An Chúirt Uachtarach

The Supreme Court

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

Supreme Court appeal number: S:AP:IE:2022:000100
[2024] IESC 10
High Court record number 2021/641
[2022] IEHC 321

Between

Bridget Delaney
Applicant/Appellant

- and -

The Personal Injuries Assessment Board, The Judicial Council, Ireland and the Attorney General
Respondents

Judgment of Mr Justice Peter Charleton delivered on Tuesday 9 April 2024

1. The need for guidelines assisting judges in the assessment of personal injuries, a core and everyday function of all courts in Ireland, has generated public debate over decades. With the passing of such guidelines by the Judicial Council, under s 7 of the Judicial Council Act 2019, on 6 March 2021, such guidelines are now in place: but, subject to this challenge. Of those who litigate as plaintiff or defendant in the High Court or Circuit Court or District Court, the cause is usually some kind of an accident and the claim for compensation is almost always based on a lack of care shown in a factory, warehouse, or road setting. Apparently, the result of this case as to the validity and operation of the personal injury guidelines passed by the Judicial Council will influence thousands of cases currently awaiting judicial analysis and multiples of that into the future. The case is thus of systemic importance.

Approach

2. The judgment of Collins J, Murray J concurring, with which this judgment concurs, sets out the issues and the arguments as to why the personal injury guidelines infringe, or operate in conformity with, the Constitution. These separate observations, in essence, reason as follows: that the guidelines do not constitute an impermissible exercise in law-making, within the meaning of normative law whereby the Oireachtas exercises the sole and exclusive law-making power of the State under Article 15.2.1° of the Constitution; that in so far as the guidelines may be regarded as having legal effect, that is within the sphere of judicial decision-making as to the assessment of damages for injury, the assessment of sentence and the making of rules for the disposal of court business; that requiring by legislation that judges set guidelines is not an infringement of the separation of powers and does not trench on judicial independence as guaranteed by Article 35.2 of the Constitution; that the nature of fact-finding as essential to the judicial function remains within the sphere of the judiciary under the guidelines as promulgated; that while judges are bound by precedent, even within the same court level, for instance the High Court, departure from precedent is possible for good reason; that precedent is always subject to revision; that judges may explain a series of decisions by issuing *en banc*, or through a single decision, a summary of existing decisions and what these mean; that the Oireachtas has shown appropriate deference to the separation of powers in leaving to the judicial sphere the setting of guidelines for personal injuries and for sentencing; that the judicial sphere is the appropriate forum for the setting of any such guidelines; and that the flexibility in the 2019 Act in enabling departure from guidelines as to the level of damages for physical injuries in the interests of justice and by further enabling departure for stated reason cannot be regarded as raising the fundamental constitutional issues addressed in argument. Statutory analysis compels the proposition that the guidelines can be departed from where the award yielded by the guidelines bears no reasonable proportion to the award that the judge independently believes, and for stated and properly explained reason, should issue. Further, that since, for different reasons, a majority variously hold that the guidelines, as originally passed on 6 March 2021, infringe the democratic power reserved to government under Article 5 of the Constitution and impermissibly delegate the exclusive legislative function of the Oireachtas under Article 15.2.1°, Hogan J with whom Whelan J agrees, or operate to trench upon judicial independence under Article 35.2, Faherty and Haughton JJ, this judgment holds that the guidelines were affirmed by the Oireachtas. The result is the overcoming of any such infirmity as that majority hold, for differing reasons, through the Family Leave and Miscellaneous Provisions Act 2021 section 31, amending section 20 of the Personal Injuries Assessment Board Act 2003 in requiring judges to "have regard to the personal injuries guidelines (within the meaning of that Act) in force" and "where they depart from those guidelines, state the reasons for such departure and include those reasons in the assessment in writing". Collins, Murray, Hogan, Whelan and Faherty JJ concur in this; Haughton J dissents. This judgment also agrees with the judgment of Collins and Haughton JJ, with which Murray J concurs, that the plaintiff did not have any property or personal right in her personal injury assessment under Article 40.3 and Article 43 of the Constitution: hence, the guidelines applied to her as of the date of assessment.

Guidelines

3. Central to the argument seeking to condemn the guidelines as infringing the exclusive law-making power of the Oireachtas, declared in Article 15.2 of the Constitution, and as

trespassing into the passing of an unconstitutional law, is that these are, of their nature, rules of law. One of the basic principles of statutory interpretation is that those subject to its terms cannot ignore an enactment binding on them because its meaning is difficult to discern. As Bennion, *Statutory Interpretation* (1st edition, London, 1984), states at page 233 "The language of command is different from other languages, which have to accept the status quo (whereas command alters it)." The language of guidance differs from the language of command because of its nature that which guides is of the nature of suggestion and not in the nature of command.

4. Henchy J in *Inspector of Taxes v Kiernan* [1981] IR 117 at 121 noted that a statutory provision directed to the public at large may be construed according to common usage, whereas those addressed to a specialised body may take on a technical aspect for interpretive purposes. Here, there is a dual direction: to the judicial council as to their highly technical and specialised function in setting up a committee to formulate, through experience and research, guidance as to personal injury awards; and to the public whereby it is made clear that a longstanding issue of national debate is to be settled by having such guidelines. Much centres on the use of the particular words. From the point of view of the committee, their task is to formulate what will guide the judiciary, while from the aspect of the general public, how damages may come to be calculated is for the first time made clear as an aspect of reasonable certainty.

5. Personal injuries guidelines adopted by the Judicial Council under section 7 of the 2019 Act are expressed under s 90(1) to "contain general guidelines as to the level of damages that may be awarded or assessed in respect of personal injuries". That is the fundamental approach. The section goes on to that that "without prejudice to the generality of" that description of the exercise conducted, the guidelines may address "the level of damages for personal injuries generally", or for "a particular injury or a particular category of injury, and in that regard "the range of damages to be considered for a particular injury or a particular category of injuries" and where, as may frequently be the case "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".

6. There are two inescapable principles to the judicial function. First, a judge should always strive to find out where the truth of a matter rests. Whether the cause is a commercial dispute as between building developers or whether the issue is as to which driver caused an accident leading to hospitalisation, there can be no sound adjudication unless a judge decides what the facts are. Often there will be contradictions and frequently the temptation to dissimulate or exaggerate will need to be kept in mind, but without deciding what happened, on the standard of proof as a probable result, any application of law will be misplaced. Secondly, a judge will strive to do justice. While that concept is fully realisable as a divine ideal, it is through law that situations are defined and the result to be applied is rendered consequent. A difference emerges in a situation where a body of experience is built up so that within a legal norm, as where a wrong is defined and proof sufficient to engender the remedy is presented to a court, the experience of the level of remedy can go beyond the result demanded by law, in tort cases damages, to the general prediction of the level of compensation mandated by law.

7. While, as the analysis in the separate judgments of Collins and Hogan JJ, elucidates, the difference as between law and the prediction of the nature of the mandated result may be permeable, describing a general result is different to the rigidity that is within the concept of legal regulation. Under s 93 of the 2019 Act, the duty of a judge to apply the

law in furtherance of a just result is expressly preserved since the legislation is not to be "construed as operating to interfere with", either, "the performance by the courts of their functions", which is an express reference to judicial independence and the duties of a judge to be impartial under Article 34 of the Constitution or "the exercise by a judge of his or her judicial functions." Personal injuries guidelines which under s 30 of the Family Leave and Miscellaneous Provisions Act 2021 amends the 2019 Act, enables departure from the guidelines. What is required is that a "court shall, in assessing damages in a personal injuries action" do no more than "have regard to the personal injuries guidelines … in force" but even that mild admonition is qualified by a flexibility that belies any argument that law is being made by judges in setting the guidelines since a court "where it departs from those guidelines" is required merely to "state the reasons for such departure in giving its decision."

8. At this point, it is important to recall that the guidelines were set by an expert committee and were voted on by the Judicial Council, consisting of all of the judges in the country with a collective experience of practice for each of them amounting to at least 20 years. What all of the judgments in this case have in common is that the guidelines are regarded as not only worthy of respect for what they are in themselves, but also that the point of departure once facts have been found is to be within the helpful steering towards a just result that these constitute. But that is not law.

Meaning of law

9. In contrast, the ecclesiastical authority of the Christian church is not based on human law but on revelation as to where right resides. This is merely an exemplar, but since every human body needs regulation, there are nonetheless rules, individually expressed as κανών, or in Latin *kanon*, the meaning of which illuminates law in its rigidity and definition, being "a straight measuring rod; a ruler". Greek law distinguished between law as divine, Θέμις, on the one hand and rules made within the polity, νόμος, and applicable custom, relying instead on the three-way distinction between divine law, human decree (nomos) and custom Δίκη. There are such distinctions in the sphere of human regulation and it is possible to differentiate as between what must happen and what may, or, even exceptionally and for good reason, may not happen as a matter of custom. The guidelines are not the former.

10. Legal philosophers will not let go of the debate as to the indefinability of law, despite law in itself being based either on definition of circumstance, remedy and result or description, applicability and result. HLA Hart in 'Definition and Theory in Jurisprudence' (1954) LQR 37 opines: "In law as elsewhere, we can know and yet not understand." Thus, addressing what is "a law" "a State" "a right", he continues:

> For the puzzle arises from the fact that though the common use of these words is known, it is not understood; and it is not understood because compared with most ordinary words these legal words are in different ways anomalous. Sometimes, as with the word "law" itself, one anomaly is that the range of cases to which it is applied has a diversity which baffles the initial attempt to extract any principle behind the application of an arbitrary convention underlying the surface differences; so that whereas it would be patently absurd to ask for elucidation of the principle in accordance with which different men are called Tom, it is not felt absurd to ask why; within municipal law, the immense variety

> of different types of rules are called law nor why municipal law and international law, in spite of striking differences, are so called.

11. Certainty is central to law, in the very least as an ideal; as the war against uncertainty through the case law demonstrates. The dissent of Lord Reid in *Shaw v DPP* [1962] AC 220, 234, against the use of criminal conspiracy to punish those who published a book of the names and contact details of prostitutes in London, attacks general offences which make criminal whatever judges seek to find right to condemn. Essentially, choice-based norms cannot have the force of law and under our Constitution, Article 5, choices leading to law derive from the machinery of democracy and not what any establishment may find repellent. Perhaps most practically, Julius Stone in *Legal Systems and Lawyers' Reasonings* (Stanford, 1964) has pointed to the convergence of seven cumulative steps as constituting law. The first principle is that law should be "recognised as a complex whole of many phenomena. What precisely this predication of unity can mean, and what are the factors working to make it a reality, are questions which no mere definition can answer". Second, law must "include norms regulating behaviour, that is, prescribing what the behaviour ought to be, forbidding what it ought not to be, or declaring what it is permitted to be." Thirdly, generally laws address social norms, usually thus requiring two actors, as in a victim and a perpetrator or a tortfeasor and a plaintiff, exceptionally law can address such issues as self-harm. Generally though, in a democratic society, norms as to the self cannot address thought or belief, only the creation of social wrongs through the expression of levels of dissent that disturb order; hate crime being an example. Fourthly, law makes up a legal order: it is not chaotically thrown together, rather convergence is what characterises rule through law. But, it must be commented, there must be limits to this principle, as where very many rulings are gathered through judicial intervention into a review judgment of existing principles; as in the seminal judgment on sentencing in rape based on the analysis of dozens of cases in *The People (DPP) v WD* [2007] IEHC 310, [2008] 1 IR 308, [2007] 5 JIC 0406. Essentially, what was done in that case and in the many cases since on sentencing and the bands applicable to describable behaviour within the confines of the same legal definition was the kind of work that a textbook writer might have done; a gathering together of precedents rather than the setting of norms. Fifthly, law is coercive in nature. As Stone says, coercive "means that the authority of law is supported, where required, by acts of external compulsion such as deprivation of life, health, liberty, or property, or the withholding of benefits of these kinds." Sixth, these norms assume the form of institutional coercion involving "established norms, even when it consists of the self-help of the aggrieved party." Seventh, that institutionalised coerciveness "should have a degree of effectiveness sufficient for the order to maintain itself. The legal order must, in other words, by and large regulate in fact the behaviour of its subjects and not merely purport to do so." Hence, it is easy to make a law providing for the exclusive use by bicycles of part of a roadway, or that by night bicycles be visible through defined lighting, but where there is no checks, visible police or enforcement, law is hollowed out of its effective character.

12. These guidelines lack these practical characteristics. The going rate for an injury has always existed. It may be part of the landscape of legal practice but it is not part of the complex whole that makes up law. It may be asked where the norm regulating conduct is in drawing up a guide to what such going rate is and requiring regard to that experience in setting damages, but leaving it to judges to do what is right and just? In that, there is no regulation of the behaviour of society. Of course, as in the Rules of the Superior Courts, the judges can be regulated as to the orders which they make. But even there, there are many authorities which say that the rules are to be used as instruments of

justice; the long title of the Court of Justice Act 1936, which provides the legal basis for the making of the rules of court states 'An Act to make further and better provision in relation to the administration of justice….' On the convergence of law into a legal order, there are examples of that which are not the result of legislating. In so far as the guidelines have legal effect, in accordance with the analysis of Collins J, this reasoning concurs that there is an interstitial responsibility in the interpretation of the sphere of competence which requires of judges that norms apply within the judicial branch of government. Hence, the Judges' Rules of 1918 have many times been said, *The People (DPP) v Farrell* [1978] IR 14, not to have the force of the rule of law but are neither to be ignored. These rules were declared by judges in consequence of a political intervention as to how the discretion against admissions against self-interest were to be applied, and in fact were applied, by judges up to that point, in criminal cases. Similarly, the M'Naghten Rules, so called, arose out of *M'Naghten's Case* (1843) 10 C & F 200 and the disquiet an acquittal by reason of madness caused. The judges merely explained the rules on insanity. That has been added to as to when someone knows that an action is wrong, originally in law but now including moral wrong, and by the inclusion of an insane compulsion; *Doyle v Wicklow County Council* [1974] IR 55. These guidelines have no coercive effect. Rather, the only coercion in a judge, addressing tort liability for personal injury is to do justice, as is the judicial duty. Nothing is to be taken from the judge, given to the judge, or effected upon the judge: instead, the judge is guided. When it is posited in argument that identical cases cannot be decided the same way as before and after the guidelines, two matters must be born in mind. Firstly, identical cases are extraordinarily rare; that is why legal principle is of general application. Secondly, precedent by judicial fiat is subject to re-analysis and hence to change; as in this court's judgment altering the rules as to provocation as a partial defence to murder in *The People (DPP) v McNamara* [2020] IESC 34. A case deciding that a lost hand carries a particular tariff will be different for a musician or a gardener, though both work with their hands, and for a barrister, who does not to that degree. The only final court is this Court, and every other precedent is both subject to revision as to quantum and analysis as to applicability. Even with this Court, there can be departure from precedent where justice requires re-consideration; *Mogul v Tipperary County Council* [1976] IR 260. While appeals are part of legal structure, this is towards to adoption of and maintenance of consistency. It cannot be regarded as an institutionalised coercion. Finally, appellate analysis applies to every decision of every court, at least as a potential. That is not the setting of coercive effectiveness but, rather, the maintenance of respect within the court system and for those driven to use their right to litigate. Hence, this analysis concurs with that of Collins J, Murray J also concurring, that in so far as the guidelines have any legal effect that this is one properly exercised by judges and is not a denial of democratic accountability under Article 5 of the Constitution; *Ellis v Ireland and the Attorney General & Others* [2019] IESC 30, [2019] 2 ILRM 420, [2019] 3 IR 511, [2019] 5 JIC 1502.

13. But, there is also an element of experience in approaching these guidelines. In reality, as any young lawyer starting a career will be aware, it has always been possible to draw on the experience of those with decades of practice to formulate on the basis of a medical report what a particular injury will likely draw from a judge, should liability be established. It might, consequently, be said that there were always guidelines, that judges discussed awards among themselves as much as practitioners, and that the going rate for categories of injury has historically been held *in pectore*, in the breast or mind of the judiciary. Certainly, there had to be a basis for appellate courts saying in the past that an award was too high or too low, but what was the basis? It had of its nature to be that knowledge of the appropriateness of an award was carried as part of a collective memory

and with a level of certainty that even those who conducted appeals could readily access and use as a common instrument for doing justice. While, thus, guidelines existed even before anyone took the trouble to systemise their logic or reduce them to writing, it may be wondered if that is all the legislature had in mind when in the 2019 Act, s 7(2)(g) provides for the adoption of draft personal injuries guidelines prepared and submitted by the Personal Injuries Guidelines Committee to the Board of the Judicial Council within 12 months with the modifications (if any) made by the Board, and whereby under s 11 that the Board would review under s 90 and then adopt such guidelines? Similarly, under s 18(5) where such guidelines are to be reviewed by the committee within three years of their adoption, what is the nature of what is being reviewed?

14. In the *Kiernan* case, as part of the passage quoted above, Henchy J stated that when a word:

> which requires to be given its natural and ordinary meaning is a simple word which has a widespread and unambiguous currency, the judge construing it should draw primarily on his own experience of its use. Dictionaries or other literary sources should be looked at only when alternative meanings, regional usages or other obliquities are shown to cast doubt on the singularity of its ordinary meaning, or when there are grounds for suggesting that the meaning of the word has changed since the statute in question was passed.

15. This represents a case where it is necessary to search for a singularity of the ordinary meaning of guidance, since every permutation of argued meaning has been contended for to the point of an equation with solid law. Further, the dual nature of those addressed by the legislation, judges as to what is to be done and the general public as to the consequence, demands clarification. *The Oxford English Dictionary* (2nd edition, 1989, London) has no definition of 'guideline' but says enough as to the meaning of what a 'guide' does and what 'guidance' consists of to undermine the argument presented on behalf of Bridget Delaney that what is involved in the personal injuries guidelines is of the nature of a command. Hence:

> To act as a guide to; to go with or before for the purpose of leading the way: said of persons, of God, Providence, and of impersonal agents such as stars, light etc. … To lead or direct in a course of action, in the formation of opinions etc.; to determine the course or direction of (events, etc.).

Judicial independence under Article 35.2

16. In terms of ordinary meaning, the *Concise Oxford English Dictionary* (10th edition, 2001, London) tends towards settling the myriad of literary examples taken from its larger cousin in assisting in the definition of the concept most fundamental to this appeal. There, the specific word 'guideline' is simply "a general rule, principle, or piece of advice." In contrast, of the nature of a rule of law is that it is of an opposite nature, that it instructs rather than guides, that it prescribes rather than suggests, and that it enjoins rather than leads.

17. In some way, it is sought to use the introductory text of the guidelines book itself to contradict this. On behalf of Bridget Delaney, it is suggested that "only in exceptional circumstances" may the guidelines be departed from: that phrase, drawn from the report

presented to the Judicial Council, is mere rhetoric and does not even approach having the status of guidance, never mind the force of law. Section 99 of the 2019 Act amends s 22 of the Civil Liability and Courts Act 2004 so as to provide that a court "shall, in assessing damages in a personal injuries action" and is therefore enjoined, to "have regard to the personal injuries guidelines (within the meaning of section 2 of the Judicial Council Act 2019)" and that "where it departs from those guidelines, state the reasons for such departure in giving its decision." Even if it were binding, which it is not as it is merely a point of view from the committee, the introduction makes clear that the use of the words 'have regard to' and 'guidelines' makes it clear that there is nothing there that speaks of the application of the force of law:

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

18. Formerly, under the Personal Injuries Assessment Board Act 2003, there existed a Book of Quantum, setting out a range of suggestions for particular injuries. Under the Civil Liability and Courts Act 2004 a similar, but, it is argued on behalf of Bridget Delaney, different, obligation of consulting that document devolved on judges hearing personal injuries cases, whereby under s 22 the court "shall, in assessing damages … have regard to the Book of Quantum" with no obligation to set out reasons for departing from that particular set of guidelines and with more freedom in the sense of a specific declaration that that regard "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." While the nature of an amendment is the alteration of a legal meaning that formerly existed, each change in a legal imperative must be examined as to whether a change has been affected and if so, what its nature is.

19. Hence, before the 2019 Act, a judge would "have regard to" the then guidelines (the Book of Quantum) and was not obliged to set out reasons for departing from them, the judge was not prohibited from having regard to matters outside the guidelines. Since the 2019 Act, a judge must have regard to the personal injury guidelines and must if he or she departs from them give a reason for that departure. In consequence, the focus is narrower: the judge is assessing the nature of injuries and taking guidance only from the guidelines and where there is a reason for departure is setting out what that is; presumably for the benefit of the plaintiff and the defendant and thus enabling consideration of an appeal. It does not prescribe when there may be departure from the guidelines, but as Meenan J reasoned in the High Court, where there is to be an award outside what is suggested by the guidelines, the requirement of reasons, which he describes as requiring logic which is "rational, cogent and justifiable," is no more than what is required in administrative law. That requirement is not burdensome; certainly no more so than the reasons required in administrative law to justify a decision. Nor is the removal of any reference to regard to matters outside the guidelines a restriction since, as again Meenan J reasons, [43]: "I do not think the absence of the proviso has the effect of limiting the reasons. If a court departs from the Guidelines, it is having regard to matters other than the Guidelines."

20. Nothing in the new statutory wording, furthermore, alters in any fundamental way the nature of a guideline as being an indication and being obliged to state why that

analysis of what is presumptively just may not be followed is doing no more than what is demanded in administrative law on an invariable basis of facilitating those involved to know where they stand and providing reasons for analysis whereby a further legal step is facilitated. Nonetheless, it must be recognised that the personal injury guidelines are a serious exercise in the attainment of a core objective of our judicial system, that of certainty of law. Since the component parts of an action in negligence consist of establishing a duty of care, a breach of that duty according to accepted and reasonable standards, an absence of reasons of public policy as to why liability should not be imposed in particular circumstances, and damage, each of these is deserving of that level of description which enables those considering embarking on an action at law, with the consequent risk of an award of costs on failing, to be advised as to the nature of what is involved. Damages being a component part, that element is as much deserving of definition as any other. Where what a judge comes up against is beyond what the guidelines contemplate, then there may be a departure for that reason.

Departure

21. A judge may hear a case and may come to a conclusion that the warehouse accident, for example, was caused by the negligent driving of a forklift truck by a fellow-employee, in which case the employer of both is liable in damages consequent upon the tortfeasor's actions. That is the first fact to be decided and it is by no means automatic that tripping on the pavement is to be adjudicated on the same basis as if someone had tripped over a badly-laid carpet within a restaurant. Secondly, the judge must assess what the plaintiff has suffered up to the date of the hearing and will likely suffer beyond. The personal injury guidelines provide for a composite figure. Judges, by convention at least, usefully decide the quantum of damage up to date and then into the future. The award is the addition of those two and any special damages, loss of wages or medical expenses, that have resulted from the injury; special damages remaining, as Collins J says, "immune from having any effect on general damages for suffering."

22. The level of damages is not set by reference alone to attention to the facts of a particular case. Rather, what is brought to that consideration in a system, such as ours, where practitioners of decades of experience populate the judicial bench, are comparisons with other cases, habituation in the analysis of medical evidence and assessment of how human nature may cause exaggeration to put across a point or, on the contrary, reticence may understate the consequences of an accident. Hence, having regard to the guidelines means a consideration, while the evidence is being heard, of where this particular plaintiff's injuries may fit within the description of insults to the body, broken ankle or missing finger, how the variations such bald facts may lead to quite different damages, and where within the striving for a just result what the judge finds as a fact an injury is to be assessed taking the guidelines into account. That is not, like the definition of law itself, an easily describable task.

23. That having been said, there may come a point where a judge finds that as a matter of judicial assessment the nature of what a plaintiff has suffered would not be fairly compensated by the described category and level in the guidelines. Collins J characterises this, correctly, as bearing no reasonable relation to the pain and suffering forced on a plaintiff through the tort of another. Unlike a normative equation of finding of fact equals result, which is law, the 2019 Act enables departure from what the result is, in this case, merely recommended to be. The judge is to be guided, not constrained; though the guidelines are the starting point. This is less an exercise in the consultation of precedent,

as a realisation that actual authority resides, pursuant to s 93 of the Act, within the independence of the judge and his or her honest assessment. Thus, guided to a particular range of damages, if that proves much more or much less, bearing thus no reasonable relation, than the assessment of the case justly requires, the judge should depart. Since, however, a reason is required in the unlikely event of departure from guidelines put together on the basis of serious research and a vast accumulation of individual practitioner and judicial experience, a proper reason would be that the guidelines did not predict a level or intensity of suffering such as that experienced by the plaintiff, one that the judge has found as a matter of fact to be more serious than the written guidance would admit of or carries a probability of physical burden beyond the examples given.

24. While the guidelines are there to assist, no judge is obliged to reach an assessment of damages that yields an unjust result because, to adopt the test from Collins J, there is no reasonable relation as between what a plaintiff has suffered and the amount of damages which the guidelines suggest. In the rare cases where that happens, a judge is merely obliged to reason out the decision in the light of the guidelines. No doubt, such judicial experience will aid the 3-year reviews that the process of drawing up guidelines is obligated to follow under the 2019 Act. Without reasons for departure, proper revision and resetting of these helpful guidelines would not be possible. Hence, the process of analysis, of reasoning and of departure contribute to the accumulation of experience around which the customary prediction of levels of damages is built.

Example

25. An example may illustrate that point. While certainty of law demands that these guidelines be the basis of awards in so far as that is possible, there will be some cases which require departure. Suppose a person is subject to an all too frequent accident in consequence of driving a car whereby they are struck by another vehicle or, in consequence of a spillage on the road, looses control and collides with an object, the result may be a whiplash or back injury. That injury will suggest a particular level of compensation, depending on duration and severity. These are facts for judicial assessment. For a sedentary job, that in an office, the injury may be inconvenient, debilitating or really difficult to live with. Sport may have to be given up, perhaps to be taken up again at a lesser level. But where the person lives with the injury and, as the law demands gets on with their life and takes whatever treatment is advised, these are predictable scenarios within which the guidelines operate.

26. Now, apply the same injury to a farmer; a person whose instrument of work is both their body and their ability to reason. That farmer suffers a similar accident but is a person who makes a living from managing and milking a herd of cows. Physical effort using the entire body is required in bringing the animals to be milked, in putting out very heavy bags of specialised feed, in confining animals in a crush to administer medication, in assisting in calving and in the myriad of other tasks that animal husbandry demands. Unable to fulfil those duties, and having built up a herd over decades through selective breeding and by buying in the most useful animals, with little or no help available, the farm starts to go from under the farmer's control. Helpless, the farmer slips into reactive depression which moves to its blackest point when the entire herd must be removed by lorry because it can no longer be cared for. What if the depression causes suicide through insanity; what if the consequence is a destroyed family with the plaintiff forced into a life of loneliness; what if there are years and years of blackness despite family support and in

the face of real suffering? Guidelines do not provide for everything or every possible situation or life-experience.

27. In such circumstances there is a reason for departure from the guidelines. While a psychiatric component may be added, overall what has happened is beyond the experience to be expected. That is the key. In consequence of injury of a particular kind there are predictable and unpredictable paths down which people are forced to tread. It might be the same were a severe pain syndrome to attach to a recoverable injury and for its intensity to utterly discommode a life. Were it not possible to depart from the guidelines, it might validly be argued that these had the force of law, but that is not the case. Good reason for departure is built into this system. Of itself that system is valuable in advising litigants and in guiding judges. But, of their nature, guidelines may be departed from with reason.

Flexibility

28. An extraordinarily stark picture is sought to be presented here on behalf of Bridget Delaney. Formerly, it is argued, under the pre-2019 Book of Quantum, her lower leg/ankle injury would have attracted a multiple of what the Personal Injuries Assessment Board has now advised. Further, whereas formerly failing in court to be awarded more than what the board suggested would operate as a factor in the discretion to award costs, now, as is set out in the judgment of Collins J, that suggestion becomes the same as a lodgement by a defendant, with the consequent result that litigation costs post the board's assessment would fall on the plaintiff, barring exceptional circumstances.

29. The Book of Quantum 2016 edition would have been the work consulted in the event that Bridget Delaney had completed the submission of medical documents to be assessed by the Personal Injuries Assessment Board under the pre-guidelines system. That book, in an earlier edition often called "the green book", was not drawn up by judges. There was no consultation as to what levels were held in common understanding concerning the level of damages. Rather, the foreword discloses that consults used data analytics "to provide predictive analytics and decision support solutions" by examining "representative samples from over 51,000 closed personal injuries claims from 2013 and 2014 based on actual figures from Court cases, insurance company settlements, State Claims Agency cases and Personal Injuries Assessment Board (PIAB) data." The task was "to distil settlement and awards data in the personal injuries process in Ireland and to present the results in a logical and easy-to-read format." While, as the authors assert, this research was "into real cases", this was, in essence, a finely researched compilation of multiple and disparate claims that were disposed of in settlements, in recommendations and in court. No group of judges actually looked at how the figures were arrived at. Hence, in the event that an argument as to making up a norm constitutes law would be much more applicable to that earlier exercise than to the distillation of experience that went into judges voting in favour of the current guidelines.

30. While the second edition of that earlier book of suggestions has greater detail and a wider range of physical insults covered than in the first edition, what must remain puzzling to a trial judge is the wide disparity as between what may be awarded in any single category. This is, no doubt, because what was involved was a statistical exercise as opposed to an analytical analysis as to what might be judicially assessed as fair. Hence, turning to the injury suffered by this plaintiff Bridget Delaney, one comes across what is

a typical example of a variable, one close to incomprehensible. Hence, for minor lower limb injuries, which "include simple non-displaced fractures to a single bone in the foot with no joint involvement which have substantially recovered" the figure suggested is "€18,000 to 34,900". This puzzling variable where the lower figure is 51.5% of the higher, or the higher is 194% above the lower, shows a variability of an extreme kind but with no guidance as to how to calculate within that range. Of course, here it is presented that Bridget Delaney would have been entitled to the higher figure. On what basis? Then, a contrast is drawn with the current guidelines.

31. There, in the guidelines now assisting judges, considerably more certainty is brought to the calculation of damages. The guidelines from 2019 mention these criteria as legitimately influencing awards:

> (i) Age; (ii) Severity and duration of pain; (iii) Nature and extent of all treatment, e.g. surgery, physiotherapy and medication; (iv) Scarring; (v) Presence or risk of degenerative changes; (vi) Instability in joint or limitation of movement; (vii) Effect on enjoyment of life, sport and leisure activities; (viii) Impact on work; (ix) Prognosis.

32. Then a range of potential injuries is set out whereby an ankle injury, on judicial assessment as severe, serious, moderate or minor, may attract a range of damages. That range, typical of what occurs elsewhere in the guidelines, is both detailed and, more importantly, justifies the research done by its close focus. Hence, deformities of the ankle with a risk of amputation justify damages from €70,000 to €100,000. But, unlike in the Book of Quantum, it is clear from the description as to what moves the damages from the lower to the higher figure. Similarly, while a range from €45,000 to €70,000 is guided for serious injuries, again it is clear why a judge might move towards the higher figure, as when walking is impaired. Coming to the moderate injury category, there €20,000 to €45,000 is guided accompanied by a descriptive set of reasons why difficulty walking over uneven ground, irritation, scarring or irritation from surgical plates might justify an upper figure. This plaintiff has been assessed by the Personal Injuries Assessment Board as being in the minor ankle injury category that attracts damages from €3,000 to €20,000. Thus, the upper figure is within the wide range of the earlier, and highly non-specific, Book of Quantum. Concise guidance is given as to why a judge might move from a lower figure to a higher one, presented as a cascade, for less "serious, minor or undisplaced fractures, sprains and ligamentus injuries", thus:

> (i) Where a substantial recovery or a recovery to nuisance level takes place without surgery within two to five years. This bracket will also apply to shorter term acceleration and/or exacerbation injuries usually between two and five years. €12,000 - €20,000
> (ii) Where a substantial recovery takes place without surgery between six months and two years. This bracket will also apply to very short-term acceleration and/or exacerbation injuries, usually less than two years. €6,000 - €12,000
> (iii) Where a substantial recovery is made within six months. €500 - €3,000

33. The assessment by the Personal Injuries Assessment Board is the upper end of the last figure. But, that is not cast in bronze. There will be a judicial assessment. If the factors of how this individual was affected is more severe, or if recovery was not

substantially made within 6 months, a higher bracket is suggested, and if the ankle is a nuisance after two years, the top bracket becomes the guide.

34. A judge's task is to listen to the evidence carefully, assess the reliability of what a plaintiff is saying, try to glean from the expert medical reports, or occasionally evidence, on what principled basis an assessment for better or worse is being made and then make a rational choice as to how the guidance will assist in an appropriate decision as to damages. That is all ahead. The apocalyptic scenario of the plaintiff only now being entitled to 8.6% of what formerly she might have been judicially assessed as being entitled to is not real. What she is entitled to awaits a judicial assessment.

35. And then there are the reasons why a judge may depart from where the guidelines will establish a starting point. Again, if this plaintiff is a person who works as a labourer in construction or a tradesperson who depends upon the fitness of their body and suffers a reaction in terms of the quality of life and work beyond what the guidelines contemplate, a reason may thereby emerge. In any event, in choosing a bracket, in assessing the precise nature of injuries and in placing them in the context of the guidelines, considerable flexibility already exists.

36. Since, however, these guidelines were drawn up under the tutelage of judges, are more than a statistical analysis from disparate sources and offer a level of detail as to the reasons for being steered towards certainty of law in damages, as in the other elements of a tort, it is the duty of the judiciary to use this serious instrument as a primary source of assistance in calculating the level of awards for particular injuries.

Judicial law-making

37. Since on this analysis, the personal injuries guidelines constitute assistance and are not legal constraints, it is impossible to contend that judges have been forced into law-making or that there has been any impermissible delegation of the law-making power of the Oireachtas under Article 15.2 of the Constitution. Nonetheless, the interstitial nature of permissible judicial activism, as exemplified by the development of the common law, would in any event provide an answer.

38. The common law develops from existing principles which are applied to emerging and new situations whereby judicial experience as to what the law is may be declared. That is not making up law but the application of what already exists and which is applied and adapted to actual lived experience; *The People (DPP) v McNamara* [2020] IESC 34 [23-30]. The underlying principle is, however, retained: otherwise that exercise would amount to law-making. It is unnecessary to repeat the analysis most recently given in *The People (DPP) v Quirke* [2023] IESC 5 [34-42] whereby an argument that a computer device constituted a separate place from the physical location in which it might be seized pursuant to a search warrant but applying the modern experience of digital technology to only enable a search of the digital content of the computer and the servers or cloud to which it is linked where a reasonable suspicion was put before a judge which enabled such an exceptional intrusion into privacy.

39. It, therefore, suffices, to conclude that no law-making is involved in judges voting on well-researched and focused guidelines as a positive indication for judicial analysis in individual cases and which may be departed from if there is reason to do so. Furthermore, it must be reflected that the Oireachtas has a function in making legislation

and not in requiring judges to act either in an unjust way or contrary to the guarantee of judicial independence, which is fundamental to our democratic system under Article 5 of the Constitution. In making a choice, therefore, that judges should set guidelines for personal injuries and for sentencing under the Judicial Council Act 2019, the Oireachtas democratically made the correct constitutional choice whereby there would be no interference in those key elements of the judicial sphere; *Ellis*.

40. In so far as the guidelines have some legal effect, Collins J, Murray J concurring, is correct that there remains a sphere of control which arises from the experience of judges as to how to best manage cases and as to how best experience may be shared for the benefit of the administration of justice. In the context of the rules of the various court jurisdictions, these require adherence to procedures designed to enable the fair disposal of cases. As cases have become more complex and expensive, it has been noticed that fairness demands an approximation of equality of arms as to the calling of witnesses. Hence, in recent times, rather than let one side ostensibly overwhelm the other with funded evidence in the form of experts pleading for a particular approach to liability, Order 39, Rule 58 RSCs makes it a general rule that, apart from the common law requirement that an expert may only be called on an issue of which the court does not have common experience, an expert may only be called to assist the court and is limited, generally, to one expert on each side. That may be called judge-made law, but it is within the sphere of control necessary for the administration of justice. It changes, as well, the substantive law which seems to have been that in an adversarial system, each side could call whatever, and no matter how repetitive, evidence. Judges may have tolerated that in the past, but the Constitution is there to enable justice more generally through the fair deployment of limited resources. Thus, when the Constitution at Article 34.1 states that justice "shall be administered in courts established by law by judges appointed in the manner provided by this Constitution", the reference to the administration of justice, "a riarfar ceart", can be taken as the establishment of a sphere of rule-making whereby that administration may justly be pursued.

41. Similarly, when an argument is presented on behalf of Bridget Delaney that proof of judicial law-making is offered by the statutory provision whereby the Personal Injuries Assessment Board in making recommendations are following the guidelines: since these are made by judges and approved by judges, the contention goes, then judges are making law for administrators. Section 20(5) of the Personal Injuries Assessment Board Act 2003, as now in force following amendment by the Family Leave and Miscellaneous Provisions Act 2021, provides that:

> 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).

42. It would be more than peculiar if there were no such provision. To what else are the Board to have regard? The Board does not have judicial power. Hence, while the board can receive an argument that the guidelines should not be followed, most usually from a solicitor on behalf of a plaintiff, the primary source of analysis had these guidelines not existed would have been judicial decisions. Returning to the Book of Quantum, which guided judicial decisions, but far less accurately and with far less rational for a particular suggestion, this, according to the introduction was based on settlements on an analysis over two years. Those settlements were arrived at on the basis of what the legal profession saw as the going rate for particular injuries. Such levels were set on the basis of what judges saw as the rate of damages for personal injuries in, must usually, negligence actions. If the board did not follow these, and in fact went so far as to go to the trouble to offer a serious and well-meaning analysis as to what judges were doing, admittedly within extraordinarily wide limits which were in no way as justified as is evident from the focus in the current guidelines, precisely what would be happening would have been that the board was literally making it up as they went along. They were not.

43. By focusing the mind of judges on guidelines, by judges debating and considering these, by judges having the power to reconsider what is recommended, as opposed to being set in stone, a valuable tool furthering the principle of legal certainty has been elucidated. That does not mean that judges are making law for the administrative sector of government.

Sufficiency of guidance

44. It is unnecessary to do more than approve the analysis of Collins J as to the sufficiency of guidance within the 2019 Act whereby there has not been a disavowal of the constitutional provision in Article 15.2.1º that the "sole and exclusive power of making laws" is thereby vested in the Oireachtas. In essence the test has not changed and every case since *Laurentiu v Minister for Justice, Equality and Law Reform and Others* [1999] 4 IR 26 has followed a basic principle that there can legitimately be secondary legislation provided the Oireachtas in delegating responsibility for detail, as it must on occasion if it is not to be swamped by the logistics of carrying out the principle of the primary legislation, defines boundaries and gives guidance as to what those secondary rules must consist of. The point is that a similar analysis, that of searching out within the primary legislation of intelligible principles, was reached by the United States Supreme Court in *Mistretta v United States* (1989) 488 US 361, in upholding the setting of guidelines as to sentencing by a committee consisting only partly, unlike here, of judges. See *Island Ferries Teoranta v Minister for Communications Marine and Natural Resources* [2015] IESC 95 [15], [2015] 3 IR 637, *Bederev v Ireland* [2016] IESC 34 [21-24] Charleton J and MacMenamin J, *NECI v Labour Court* [2021] IESC 36 [53-63] MacMenamin J and Charleton J.

45. It must be remembered that the point of all of these cases is to state a principle. It is not to cause confusion through a proliferation of authorities. All the authorities say the same thing: the legislature under Article 15.2 of the Constitution must be enabled to delegate the detail of legislation to a designated rule-making committee, otherwise the ability to legislate would be swamped in unnecessary logistical analysis as to how to carry out the policy or purpose involved; it is not unconstitutional to enable a subordinate rule-making authority with limited choice; what matters is the degree of control which the legislature has built into the legislation; whether control been maintained through the Oireachtas retaining the entitlement to vote on, or obligation to approve, subordinate

rules (though this is not decisive but only part of the potential analysis); whether the traditional principles and policies test, or the test based on intelligible principle, or an analysis based on guidance and boundaries, is used – all propose the same principle: the legislation must be analysed as to what is delegated and whether there is sufficient guidance as to what the rule-making subordinate may do and what the general boundaries are as to what that subordinate rule-maker must keep within. That area of law is settled by the decisions of this Court in constraining by the boundaries set and principles discernible from the parent legislation the making of subsidiary legislation in conformity with Article 15.2.1° of the Constitution; *Cityview Press v An Chomhairle Oiliúna* [1980] IR 381, *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1, *O'Sullivan & Anor. v. Sea Fisheries Protection Authority & Other.* [2017] IESC 75, [2017] 3 IR 751. Moreover, a key indication of the retention of control by the Oireachtas, is through return and vote on delegated legislation, as noted in *NECI v The Labour Court & Others* [2021] IESC 36.

46. Here there is an intelligible set of instructions, there is guidance as to what has to be done, there are boundaries, the task is traditionally one within the judicial sphere, as a matter of history that task has been held as common knowledge as between judges and experienced practitioners and the legislature has refrained, rightly, given the separation of powers, from retaining power to vote on the guidelines. It has been left to the judges alone. There is no breach of Article 15.2.1° of the Constitution.

Liability

47. In due course, while no comment is made here, consideration as to why tripping on the pavement and in what circumstances may establish liability on a local authority, or gas or water company, as are the common defendants, should be undertaken. Consulting *Salmond on the Law of Torts* (17th edition, 1977, RFV Heuston) from page 267 demonstrates a series of rules as to occupiers' liability and the degree of care needed according to the analysis in *Indemaur v Dames* [1950] 2 KB 353, 366, depending on the status of the person to whom a duty of care was owed. While in *Purthill v Athlone UDC* [1968] IR 205 and *McNamara v ESB* [1975] IR 1, a general negligence test is substituted, the degree of duty remains important to liability.

48. The law of negligence is about establishing standards for ordinary care. Thereby, society is ordered for the better. Impossible standards break the reasonableness test and do not in any way assist in that task. People are generally aware that a public street is not a carpeted interior and so they look out for themselves. What degree of negligence arises if there is a visible flaw in a pavement, if there is liability, what degree of contribution to the damage would someone not taking care be assessed at? In *Haley v London Electricity Board* [1963] 3 All ER 1003, a blind person fell at a barrier guarding an excavation in the pavement but liability was not established, even though he could not look out, the Court of Appeal being concerned at setting too high a standard. An appropriate case awaits analysis.

Affirmation

49. A pleading point has been made that while the issue of affirmation through the Family Leave and Miscellaneous Provisions Act 2021 was argued fully before the Court, and was the subject of written submissions, the Court cannot deal with that fundamental issue because the State did not plead that point. This is incorrect. In dealing with the construction of a statute which is germane to a decision, a court is the master of its own

procedures; *R v Wormwood Scrubs Prison Board of Visitors, ex parte Anderson* [1984] 1 All ER 799. Furthermore, that fundamental duty is not to be ousted by the pleadings of the parties since the construction of legislation is key to every judicial decision and the judicial function is in applying the law as democratically passed by the legislature on the basis that such law applies to the entire country. Even more so, the provisions of the Constitution, the fundamental law of the State, is there to be applied, and thus construed by judges in every case, binding as it is on all situations that are subject to legal decision.

50. Having regard to that fundamental duty to apply the law as promulgated by the Oireachtas, and with even greater force, to abide by the judicial oath in Article 34.6.1° to "uphold the Constitution and the laws", it is clear that the constitutional infirmity found, for different reasons, by a majority of this Court, was removed through the guidelines being affirmed by the Oireachtas, through the Family Leave and Miscellaneous Provisions Act 2021 section 31, amending section 20 of the Personal Injuries Assessment Board Act 2003 in requiring judges to "have regard to the personal injuries guidelines (within the meaning of that Act) in force" and "where they depart from those guidelines, state the reasons for such departure and include those reasons in the assessment in writing". That could only mean one thing: that the Oireachtas were conscious of the guidelines having been passed by the Judicial Council on 6 March 2021. There were no other guidelines. Statutes are not to be stripped of their plain meaning through inventive argument. Law is a plain discipline. Certainty of law is a core constitutional value.

51. The law should serve the public interest; Bennion, *Statutory Interpretation* (1st edition, London, 1984) p 295. Where there are opposing constructions possible, it is the duty of the court, if it is possible, to read legislation in such a way to give life to the presumption that the Oireachtas is, under the Constitution, the servant of the public interest and, furthermore, under the Preamble to the Constitution, as much bound to give effect to the aspiration of "true social order" as is the legislature. What is clear is that: firstly, the Oireachtas always intended that there should be functioning guidelines; secondly, the Oireachtas chose for the best of constitutional reasons that since the setting of guidance for other judges was within the judicial sphere, that compiling and approving such had to be done by judges acting as a body under the Judicial Council Act 2019; and, thirdly, not only the Oireachtas but as a matter of common knowledge, the personal injury guidelines were compiled through research and passed by judges meeting in quorum on 6 March 2021. Hence, there is no need for the application of any but the fundamental principle that intention may be discerned, notwithstanding the imperfection of language, from the circumstances "with reference to which those words were used", thus amplifying "what was the object, appearing from those circumstances, which the person using them had in view." See Lord Blackburne in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743. Even were this not so, and it is, Bennion, at p 233, proposes this rule:

> Where, in relation to the facts of the instant case, it appears that neither the legislators nor the draftsman possessed an actual intention, Parliament is nevertheless taken to have had an intention; and the enactment is to be construed accordingly. This involves expounding the verbal formula of the enactment creatively, using its wording as a guide to the imputed intention.

52. While in this instance, this is not necessary, it also makes sense in a context where one member of the Court, Haughton J, had sufficient doubt as to the purpose of the relevant provision of the Family Leave and Miscellaneous Provisions Act 2021 as to dissent. In fact, the very commencement of Bennion's analysis, at pp 3-5, is that it is the

duty of the courts in interpreting a legislative provision to arrive at what the legal meaning of an enactment. Even if not clear, it is the duty of the judge to not decline to read an enactment normatively. Hence, the reasoning for concurring in the analysis of Collins J on this issue.

Vested rights

53. It is not necessary to do more than offer some support in joining in the judgments of Collins and Haughton JJ, Murray J concurring, in concluding that Bridget Delaney, when she applied to have her claim assessed by the Personal Injuries Assessment Board, or when that claim was assessed, or when the matter comes for analysis by a judge in court in accordance with the guidelines passed by the Judicial Council on 6 March 2021, did not have any vested property rights as to the manner, or result, of any assessment of her grazed knee and fractured ankle. There is a fundamental difference as between owning a property, suing for specific performance in respect of that property on a vendor and purchaser summons, and taking a tort action to recover damages where a plaintiff trips up in that property and consequently claims damages for occupiers' liability in breach of a duty of care through negligence. In the first instance, the right is vested under Article 43 of the Constitution and the right to sue for the vindication of that right may be claimed under Article 40.3.1°.

54. That is not the same in the second instance. There, the right is to have recourse to the courts to have a just appraisal as to whether: firstly, the occupier is liable in respect of the static condition of the premises on negligence principles (owing a duty of care, at what level, whether there was negligent departure from that standard, whether there was damage and at what level, and whether the law regards it as neither fair nor reasonable to apply liability within the broad area of operation of the circumstances); secondly, the measure of damages is such as, in traditional language, to put a plaintiff back in the notional condition in which he or she would have been had the damage from the accident not occurred. If such a plaintiff suffers special damage, in the sense of medical or psychiatric expenditure or from the need to alter their dwelling to accommodate a change in lifestyle, that is an actual loss and is recoverable. It is not the same with personal injuries general damages. There the right is to sue for a remedy as to what a judge will regard as the appropriate compensation. It is axiomatic to these proceedings that this is subject to precedent, to analysis, to consulting as to appropriate levels what research may indicate as to condition; but it is contingent on that level changing upwards or downwards depending on the levels regarded as appropriate, not at the time the accident occurs, but when the matter comes to court.

55. Equality, as guaranteed by Article 40.1 of the Constitution, does not come into the analysis. A court may decide in a given case that, on appellate analysis, the general level at which a plaintiff was compensated in the High Court, erred in principle and was, for the sake of argument, far too low. How could that mean that every plaintiff in the 5 years prior was thereby vested a right to a rehearing, or appeal, where they could show like levels of injury? Or if the award was too high, would every such plaintiff have to return to court to reimburse defendants or, as may often be the case, insurance companies exercising a power of subrogation? An example, mentioned in the judgment of Collins J, was when the maximum recoverable general damage for catastrophic injury was fixed at a level of first €500,000 and then €550,000 and has now become a guided amount of €600,000. That changes nothing from the past because no one in the past had any vested right to any legal remedy other than a just assessment.

56. No right to seek an appropriate assessment is in any way altered by the legislation. A plaintiff remains entitled to bring a claim, remains entitled to full compensation in respect of monetary loss, meaning special damage or out-of-pocket expenses in consequence of the injury, and the cause of action remains effective. No one in the past in any personal injury claim was ever guaranteed, much less vested with, any personal right to recover at a particular level in consequence of the application of what a judge sees as the appropriate level. In the past, furthermore, that amount varied, sometimes quite markedly, from judge to judge. Experience demonstrates that there was never any right to a particular kind of assessment at any particular level from any particular judge. Now, guidelines correct those potential anomalies and establish a more certain approach for those who suffer injury.

57. It follows that the 2019 Act does not operate in an unconstitutionally retrospective manner. Legislation that operates retrospectively is not, for that reason alone, unconstitutional. Legislation may be expressed to apply to situations as and from when an enactment is commenced and, generally, there is a presumption that legislation is forward-looking. Article 15.5.1º provides: "The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission." On some particular day someone does something, such as taking a photograph of a person under 18 in the public street, but he or she commits no crime. Later, privacy rights are so valued that the Oireachtas requires all those photographed in public places to give consent. Most obviously, there cannot be retroactive penal sanction. But, and this should be left to an appropriate case for decision, perhaps one also commits a tort or a breach of contract. The Irish text does not add to the meaning: "Ní cead don Oireachtas a rá gur sárú dlí gníomhartha nár sháru dlí iad le linn a ndéanta." That provision of the Constitution does not vest rights to particular levels of damages. It does not say that these cannot change. That would be inconsistent with the declaration that justice, the decision as to amount, is to be administered by judges in courts; Article 34.1 of the Constitution. Changes in amount, most obvious in property prices and in compulsory purchase of land for roads, have been extraordinary, up and down, since 2000. That continues. Judges are empowered to take a different view as to the level of compensation of an injury from year to year. That is not making something an infringement which was not an infringement of the law when it happened. What is clear is that there is a right to damages, assessed by a judge in a court and subject to appellate correction in the ordinary way, where a duty of care has been breached negligently and where the law regards a remedy in that tort as fair and reasonable. That has not changed. If the law was infringed, there is a remedy: that of recovery for actual monetary loss to the date of assessment and into the future, and a right to have the level of personal suffering assessed in accordance with the norms applied by the courts from time to time. These norms have changed and will continue to develop.

58. Legislation is not limited to what is prospective but may affect existing or prior situations; see the remarks of Lord Denning in *Attorney General v Vernazza* [1960] AC 965 and see *Sweetman v Shell E&P Ireland Limited* [2016] IESC 58. In *Hamilton v Hamilton* [1982] IR 466 at 480-81, the remarks of Henchy J make it clear that where proceedings are pending, the rule is that proceedings already brought are not affected, whether an enactment is prospective or retrospective. Legislation can change existing liability; Bennion, *Statutory Interpretation* (1st edition, London, 1984, and see also to the same effect the current edition) para 131. Legislation can deal with existing situations and as explained by O'Higgins CJ at 473 of that judgment:

> Many statutes are passed to deal with events which are over and which necessarily have a retrospective effect. Examples of such statutes, often described as *ex post facto* statutes, are to be found in Acts of immunity or pardon. Other statutes having a retroactive effect are statutes dealing with the practice and procedure of the Courts and applying to causes of action arising before the operation of the statute. Such statutes do not and are not intended to impair or affect vested rights and are not within the type of statute with which, it seems to me, this case is concerned. For the purpose of stating what I mean by retrospectivity in a statute, I adopt a definition taken from Craies on Statute Law (7th ed., p. 387) which is, I am satisfied, based on sound authority. It is to the effect that a statute is to be deemed to be retrospective in effect when it "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

59. Nothing in the 2019 Act has had the effect of removing from any plaintiff the right to recover special damages, that which a plaintiff was forced, through the wrong done to them, to expend. But, there is no right to what traditionally might have been regarded as generosity or parsimoniousness. Guidelines now direct the path; but subject to the independence of the judiciary under Article 35.2 of the Constitution and the duty of every court to make a just assessment, which is intrinsic to the judicial oath under Article 34.6.1°. Not even legislation can change that. The Oireachtas is not empowered, ever, to "enact" any law "which is in any respect repugnant to" the Constitution; Article 15.4.1°. Specifically, and in the clearest terms, the 2019 Act upholds those fundamental democratic values of judicial independence and of judges being charged with the just administration of the law on the basis of a diligent search for the truth within a juridical contest.

Conclusions on the Constitution

60. In the citation of authority, thus far, and in deference to the position advanced by those who consider that it should be declared that section 7(2)(g) of the Judicial Council Act 2019 is unconstitutional in its current form, though later affirmed and thus in force, by s 30 of the Family Law and Miscellaneous Provisions Act 2021, it is appropriate to summarise how the reasoning in this judgment may be condensed. Thus:

1. While the constitutional system is one of separation of powers, that separation is not one of impermeable boundaries. Judges have a role in judging, while those elected are charged under Articles 5 and 15.2.1° of the Constitution with making laws, the Government, in legislating or not legislating and in its executive acts and in policy making, being answerable to Dáil Éireann and the political body as a whole being answerable to the electorate. The limits of judicial investigation within the Oireachtas has been defined by *Maguire v Ardagh* [2002] IESC 21, [2002] IR 385. Just as the Oireachtas can do some investigating in aid of policy, judges may be given limited delegated and clearly defined secondary legislative responsibility within a sphere of competence that does not trench upon judicial independence.
2. Established authority confirms unambiguously that secondary legislation, by way of Ministerial order or other delegated legislative process, is lawful under Article 15.2.1° of the Constitution; *Island Ferries Teoranta v Minister for Communications*

Marine and Natural Resources [2015] IESC 95 [15] [2015] 3 IR 637, *Bederev v Ireland* [2016] IESC 34 [21-24] Charleton J and MacMenamin J, *NECI v Labour Court* [2021] IESC 36 [53-63] MacMenamin J and Charleton J. Furthermore, it should not be lost sight of that secondary legislation is of considerable use. Those authorities confirm that without the possibility of filling in the details of legislation through delegated enactment, the task of drawing up primary legislation would become impossible. Regrettably, some contemporary legislation already has the characteristic of discursiveness, and hence lack of clarity, in an attempt to avert almost inevitable challenge to that lawful process of delegation. Once the delegation is done by primary legislation that sets boundaries to the delegate and which provides sufficient guidance, the process is lawful. Within those strict parameters, secondary legislation can therefore add to, and hence change, the body of law; *Bederev*.

3. There is nothing unlawful, and nor is it an affront to judicial independence under Article 35.2 of the Constitution, in judges being tasked as a body with fixing secondary legislation, provided such regulations are within the sphere of judicial competence. This is what has happened for the last 100 years, since section 22 of the Courts of Justice Act 1924. Those rules of court are affirmed by Ministerial order under section 36 of that Act. Affirmation by the Oireachtas, established authority as cited, affirms that the retention of control by the Oireachtas can be part of the process whereby democratic accountability is retained under Article 15.2.1° of Constitution; *Bederev*, *NECI*. But return to the Oireachtas for affirmation of secondary legislation is not necessarily decisive.
4. A democratic choice has been made here by the Oireachtas. Furthermore, that is a choice showing appropriate respect for the separation of powers. Since judges preside over personal injury cases and set the level of general damages for pain and suffering, it is not only constitutionally permissible, but a democratic entitlement in the Oireachtas, for judges to be asked to guide that process in such a way as to bring consistency and predictability into the system. Predictability of law is part of the rule of law, which, in turn, reflects the Preamble's aim of the Constitution in striving for "true social order". That democratic choice accords with Article 5 of the Constitution and respects the inherent separation of powers doctrine of our fundamental law.
5. Judges are servants of the public good. All the branches of government under the Constitution, political, executive and judicial serve the people through whatever constitutional means may enhance true social order. Judges were not coerced into formulating personal injury guidelines. A democratic choice was made by the Oireachtas that judges should engage in a structured exercise of setting predictable guidance for themselves and in aid of the just disposal of litigation in personal injury cases. That choice was legitimate. What would be considerably more troubling constitutionally would be that some other body might be so tasked instead of judges. Any such exercise would trench on judicial independence and, furthermore, would lack the literal centuries of experience collectively represented by the vote of the Judicial Council, in favour of passing the personal injuries guidelines on 6 March 2021.
6. Finally, as the majority judgments implicitly require that legislation should provide for affirmation by the Oireachtas, in the model of *Bederev* or *NECI*, of any guidelines passed by the Judicial Council into the future, it is necessary to recall the decision in *Ellis v Minister for Justice and Equality, Ireland and The Attorney General* [2019] IESC 30, [2019] 2 ILRM 420, [2019] 3 IR 511, [2019] 5 JIC 1502. No doubt, the Government will take advice on the disturbing notion of any

alteration of guidelines that might amount to a direction to the judiciary as to how to decide cases. That is what this legislative model avoided.

Summary

61. Given that there are, in all, five judgments by members of the Court, it is appropriate to attempt to summarise the basis upon which the ultimate order of the Court is to be drawn up.

62. To reiterate central facts, first of all. Bridget Delaney tripped on a public footpath in Dungarvan, county Waterford, on 12 April 2019. On 23 July 2019 the Judicial Council Act came into law, with sections of the legislation, except sections 98 and 99, dealing with personal injuries coming into operation on 16 December 2019. On 6 March 2021, following research and analysis, personal injury guidelines were presented by the personal injury guidelines committee to all of the judges in Ireland and that body, comprising the Judicial Council, being quorate, passed the personal injury guidelines in issue in these proceedings. On behalf of Bridget Delaney, it is claimed that, if anyone is found liable for her tripping on a public footpath, the maximum damages she would recover in court would be much reduced from prior assessments by judges who had regard to the then extant handbook on personal injury damages. For the sake of clarity, it must be noted here that the Personal Injuries Assessment Board has no power to either assess recoverable damages or to decide if a plaintiff should succeed in a tort action for personal injuries. The limit of the power of that body is to make a suggestion to a plaintiff, not to a court, as to what damages should be recovered in the event of a court finding a defendant liable for a wrong leading to personal injuries. Failure to accept the recommendation of that body will affect, however, the recovery of a plaintiff's costs in the event that a plaintiff succeeds, firstly, in establishing liability on a defendant for damages and, secondly, the level of damages recovered is the same or less than that recommended administratively. On 22 March 2021 Seanad Éireann agreed to amendments by Government to the existing Family Leave and Miscellaneous Provisions Bill 2019. The result was that when enacted as the Family Leave and Miscellaneous Provisions Act 2021, as passed on 27 March 2021, section 30 amended section 99 of the Judicial Council Act 2019 and inserted a new section 100 into that legislation and further, by section 31, amended section 20 of the Personal Injuries Assessment Board Act 2023, requiring that in the assessment of personal injuries that in requiring judges to "have regard to the personal injuries guidelines (within the meaning of that Act) in force" and "where they depart from those guidelines, state the reasons for such departure and include those reasons in the assessment in writing". That enactment was signed into law on 24 April 2021. Under the legislation, Bridget Delaney was required to apply to the Personal Injuries Assessment Board for an assessment before issuing proceedings. That assessment issued on 13 May 2021.

63. Five judgements are being delivered by the seven members of the Court: those of Charleton J, of Hogan J (with which Whelan J agrees), of Collins J (with which Charleton and Murray JJ agree), and of Faherty J and of Haughton J. Because of the complexity of the issues, as to separation of powers, democratic accountability, delegated legislation, the independence of the judiciary, statutory construction, constitutional construction, the limits of judicial competence, retrospectivity, vested rights, equality, affirmation of secondary legislation by subsequent legislative enactment and the nature of what a guideline is, there are various differences between the members of the Court on the reasoning as to the issues arising in the case. However, it is useful to clarify as follows:

1. A majority of the Court (Charleton, Murray, Collins, Faherty and Haughton JJ; Hogan and Whelan JJ dissenting) consider that the personal injury guidelines voted into force by the Judicial Council, which comprises all sitting judges, on 6 March 2021 have normative/legal effects. This means that the guidelines are legally binding. Three members of the court (Charleton, Murray and Collins JJ) define the standard thus: the guidelines should only be departed from where there is no reasonable proportion between the guidelines and the award which should otherwise be made.
2. In view of that decision, a majority of the Court (Hogan, Whelan, Faherty and Haughton JJ; Charleton, Murray and Collins JJ dissenting) conclude that section 7(2)(g) of the Judicial Council Act 2019 Act is unconstitutional, in its present form, as being contrary to the independence of the judiciary as guaranteed by Article 35.2 of the Constitution.
3. A majority of the Court (Charleton, Hogan, Murray, Collins, Whelan and Faherty JJ; Haughton J dissenting) consider that the guidelines were subsequently independently ratified by the Oireachtas and given legal effect by the enactment of the Family Leave and Miscellaneous Provisions Act 2021, which entered into force on 24 April 2021. Thus, the personal injury guidelines passed by the Judicial Council on 6 March 2021 are in force as a matter of law and have thereby been given legal effect.
4. A majority of the Court (Charleton, Murray, Collins and Haughton JJ; Hogan, Whelan and Faherty JJ dissenting) consider that the transitory provisions of the 2021 Act are not unconstitutional and that there were no vested property or personal rights in the appellant to have her case adjudicated by the Personal Injuries Assessment Board, or by a court, under any earlier guidelines than those passed by the Judicial Council on 6 March 2021 as confirmed by the provisions of the 2021 Act.

64. Given the complexity of the issues addressed in the judgments delivered by five members of the Court, it is thus appropriate to indicate the orders which, consequent upon that analysis, the Court proposes to make. Hence, this Court will make:

1. A declaration that section 7(2)(g) of the Judicial Council Act 2019 is unconstitutional in its current form;
2. A declaration that the personal injury guidelines adopted by the Judicial Council on 6 March 2021 were given force of law by virtue of section 30 of the Family Leave and Miscellaneous Provisions Act 2021 and are consequently in force;
3. A declaration that the Personal Injuries Assessment Board, accordingly, acted properly and in accordance with law in applying the personal injuries guidelines to the appellant's application to be assessed as to her pain and suffering in May 2021;
4. An order that, save for the declaration of unconstitutionality in respect of section 7(2)(g) of the 2019 Act and the order for costs, the appeal from the order of the High Court is to be dismissed; and
4. Presumptively, given those orders of the Court, an order that the appellant should be awarded costs as against Ireland and the Attorney General, with the Personal Injuries Assessment Board to abide its own costs.