THE HIGH COURT

[2021] IEHC 643

[2018 No. 548 P]

BETWEEN

SUSAN O'MAHONEY

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL, KEVIN KIELY AND JOSEPH CORBETT

DEFENDANTS

THE HIGH COURT

[2018 No. 1850 P]

BETWEEN

SARAH KENNEDY

PLAINTIFF

AND

TIPPERARY COUNTY COUNCIL, KEVIN KIELY AND JOSEPH CORBETT

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 18th day of June, 2021

SUMMARY

1. In 2008, in the Supreme Court case of *O'Keeffe v. Hickey and Ors*., [2009] 2 I.R. 302 Hardiman J. referenced the practice where parents take claims for personal injuries suffered by their children while playing in a playground. He was particularly critical of the view that every injury is compensatable and the eternal quest for a 'deep pocket' (such as a business, an insurance company, a local authority etc.) which could be made liable for an accidental injury. He expressed concern, at that time, that such claims were occurring at an ever-increasing pace and referenced the negative effects that they were having on the freedom of children to play. He quoted with approval the prediction that '*if parents continued to sue for playground accidents, children would not be allowed to run or play in school yards.*' (at pp. 321-322)

2. Hardiman J. might be more than a little disappointed to learn that not only had claims by parents for *injuries to their children* in playgrounds continued apace since 2008, but that now, some thirteen years later, there is a new type of claim regarding playgrounds, namely a claim for *injuries to adults* when they are using swings, not in a hotel, bar or gym, but rather in a children's playground. This and the other issues which arise in this case can be summarised as follows:

(i) Adult injured while on a child's swing

3. This case concerns a claim by two adults who were injured when using a swing, not in an adult location, but in a children's playground. It considers the '*chilling effect'* of claims such as these on the provision of play or adventure facilities for children (and indeed the provision of goods/services generally to all citizens) and the application of what is '*universally known by reasonable adults of normal intelligence'*, in other words, common sense, (as highlighted by the Court of Appeal in *Cekanova v. Dunnes Stores* [2021] IECA 12) to such a claim.

(ii) A claim that €54,700 is fair compensation for a 'minor' injury

4. This case also considers a claim made by the plaintiff through her lawyer that an injury which her counsel categorised as a '*minor'* ankle injury that kept someone out of work for just 10 weeks would nonetheless merit damages for 'pain and suffering' (in addition to any out of pocket expenses) of up to €54,700 under the *non-binding* Book of Quantum (assuming, of course, negligence was established), even though:

- the *binding* case law from the Supreme Court (in Simpson v. Governor of Mountjoy [2021] IESC 81) regarded the sum of €7,500 as appropriate compensation for a person who was wrongfully required to slop out for 7.5 months in a prison, and,

- it would take a person on the average wage in the State over 1.5 years to earn €54,700 (applying the *binding* principles adopted by the Supreme Court in *McDonagh v. Sunday Newspapers* [2018] 2 I.R. 79 for assessing the reasonableness of damages, i.e. *'how long and how hard an individual would have to work to earn'* the proposed sum), and

- the amount of damages for the 'pain and suffering' caused by a minor injury to an ankle is required to be *proportionate* to the pain and suffering cap of €500,000 for quadriplegia/catastrophic injuries (according to the binding principles set down by the Court of Appeal in *Nolan v. Wirenski* [2016] IECA 56), yet a sum of €54,700 is almost 1/9th of the cap, which cannot in this Court's view be regarded as proportionate in light of the huge difference between the pain and suffering involved in quadriplegia/catastrophic injuries on the one hand and the pain and suffering involved in a minor ankle injury on the other.

For this reason, as noted below, when the foregoing principles for the assessment of damages set down by the Supreme Court and the Court of Appeal (which, unlike the Book of Quantum, are binding on this Court) are applied, this Court concludes that a more appropriate sum for fair compensation for a minor ankle injury would be between €5,000 and €7,500, thus illustrating that in some cases the *non-binding* Book of Quantum will be of little or no assistance to a court in calculating damages. Accordingly, this claim, if it was to be brought at all, should have been brought in the District Court.

(iii) Minor injury claims instituted in the High Court rather than the District Court

5. This case also illustrates that there may be financial reasons why some claims, for minor and moderate injuries taken by impecunious plaintiffs may be brought in the High Court, rather than the District Court or Circuit Court. It is important to emphasise that it is not being suggested that this is what happened in this case and there is no suggestion that the plaintiffs' lawyers did not *bona fide* believe that their client was genuinely entitled to compensation in excess of €60,000 (the floor for High Court damages), even though it is this Court's view that the appropriate compensation for her injury was €5,000 - €7,500. Indeed, it is clear that the plaintiffs' lawyers were making the best case possible for them.

6. Rather the point that is being made is that it is clear that issuing proceedings for minor injuries in the High Court, rather than the District Court, by an impecunious plaintiff may amount to greater leverage upon the defendant to settle that claim. This is because,

where a plaintiff is not in a position to pay legal costs, if he or she loses, the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42 observed that litigating may be part of *an 'unfair tactic little short, at least in some cases, of blackmail'* to force a defendant to *'buy off the case',* even if the claim is '*unwholly unmeritorious'.* If one accepts therefore the Supreme Court's conclusion that an impecunious plaintiff may, in some cases, be using his impecuniosity as leverage, it seems clear that instituting a minor claim in the High Court increases that leverage. This is for the simple reason that a defendant will make a much greater saving on legal costs (which he would not recover from an impecunious plaintiff) by settling a High Court action, than settling a District or Circuit Court action.

7. Accordingly, logic would suggest that the amount which a defendant will pay to settle a claim is much greater in the High Court, than in the District Court, since the saving on legal costs is so much greater. For example, in the case of *Condon v. Health Service Executive, Szwarc v. Hanford Commercial Ltd. T/A Maldron Hotel Waterford* [2021] IEHC 474, submissions were made to this Court that the price for buying off that High Court personal injury case, which was described as a nuisance claim, was €20,000, with the plaintiff's lawyers getting €10,000 and the plaintiff getting €10,000.

8. When one considers that legal costs in the District Court are likely to be in the hundreds of euro, one can see the much greater 'nuisance value' of an unmeritorious claim for a 'minor injury' which is brought by an impecunious plaintiff in the High Court, than the same claim brought in the District Court. This is because the defendant will 'only' save say €500 - €1000 in legal costs by settling a District Court claim for minor injury, but could save €50,000 - €100,000 in legal costs by settling the same claim for damages for minor injury, if brought in the High Court.

9. Thus, for an impecunious plaintiff with an unmeritorious claim for say a minor ankle injury who hopes to get a settlement, instituting the proceedings in the High Court, rather than the District Court, would appear to increase the 'nuisance value' of the claim by circa €10,000 and thus make financial sense from his perspective (since as an impecunious plaintiff he will be unlikely to be paying the legal costs of the defendant, if he loses).

10. It is important to note that there is currently no legal bar on claims for minor injuries being taken in the High Court. It is a matter for the plaintiff to decide in which court he wishes to take his claim for a minor injury. For a plaintiff, the choice of the High Court for a minor injury will in many cases be of little import because, as noted below, 99% of cases settle (e.g. with the defendant buying off the cost of having to fight a High Court claim), and this is particularly the case, if the plaintiff is impecunious as he will not be paying the expensive High Court costs, even if the he loses. However, for the defendant, who is subjected to a claim for a minor personal injury in the High Court rather than the District Court, this choice is of huge importance, since in order to defend a claim for minor injury in the District Court, it will cost him €500-€1,000 in legal fees, a fraction of the €50,000-€100,000 which it will cost him to defend the exact same claim for a minor injury in the High Court.

11. It is important to emphasise of course that even though the lawyers' fees will be greater in the High Court, than in the District Court, it is not being suggested that the lawyers in this case instituted the proceedings in the High Court for anything other than *bona fide* reasons. In any case, the decision to institute the proceedings, and in which jurisdiction they are instituted, is the decision of the client and lawyers act on the instructions of their clients.

Causing delays for plaintiffs with serious and catastrophic injuries?

12. The taking of a minor injury claim in the High Court, rather than the District or Circuit Court is relevant because there is a well-publicised delay in having cases heard in the High Court at present. As a result, plaintiffs who have serious and catastrophic injuries, and whose cases should unquestionably be dealt with by the High Court, are being delayed in receiving their urgently-needed compensation. To the extent that 'minor' injury cases are instituted in the High Court, this is a matter of general concern because it would be contributing to that delay for those plaintiffs with life threatening and life altering injuries.

13. However, the incentive to take unmeritorious claims for minor injuries in the High Court, rather than the District Court or Circuit Court, is likely to continue in the absence of objective criteria for the classification of those injury claims which are permitted to be brought in the District or Circuit Court (so it is not simply at the choice of a plaintiff) or, failing that, a financial disincentive for impecunious plaintiffs (who are unlikely to be paying the defendant's legal costs if they lose and so for whom the choice of the High Court, with its considerable legal costs, is irrelevant), while of course at all times recognising a plaintiff's right of access to the courts.

14. Of course, in referencing the right of a plaintiff to access the courts, it is important to note that the Supreme Court has pointed out that the more appropriate characterisation of this litigation right is not merely a right of access of *a plaintiff* to the courts, but rather the right of plaintiffs and defendants '*to have litigation fairly conducted'* (*per Farrell v. Bank of Ireland* [2012] IESC 42 at para. 4.6). In this regard, having litigation fairly conducted for a plaintiff and defendant is arguably having a level playing field between defendants and plaintiffs regarding legal costs, so that as regards legal costs, it is not 'lose-lose' for a defendant sued by an impecunious plaintiff, yet 'no lose' for that plaintiff (as apparently in this case), or at least that there is some sufficient financial disincentive to a plaintiff in taking unsuccessful litigation.

BACKGROUND

15. This was a hearing involving a claim by two adults, for personal injuries which were sustained on two separate occasions when using the same swing in the same community playground. The swing in question is designed for children and is located in a children's playground in Newcastle, Co Tipperary. It is relevant to note that there was a sign on the fence of the playground which provides that:

> "This playground is for the use of all children 12 years and under."

16. The swing is a basket swing, which is commonly to be found in modern playgrounds. It is also referred to as a bird's nest swing, as a child can sit or lie in the centre of the swing, which is circular in shape with a diameter of 1.25 metres, with a rigid rim circumference and with lattice rope or webbing in the centre of the circular basket, which operates as the swing's sitting or lying area.

17. Evidence was provided that the bird's nest swing does not swing up or down to a high degree like the older traditional swings, because of the weight of the basket. Instead it sways back and forth relatively close to the ground. The plaintiffs' engineer provided evidence that this swing was designed for children from age 1 up to adolescence.

18. To their credit, the residents of Newcastle, Co. Tipperary raised funding for the building of the playground, in which the swing is located, in order to provide what was recognised by the plaintiffs as an impressive amenity for the children of the locality. It is the local authority, Tipperary County Council (the "Local Authority"), which has responsibility for the maintenance of the playground and so it is being sued in these proceedings and it has taken over the defence of the action on behalf of the second and third named defendants.

19. It is not claimed by the two plaintiffs that the swing is not a child's swing. Nor do they claim that it is an adult's swing. However, in March 2016, one plaintiff decided to join the child under her care on the swing, and the other plaintiff decided to do the same thing with the child under her care in July 2016. The plaintiffs do not claim that they did so for their own enjoyment or the enjoyment of the children, but rather they both claim that they got onto the swing as they felt it was safer for the children, even though the swing is designed for use by children on their own and, as mentioned above, the swing is not designed to behave in the same way as a traditional swing and so does not swing up in the air to a high degree, but sways from side to side.

20. As regards the details of the two separate accidents, on 30th March, 2016, the plaintiff in the first set of proceedings ("Ms. O'Mahoney") decided to accompany a boy of 2 years and 10 months of age, who she was childminding at the time, on the swing. Ms. O'Mahoney caught her right ankle on the underside of the swing as she attempted to get off the swing and she suffered an undisplaced fracture to her ankle as a result. She was in a cast for 6 weeks and then in a boot for 4 weeks and within 2.5 months she was back working as a carer.

21. An almost identical accident happened to a different woman, the plaintiff in the second set of proceedings, on 13th July, 2016, ("Ms. Kennedy") when she decided to accompany her cousin, a boy of 16 months at the time, onto the swing. Ms. Kennedy confirmed in her evidence that Ms. O'Mahoney and herself know each other as acquaintances. Ms. Kennedy's injury occurred when she had her young cousin in her arms when she was attempting to get off the swing, when she caught her right ankle in the underside of the swing. She suffered an undisplaced fracture of her ankle and some ligament damage. She was in a cast for four weeks and was out of work for eight weeks and had some ligament damage for a short time thereafter for which she wore an ankle support.

22. It was possible for Ms. O'Mahoney's case and Ms. Kennedy's case to be heard together, as they both sought advice from the same solicitor regarding their almost identical claims for personal injuries and he instructed the same expert engineer and counsel. Hence judgment is being delivered in both cases at the same time.

ANALYSIS

23. Both plaintiffs seek compensation at the High Court level (i.e. more than €60,000) from the local authority on the grounds that it set the height of the swing at a level that was too low and as a result of this alleged negligence/breach of duty, the local authority created an entrapment risk. As a result of this negligence, the plaintiffs claim that they caught their ankles under the swing when trying to get off and thereby suffered injuries. It is the plaintiffs' case that they were recreational users under s. 4(1) of the Occupiers Liability Act, 1995 when sitting on the swing, on the basis that they were entitled to use the swing for the purpose of accompanying the children in their respective care, and that therefore they were both entitled to rely on the swing being kept in a safe condition for their use.

24. In essence therefore, the plaintiffs are claiming that the swing, which was designed for use by children under 12, was hung too low to the ground for use by them. In this regard, they are both adults of similar heights, 5 ft 5 inches in Ms. Kennedy's case and 5ft 6 inches in Ms. O'Mahoney's case. They claim therefore, that the swing was not safe for their use and this caused their respective ankles to get caught between the swing and the ground when they were getting off the swing.

Appropriate clearance for the swing

25. There is a dispute between the engineers as to whether in fact the swing was set at too low a level in breach of the relevant British Standard applicable at the time (BS EN1176). The plaintiffs' engineer claims that the clearance of 350 mm (set down in that British Standard - 'BS') should be measured from the lowest point of the basket (in the centre of the ring) to the ground, while the defendant's engineer claims that it should be measured from the hard edge of the circular rim of the basket (which is higher from the ground).

26. The applicable BS at the time states that the clearance is to be measured

> *'between the lowest part of the seat or platform and the playing surface when the swing is at rest'*

which the plaintiffs claim supports their contention that it should be measured from the flexible netting in the centre of the swing.

27. However, the defendants' engineer points out that this is not a traditional swing and that the most appropriate place to measure the clearance is from the hard rim, since this is the point from where one gets on or off. He supports this interpretation by referring to the revisions to the BS made in 2017 (EN 1176-2: 2017). While this revised BS did not apply at the relevant time of the accidents, he relies on this change to support his interpretation of how the original BS should be applied to non-traditional swings, such as the bird's nest swing. This revised BS provides that the clearance (which had increased to

400mm in the revised BS) is to be taken from the *'underside of the rigid part of the seat in its most onerous position'.*

28. While the clearance from the underside of the rigid part of the seat of the bird's nest, namely the hard rim circumference of the bird's nest swing, exceeded the minimum 350mm (and this was accepted by the plaintiff's engineer), the clearance from the interior flexible netting did not do so, as it was 187 mm, which is almost 8 inches less than the clearance required under the BS.

29. It follows that the plaintiffs' engineer claims that the swing should have been raised by approximately 8 inches and this would have avoided the entrapment. The defendants' engineer disagrees and claims that the swing was set at the right height and in compliance with the relevant BS, since the clearance must be measured from the hard rim i.e. the rigid part of the seat.

30. It seems to this Court that there is logic in the interpretation proposed by the defendants' engineer, such that the appropriate point from which to measure the clearance is from the bottom of the rigid part of the swing, for the simple reason that this is the point at which a child exits the swing. If the clearance is measured from this point, then the swing is in compliance with the BS standard. That is the end of the personal injuries claim, since there is no breach of duty/negligence on the part of the Local Authority, as it complied with the BS. However, even if this Court is wrong in that regard, for the reasons set out below, it finds that, in any case, the Local Authority has not breached any duty, statutory or otherwise, to the plaintiffs.

Common sense suggests that an adult should not use a child's swing

31. Ms. O'Mahoney accepted in evidence that her common sense would have told her not to use the swing if she were on her own, since it was a child's swing. This is just common sense and this Court did not need Ms. O'Mahoney to make this admission, for it to reach that conclusion. However, Ms. O'Mahoney maintained that she got into the swing with the child under her care, as she felt that he might get injured otherwise.

32. Ms. Kennedy made a similar claim regarding her reason for getting into the swing with the child under her care.

33. However, in this regard it is relevant to note that there was no evidence of this swing being an injury risk for children to use on their own, without an adult. Indeed, quite the contrary assumption might be taken (i.e. that it was safe for use by children *alone*) from the notice on the playground which makes it clear that '*the playground'*, which must mean the equipment in the playground (since it would be normal for adults to accompany children into the playground itself) is for the use of *children.* The corollary of this is, of course, that the equipment, and thus the swings, are not for the use of adults.

34. Ms. O'Mahoney accepted that she was aware of the contents of the Notice regarding the playground being for the use by children of 12 and under. However, Ms. Kennedy, despite using the playground regularly for many years, claimed that she had not seen the Notice.

On the balance of probabilities however, in view of the number of times she used the playground, this Court finds that Ms. Kennedy would have been aware of its contents.

35. Yet, even if Ms Kennedy were not aware of the notice, common sense would tell any adult, including Ms. Kennedy, that she should not be using a swing which is designed for use by children. Common sense is an important, but often over-looked, factor in determining liability for accident claims, since as noted by Keane J. in *Turner v. The Curragh Racecourse* [2020] IEHC 76 at para. 55 (when quoting from p. 57 of the judgment of Geoghegan J. in *Weir-Rodgers v. S.F. Trust Ltd.* [2005] 1 I.R. 47):

> "the common law is just the formal statement of the results and conclusions of the common sense of mankind." *(per* Lord M'Laren in *Stevenson v. Corporation of Glasgow* 1908, SC 1034 at p. 1039)

36. A good example of the application of common sense to an accident claimis provided by the Court of Appeal in *Cekanova v. Dunnes Stores* [2021] IECA 12 where a claim, for personal injuries by a plaintiff, who made tea in a glass jug which shattered, was dismissed on the grounds that:

> "It is universally known by reasonable adults of normal intelligence that boiling or very hot water has the potential to shatter an ordinary glass vessel." (at para. 31)

37. Similarly, in this case, *'reasonable adults of normal intelligence'* know, or should know, not to use swings designed for children. The corollary of this is that if adults get injured because they use a swing, designed for children, which they claim is too low to the ground for them (and particularly where no evidence was produced of children being injured because it was too low to the ground), those adults do not have a right to damages, for any injuries suffered, against the local authority which is managing the playground (on the grounds of any alleged breach of duty by it).

38. Furthermore, there is a duty on individuals to take reasonable care for their own safety (*Lavin v. Dublin Airport Authority plc* [2016] IECA 268 at para. 52) and the decision by the plaintiffs to use equipment which they knew, or should have known, was designed for use by children under 12, amounts to a failure by them to take reasonable care for their own safety. Accordingly, it is not a breach of any duty on the part of the local authority not to raise the swing so as to accommodate adults.

39. If the plaintiffs decide to use a child's swing at their own risk, they should take extra care to plant their feet, before attempting to get off the swing and in this regard, engineering evidence on behalf of the defendant was provided that the accident would have been avoided by both plaintiffs, if this had been done.

40. Indeed, in the case of Ms. Kennedy, not only did she not take extra care when getting off a child's swing, she actually appears to have taken even less care than Ms. O'Mahoney, since Ms. Kennedy attempted to get off a moving swing while holding a child in her arms

– this apparent carelessness seems to fly in the face of Ms. Kennedy's claim that her reason for getting on the swing in the first place was to protect the safety of the child.

The social effect on children's playgrounds of a finding of negligence

41. Although not determinative of this Court's finding, it is nonetheless relevant to note that engineering evidence was provided that if the swing was raised by approximately 8 inches, as the plaintiffs claim should have happened, this would, firstly, make the swing much harder to access for small children.

42. Secondly, making the swing higher by 8 inches in order to make it safer for adults (or indeed in order to reduce the chances of personal injury claims by adults) would have the direct effect of making the swing scarier for young children, since engineering evidence was provided that the swing is designed to sway over the ground as close as possible to the ground to make it *less scary* for young children to use.

43. Thirdly, this engineering evidence was also to the effect that the increase in height would make the swing less safe for young children when, from time to time children, as would be expected, fall from the swing on to the ground, since the ground would be a further 8 inches away.

44. Yet the purpose of these changes sought by the plaintiffs to a child's swing, to the detriment of the children who use it, would be to prevent it becoming an entrapment risk for persons such as the plaintiffs, i.e. adults, for whom the swing was not designed and where no evidence had been provided of any entrapment risk to children using the swing.

The 'chilling effect' of an award of damages against a provider of play activities

45. Similarly, while also not determinative of this Court's finding, it is relevant to note that individual claims for personal injuries such as in this case, can, in certain circumstances, have a wider effect and thus a considerable social cost on the freedom of citizens in this State. This was the view of Hardiman J. in *O'Keeffe v. Hickey* [2009] 2 I.R. 302 where he was critical of the view that

> "it is widely believed that every misfortune must be compensatable." (at p. 320)

46. He observed that the notion that unfortunate accidents, such as this one, must be compensatable, can have a '*chilling effect'* on public authorities, such as the local authority in this case (or indeed privately insured businesses providing play areas or play activities for children). At p. 321 Hardiman was also critical of the:

> "eternal quest for a "deep pocket" which can be made liable [for accidents] not merely proceeds apace, but at an ever increasing pace."

47. Hardiman J.'s comments in that case seems particularly apposite for the facts of this case, since Hardiman J. went on to note at pp. 321 - 322 that:

"And on the 22nd October, 2008, it is reported in *The Irish Times* that a Circuit Court Judge in Cork predicted that if parents continued to sue for playground accidents, children would not be allowed to run or play in school yards."

48. In the 13 years since that judgment, matters are continuing to proceed at '*an ever increasing pace'* as regards the search for compensation from deep pockets for personal injuries, such that not only are parents suing for playground incidents involving injuries to their children, but we now have reached the stage where adults are suing for injuries to themselves where they use playground equipment intended for use by children, and the level of damages sought are such that the claims are not being made in the Circuit Court, but for the greater level of damages available in the High Court.

49. It is of course human nature, as observed by Hardiman J., to have sympathy for plaintiffs, such as Ms. Kennedy and Ms. O'Mahoney who fractured their ankles, as there is a *'a human tendency to wish that that person should be compensated*' (at p. 319). However, he pointed out that a finding of liability *'is not a light thing and has an effect quite separate from its consequences in damages'* (at p. 317) since it can have a 'chilling effect' on the State and private initiatives. Although not determinative in this case, it remains to be observed that claims in the High Court by adults who use children's swings in playgrounds, if they were successful, could well lead to this '*chilling effect'* on the provision by public authorities of playgrounds for children (or indeed adventure centres, *crêches* and other services for all citizens). The consequences, quite separate from an award of damages, in this instance might be an interference with the liberty of children to play in playgrounds. In this regard, it was noted by Lord Hobhouse in *Tomlinson v. Congleton Borough Council* [2004] 1 AC 46 at para. 81:

> "The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen."

The 'chilling effect' arises even where the claims are dismissed

50. Indeed, even where such claims are not successful, the very bringing of them can have a negative effect on the provision of such services, particularly where the plaintiffs, as appears to be the case here, may not have the financial resources to pay the defendant's legal costs if they lose, since it appears that one and perhaps both defendants are unemployed. Accordingly, the local authority in such situations could end up 'winning' the case but losing financially, with the local authority, and therefore the taxpayer, having to pay the tens of thousands in legal costs of 'winning' a High Court personal injuries action (as noted in *Dempsey v. Foran* [2021] IEHC 39 at para. 73 *et seq*).

51. Unfortunately, for the children who use playgrounds, one way, for providers of playgrounds and other facilities or services for children, to avoid having to fight and win unmeritorious claims (at significant irrecoverable legal costs), is to cease providing such facilities in the first place. Hence there is the '*interference with the liberty of the citizen'* to which Lord Hobhouse referred, that the bringing of such claims can cause.

52. It is for this reason that this Court would observe that it is not only the case that a *finding of liability* for personal injuries can have a chilling effect on the provision of such facilities, it is also the case that where a provider of facilities (whether a local authority or a private entity) is subject to a claim from impecunious plaintiffs, even the *dismissal* of those claims will be at significant cost to that provider, since there is currently no

effective way for the provider to recover legal costs for winning a claim against an impecunious plaintiff. In this respect, it is not a level playing field in such litigation, since as noted in *Dempsey,* it is a '*no lose'* scenario for an impecunious plaintiff as regards legal costs, but it is '*lose-lose'* for the defendant.

The 'chilling effect' arises even where the claims are settled

53. It is for this reason that claims, even those with little prospect of success are often settled by defendants, since it makes economic sense for a defendant to '*buy off'* a claim from an impecunious plaintiff, that it might regard as *'blackmail'*, to use the expressions adopted by the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42 at para. 4.12. Such claims appear to fall within the description of 'nuisance claims' used by counsel in *Condon v. HSE* [2021] IEHC 474. This court understands this term to mean cases which have a low probability of success (say 10% or less), but which make economic sense for the defendant to buy-off. This is particularly so if it will cost the defendant more to 'win' the case (since it is unlikely to recover its legal costs from an impecunious plaintiff) than it would cost it to settle the claim (for a lesser sum than its irrecoverable legal costs).

54. However, if (using the figures supplied to this Court in the *Condon* case), those claims are bought-off by a defendant on the basis of €10,000 for the plaintiff and €10,000 for his lawyers (a total of €20,000, which is not an insignificant sum of money for a provider of children's play activities), such a settlement of nuisance claims (on top of the legal costs of say €10,000 payable to the their own lawyers) may nonetheless have a 'chilling effect' for that provider (notwithstanding that it is less than the €50,000 - €100,000 that it might cost to 'win' the action if it were to be heard in the High Court).

55. However, clearly this is a catch-22 situation, since while it costs more to fight nuisance claims than settle them, if a defendant settles 'nuisance claims', then the greater the incentive there is for plaintiffs to bring nuisance claims. Accordingly, it seems that so long as there is no financial disincentive for an impecunious plaintiff to bring nuisance claims, in the hope of receiving a settlement, such claims will continue to be brought, particularly if it makes economic sense for the defendant to buy them off, rather than litigate them.

56. In this regard, it is perhaps not surprising that such a high percentage of personal injuries cases settle. In the *Report of the Personal Injuries Guidelines Committee* (published by the Judicial Council in December 2020) it is stated that only about 0.54% of all personal injury claims (in the period 2017-2019) were actually heard in court (unlike say judicial review cases, where there is anecdotal evidence that only circa 10% of such claims are settled).

57. Based on the foregoing, it seems that the chilling effect, to which Hardiman J. referred, arises not just with (i) a finding of liability by a court against a provider of play/recreational activities (and indeed other services to adults/children which might give rise to claims), but also (ii) where claims against impecunious plaintiffs are dismissed and (iii) where claims are settled (since it does not make economic sense to spend more to 'win' litigation against an impecunious plaintiff than it costs to settle the claim).

While law is required to protect freedom, too much law can restrict freedom

58. It is also relevant to note that the claim in this case appears, to this Court at least, to be a new category of claim (or what might be termed new law), in that it seeks damages for personal injury to an adult from her use of a swing designed for children. While it is clear that law is necessary to protect the freedoms of citizens, e.g. the law making it a crime for one person to assault another, this case also illustrates that the law (or what might be termed 'too much law') can in some instances have the effect of restricting the freedom of citizens. This is because a finding of a breach of a duty to adults when using children's swings may lead to those swings being raised to prevent future claims (as noted by the engineer for Tipperary County Council), thereby depriving younger children of the freedom and pleasure of using those swings. It is this type of restriction of freedom by what might be termed too much law that the American jurist, Professor Grant Gilmore, may have had in mind, when he stated that *"[i]n Hell, there will be nothing but law…."* (Grant Gilmore, *The Ages of American Law* (1977) at p. 111).

59. This case therefore illustrates the risks, to the *freedom of all citizens* of too much law, or of what Hardiman J. referred to as the '*eternal quest for a "deep pocket"*'. This is because it is important to bear in mind that what people sue for (whether the claim is won, settled or indeed lost – particularly if the winning local authority ends up footing the cost of 'winning' the claim) ends up defining the limits of freedom for all citizens. Ironically therefore, personal injury claims such as this one can have the greatest effect, not on the parties to the litigation, but rather people who are not party to the claim, nor even aware of its existence, but who may have their freedoms restricted by the chilling effect of such claims (i.e. other children who might have the birds' nest swing altered or indeed taken away to prevent further claims).

60. The case of *Tomlinson v. Congleton Borough Council* has been previously referenced. It was concerned with a claim from an 18-year-old man who broke his neck and was paralysed for life when racing into a lake from a sandy beach and diving in at too sharp an angle onto the sandy bottom of the lake. If the claim was successful it might have given rise to a restriction on the freedom of other swimmers, not just in that lake, but in other lakes throughout England, so as to eliminate the risk of similar claims.

61. In considering whether the local authority should be liable, for allegedly not doing enough to protect against the swimming accident, the House of Lords considered not only the likelihood that someone might be injured and the seriousness of the injury which may occur, but they also considered the social value of the activity giving rise to the accident, observing that the Court of Appeal had made no reference to the social value of the activities in question. In *Tomlinson*, the social value was significant (namely the joy of swimming in a lake – similar to the joy of children playing in a playground) and that social value was such as to militate against a finding of liability (which liability was likely to lead to a restriction on other persons swimming in that lake).

62. It is clear from the various judgments of the House of Lords that it concluded that permitting Mr. Tomlinson's claim would encourage the parks in England to restrict access to normal and healthy activities affecting the enjoyment of countless people. There was

thus an important question of freedom at stake and it was held by the House of Lords to be unjust that the harmless recreation of others on the beaches should be prohibited in order to comply with what was an alleged legal duty to prevent accidents, on the part of the local authority.

63. The House of Lords held that this misguided perception of justice on the part of the English Court of Appeal in awarding damages can hurt the public generally (*albeit* that it may have resulted from an understandable sympathy which a court might feel for the life-altering injuries suffered by Mr. Tomlinson). However, this desire, which Hardiman J. described as *'a human tendency to wish that that person should be compensated' (O'Keeffe v. Hickey* [2009] 2 I.R. 302 at p. 319) in respect of one injured citizen can have a negative effect on *the freedom of all citizens*. Lord Hoffman stated at para. 81:

> "The arguments for the claimant have involved an attack upon the liberties of the citizen which should not be countenanced. They attack the liberty of the individual to engage in dangerous, but otherwise harmless, pastimes at his own risk and the liberty of citizens as a whole fully to enjoy the variety and quality of the landscape of this country. The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen."

Lord Hoffman, at para. 46, also referenced the fact that it

> "Is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious."

He went on to criticise the misguided perception of the Court of Appeal of the impact an award of damages could potentially have on public enjoyment of facilities.

> "Sedley LJ, … was able to say that if the logic of the Court of Appeal's decision was that other public lakes and ponds required similar precautions, "so be it". But I cannot view this prospect with the same equanimity. In my opinion it would damage the quality of many people's lives." (at para. 48)

Lord Hoffmann further noted at para. 34:

> "The question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other."

Lord Scott stated at para. 94:

> "Of course there is some risk of accidents arising out of the joie-de-vivre of the young. But that is no reason for imposing a grey and dull safety regime on everyone."

Does the law require that all trees be cut down because someone may climb and fall?

64. Lord Hobhouse also made remarks regarding the impact awards of damages could have on the freedom of others to enjoy amenities (at para. 81):

> "It is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require that attractive waterside picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no."

Similarly, in this case, this Court might ask does the law require that the birds' nest swing be raised 8 inches because an adult decides to use it and thereby deprive young children from climbing onto the swing because of its raised height?

65. It seems to this Court that the *Tomlinson* case illustrates that the goal of law is not just to decide whether or not to provide compensation for an accident to a particular individual, but also to bear in mind the daily freedoms of every citizen, who are not parties to that litigation. This is because what people sue for can result in key limitations on the freedoms of all citizens (whether adults swimming in a lake or children playing in a playground).

High Court is bound by Court of Appeal direction not to not deny children joy of playing

66. It is also relevant to note at this juncture that the High Court (and for that matter the District and Circuit Courts) are bound by the direction from the Court of Appeal that judges should ensure that they do not risk denying children positive experiences such as playing in a playground. In this case, the playground was one which was funded by a local community. In the judgment of Irvine J., as she then was, in *Byrne v. Ardenheath* [2017] IECA 293 at para. 49, she dismissed a personal injuries claim by a plaintiff who slipped on a grassy bank and she stated that:

> "**Judges should be careful** when interpreting statutory provisions such as s. 3 of the [Occupiers' Liability Act, 1995] **to ensure that they do not** inadvertently and contrary to the intention of the legislature by their **judgments end up denying children the joy of running down a grassy slope** in a public park on a dry summer day or the golfer the pleasure of playing to an elevated green surrounded by a grassy bank." (Emphasis added)

67. In this context, it is to be noted that if the plaintiffs in this case were successful, it would be likely to lead to an increase in the height of the swing in question by approximately 8 inches. As noted by the defendant's engineer, this is likely to prevent certain smaller children from getting on to the higher swing and would therefore '*deny children the joy'* of being on that swing, all because of a personal injuries claim by an adult using a swing in a children's playground. This is therefore a further reason why the claim should be dismissed.

68. It is also relevant to note that Hardiman J. further referenced the effect of findings of negligence on children's play in *O'Keeffe v. Hickey*, when he quoted with approval the judgment of Binnie J. in the Canadian Supreme Court case of *Jacobi v. Griffiths* (1999) 174 DLR (4th) 71 at p. 105. In that case, there was a dismissal of a claim of vicarious liability against a non-profit organisation and Binnie J. observed that in the event of a finding of liability, the '*rational response'* of non-profit recreational organisations dealing with such claims '*may be to exit the children's recreational field altogether'*. Hardiman J. then went on to reference the decline in the number of people performing voluntary activities on a local community basis and he observed that the decisions which courts take imposing liability for negligence '*are not without relevance to these issues'* (at p. 343).

69. Similarly, in this case, if there were to be an award of damages for this new category of claim (of adults injured using children's swings), it seems that it would be a rational response for organisations to exit the field of provision of play or adventure centres for children.

Conclusion on liability

70. This Court has concluded that there was no breach of duty by the Local Authority as it did in fact comply with the relevant BS standard for the height of swings. However, even if this was not the case, it is not necessary for this Court to determine whether in fact there was a deviation, in relation to the swing, from the British Standards applicable at the time. This is because there is a complete absence of causation between the alleged breach of duty (being the failure to raise the swing) and the occurrence of the accident. This is because the 'legal cause' of the accident was not the fact that there was an alleged shortfall in the clearance between the child's swing and the ground, making it unsafe for use by the plaintiffs, who are both adults. Rather, the legal cause of the accident was that two adults chose, on separate occasions, to use equipment which was designed for children and which (as stated implicitly by the terms of the Notice but also based on common sense), was not for use by adults.

71. Then, when using the equipment, they failed to take sufficient care for their own safety. In this regard, since the plaintiffs chose to use equipment which was not for use by adults, but for children of 12 and under, it is perhaps not surprising that they found the swing to be 'too low' for their usage and so caught their ankles between the swing and the ground.

72. In those circumstances, they cannot, in this Court's view, suggest that the accidents were legally 'caused' by Tipperary County Council, when in fact the accidents were caused by their decision to use equipment which was not designed for use by adults. Just as if an adult decided to accompany her toddler on a child's tricycle because she was afraid that he might fall off and she ended up injuring herself when getting off the tricycle, she could not, in this Court's view, apportion liability to the manufacturer of the tricycle, so too the plaintiffs cannot seek to apportion liability to the Local Authority in these circumstances for the plaintiffs' failure to use common sense and look out for their own welfare.

73. For all the foregoing reasons, the claims of both plaintiffs are dismissed.

Accidents do not automatically give rise to a right to compensation

74. In concluding this part of the judgment, this Court would summarise and add to Hardiman's comments in *O'Keeffe v. Hickey* that it is important for potential plaintiffs and their lawyers to bear in mind that, just because:

- an accident occurred and someone is injured, and
- it occurred on property which is insured or owned/managed by the State or another insured party or a 'deep pocket' to quote Hardiman J., and
- it could be said that 'but for' something (in this case the swing being low) it would not have happened (see Lavin v. Dublin Airport Authority plc [2016] IECA 268 at para. 54 et seq.), and
- an engineer provides an expert opinion that in his opinion the location of the accident was substandard (because courts should approach with caution opinions from experts engaged by one party in litigation – see *Byrne v. Ardenheath* [2017] IECA 293 and *Hanrahan v. Minister for Agriculture, Fisheries and Food* [2017] IESC 66)

does not give rise to a right to damages. As the foregoing analysis illustrates, there are other factors to be considered, such as the social value of the activity in question, the effect of a successful claim on the freedom and liberty of others, the duty of every citizen to take reasonable care for themselves, the application of common sense (i.e. what '*universally known by reasonable adults of normal intelligence*') etc.

What would the reaction be if the accident occurred in her own home or on a sports pitch?

75. In this regard, in analysing whether someone else is legally liable for an accident, it is sometimes helpful to consider the likely reaction of the plaintiff if the accident had happened in her home or indeed on a sports field. It seems to this Court that if the plaintiffs had fractured their ankles while playing with children in their own home in similar circumstances or on sports field, they would, in this Court's view, be likely to dismiss it as an 'unfortunate accident' or a failure of common sense or a misjudgement which befalls everyone at some stage in their lives and for which no compensation is available.

76. Just because the accident happens in a public place which is covered by insurance, or which is the responsibility of a State body, does not alter the essential character of what occurred as an unfortunate accident for which no one, other than the plaintiff, is responsible.

77. Accordingly, while a court might have sympathy for the plaintiffs for the fractured ankles they suffered, it is not the job of a court to be generous based on sympathy, with other people's money, whether that money belongs to a taxpayer, an insurance company or an individual uninsured defendant. Accordingly, there is no basis upon which the plaintiffs' '*quest*' for '*a deep pocket'* can be satisfied in this case.

78. Furthermore, in light of the considerable backlog in the High Court, it seems to this Court that this backlog might be eased (for the benefit of litigants with serious injuries in need of urgent compensation) if litigants and their lawyers asked what the reaction would have been if the accident had occurred in their own home? Such a question would, in this Court's view, have highlighted in this case (and perhaps in other cases) that the real cause of the accident is an absence of care or common sense and not alleged negligence by some third party, who has insurance or a 'deep pocket'.

DAMAGES OF OVER €54,000 FOR 'MINOR' INJURY?

79. If this Court is wrong regarding liability, it is relevant to consider the submissions of counsel for the plaintiffs regarding what he regarded as fair compensation for the injuries sustained.

80. Mr. Counihan S.C for the plaintiffs made submissions in this case regarding the application of p. 64 of the Book of Quantum to the plaintiffs' injury, which deals with what is described as 'minor' ankle injuries. On this basis he submitted that Ms. O'Mahoney was deserving of damages of in the region of €54,700. In this regard, it is to be noted that there was no claim for special damages in the form of loss of earnings as it seems that Ms. O'Mahoney was not employed at the time. Out of pocket expenses were claimed in the form of 'medical expenses' and 'travelling expenses', but these were not particularised.

81. There was no indication given to the Court that these out of pocket expenses were substantial or came anywhere close to €5,300 (which, when added to the figure of €54,700 relied upon by counsel, would give a total of €60,000, the floor for damages in the High Court). Accordingly, it seems that the plaintiff and/or her lawyers regard her minor ankle injury as justifying an award for pain and suffering alone of close to €60,000.

82. Counsel for Tipperary County Council, Mr. Bulbulia BL agreed with Mr. Counihan's description of the plaintiffs' injuries as 'minor' and he quoted from the Book of Quantum as to the inclusion of '*a simple non-displaced fracture in the ankle'* in this category of minor injuries. In doing so, he referred the Court to the non-binding Book of Quantum referencing damages of 'up to €54,700'. Both counsel referred only to the non-binding Book of Quantum and they did not made any submissions regarding the effect of the principles (set down by the Court of Appeal and the Supreme Court and set out below)

which bind this Court regarding the assessment of damages on the appropriate compensation in this case.

Personal Injuries Guidelines are not binding in this case

83. Both counsel placed reliance on the Book of Quantum, as the proceedings were issued prior to the 24th April, 2021, when the Personal Injuries Guidelines were passed by the Judicial Council (the "Personal Injuries Guidelines"). For this reason, the Personal Injuries Guidelines are not binding regarding the assessment of damages in this case.

84. It is relevant to note that when this Court heard High Court personal injuries actions in June 2021, most, if not all, the cases which were heard were instituted on average six years earlier. Accordingly, it seems likely that many, if not the majority, of cases to be heard in the High Court over the next six years will be ones initiated prior to 24th April, 2021. Therefore, the Personal Injuries Guidelines may not be binding regarding the assessment of damages in the majority of cases to be heard for the next six years and hence it is important to clarify the binding legal principles which will apply during that period.

85. In particular, each time a plaintiff relies on the Book of Quantum to support his claim for damages, it is important for this Court to consider what the appropriate level of damages should be, in light of the case law for calculating damages set down by the Court of Appeal and the Supreme Court, particularly since the Book of Quantum is *not binding* on this Court (this is because s. 22 of the Civil Liability and Courts Act, 2004 provides that '*The court shall, in assessing damages in a personal injuries action,* ***have regard*** *to the Book of Quantum.'* (Emphasis added)).

86. This issue is particularly relevant in the present context since, as noted below, this Court concludes that the *non-binding* Book of Quantum figure of €54,700 is considerably more than the sum for fair compensation reached, when this Court applies the *binding* principles for assessing compensation, set down by the Court of Appeal and the Supreme Court.

87. For the avoidance of doubt, it is important to emphasise that the Personal Injuries Guidelines which have been described as reducing personal injury awards by 50% (see The Irish Times, '*Personal injury awards drop 50% following introduction of new guidelines'*, 6th July, 2021) are not binding on this Court in relation to the assessment of damages in this case and were not relied upon by this Court.

88. However, it is important to note that this does not mean that the principles set down by the Court of Appeal and the Supreme Court are not binding on this Court, regarding how to assess damages (which are referenced in the Personal Injury Guidelines themselves and in the Report of the Personal Injuries Guidelines Committee published by the Judicial Council in December 2020, as the basis for the calculation of damages). The High Court (and indeed the Circuit and District Courts), are bound by those principles and so those principles, which will be considered next, have a direct and binding impact on the assessment of damages by this Court.

The law which governs the calculation of damages

89. When calculating the level of damages for an award in a case such as this, while *the non-binding* Book of Quantum is of relevance, it is of limited assistance in comparison to the principles of the Court of Appeal and the Supreme Court which *bind* this Court. Significantly the figure that this Court would regard as fair compensation for Ms. O'Mahoney (applying the binding principles of the Court of Appeal and the Supreme Court) is less than the figure which counsel suggest is appropriate based on the Book of Quantum.

Compensation of up to €54,700 for 'minor' ankle injuries according to Book of Quantum

90. The section of the Book of Quantum to which this Court was referred by counsel for Ms. O'Mahoney was the following at p. 64:

> **"Fractures – distal Tibia, distal Fibula and Talus**
>
> Three bones form the ankle joint; the distal (bottom end) tibia bone (known as the medial malleolus), the distal (bottom end) fibula (known as the lateral malleolus) and the talus bone (one of the tarsal bones in the foot). Fractures that involve the joint are usually considered more complicated than others due to the increased impact on limb movement. The more severe injuries involve displacement and ligament damage (which may be treated with either open or closed reduction).
>
> **Minor** **up to €54,700**
>
> These injuries will include simple non-displaced fracture in the ankle which has substantially recovered.
>
> **Moderate** **€39,100 to €87,600**
>
> These injuries will include displaced fractures to a single bone in the ankle, or nondisplaced fractures to multiple bones with a full recovery expected with treatment.
>
> **Moderately Severe** **€79,900 to €89,300**
>
> Multiple fractures that have resolved but with ongoing pain and stiffness which impacts on movement of the ankle.
>
> **Severe and permanent conditions** **€80,500 to €93,300**
>
> These injuries include all three bones of the ankle structure which required extensive surgery and extended healing but may result in an incomplete union and the possibility of having or has achieved arthritic changes and degeneration of the ankle joint and may affect the ability to walk unaided."

The injury in this case

91. Ms. O'Mahoney suffered a straightforward or undisplaced fracture of her ankle. She was in a cast for six weeks and a boot for four weeks and was out of work for ten weeks. The

fracture healed very quickly and an x-ray after her return to work showed that it had healed without complications.

The Personal Injuries Guidelines are not yet binding but can be relied upon

92. This case was instituted prior to 24th April, 2021 and so the figures in the Personal Injuries Guidelines regarding minor ankle injuries are not binding on this Court regarding its assessment of damages.

93. While this Court does not feel it needs to refer or rely upon the figures set out in the Personal Injury Guidelines to assist it assessing damages in this case, it remains to be observed that there is no reason why, in appropriate cases, an Irish court cannot, if it so wishes, refer to the Personal Injury Guidelines to assist it in reaching its assessment of damages, even though the Personal Injury Guidelines are not 'binding' on the court (in relation to litigation commenced prior to 24th April, 2021). (In this regard**, s. 22(2) of the Civil Liability and Courts Act 2004 states that subsection (1) (cited above) '*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').*

94. This conclusion is based on the fact that the Supreme Court, in *Morrissey v. Health Service Executive* [2020] IESC 6 at para. 14.18, in deciding whether the cap for damages at €500,000 was reasonable, relied on Judicial Guidelines for the Assessment of Damages in Northern Ireland and also on Judicial Guidelines for the Assessment of Damages in England and Wales. Clarke C.J. stated:

> "In the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland (5th Ed.), which were published in 2019 as a resource for courts and practitioners in the assessment of damages in personal injury cases, the highest level of damages specifically provided for is in respect of injuries resulting in quadriplegia, which attract awards between £475,000 and £700,000. In the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases (14th Ed.), published in 2017, which are for the benefit of the judiciary in England and Wales, the highest awards of damages recommended are also in respect of injuries resulting in quadriplegia, which will generally attract an award of between £284,610 to £354,260."

95. Thus, even though those foreign judicial guidelines on damages are clearly not binding as a matter of Irish law on the Supreme Court, that court relied upon them to reach its conclusion as to whether a particular figure for damages, in that case the cap of €500,000, was reasonable.

96. It is difficult to see therefore why an Irish court could not, if it so wished, rely on other non-binding guidelines (in this case the Personal Injury Guidelines issued by the Judicial Council in Ireland), even if those Guidelines are not binding on the court (if the litigation was commenced prior to 24th April, 2021), in order to assist the court, if it felt it needed assistance, in reaching its conclusion as to the reasonableness of a certain figure for damages.

97. Indeed, the argument for an Irish court relying on the Judicial Council's Personal Injury Guidelines is much stronger than the argument for an Irish court relying on the Northern Irish or the English & Welsh Guidelines. This is because the Personal Injury Guidelines are binding as a matter of Irish law (in relation to cases instituted since 24th April, 2021), while these 'foreign' guidelines are not, and are unlikely to ever to be, binding on an Irish court, yet the Supreme Court had no issue relying upon them.

THREE PRINCIPLES HIGH COURT MUST APPLY IN ASSESSING DAMAGES

98. However, this Court does not feel it needs to rely on the Personal Injury Guidelines, since it does not need to go beyond the three core principles set down by the Court of Appeal for the assessment of damages, which are binding on the High Court. In Nolan v. Wirenski at para. 31, Irvine J. (as she then was) set out these three founding principles which apply to the assessment of damages as follows:

> "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."

Thus, while it seems clear that the High Court *may*, in reliance on *Morrissey*, rely on the Personal Injuries Guidelines as assistance in calculating damages (which this Court does not feel it necessary to do), it is '*required*' to apply these three principles in the calculation of damages, which this Court will now do:

(I) IS THE AWARD FAIR TO THE PLAINTIFF AND DEFENDANT

99. The first principle is that awards of damages should be 'fair to the plaintiff and the defendant.'

100. Therefore, in every case in which damages are being assessed, the Court must consider not only whether the amount of damages proposed is reasonable in light of the pain and suffering which the plaintiff has had to endure previously and into the future, but also whether the amount of damages is a reasonable amount to ask a defendant to pay for causing (usually accidentally) the pain and suffering in question.

101. It seems to this Court that what is fair compensation arises independent of the financial standing of the plaintiff or the defendant. This is because the test is not what a defendant can afford, but rather what is a fair award in light of the second and third principles for assessing damages i.e. the proportionate principle and the common good/social conditions (which as noted below relates, *inter alia*, to the general level of incomes in the State).

102. Thus, it seems to this Court that it is irrelevant, in calculating the level of damages, whether the defendant is an insurance company, the State/taxpayers, an uninsured person on the average wage or an unemployed individual. Thus, as noted by Hardiman J.

in *O'Keeffe v. Hickey* at para. 42 (*albeit*, in the context of finding a defendant vicariously liable for injury)

> "I do not consider that companies, institutions or even the State itself are necessarily to be considered in a different light than an individual."

103. Similarly, as noted hereunder, while the amount due to a plaintiff in respect of special damages, such as loss of earnings, will vary depending on whether she is a successful business woman or unemployed, what is fair in respect of general damages for pain and suffering is in general the same whether the plaintiff is wealthy or unemployed, since pain and suffering takes no account of a person's wealth.

104. While the concept of what is 'fair' compensation to a plaintiff and a defendant would, in the absence of further guidance (in the form of the second and third principles), be open to very differing interpretations, it seems to this Court that, when it comes to coming up with a figure to compensate a plaintiff for the injury caused, the second and third principles provide much more concrete assistance (because of the reference to actual euro figures as a touchstone for calculating damages).

(II) IS THE AWARD PROPORTIONATE?

105. The second principle derives from a number of cases including the Supreme Court decision in *M.N. v. S.M.* [2005] 4 I.R. 461 and the Court of Appeal decision in *Wirenski*. It is whether the proposed award, of general damages for pain and suffering, as distinct from special damages, is proportionate within the scheme of awards generally and in particular to the general cap on damages for catastrophic/quadriplegic injuries. As regards that cap, Irvine J., as she then was, noted in *Wirenski* at para. 32 that:

> "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."

106. At para. 42, she noted:

> "As Denham J. advised in M.N. v. S.M. damages can only be fair and just if they are proportionate not only to the injuries sustained by that plaintiff but also proportionate when assessed against the level of the damages commonly awarded to other plaintiffs who have sustained injuries which are of a significantly greater or lesser magnitude."

107. Compliance with this '*proportionate'* principle is important in order to avoid what the Court of Appeal described in *Payne v. Nugent* [2015] IECA 268 at para. 18 as the *'concertina'* effect on damages. The judgment in *Payne v. Nugent* refers to four classes of injuries in this regard, namely:

- modest (or minor),
- middle-ranking (or moderate),
- serious, and,
- catastrophic.

108. The Supreme Court judgment in M.N. v. S.M. [2005] 4 I.R. 461 and the Court of Appeal judgments in *Nolan v. Wirenski* [2016] IECA 56 and *Fogarty v. Cox* [2017] IECA 309 make it clear that:

- modest damages should be awarded for minor injuries,
- moderate damages for middling injuries,
- severe injuries should attract damages which are distinguishable from catastrophic injuries.

109. The judgment in *Payne v. Nugent* discusses the necessity for awards of damages to avoid the '*concertina type effect'*, in order to avoid an injustice being caused to persons with *catastrophic* injuries or *serious* injuries. This injustice would arise if persons with modest/minor injuries, receive awards which are not significantly less than those received by persons with *moderate/middle ranking injuries*, which are themselves not significantly less than those received by persons with *serious injuries* such as a loss of a limb, which themselves are not significantly less than those with *catastrophic* injuries/quadriplegia.

110. It is important to note that while the *Wirenski* judgment referenced €450,000 as the cap for damages it is clear from para. 14.24 of the *Morrissey* decision that the current cap is now €500,000.

Application of the proportionate principle in this case

111. In this case, one can apply the proportionate principle by noting that the suggested award of up to €54,700 for the pain and suffering, relating to (what the Book of Quantum and counsel for Ms. O'Mahoney described as) a 'minor' ankle injury and led to her being out of work for 10 weeks, is almost 1/9th of €500,000 (the maximum award for the pain and suffering for a quadriplegic/catastrophic injury).

112. It is difficult for this Court to see how this could be regarded as *'proportionate'* (bearing in mind the requirement that awards for minor injuries must be proportionate to quadriplegia/catastrophic injuries) in light of the respective pain and suffering attaching to, on the one hand, quadriplegia/catastrophic injuries, and on the other hand, a minor ankle injury – i.e. how could it be proportionate for the latter injury to give rise to an entitlement to almost 1/9th of the damages of the former life-changing catastrophic injuries.

113. It is this Court's view that this would not be proportionate. Rather an award of closer to €5,000 – €10,000 would be more proportionate and consistent with the need to avoid the '*concertina'* effect.

114. When applying this principle for the assessment of damages, it seems to this Court to be undoubtedly easier to compare serious injuries such as loss of a limb with catastrophic injuries such as quadriplegia which are in some way comparable, so as to decide if the proposed award is proportionate, than it is to compare a modest injury with catastrophic injuries, since a minor ankle fracture is so far removed from quadriplegia/catastrophic injuries.

115. For this reason, the real value of this proportionate principle, in this Court's view, is not so much to come up with an actual award (for which the third principle regarding the general level of incomes is of greater assistance), but rather to help a court to 'reality-check' a proposed award. Nonetheless this proportionate principle is of relevance for modest/minor injuries, particularly in view of the importance of avoiding the *'concertina'* effect as outlined by the Court of Appeal.

(III) IS AN AWARD REASONABLE IN LIGHT OF THE COMMON GOOD & SOCIAL CONDITIONS IN THE STATE?

116. The third and final principle, which the High Court is obliged to apply by the Court of Appeal decision in *Wirenski* (and, as noted below, by the Supreme Court decision in *Sinnott v. Quinnsworth* [1984] I.L.R.M. 523), is whether the proposed compensation is objectively reasonable in light of the common good and social conditions.

117. The perception of what is in the common good will vary depending on the particular circumstances of a personal injuries case and is a somewhat subjective criteria and less concrete than the term 'social conditions'. In this Court's view, it is unlikely to be a regular factor in assessing the precise amount of damages in a particular case, but it could well be necessary, in the particular circumstances of a case, for reference to be made to the common good in assessing damages. For example, in rare circumstances, it is possible that the common good might necessitate an award of increased or reduced damages, than might otherwise be the case, if the court felt that the common good justified such a reduction/increase.

118. The most helpful aspect of the third principle in assessing damages, is in this Court's view, likely to be the 'social conditions' aspect of this principle. This is because the term '*social conditions'* is, in this Court's view, a much more specific term than '*common good'* and accordingly capable of being of concrete assistance in assessing how much compensation should be paid in respect of a particular personal injury. This is because it seems clear from the judgment of O'Higgins C.J. in *Sinnott v. Quinnsworth* [1984] I.L.R.M. 523, that the term *'social conditions'* refers, *inter alia*, to the general level of incomes in the State. At p. 532 of that judgment, he stated that in determining whether a figure for general damages for pain and suffering was fair and reasonable:

"some regard should be had to the ordinary living standards in the country, to the **general level of incomes** and to the things upon which the plaintiff might reasonably be expected to spend money." (Emphasis added)

The fact that this Court is obliged to have regard to the general level of incomes in assessing damages for pain and suffering is also clear from the High Court decision in *Yang Yun v. MIBI* [2009] IEHC 318.

119. In that case, in determining the appropriate level of general damages for personal injuries, Quirke J. makes it clear that account must be taken of '*economic realities'* (at para. 157) and in particular regard must be had to *'individual disposable income'* (at para. 156), which he regarded as a relevant factor in the measurement of *'contemporary standards'* (at para. 135) and in particular current *'social conditions'* (which is the same expression used by the Court of Appeal in the *Wirenski* case). He clarifies why disposable incomes have no relevance to pecuniary loss or special damages, but they are relevant to general damages or non-pecuniary losses, at para. 153 of his judgment:

"However, in *Heil v. Rankin [*2001] Q.B. 272 at p. 297, the Court of Appeal (Lord Woolf M.R.) pointed out that:

"A distinction exists… between the task of the court when determining the level of pecuniary loss and when determining the level of non-pecuniary loss. In the case of pecuniary loss, and issues such as that which engaged the House of Lords in *Wells v. Wells*, the court is only required to make the correct calculation. Economic consequences are then irrelevant. When the question is the level of damages for non-pecuniary loss the court is engaged in a different exercise. As we have said, it is concerned with determining what is the fair, reasonable and just equivalent in monetary terms of an injury and the resultant PSLA. The decision has to be taken against the background of the society in which the court makes the award."

Those observations and the distinction identified by Lord Woolf between pecuniary loss (compensated by special damages) and non-pecuniary loss (compensated by general damages) are quite consistent with the principles and further distinctions identified by the Supreme Court in *Sinnott v. Quinnsworth* and *M.N. v. S.M*.

Hence, the need for the courts to hear evidence of and to consider "contemporary standards and money values" when assessing and calculating the limit or "cap" to be imposed on awards for general damages from time to time.

It was confirmed in evidence that this country is presently enduring a period of unprecedented recession. **There has been a significant drop in individual disposable income** and it is anticipated that this will become more acute during the next several years. Wealth and living standards have declined appreciably and economic growth has been replaced with contraction.

> **Those factors are relevant to the measurement of "contemporary standards" and current "social conditions**" within this country and it can be validly argued that**, in general, awards of general damages should reflect such economic realities**." (Emphasis added)

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

High Court obliged to have regard to the general level of incomes in assessing damages

121. Based on the foregoing case law, it seems clear therefore in applying the third founding principle for the assessment of general damages in a personal injuries case, this Court is obliged to have regard to the general levels of income.

122. Furthermore, this Court believes that the general level of incomes (which this Court interprets to mean the average earnings of people in the State) is a very useful tool, in conjunction with the 'proportionate principle', in calculating an appropriate figure for compensation, particularly when one is dealing with modest or middle ranking injuries, which in severity are a long way from catastrophic injuries, for which €500,000 is the 'cap' on general damages.

123. This is because for very minor injuries in particular, it may be difficult to even contemplate that the injury is any way referable or even on the same scale as quadriplegia, e.g. a soft tissue injury, which is the type of injury which a court often has to deal with in personal injury cases. For such injuries a touchstone such as general level of incomes/average earnings in the State is, in this Court's view, crucial in the assessment of damages (in conjunction with the proportionate principle).

Touchstone is not unemployment rate or large salary, but 'general level of incomes'

124. Of course, the general level of incomes is not what an unemployed person might receive per annum on job seeker's allowance (circa €10,000 per annum) or what an old-aged pensioner receives (circa €13,000). On the other hand, the general level of incomes is not what a successful lawyer or other successful professional or businessperson earns per annum, which could be many multiples of these amounts. Rather the general level of incomes or touchstone amount appears to this Court to be the average earnings of everyone in the State from those on social welfare up to and including those on the highest salaries.

125. The logic of this approach seems to this Court to be that pain and suffering does not discriminate between the wealth of victims. If one is unemployed or wealthy, the calculation of damages for pain and suffering should be related to average incomes. In this instance, it means that the general level of incomes/average earnings of a person in Ireland is to be used as a touchstone in deciding on the appropriate level of damages for all claims of pain and suffering for personal injuries. As previously noted, Hardiman J.

observed in *O'Keeffe v. Hickey* at p. 317 that '*companies, institutions or even the State itself are necessarily to be considered in a different light than an individual.'*

126. While this observation was made in the context of finding a defendant vicariously liable for personal injuries, it seems to this Court, equally applicable to the calculation of damages, since the relevant principles for calculating damages, and in particular the 'general level of incomes' takes no account of the financial position of the defendant or indeed if he is insured or not.

127. Of course, it is important to bear in mind that this is not the case in relation to special damages (or pecuniary losses), which will often vary depending on the financial position or wage of the plaintiff. So, while general damages for pain and suffering do not discriminate based on a person's wealth, special damages will apply differently to people depending on their financial circumstances. For example, if a person is out of work for 10 weeks because of an ankle injury and she was earning €10,000 a week, then she will have in addition to a claim for general damages for pain and suffering, an entitlement to receive from the defendant special damages in respect of a loss of earnings of €100,000. Thus an award of damages could be for a figure of €100,000 in special damages plus a figure for say €7,500 in general damages for pain and suffering, giving a total award of €107,500. However, in this judgment, this Court is not concerned with special damages, but only with general damages for pain and suffering.

What is the general level of incomes in Ireland?

128. Since a court has to turn the abstract (pain and suffering) into the concrete (a sum of money), it is important to have a precise figure for the general level of incomes, in much the same way as one has regard to a concrete figure for the 'cap' on damages, which is currently a figure of €500,000.

129. For this purpose, this Court relies on the figures published by the Central Statistics Office ("CSO"), and in particular the annual release of the *'average weekly earnings*' in the State. The most recent figure released by the CSO is €867.52 per week i.e. €45,111 per annum (CSO Statistical Release, 1 June 2021), which is circa €35,000 after tax.

The after-tax amount of the general level of incomes

130. In this regard, it seems clear to this Court that in determining the 'general level of incomes', the after-tax income has to be considered since this is the amount actually received by an employee. Support for this view is to be found in the approach of the Supreme Court in *McDonagh v. Sunday Newspapers* [2018] 2 I.R. 79 to assessing whether a damages award by a jury in a defamation action was fair. At pp. 109 and 110 O'Donnell J. stated:

> "Finally, the award was on any view a very large sum of money which would have meant that the plaintiff could live very comfortably for the rest of his life. Given the fact that tax is not chargeable on the award**, it is worth considering how long and how hard an individual would have to work to amass such a sum**, and in turn what €900,000 in 2008 or its equivalent in today's money could purchase. I

agree with all my colleagues that the award was excessive and must be set aside." (Emphasis added)

Thus, it is to be noted that the Supreme Court concluded that it was relevant, in determining whether an award was reasonable, that no tax was paid on the award. To put it another way, it was the 'after-tax' amount which was considered by the Supreme Court in assessing the reasonableness of damages. Similarly, it seems to this Court that a court must take account of the 'after-tax' amount of the 'general level of incomes' in the State (and not the gross earnings), in deciding whether an award for pain and suffering is reasonable, when it is applying the third principle for assessing damages.

131. Accordingly, it is to this figure of *circa* €35,000 per annum (after tax) or *circa* €3,000 per month, which this Court will refer to as the *'average earnings'* or the *'general level of incomes'* (to use the expression used by O'Higgins C.J.), in order to determine what is a fair and reasonable amount of compensation in a particular case.

Application of 'general level of incomes' to this case

132. Applying the Supreme Court's analysis in *Sinnott v. Quinnsworth* therefore, one might ask whether, bearing in mind that the average earnings for a year in the State is circa €35,000 per annum, a figure of €54,700, as suggested by counsel for the plaintiffs, would be fair and reasonable compensation for a person who had a straight-forward fracture of an ankle which healed without complications and led to her being out of work for 10 weeks.

How long would someone have to work to earn those damages?

133. Another way to apply this third principle is to ask how long someone would have to work to earn the proposed damages, since this is what was done by the Supreme Court in *McDonagh v. Sunday Newspapers* when assessing whether a particular figure for damages was reasonable. In that case, it asked how long someone would have to work to earn the amount in question. At pp. 109 and 110, in determining whether an award of damages was reasonable, O'Donnell J. stated:

> "Finally, the award was on any view a very large sum of money which would have meant that the plaintiff could live very comfortably for the rest of his life. Given the fact that tax is not chargeable on the award, **it is worth considering how long and how hard an individual would have to work to amass such a sum**, and in turn what €900,000 in 2008 or its equivalent in today's money could purchase. I agree with all my colleagues that the award was excessive and must be set aside." (Emphasis added)

Although this test as to the reasonableness of damages was done in the context of a defamation award, there seems no reason why the same exercise cannot be done in relation to damages for pain and suffering, since in either case one is seeking to determine whether an amount of damages in euro terms is reasonable.

134. In addition, it seems to this Court that, although not explicitly stated by O'Donnell J., the question was not how long a wealthy person would have to work, since logic would seem

to dictate that it is how long a person on average earnings would have to work. Accordingly, this approach by the Supreme Court in *McDonagh* is consistent with, but perhaps a slightly more user-friendly adaptation of, O'Higgins CJ.'s test in the *Sinnott v. Quinnsworth* case.

135. When the analysis is done in this manner, it appears to this Court that €54,700 could not be said to be fair to the plaintiff *and* the defendant. To put the matter another way, if the defendant were uninsured and he was a person on the average wage, he would have to work *for over a year and a half* to earn enough to pay the plaintiff damages for the pain and suffering caused to her by his accidental infliction of the ankle injury, which fully healed and kept her out of work for just 10 weeks.

136. Similarly, looking at it from the plaintiff's perspective, for her to earn this sum of money, she would have to work for over a year and a half, if she was on the average wage. Viewed in the 'general level of incomes' context (the third principle), which this Court is required to consider, it seems clear that €54,700 is well in excess of what could be regarded as fair compensation for a minor ankle injury.

137. It has already been noted, that when considering the 'proportionate' principle (the second principle), this Court concluded that a sum of €5,000 - €10,000 would amount to fair compensation for Ms. O'Mahoney's injury to her ankle (relative to the cap of €500,000 for paraplegia/catastrophic injuries).

138. It is helpful to now consider this sum of €5,000 - €10,000 in light of the general level of incomes/how long one would have to work test, to see if it is reasonable in that context. A sum of €10,000 is the net sum of money which would be earned by a person on the average wage working for a period of just over 3 months (based on net average earnings of €3,000 per month). It seems to this Court therefore that a figure of €5,000 - €7,500, i.e. between two and three months' income, would be fair compensation for the pain and suffering caused to Ms. O'Mahoney for her 'minor' ankle injury. It must be remembered that Ms. O'Mahoney, or indeed any other plaintiff, will also be entitled to any out of pocket expenses (or special damages), such as loss of earnings, medical expenses etc. on top of this figure for pain and suffering (or general damages).

139. Having considered the three founding principles for the assessment of damages set down by the Court of Appeal and the Supreme Court, and having concluded that a sum of a maximum of €7,500 would be fair compensation, it is useful to now consider a rare case in which the Supreme Court had to calculate what it regards as moderate damages (since appeals in relation to damages for minor injuries are rarely if ever heard by the Supreme Court) and in particular the type of injury for which the Supreme Court regarded €7,500 as fair compensation.

Type of injury for which Supreme Court regards €7,500 as fair compensation

140. In *Simpson v. Governor of Mountjoy* [2019] IESC 81 the Supreme Court considered the appropriate amount of compensation for a person who cannot be said to have *'sustained significant injuries'* (at para. 118). This Supreme Court case is being considered in the

context of the plaintiffs' counsel having referred to their injuries as falling within the category of *'minor'* ankle injuries in the Book of Quantum (*albeit* that he did so by reference to the €54,700 figure and in the context of proceedings that were taken in the High Court with a jurisdiction of €60,000 for damages in personal injury cases).

141. Since minor injuries are normally dealt with in the District Court (with a final appeal to the Circuit Court) or perhaps in the Circuit Court (with a final appeal to the High Court), it is unusual for there to be a judgment from the Supreme Court on the appropriate level of compensation for 'minor' injuries. Hence the *Simpson* decision assumes particular importance not just for this Court, but also for the Circuit and District Courts when these courts are presented with minor/modest or moderate/middling injuries.

142. In the *Simpson* case, the plaintiff took an action seeking damages against the State as he was, for a period of seven and a half months, forced to slop out in prison. Although not a personal injuries action (as it was an action for damages for breach of constitutional rights, including his right to dignity, privacy and autonomy), nonetheless it is relevant to note that the plaintiff was claiming damages for the harm caused to him, since he sought damages for the fact that he felt *'deeply humiliated, alienated from support and denigrated'* as a result of his exposure to conditions which were '*distressing, humiliating, and fell far below acceptable standards'* (at para. 116 *et seq*.). In many ways, the claim therefore was similar to a claim for 'pain and suffering' in tort law made by a person who suffered personal injuries.

143. Crucially, it is important to note that the approach of MacMenamin J. (at para. 126 et seq.) was '*insofar as practicable, to adhere to principles applicable in tort law'* and he applied a '*restitutionary element'* to the assessment of damages. In making the award, he stated that '*the award should be characterised as compensatory damages'*. This is the same approach which is taken to assessing damages for pain and suffering in personal injury actions. This case therefore is an important statement by the Supreme Court regarding what amounts to 'minor' or moderate damages for injuries which the Court determined could be said to not be 'significant' (at para. 118) or serious and so in this Court's view, is of considerable relevance to the District, Circuit and High Courts in considering 'minor' or 'moderate' damages for personal injuries which are not serious.

144. In that case, the Supreme Court determined that the sum of €7,500 was appropriate compensation for a prisoner who was forced to slop out for seven and a half months and MacMenamin J. described the sum of €7,500 as '*moderate compensatory damages'* (at para. 130) for the injury caused to the plaintiff. This sum was claimed in respect of the stress and humiliation suffered by the prisoner and so it seems clear that the damages which were awarded were designed to compensate him for the pain and suffering endured by him during that seven and half month period, in exactly the same way as general damages for pain and suffering are designed in a personal injuries action to compensate a plaintiff.

145. Since the Supreme Court regards €7,500 as 'fair' damages from the perspective of the plaintiff and the defendant for the pain and suffering caused to a plaintiff for having to

slop out for seven and a half months, which sum the Court described as '*moderate compensatory damages'*, it is difficult to see how Ms. O'Mahoney who was out of work for just over two months as result of a minor ankle injury, which healed without complication, would be entitled to multiples of that amount for her pain and suffering, as suggested by her counsel in reliance on the Book of Quantum.

Advantage of the three founding principles in calculating damages

146. Before concluding on the appropriate level of damages in this case, it is worth noting that, while the first founding principle (of what is '*fair to the plaintiff and defendant'*) is necessarily subjective for each judge, the second and third founding principles for the assessment of damages are considerably less subjective, since they use concrete figures, namely a cap of €500,000 and the general level of incomes of *circa* €35,000 per annum after tax.

147. The use of these concrete figures as the basis for calculating damages are useful since it illustrates for litigants that damages are not plucked out of the sky by courts, but rather the courts are required by the Court of Appeal and Supreme Court to conduct an exercise using concrete figures (for the cap on damages and the general level of incomes) that change over time with inflation.

148. It does not mean that two judges will reach the same figure, since one judge might regard the pain and suffering for an injury as worth in monetary terms say one year's average income, while another judge might be of the view that it is worth one and half years' average income, but it does mean that the final figure is relatable to concrete figures and provides in *each case* therefore a type of 'reality-check' for a plaintiff and a defendant, as to the level of damages.

149. Applying the three founding principles for the assessment of damages should therefore make it easier for litigants and their lawyers to understand how a court comes up with a figure for pain and suffering, and therefore it may facilitate the settling of claims, without litigants and their advisers themselves being expected to pluck figures out of the sky.

Conclusion regarding damages

150. Based on the foregoing, it seems to this Court that if Ms. O'Mahoney were to be awarded damages, it should be in region of €5,000 - €7,500 and so this claim should, in any case, have been brought in the District Court.

151. Such an award is, in this Court's view:

- proportionate to the cap of €500,000 for damages for pain and suffering for quadriplegia/catastrophic injuries in view of the vast difference between the respective injuries, and,

- reasonable in light of the general level of incomes (after tax) of *circa* €35,000 per annum, bearing in mind it would take a person on the average wage 2-3 months to earn that amount of damages (in reliance on the Supreme Court in *McDonagh*).

152. In addition, to 'reality-check' the award, it is to be noted that the Supreme Court determined that an award of €7,500 was fair compensation for a person who felt '*deeply humiliated, alienated from support and denigrated*' as a result of having to slop out for *seven and half months* which the Court found was *'distressing, humiliating, and fell far below acceptable standards'.* Accordingly, a sum of €5,000 - €7,500 seems reasonable for the 'pain and suffering' endured by Ms. O'Mahoney as a result of her undisplaced fracture which fully healed without complications and led to her being out of work for just over two months.

153. In conclusion, this Court would observe that although no reliance was placed in this judgment on the Personal Injury Guidelines, it remains to be observed that the range of awards set out in the Personal Injuries Guidelines for '*minor ankle injuries'*, which include '*less serious, minor or undisplaced fractures'* states that an ankle injury which recovers within six months is assessed at €500 – €3,000 and where there is recovery within six months to two years, the award is in the region of €6,000 - €12,000.

Why some unmeritorious claims might be brought in the High rather than District Court

154. This Court has expressed the view that even if this was a meritorious claim, it should have been instituted in the District Court.

155. However, if an impecunious plaintiff with an unmeritorious claim hopes to receive a settlement, it is to be noted that if he institutes proceedings in the High Court, rather than the District Court or Circuit Court, he may be increasing the likelihood of a settlement as well as increasing the amount of that settlement.

156. This is for the simple reason that there is a much greater financial incentive for a defendant to settle a High Court claim against an impecunious plaintiff, than a District Court claim. To take an example, if the details provided to this Court in the *Condon* case regarding the settlement of two nuisance claims were representative of the value of nuisance claim settlements generally in the High Court, then a plaintiff with a nuisance claim might expect to get €10,000 to withdraw his High Court action and his lawyers might get €10,000. In contrast, legal costs in the District Court for a 'minor' injury are likely to be €500 - €1,000. Accordingly, in the context of a High Court action, settling an unmeritorious claim by an impecunious plaintiff for €20,000 may make economic sense for a defendant, since he may save perhaps €50,000 - €100,000 in legal costs, which he would not recover if he were to win the litigation.

157. This saving in legal costs for the defendant is likely to be *fifty times* more than the defendant would save in settling a District Court case (a saving of legal costs of €500 - €1,000), and perhaps *ten times* more than the defendant would save in the Circuit Court (say legal costs of €5,000 - €10,000).

158. It should be clear therefore that there are economic reasons why an impecunious plaintiff with an unmeritorious claim for a minor injury, who is hoping for a settlement, would choose to institute proceedings in the court where legal fees are highest, since there will be a greater incentive for the defendant to settle the claim.

159. As noted by the Supreme Court in *Farrell v. Bank of Ireland* [2012] IESC 42, the inability of an impecunious plaintiff to pay legal costs if he loses the litigation can be used as '*a form of unfair tactic little short, at least in some cases, of blackmail'*. If this approach is taken by a plaintiff (and it is not suggested that it was taken by the plaintiffs in this case), it follows that the higher the legal costs, the bigger the blackmail or leverage for a settlement. Hence, there are economic reasons why such a plaintiff might institute an unmeritorious claim in the High Court, rather than the District Court, particularly as there appears to be little if any economic disincentive to doing so.

160. In the absence of any financial disincentive to taking minor injury claims in the High Court (or indeed a system in which the jurisdiction in which a claim is brought, is determined by objective criteria, rather than at a plaintiff's choosing), this continued approach is likely to lead to some personal injuries cases for minor injuries continuing to be taken in the High Court.

161. This is a significant issue because while one might have thought that the High Court is reserved for serious and significant cases (and the District Court for minor injuries), this case perfectly illustrates that even where the plaintiffs' counsel and the Book of Quantum categorise an injury as 'minor' it can still end up in the High Court and occupy that court, in this case, for two days. It seems to this Court that it is not a one-off occurrence that minor injury cases, which should be taken in the District Court, end up in the High Court, since the same week as this case was heard by this Court, a claim for an even more minor injury (*albeit* an appeal from the Circuit Court) took up a similar amount of expensive and valuable High Court time (see *Hardy v Bible* [2021] IEHC 614, a claim involving alleged soft tissue injuries in which the plaintiff self-referred to a busy emergency department for '*occasional neck pain'* for which he had taken one painkiller).

162. The reason that it is significant that minor injury claims are being brought in the High Court, is because there is considerable backlog in the High Court, which means that other litigants, some with far from minor injuries (i.e. terminal or life-altering conditions) are left waiting for a High Court judge to become available to hear their cases.

163. It must be emphasised that in making this point that minor injury claims can end up clogging up the High Court, it is not being suggested that the plaintiffs or their lawyers in this case believed that the claims were unmeritorious or indeed instituted the claims in the High Court in order to increase the chances of a significant settlement or indeed believed that their claims were not deserving of compensation at the High Court level. Nor is it being suggested that lawyers would institute proceedings in a higher court on behalf of impecunious plaintiffs, on the basis that a settlement in a higher court is likely to lead to a greater settlement sum in respect of legal fees. This is because it also must always be borne in mind that lawyers act on instructions of their clients regarding the issuing of proceedings and the jurisdiction in which they are issued.

'No lose' for the plaintiffs but 'lose/lose' for the defendants

164. Finally, this case is another example of a case, where it is likely to be 'no lose' for the plaintiffs, as regards legal costs, but 'lose/lose' for the defendants, as the plaintiffs may

not be in a financial position to pay the legal costs which have been awarded against them and so the defendants may end up paying their own High Court legal costs of *circa* €50,000-€100,000 even though they have won this case.

165. Indeed, were the plaintiffs to appeal, and even though at first instance the claim has been found to be unmeritorious (and so such an appeal would be, not just on quantum, but also on liability), there is at present no requirement for such losing plaintiffs to provide security for the costs of such an appeal. Accordingly, even though the defendant has won the case in the High Court (but is likely to have 'lost' on legal costs), if the plaintiffs appeal, the defendant will for a second time face the prospect that if it wins that appeal it will still have to pay its legal costs.