and suffering. The level of award that may be made differs – often very significantly – between different courts and over time according to a judgment that, as the former Chief Justice observed in *Morrissey*, involves a significant subjective element.

321. Notably, the Plaintiff herself did not go so far as to contend that she had any "*vested right*" to any particular level of general damages against the Local Authority here. Correctly, she did not contend that the contents of the Book of Quantum gave rise to any such right and she also expressly accepted that whatever the "*going rate*" may have been at the time that she suffered her accident and/or when she applied to PIAB, it was liable to alteration by subsequent judicial decision. While the Plaintiff argued that legislative intervention was categorically different, if she truly had a vested right to a particular level of general damages, whether by reference to the "*going rate*" at the time of her accident, or, alternatively, the "*going rate*" when she made her application to PIAB, then the courts, as much as the legislature, would be *prima facie* obliged to protect and vindicate that right. That has never been suggested and any such argument was disavowed by the Plaintiff here.

322. The reality is that any *right* that the Plaintiff has to general damages was (and is) contingent and unquantifiable and is capable of being articulated only at a high level of generality, namely as a right to such damages as appears to the court hearing her claim (or the court hearing any appeal from that court) to be proportionate and fair, having regard to the nature of her injuries and their effect on her. That right, so expressed, is one that the Plaintiff continues to enjoy, subject to first establishing liability on the part of the Local Authority.

323. The fact that the Plaintiff made her application to PIAB under the PIAB Act did not alter that position. That application did not have the effect of vesting in the Plaintiff any right to any particular level of general damages, whether by way of assessment from

PIAB (which assessment is not, of course, binding on either party) or by way of subsequent award from a court.

324. Ultimately, the Plaintiff has not established that any personal *right* of hers – as opposed to some *expectation* – has been or will be interfered with by the 2019 Act and/or the Guidelines. Even if the application of the Guidelines results in a lower award for the Plaintiff than she would may have received previously (though that remains to be seen, given that her claim against the Local Authority has yet to be determined and no judicial assessment of the damages she is entitled to (if any) has yet been made), that does not give her a constitutional claim, any more than she would have had such a claim in the event that the "*going rate*" for her injury was radically reduced by a judicial decision made after her accident. If such a *judicial* reduction is permissible, that can only be because the claim for general damages is a wholly contingent one that does not involve any vested right. Otherwise, what would be impermissible interference for legislature (or its delegate) would equally appear to be an impermissible interference for the court.

325. In these circumstances, the *"proportionality v rationality*" issue does not really fall for decision. *Tuohy v Courtney* has been the subject of many critical comments, both as to its outcome and its underlying analysis: see for instance the comments of McKechnie J in *Brandley*, of O' Donnell J (as he then was) in *Cantrell v Allied Irish Banks* [2020] IESC 71 and of Hogan J in his concurring judgment in *Smith v Cunningham* [2023] IESC 13. In *CW v Minister for Justice* [2023] IESC 22, this Court allowed that the *Tuohy v Courtney* rationality test "*may*" be applicable (in at least some cases) where the issue concerns a legislative choice as to the balancing of the rights of private individuals

(joint judgment of O' Donnell CJ and O' Malley J, at para 229). However, in *CW* the Court went on to apply a proportionality test, rather than the *Tuohy v Courtney* rationality test.

326. It is not necessary for the purposes of deciding this appeal to determine whether the *Tuohy v Courtney* rationality test has any continuing vitality and, that being so, it appears appropriate to leave that question to be debated and determined in proceedings in which it arises in a concrete way.

327. Applying a proportionality test here – a somewhat artificial exercise in light of the analysis above – there can be no doubt, in my view, that the issue of personal injury awards is a matter of legitimate concern for the legislature. Quite apart from considerations of consistency, certainty and predictability, the *level* of personal injury awards has significant societal implications, as has been explicitly acknowledged in the caselaw discussed earlier. It is clear from the 2019 Act, and in particular section 90(3), that these were matters of concern for the Oireachtas. The measures adopted in the 2019 Act providing for the drafting and adoption of personal injury guidelines are rationally connected to the objective of addressing those concerns and are not arbitrary, unfair or based on irrational considerations. As to minimal impairment, the Oireachtas did not alter, or authorise the alteration, of the fundamental principles for the assessment of damages and did not interfere with the basic requirement that awards of general damages should be proportionate, fair to both sides and objectively reasonable and was careful to provide that personal injury guidelines would not be mandatory and could be

departed from. The effect of these measure on the right (the right to general damages) is, in my view, proportionate for the reasons just set out.

328. In his judgment (with which Whelan J agrees), Hogan J expresses the view that the application of the Guidelines to Ms Delaney's claim breaches her entitlement to have her claim assessed by PIAB under the "*old law*." He would therefore quash the PIAB assessment and direct PIAB to assess her application "*by reference to the old, pre-2021 Act law*" (para 97).

329. That result is said to follow from *Hamilton v Hamilton* which, it is suggested, is authority for the proposition that the Oireachtas cannot – at least generally – legislate with retrospective effect in a manner which adversely affects a pending claim (para 88).

330. In my view, *Hamilton v Hamilton* is not authority for such a sweeping proposition. There is no doubt that legislation that seeks to *direct* a court how to determine a pending case will be invalid: *Buckley*. But legislative measures that apply generally and are not targeted at particular litigation are not impermissible even where they have a decisive impact on pending litigation: *Camillo*. If *Hamilton v Hamilton* was indeed authority for the proposition set out above, it would follow that *Camillo* was incorrectly decided because, on that basis, the applicant for the gaming licence had a right to have his application determined under the "*old law.*" Such an approach has never been endorsed by this Court and would, if correct, have a dramatic effect on the ability of the Oireachtas to legislate, and would position Irish constitutional law as a notable outlier

in the extent of the restriction on the power of parliament triggered by the institution of legal proceedings.

331. The decision in *Hamilton v Hamilton* was in fact concerned with a very specific factual situation. The second defendant, FD, had contracted to purchase a substantial estate from the first defendant, CH. The contract was executed, the deposit paid and specific performance proceedings commended by FD – all prior to the enactment of the Family Home Protection Act 1976 ("*the 1976 Act*"). Sometime after its enactment, an order for specific performance was made by the High Court. CH wished to complete the transaction but his wife, the plaintiff AH, brought proceedings asserting that her consent was required under the 1976 Act and that any conveyance entered into without that consent (which, it was clear, would not be forthcoming) would be void.

332. Those were the circumstances in which the issue of retrospectivity arose in *Hamilton.* All four judges in the majority (Costello J dissented) were of the view that the plaintiff's claim failed by reason of the fact that a decree of specific performance had been made. On that basis, according to O' Higgins CJ, FD was "*the beneficial owner of the lands contracted to be sold*" (at 476). If section 3 of the 1976 Act was given retrospective effect, that "*would render impossible the completion of the sale in accordance with his contract, and to deprive [FD] of the benefit of his contract, of his right to enforce the same specifically, and, of his previously acquired beneficial interest in the property contracted to be sold*" (at 476). Were the Act to have such an effect it "*would constitute a clear infringement of the provisions of Article 40, s.3 of the Constitution*" (at 477). In

other words, if the Act was given retrospective effect, it would effectively nullify the vested property rights of FD.

333. Henchy J agreed with that analysis. In his view, if the Act was given retrospective effect, the position would be similar to that in *Buckley* in that FD's "*constitutional right to pursue his pending claim for specific performance*" (which, Henchy J noted, had been held to be good in law) would be extinguished or stultified (at 483). That would not be constitutionally permissible because the 1976 Act could not properly trench on FD's right to carry his pending specific-performance action to a successful conclusion (*ibid*). Such right was, of course, a property right, directed at the enforcement of contractual rights vested in FD upon the conclusion of the contract. This part of Henchy J's analysis is consistent with that of O' Higgins CJ and turns on the fact that the retrospective application of the 1976 Act would negate FD's property rights and particular his rights under the specific performance decree.

334. Henchy J also went on to consider whether, absent any pending specific performance proceedings, FD would have been entitled to succeed on the appeal (the High Court had held that the 1976 Act applied). Again, his analysis focused on FD's property rights. On execution of the contract for sale and payment of the 10% deposit, FD had acquired a beneficial estate in one-tenth of the property contracted to be sold and he "*unquestionably*" had a contractual right to acquire both the legal and equitable estates in the whole of the fee simple (at 484). The application of the 1976 Act would, in his view, necessarily involve a "*retrospective depreciation*" of the legal effect of the contract for sale, making that contract "*sterile as it can never mature into a valid*

conveyance" (at 484-485). In Henchy J's view, it was to be presumed that the Oireachtas did not intend to legislate with that effect. He refrained from expressing any view whether, if the 1976 Act was clearly intended to apply retrospectively, it would be unconstitutional "*for failing to protect property rights*" (at 487). That is an important aspect of his judgment that should not be overlooked (and in fact Costello J, dissenting, was of the view that, even though the 1976 Act effectively frustrated the contract for sale, it was not unconstitutional).

335. Here, of course, the Plaintiff did not have any claim pending in court as of 24 April 2021 when the Guidelines came into effect. The fact that proceedings were pending before *a court*, and that an order of specific performance had subsequently been made by *a court*, were not incidental features of *Hamilton v Hamilton* but were in fact central to this Court's analysis, as is evident from its reliance on *Buckley*. In any event, my colleague's analysis does not appear to rest on the fact that Ms Delaney had actually made an application to PIAB. If, as he states, the right here was "*Ms Delaney's right to sue in respect of a justiciable wrong*", any such right appears to have arisen when Ms Delaney fell and injured herself as a result of the alleged negligence of the Local Authority. If that is so, then it follows that if indeed she has a right to have her general damages claim assessed under the "*old law*", so too would all other plaintiffs and potential plaintiffs whose cause of action arose before 24 April 2021, regardless of when they applied to PIAB or issued proceedings in court.

336. In any event, I do not consider that such a right to sue can properly be equated with the property rights at issue in *Hamilton v Hamilton* or in *In re Article 26 and the Heath*

Amendment (No 2) Bill 2004 (or, for that matter, the rights at issue in *Buckley*). For the reasons set out earlier, a right to sue for general damages for personal injury is qualitatively different from a claim to an interest in property (*Buckley and Hamilton v Hamilton*) or a claim to debt arising from the unlawful appropriation of property (*In re Article 26 and the Heath Amendment (No 2) Bill 2004).* The observations of Murray CJ (for the Court) at 196 must be understood in that context and they cannot simply be applied to the very different claim here. The Plaintiff's case cannot be properly adjudicated on unless that fundamental distinction is addressed.

337. In contrast to the nursing home residents whose rights were at issue there, this Plaintiff had no vested right to any particular level of damages in respect of pain and suffering which was adversely affected by the adoption of the Guidelines on 24 April 2021 and the subsequent application of those Guidelines for the purpose of PIAB's assessment. It follows that there is nothing intrinsically unfair about the application of the Guidelines to her, any more than it would have been unfair to have had regard in the making of that assessment (or the making of an award for general damages by a court) to a decision of a court which effectively reduced the "*going rate*" for her injury from the going rate applicable at the time of her accident or the time that she applied to PIAB. The sole right is to have the assessment conducted in accordance with law and that law is subject to the possibility of both legislative and judicial modification. As a matter of principle, courts are bound to respect the property rights of litigants to the same extent as the legislature is. Accordingly, if it were the case that a personal injury plaintiff had a constitutionally protected right to have his or her damages assessed by reference to the law as it stood at the time of their accident (or, alternatively, at the time that they

applied to PIAB or commenced court proceedings), the making of a lower award resulting from an intervening decision of a court in another case would infringe that right, just as the making of a higher award (resulting, for example, from a decision to increase the "*cap*" on general damages awards) would infringe the property rights of defendants. No doubt there are, in general, significant differences between judicial "*law-making*" and the exercise by the Oireachtas of its legislative competence but those differences do not explain how it might be suggested that the property rights of personal injury claimants may be affected by judicial decisions in a manner that is said not to be open to the legislature. The correct position, in my view, is that judicial decisions can and do retrospectively affect awards for general damages in personal injury actions because the only right that a plaintiff has (other than the residual right to receive an award that is not so low as to fail to provide a constitutionally adequate remedy *a la Sweeney v Duggan*) is to receive an award assessed in accordance with the rules in place at the time of assessment.

338. There is, of course, another critical difference between the position in *Hamilton v Hamilton* and *In re Article 26 and the Heath Amendment (No 2) Bill 2004* (and *Buckley*) and that presented here. All of those cases involved interventions that, if permitted, would effectively nullify the property rights of the claimants (or, in *In re Article 26 and the Heath Amendment (No 2) Bill 2004*, the potential claimants whose rights would be affected by the Bill was permitted to enter into force). Hogan J allows that "*nothing as drastic*" is at issue here. But, that being so, it cannot simply be assumed that any interference with property rights effected by the Guidelines (assuming that, contrary to the view already expressed, a claim for general damages for personal injury is a species

of property right akin to the rights at issue in the earlier cases) exceeds constitutionally permissible limits. Unless it is the case that there is some absolute principle that the Oireachtas or its delegate cannot adopt *any* measure that alters the law applicable to pending civil proceedings in any way – and there is no such principle in my view – then any finding that the application of the Guidelines to the Plaintiff's pending application to PIAB is unconstitutional surely demands rather more by way of analysis than is contained in the judgment of my colleague

339. Finally, I note that Hogan J refers to Article 40.1 in this context. For the reasons set out below, I do not consider that Article 40.1 assists the Plaintiff here.

Equality

340. Counsel for the Plaintiff made it clear that the equality issue was not a "*central plank*" of her appeal. It nonetheless needs to be considered.

341. The 2004 Act (as amended by the 2019 Act) excludes the application of the Guidelines where proceedings were instituted prior to 24 April 2021. Thus, if the Plaintiff had issued her proceedings against the Local Authority prior to that date – and assuming that she was successful on liability – the court would have assessed her claim for general damages by reference to the Book of Quantum, and not by reference to the Guidelines.

342. There is nothing unusual about such a cut-off – it is commonplace for legislation and measures adopted pursuant to legislation to provide that they do not apply to pending

proceedings. That may be because of a concern that the application of the measure to existing proceedings could give rise to constitutional issues or it may be for other, more practical, reasons.

343. Here, however, there is an additional factor. As already noted, the Plaintiff here was not in a position simply to institute proceedings against the Local Authority. Instead, the PIAB Act required personal injury claimants to first make an application to PIAB and put a bar on the institution of court proceedings unless and until authorised by PIAB. To accommodate that requirement, the Oireachtas provided for a standstill period for limitation purposes while the application was being processed by PIAB and for a further period after the authorisation issued: section 50 of the PIAB Act. A further indication of the integration of the PIAB process and proceedings in court is provided by section 51A which provides for adverse costs consequences for claimants if they fail to accept a PIAB assessment and then do fail to obtain a higher award in court (section 51A was inserted by Personal Injuries Assessment Board (Amendment) Act 2007 and has been significantly amended – and made more onerous from a claimant's point of view – by section 16 of the Personal Injuries Resolution Board Act 2022).

344. The 2019 Act draws a sharp distinction between personal injury claimants in the PIAB process as of 24 April 2021 and those who had issued proceedings as of that date. That is so regardless of when the claimant may have suffered injury and when they applied to PIAB. A claimant who suffered injury on the same day as the Plaintiff and who applied to PIAB on the same day that she applied may have received an authorisation more quickly (as would be the case if, for instance, the respondent refused to consent

to PIAB assessment) and thus have been in a position to issue proceedings prior to 24 April 2021, in which case that claimant would have their claim assessed by reference to the Book of Quantum and would, presumptively at least, receive a higher award of general damages (in fact, as already explained, once an assessment was made prior to 24 April 2021, that excluded the application of the Guidelines to that particular claimant).

345. The argument here is that this different treatment is in breach of Article 40.1. The Plaintiff had, by making an application to PIAB, taken the required first step in bringing a claim against the Local Authority prior to 24 April 2021 and, it was said, ought not to have been treated differently to other claimants who had, by happenstance or good fortune, progressed through the PIAB process, at least to the point of the issuing of an assessment.

346. *Donnelly v Minister for Social Protection* [2022] IESC 31, [2022] 2 ILRM 185 provides the framework for analysing this argument. Following a comprehensive discussion of the caselaw, O' Malley J (for the Court) set out the correct approach, as follows:

> *"188. The authorities do demonstrate support for the following propositions:*
>
> *(i) Article 40.1 provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
>
> *(ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Art. 40.1.*

(iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.

(iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.

(v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.

(vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case.

189. It is necessary, therefore, to look at the elements of a successful claim. In my view, the formulation adopted by Barrington J. in Brennan and approved a number of times in this Court is consistent with the analysis in Dillane. The statutory classification must be for a legitimate legislative purpose, and it will not be legitimate if it is arbitrary, capricious or irrational. Further, the

classification must be relevant to the legislative purpose, and it will not be relevant if it is incapable of supporting that purpose.

190. The establishment of a prima facie case, therefore, means presenting a case on the basis of which a court could find that the legislation does not have a legitimate objective, or that the discrimination created by it is irrational, arbitrary, capricious or not reasonably capable, when objectively viewed in the light of the social function involved, of supporting the selection or classification complained of. If the party mounting the challenge can do this, then naturally the onus will shift to the State. No novel principles are required. However, this does not appear to be what the appellant is contending for. What seems to be sought is an approach which would require the State to adduce evidence and justify the legislation despite the fact that the plaintiff has not, in fact, presented sufficient material to fully ground a finding in his or her favour. This would, indeed, be a new approach that, as the Court pointed out in Fleming, is not supported by authority. In my view, it is incompatible with the presumption of constitutionality.

191. The approach must be one that includes appropriate deference to the principle that the Constitution allocates the primary function of making decisions in such matters to the People's elected representatives in the Oireachtas, and that it is not for the courts to usurp that function. Where the constitutional guarantee of equality is the only ground for a challenge the court will have to bear in mind that all legislation involves differentiating between

individuals or groups, and that inevitably the differentiation settled upon by the legislature will mean that some people are excluded despite being in a very similar position to some people who are included.

192. What might be termed a 'pure' equality claim may arise where the legislature has decided to confer a benefit on a class of persons, and the plaintiff is aggrieved at being excluded because he or she has at least some relevant similarity with those who are included. But the legislature is entitled to make policy choices, and therefore must be entitled to distinguish between classes of persons. To refer again to the text of Art. 40.1, the equality guarantee is not to be interpreted as meaning that the State shall not, in its enactments, have 'due regard' to differences of physical and moral capacity, and of social function. I consider, therefore, that the challenge can only succeed if the legislative exclusion is grounded upon some constitutionally illegitimate consideration, and thus draws an irrational distinction resulting in some people being treated as inferior for no justifiable reason. The Constitution does not permit the court to determine that the plaintiff should be included simply because a more inclusive policy, assimilating more people sharing some relevant characteristic into the class, would be 'fairer'.

193. In considering whether the legislation offends against the Constitution, the Court will engage in a greater degree of scrutiny where the differentiation involves what may be termed one or more 'suspect' grounds. In using the word 'suspect', I do not intend to import the jurisprudence concerning that

classification in other jurisdictions, which may have the potential to result in overly rigid differentiations between the applicable standards of review. It should be borne in mind that context is relevant here, and also that some grounds of discrimination, even within the core category of characteristics of human personality, are more likely to be offensive than others and thus require more intense scrutiny.

194. The guarantee in Art. 40.1 is grounded upon the respect due to all human persons. The question here must in the first instance be whether the legislation draws a distinction on the basis of intrinsic aspects of the human personality such as those referred to in Murphy v Ireland. The reason that grounds concerning those intrinsic aspects of human personality are considered 'suspect' is that a differentiation based on such grounds may in fact be the result of either irrational prejudices or groundless assumptions. In my view, the obligation of the Court under Art. 40.1 includes ensuring that groundless assumptions or prejudices have no role in determining the legal rights of the individual."

347. There is no question here of any "*suspect*" classification – the distinction drawn by the legislature is not based on any personal characteristics of 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 insofar 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. It is also important to bear in mind in this context that claimants such as the Plaintiff retain the right to general damages and to have such damages assessed by a court in accordance with established principles and, if justice requires, at a level higher than that indicated by the Guidelines. That is relevant to the issue of justification.

348. On balance, I do not consider that the Plaintiff has established that the distinction at issue here is inconsistent with Article 40.1. The onus is on her to establish that the relevant provisions of the 2019 Act are clearly unconstitutional. In my view, she has failed to discharge that onus.

349. That conclusion is not affected by this Court's decision in *McMahon v Leahy* [1985] ILRM 422. That was an extradition case involving very particular facts and does not affect the *Donnelly* analysis.

350. Accordingly, I would dismiss the Plaintiff's appeal on this ground.

(8) THE CONFIRMATION ISSUE

351. On my analysis, no need for any confirmation of the Guidelines arises and, accordingly, I can deal with this issue briefly.

352. The Guidelines at issue in these proceedings were adopted by the Council on 6 March 2021. They entered the public domain almost immediately. Some weeks later, on 27 March 2021, the Oireachtas enacted the Family Leave and Miscellaneous Provisions Act 2021. As I have already explained, that Act amended (the then uncommenced) section 99 of the 2019 Act. Section 99 (as amended) in turn amended section 22 of the 2004 Act so as to impose on courts an obligation to have regard to the personal injuries guidelines for the time being in force. The same Act amended the PIAB Act so as to impose an express obligation on PIAB to have regard to the guidelines for the time being in force. All of these provisions came into force together on 24 April 2021 (the timeline is more fully set out in the Chronology in Annex II).

353. By legislating as it did, when it did, the Oireachtas arguably impliedly ratified or confirmed the Guidelines that had been adopted by the Council on 6 March 2021. So it appeared to the Court as it came to finalise its decision and as already explained, it invited further submissions specifically on that issue and held a further oral hearing in which the issue was addressed by Counsel for the Plaintiff and the State.

354. Notwithstanding the Plaintiff's forceful objections to this issue being considered at all, on the basis that it was not an argument ever advanced by the State, I agree with my colleagues that the issue is one which should be addressed, having regard to the importance of the issues confronting the Court and the serious consequences likely to follow in the event that the Guidelines are struck down.

355. In my view, the confirmation issue presents two related questions, as follows:

(1) Does section 30 of the 2021 Act (amending section 99 of the 2019 Act insofar as it amends section 20(4) of the 2004 Act) reflect a legislative intention that courts should "*have regard to*" the Guidelines adopted by the Council on 6th March 2021?

(2) Does section 31 of the 2021 Act (amending section 20 of the PIAB Act) reflect a legislative intention that PIAB should "*have regard to*" those Guidelines?

356. Given that, as of the enactment of the 2021 Act, the "*guidelines ... in force*" were the Guidelines adopted by the Council on 6 March 2021, there appears to be no real room for doubt that such confirmation is precisely what the Oireachtas intended. If the Guidelines needed confirmation, (and in my opinion they did not) they were confirmed by the 2021 Act. The "*force*" of those Guidelines did not arise from their adoption by the Council: their "*force*" is conferred by section 22 of the 2004 Act (as regards the courts) and section 20 of the PIAB Act (as regards PIAB) – and in each case the

operative provisions were enacted by the Oireachtas in the 2021 Act in the clear knowledge that the Guidelines had been adopted and with a clear intent that they have the force provided for by those provisions.

357. To that extent, therefore, I agree with the judgment of Hogan J. As to his view that the effect of such confirmation was to give "*statutory effect*" to the Guidelines such that they cannot be amended other than by primary legislation enacted by the Oireachtas, that issue does not arise on my analysis. In any event, it follows from the holding of the majority that legislative intervention will be required to permit the adoption of any further personal injury guidelines (and any sentencing guidelines).

CONCLUSIONS

358. For the reasons set out in this judgment, I would reject all of Mr Delaney's grounds of appeal and affirm the Order made by the High Court dismissing her proceedings.

359. In summary:

(1) Assessing general damages/damages for pain and suffering in personal injury actions has, as a matter of history, always been a judicial function. That position is not altered by the 2019 Act.

(2) Courts have repeatedly emphasised the importance of consistency and predictability in the assessment of such damages and in ensuring that awards are proportionate and fair to both parties. Courts have also made it clear that wider societal interests are relevant in this context.

(3) In practice, achieving these objectives presents significant challenges. Damages for pain and suffering do not involve any form of objective calculation and involve a significant element of subjective assessment. Arriving at a proportionate and fair award is very difficult in an individual case, where the court is concerned only with a particular injury (or combination of injuries) comprising only a small part of the spectrum of possible injuries.

(4) The adoption of detailed general guidelines directed to the level of damages to be awarded for pain and suffering in respect of particular injuries is a valuable and useful exercise likely to significantly advance the achievement of the (judicially-mandated) objectives of consistency, predictability, proportionality and fairness. That is the context in which the Oireachtas legislated here.

(5) In requiring courts to "*have regard*" to the personal injury guidelines adopted under section 7, and requiring any departure from them to be reasoned, the Oireachtas contemplated that such guidelines should have more than merely hortatory effect and should instead have significant effect in the assessment of awards for general damages in personal injury actions.

(6) An award in accordance with the Guidelines ought to be the presumptive starting point. In many if not most cases, that will also be the end point.

(7) If a court (or PIAB) considers that an award within the range indicated by the Guidelines would not be consistent with any reasonable application of the principles governing the assessment of general damages, such that, in the court's (or PIAB's) view, such an award would not represent just and/or proportionate compensation for the injury sustained in that particular case, the court (or PIAB) may depart from the Guidelines. That is a significant threshold, involving as it must a finding that there is no reasonable proportion between the award indicated by the Guidelines on the one hand and the award that the court considered it appropriate to make, applying the principles governing the

assessment of general damages and unconstrained by those Guidelines, on the other. A clear standard of that kind is necessary to ensure the consistent and effective application of the Guidelines by PIAB and the courts.

(8) PIAB's assessment of Ms Delaney's application was made after 24 April 2021. It follows that the Board correctly assessed her application by reference to the Guidelines and not to the Book of Quantum. The manner in which PIAB made that assessment did not involve any procedural unfairness to Ms Delaney.

(9) As regards Article 15.2 of the Constitution, having regard to the narrow scope of the delegation here, the fact that it is significantly constrained by the factors identified in section 90(3) of the 2019 Act and taking into account also the status and effect of the guidelines adopted under section 90, the suggestion that the Oireachtas has abdicated its exclusive legislative competence must be rejected. The Oireachtas was entitled to delegate the function of adopting personal injury guidelines having the effect provided for by the 2019 Act and the 2021 Act and the amendments made by those Acts to the 2004 Act and to the PIAB Act and it did so in a constitutionally permissible manner here.

(10) The absence of any "*supervisory mechanism*" requiring positive approval of the guidelines by the Houses of the Oireachtas or providing for their annulment by the Houses does not affect that conclusion. There is no principle that an otherwise permissible delegation – as this is – is rendered invalid by reason only of the absence of such a supervisory mechanism.

(11) Article 15.2 of the Constitution permits the Oireachtas to delegate a power to make "*law*". Therefore, it does not follow from the fact that the Guidelines may be said to change the law relating to the assessment of damages for pain and suffering in personal injury actions that the power to make guidelines having such effect cannot be delegated by the Oireachtas.

(12) The Guidelines are not *ultra vires* the 2019 Act.

(13) The imposition by the Oireachtas of an obligation on courts to "*have regard to*" the Guidelines is, in my view, clearly within its legislative competence. Such an obligation cannot plausibly be characterised as an undue interference with the administration of justice or the independence of the courts in the performance of judicial functions. It does not impermissibly impair the *adjudicative*/*decisional* independence of the courts.

(14) Nor, in my view, does the conferral on the judiciary (in the form of the Judicial Council) of an obligation to adopt personal injury guidelines having the effect provided for in the 2019 Act and 2021 Act (and the amendments made by those Acts to the 2004 Act and the PIAB Act) violate the institutional independence of the judiciary.

(15) I accept of course that judicial independence is a core constitutional value. I accept also that the separation of powers has a high constitutional value. But

any theory of the separation of powers that is premised on there being bright-line boundaries between the executive, legislative and judicial branches would be wholly unworkable. It is therefore unsurprising that this Court's jurisprudence has never proceeded on the basis of purely formalistic distinctions between those branches. This Court's cases are properly understood as reflecting a functional approach to the separation of powers, directed not to labels but to substance. It is necessary in every case to look at the particular characteristics of an impugned measure and ask not what descriptor should be attached to it but *why* it is said to be constitutionally impermissible to for one branch or another to undertake the function at issue. Central to that analysis is whether or not the impugned measure impairs a core function of another branch.

(16) The question is, ultimately, one of overall appreciation. The critical considerations are, firstly, that the adoption of guidelines relating to the assessment of general damages in personal injuries actions, while a non-judicial or extra-judicial function, is very closely related to the exercise of assessing such damages, which is undoubtedly a judicial function; secondly, by reason of their expertise and experience in carrying out that function, the judiciary are particularly well-placed to formulate such guidelines and, thirdly, the nature of the assessment exercise – involving, as it does, a significant degree of subjective judgment, giving rise to significant issues of consistency, certainty and predictability and involving the application of principles of assessment that, inherently, are challenging to apply within the confines of an individual case –

is such that guidelines are liable to assist in its proper performance, without usurping the functions and responsibilities of the judge or court.

(17) This constellation of factors is exceptional. What is, in my view, determinative here is that the assessment of damages involves a quasi-discretionary judgment which allows room for, and indicates the utility of, structured and systematic guidance *and* that the judiciary are particularly well-placed to formulate such guidance for the very reason that such assessment has traditionally been its "*own business."* That is true also of sentencing (though, historically, the Oireachtas has played a greater role in relation to sentencing, at least to the extent of prescribing maximum sentences) and it is perhaps not surprising that the 2019 Act also provides for the adoption of sentencing guidelines by the Council. Apart from these two specific areas, which are arguably *sui generis*, there would appear to be very limited if any scope for the Oireachtas to treat the 2019 Act as a legislative blueprint that could properly be extended to other areas.

(18) Accordingly, I conclude that the relevant provisions of the 2019 Act do not violate the *institutional* independence of the judiciary, either as a matter of actuality or perception. I do not believe that conferring on members of the judiciary the function of formulating guidelines on the assessment of damages in personal injuries actions, structured in the manner that function is in the 2019 Act, undermines the integrity of the judiciary or would be perceived by the public to do so. A reasonably informed member of the public, aware of the fact

that the assessment of general damages has historically been the preserve of the judiciary would not, in my review, regard the provisions of the 2019 Act as undermining judicial independence or entangling the judiciary in matters properly the province of the political branches. On the contrary, it appears to me that the public would be most surprised indeed to be told that in refraining from intervening directly as to the level of personal injury awards and instead legislating to give power to adopt guidelines on that issue to *judges* in the manner set out in the 2019 Act, the Oireachtas had thereby violated the independence of the *judiciary*.

(19) The application of the Guidelines to Ms Delaney's claim does not involve any violation of her personal rights under the Constitution. She has no constitutional right to have her claim for damages for pain and suffering assessed at a particular level or by reference to any particular date – whether the date of her accident or the date of her application to PIAB. In that respect, a claim for damages for pain and suffering is qualitatively different to claims to vindicate a pre-existing property right, such as was at issue in *Buckley* and *In re Health (Amendment) (No 2) Bill*.

(20) Ms Delaney's right of access to the courts and her right to litigate are not affected by the Guidelines and the Guidelines do not impair any entitlement to an effective remedy in the event that she succeeds in her claim against the Local Authority. In that event that she will be entitled to recover any financial loss in full and she will also be entitled to damages for pain and suffering assessed in

accordance with the rules applicable at the time of assessment. Those rules will permit the court to make an award higher than that indicated in the Guidelines if an award in accordance with the Guidelines would not be consistent with any reasonable application of the principles governing the assessment of general damages, such that, in the court's view, such an award would not represent just and/or proportionate compensation for the injury sustained by her.

(21) In my view, the Guidelines were and are valid and therefore no question of their confirmation by subsequent enactment arises. If the issue did arise, I would have found that the Guidelines were indeed confirmed by the sections 30 and 31 of the 2021 Act.

360. A majority of the Court has reached a contrary view on the issue of judicial independence. As a result, the Court today declares section 7(2)(g) of the 2019 Act invalid. Section 7(2)(g) simply requires the Judicial Council to adopt personal injury guidelines and does not say anything as to the effect of those guidelines so it is not entirely clear to me why it is that subsection – rather than the provisions of the 2019 and 2021 Acts which, by way of amendment to the 2004 Act and the PIAB, prescribe the effect of such guidelines – that should bear the brunt of the majority's disapproval. In any event, the effect of this Court's decision today is that if further personal injury guidelines (or sentencing guidelines) are to be adopted in the future, some different mechanism for the adoption of such guidelines must first be prescribed by the Oireachtas. That might involve the Oireachtas legislating directly to impose a set of guidelines on the courts. Alternatively, the Oireachtas could give the power to make

guidelines to a body other than the Judicial Council, which guidelines would then bind the courts. It could perhaps involve retaining such a power in the Council but making its exercise conditional upon Oireachtas approval (though it is not clear from the judgments of the majority whether such would be enough to address their concerns on this issue). I agree with Charleton J that each of these scenarios would trench upon, rather than protect, the principle of judicial independence and I have a significant concern that, in the name of vindicating judicial independence, the majority has instead unwittingly undermined it.

ANNEX I

(1) SECTION 22 OF THE CIVIL LIABILITY AND COURTS ACT 2004

(AS OF 24 APRIL 2021)

"Matter to be taken into account by the court when assessing damages.

22.*—(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.

(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.

(2) Subsection (1A) shall not operate to prohibit a court from having regard to matters other than the Book of Quantum when assessing damages in a personal injuries action to which that subsection applies.

(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."

(2) SECTION 20 OF THE PERSONAL INJURIES ASSESSMENT BOARD ACT 2003

(AS OF 24 APRIL 2021)

"Assessment

20.*—(1) In this section "assessment", in relation to a relevant claim, means an assessment of the amount of damages the claimant is entitled to in respect of the claim on the assumption that the respondent or respondents are fully liable to the claimant in respect of the claim.*

(2) An assessment of a relevant claim shall be made by such one or more of the employees of the Board for the time being assigned the performance of functions under this Chapter as the Board directs (in subsequent sections of this Part referred to as "assessors").

(3) That employee or those employees may be assisted in the making of the assessment by one or more of the persons the services of whom are engaged by the Board under section 80 (in subsequent sections of this Part referred to as "retained experts").

(4) Subject to subsection (5), an assessment shall be made on the same basis and by reference to the same principles governing the measure of damages in the law of tort and the same enactments as would be applicable in an assessment of damages were proceedings to be brought in relation to the relevant claim concerned.

(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).”

ANNEX II: CHRONOLOGY

Date	Event	Reference/Comment
12 April 2019	Plaintiff falls on the footpath in Dungarvan	
23 July 2019	Judicial Council Act 2019 Act enacted	
16 December 2019	The provisions of 2019 Act relating to the adoption of personal injuries guidelines (but not sections 98 and 99) come into operation	Judicial Council Act 2019 (Commencement) (No.2) Order 2019 (SI 640/2019)
6 March 2021	Personal Injuries Guidelines adopted by the Judicial Council	
22 March 2021	Seanad agrees to Government amendments to the Family Leave Bill 2021, including insertion of new Part 9 and amendment to its title	
27 March 2021	Family Leave and Miscellaneous Provisions Act 2021 enacted	Part 9 of the 2021 Act (in section 30) amends section 99 of the 2019 Act, and inserts a new section 100 into that Act

		and (in section 31) amends section 20 of the Personal Injuries Assessment Board Act 2003
24 April 2021	Part 9 of the 2021 Act comes into operation	Family Leave and Miscellaneous Provisions Act 2021 (Part 9) (Commencement) Order 2021 (SI 180/2021) made on 15 April 2021
24 April 2021	Sections 98 and 99 of the 2019 Act (as amended by the 2021 Act) comes into operation	Judicial Council Act 2019 (Commencement) Order 2021 (SI 182/2021) made on 15 April 2021
		Section 100 appears to have come into operation only on 3 October 2022 – see Judicial Council Act 2019 (Commencement) Order 2022 (SI 489/2022)
13 May 2021	PIAB Assessment issues	
July 2021	JR proceedings commenced	