,

# AN CHÚIRT UACHTARACH

# THE SUPREME COURT

**S: AP:IE: 2022:0000100**

**[2024] IESC 10**

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

**BETWEEN/**

**BRIDGET DELANEY**

**Applicant/Appellant**

**AND**

**PERSONAL INJURY ASSESSMENT BOARD, THE JUDICIAL COUNCIL,**

**IRELAND AND THE ATTORNEY GENERAL**

**Respondents**

**JUDGMENT of Mr. Justice Gerard Hogan delivered the 9th day of April 2024**

## Part I - Introduction

### Background

**1.** The reform of our personal injuries law has been a topic which has exercised considerable public concern and attention for at least a generation. Some, of course, are content with the existing state of affairs and many of those who take that view are convinced that if reform is necessary, it should commence with the insurance industry. Yet there has long been a conviction in many other quarters that our system of personal injuries law has been too accommodating to plaintiffs, both in terms of liability and quantum. Those who urge this form of tort law reform contend, broadly speaking, that the effect of the current system is to encourage speculative claims and to push up insurance premia to unsustainably high levels, often to the detriment of small businesses in particular.

**2.** There have also been numerous expressions of judicial concern lest a perceived expansion of liability and augmentation of quantum should have unintended adverse consequences, such as, for example, the curtailment of playing areas for children or the closing of open spaces for hillwalkers. These concerns were well summarised by Irvine J. in her judgment in *Byrne v. Ardenheath Ltd*. [2017] IECA 293 (a case concerning the potential liability of the owners of a licensed premises to a patron who had slipped on a grassy bank when taking a short cut from the premises to a nearby car park) when she expressed concern that judicial determinations as to liability might "inadvertently…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." In *Lavin v. Dublin Airport Authority* [2016] IECA 268 Peart J. likewise stressed the importance of our personal injuries law reflecting the fundamental principle that adults should take care with their own personal safety. These are very recent examples of the judicial rejection of claims "for fear of the deleterious social effects that the developments sought by claimants might bring by way of a growth in litigation"

in Quill and Friel, "Introduction" in *Damages and Compensation Culture* (Bloomsbury, 2016) at p. 2.

**3.** At all events it is possible to note a range of legislative responses to these issues. One first saw the abolition of juries in personal injury cases by the Courts Act 1988. The Occupiers' Liability Act 1995 followed in turn. Then the Oireachtas enacted the Personal Injuries Assessment Board Act 2003 ("the 2003 Act") which provided for the creation of the first respondent. The Civil Liability and Courts Act 2004 ("the 2004 Act") then followed in its wake, s. 22(1) of which obliged courts to have regard to a book of quantum. The 2004 Act also reduced the general limitation period for personal injury claims from three years to two years.

**4.** The Judicial Council Act 2019 ("the 2019 Act") represents the latest – and perhaps the most ambitious – endeavour for reform in this general direction. The combined effect of s. 7(2)(g) and s. 90 of the 2019 Act is to empower the Council to adopt guidelines in respect of both personal injury awards and sentencing in criminal cases. Section 22(1) of the 2004 Act (as inserted by s. 99 of the 2019 Act) (as now itself substituted by s. 30 of the Family Leave and Miscellaneous Provisions Act 2021) ("the 2021 Act") now provides that the court:

> "….shall in assessing damages in a personal injuries action commenced on or after the date on which section 99 [of the 2019 Act] comes into operation –
>
> (a) have regard to the personal injury guidelines….in force, and
>
> (b) where it departs from those guidelines, state the reasons for such departure in giving its decision."

**5.** A similar amendment was made to the 2003 Act by s. 31(b) of the 2021 Act. Section 20(5) of the 2003 Act (as so amended by the 2021 Act) now provides that PIAB's

assessors are equally obliged to "have regard to the personal injuries guidelines" and that "where they depart from those guidelines" they must "state the reasons for such departure and include those reasons in the assessment."

**6.** The provisions of the 2004 Act (as so amended) were commenced on the 24th April 2021: see Article 2 of Judicial Council Act 2019 (Commencement) Order 2021 (S.I. No. 182 of 2021). It is accepted that by virtue of the transitory provisions dealing with still-unresolved claims which happened to be commenced before that date that these new provisions relating to the guidelines nonetheless apply in respect of Ms. Delaney's personal injuries claim: see s. 22(1A)(b) of the 2004 (as inserted by s. 99 of the 2019 Act) (and as in turn inserted by s. 30 of the 2021 Act). (As will later become clear, this particular transitory provision is of some importance in the resolution of this case and I propose to return to it in some detail at a later point in this judgment).

**7.** As it happens – and speaking entirely for myself — I completely support the idea of guidelines for both personal injuries and sentencing. Guidelines of this kind lead to legal certainty and predictability, lower costs and greater efficiencies. The present guidelines in respect of personal injuries were adopted by the Council on 6th March 2021. They were approved by the entire judiciary (consisting of the judges of the District Court, Circuit Court, High Court, Court of Appeal and Supreme Court) at a meeting held on that date. For my part, I also fully support these guidelines: the analysis contained therein is comprehensive, thoughtful, compelling and impressive in its detail and scope. And I further agree with the broad thrust of the guidelines: they promote consistency and lower awards. If I were a legislator, I would vote for them without hesitation.

**8.** But here lies the nub of the matter. When the Council adopted the guidelines, its members were not sitting as judges, but rather met as a collective *en banc* meeting of judges from all five courts. The judges in question were then called upon to vote upon the merits of the guidelines. It has not, I think, ever been suggested that the judges were thereby exercising the judicial power of the State within the meaning of Article 34.1 of the Constitution: the Council was in reality exercising a form of rulemaking power as distinct from the adjudicatory powers which are the hallmark of the judicial power vested in individual judges and courts.

**9.** The question which thus arises in this appeal is whether the judiciary (i) can be invested with a power to make binding guidelines of this kind which have the effect in and of themselves of altering the substantive law and (ii) whether they have in fact been so invested with such a power by the 2019 Act. For reasons I shall now set out, I am of the view that both questions should be answered in the negative. I am, however, also conscious that a majority of the Court takes a different view and by their respective judgments my colleagues have determined that the guidelines do in fact have normative effects and that they significantly change the legal landscape surrounding the award of damages for personal injuries. This determination has profound implications for the constitutionality of these provisions of the 2019 Act. I propose to return to this issue at various points in my judgment.

**10.** Before considering these questions in more detail, it is necessary to take up the narrative again and draw attention to the changes effected by ss. 30 and 31 of the 2021 Act. The 2021 Act was signed by the President on 27th March 2021 (i.e., some three weeks after the approval of the guidelines by the Judicial Council). This Act was commenced with effect from 24th April 2021: see Family Leave and Miscellaneous Provisions Act 2021 (Part 9) (Commencement) Order 2021 (S.I. No. 180 of 2021). Section 30 of the 2021

Act substituted a new version of s. 99 of the 2019 Act. This in turn mean that s. 22 of the 2004 Act stood substituted by this new version of s. 99 of the 2019 Act. These changes were largely verbal and editorial in nature and did not significantly affect the post-2019 version of s. 22 of the 2003 Act which was actually in force as of the date of the adoption of the guidelines by the Judicial Council.

**11.** The appellant in this appeal, Ms. Delaney, maintains that she suffered an ankle injury as a result of a fall on 12th April 2019 on a defective footpath in Dungarvan, Co. Waterford. It appears that as a result of the fall she was required to use a special form of orthopaedic boot for about four weeks. The medical prognosis was that she was likely to have some swelling in her ankle for approximately 6 to 9 months. While the detail of all of this is set out in the judgment which Collins J. is about to deliver (and which account I respectfully adopt), the following short summary must suffice for present purposes.

**12.** The appellant then made a claim for personal injuries against Waterford City Council. She first made an application to the Personal Injuries Assessment Board ("PIAB") on 4th June 2019. (PIAB has now been re-named as the Personal Injuries Resolution Board: see s. 2 of the Personal Injuries Resolution Board Act 2022). One of her concerns was that the entire PIAB process would have the effect of delaying the resolution of this claim until after the new guidelines came into effect. There was, however, a delay in the making of the assessment by PIAB. It is perhaps unnecessary to explore the reasons for this, but it seems to have been principally caused by a combination of factors associated in part with the restrictions imposed as a result of the Covid-19 pandemic, but perhaps particularly by reason of the delayed transmission of her X-rays to PIAB. It is sufficient to say that the assessment took place on 14th May 2021 – i.e., some three weeks after the guidelines had entered into force — when she was offered the sum of

€3,000. It does not appear to be disputed but that had her claim been dealt with under the previous personal injuries regime it is likely that she would have been awarded a sum somewhere between €18,000 and €34,500 by way of general damages.

**13.** The appellant rejected that award and was granted the appropriate statutory authorisation by PIAB on 3rd June 2021 pursuant to s. 32 of the 2003 Act. She has since issued separate proceedings against Waterford County Council. Those proceedings await judicial determination.

**14.** Against this general background we may now proceed to consider the wider questions raised by this appeal.

**Part II - The Separation of Powers Issues**

**15.** One may commence a discussion of this by pointing to the clear differences between the exercise of the Article 15 legislative power on the one hand and the Article 34 judicial power on the other. The legislator typically decides on policy choices in the course of making a generally applicable binding societal norm in the form of an Act of the Oireachtas. In contrast to the position of a judge, a legislator does not have to explain his or her decision. Nor does the legislator have to be consistent or to act by reference to precedent or base any decision by reference to existing legal principles. The legislator can act – and frequently does act – under the dictation of others (such as other members of a political party or grouping) and is otherwise frequently guided by his or her own subjective and intuitive view as to what would be best for society. The Government is accountable to Dáil Éireann (Article 28.4) and the Oireachtas itself must subject itself to the judgment of the electorate in the manner provided for by Article 16 and Article 18 and within the time period specified by the Electoral Acts.

**16.** This, on the other hand, is not the role of a judge. The judge's role is to act in a neutral and objective fashion, independent of the personal, political, or other views of the judge

in question. Any judicial decision should be based upon an impartial evaluation of the evidence and the application of the law to those facts in a consistent and even-handed fashion. His or her appraisal of the law should be squarely based on the application of well-established legal principles such as *stare decisis,* the existing common law rules and the principles of statutory interpretation and not on the subjective opinions of the judge concerned as to what the law should be. Article 35.2 provides that "subject only to this Constitution and the law" judges shall be independent in the exercise of their judicial functions. Critically, however, the judiciary "are not, and cannot be, directly responsible for their decisions, or liable to recall if their decisions are unpopular": *TD v. Minister for Education* [2001] 4 IR 259 at 338, per Hardiman J.

**17.** It is true, of course, that in some contexts and in some respects, judges may be said to "make" law, not only in the sense that sometimes their decisions have wide and far-reaching effects on society at large, but also because judges can and do make choices resulting in incremental changes in the law by reason of the interpretation of statute or the application of common law principles. It is important, of course, to stress that this function has definite limits. First, any judicial decision may be – and, not infrequently, is – overruled (generally with prospective effect) by new legislation enacted by the Oireachtas. Even in the constitutional sphere, their pronouncements are not final, since if necessary the matter can be referred "in final appeal" to a referendum of the People in accordance with Article 6, Article 46, and Article 47 of the Constitution.

**18.** Second, over and above this, the adjudicatory powers inherent in the judicial function have certain specific limits. As Holmes J. famously observed in his dissent in *Southern Pacific v. Jensen* 244 US 205 at 221 (1917):

> "I recognise without hesitation that judges do and must legislate, but they can only do so interstitially; they are confined from molar to molecular motions. A

common-law judge could not say that I think that the doctrine of consideration is a bit of historical nonsense and shall not enforce it in my court. No more could a judge, exercising the limited jurisdiction of admiralty, say 'I think well of the common law rules of master and servant and propose to introduce them here *en bloc*.'"

**19.** Similar sentiments have been expressed in this jurisdiction and the following examples may be taken as representative. In *Vone Securities Ltd. v. Cooke* [1979] IR 59 this Court was required to consider the proper construction of the word "month" as it appeared in a particular lease. As the law then stood the word "month" as it appeared in a document such as this was deemed to mean a lunar month and not a calendar month. Although Henchy J. decried this rule ([1979] IR 59 at 71) as an "unjustified archaism which serves to ensnare those who are unfortunate enough to be unaware that the word is capable of bearing this arcane connotation", he felt that it would not be proper to sanction its abrogation by judicial decision, since this was properly a matter for the Oireachtas. (The rule was ultimately abolished by the provisions of s. 75(a) the Land Law and Conveyancing Law Reform Act 2009).

**20.** And in *RT v. VP (orse. VT)* [1990] 1 IR 545 at 558 Lardner J. observed:

> "Historically the common law has developed at least in part by the application of established principles to new cases – to novel facts and circumstances. It has undoubtedly involved the development of the law and novel judicial decisions are not infrequently referred to as judge-made law. It is a judicial activity which has occurred in Ireland for centuries and has continued in superior courts prior to and since the enactment of the Constitution of Ireland 1937. In my view it is not *in its proper exercise* an impermissible exercise of the legislative function." (Emphasis supplied)

**21.** There could, therefore, be no objection to judgments which sought to make sense of the existing case-law by providing for guidance in certain areas of the law. Examples include decisions dealing with the "cap" of monetary damages (such as the decision of this Court in *Morrissey v. Health Service Executive* [2020] IESC 6**)** or providing guidance in terms of the amount of damages in defamation cases (such as *Higgins v. Irish Aviation Authority* [2022] IESC 13, [2023] 1 IR 65) or guidelines as to sentencing in rape (*The People (Director of Public Prosecutions) v. WD* [2007] IEHC 310, [2008] 1 IR 308) or assault offences (*The People (Director of Public Prosecutions) v. Fitzgibbon* [2014] IECCA 25, [2014] 1 IR 627). The giving of guidance of this kind via specific judicial decisions in this fashion would, in its proper exercise, amount to judicial adjudication in particular cases based on facts, arguments, reasoning by analogy, past precedent and the need for the rationalization of inconsistencies in the past decisions which had accumulated over time and so forth.

**22.** But to adopt and adapt Holmes' famous words in *Jensen*, a common law court could not say, for example, that "we think that the existing figures in all personal injuries awards are a bit of historical nonsense and that for the future they should all be reduced in each and every case by 50% and we propose to introduce these new rules *en bloc*" for this would, in essence, be a form of rulemaking and not judicial adjudication using the incremental case-by-case method. One could say much the same in respect of judicial guidelines which, let us suppose, had purported to sanction (prior to 2009) the abrogation of the lunar month rule for leases and deeds discussed in *Vone Securities* or, to take another example, which purported to dispense with some of the less defensible features of the rule against hearsay or, indeed, any number of other common law rules and practices whose continued existence may seem out of place in a modern society. Yet this is in substance what the Council is called upon to do by making guidelines of

this kind *if* on the proper construction of this legislation— and it is an "if" — these guidelines were to be given the immediate force of "hard" law.

**The Rules Committees example**

**23.** Perhaps the closest example to the powers vested in the Judicial Council by s. 90 of the 2019 Act (and, by extension, the new s. 22(1) of the 2003 Act as inserted by s. 99 of the 2019 Act) is to be found in the powers assigned to the various Rules Committees – such as the Superior Courts Rules Committee — by the Courts of Justice Act 1936 ("the 1936 Act") and a variety of other statutory provisions. These Committees have been vested by statute with the power to make rules governing the practice and procedure of the various courts. The 1936 Act also provides that certain judges – such as the Chief Justice and the Presidents of the various courts – will be members of the relevant Rules Committee and this, in certain respects, may be said to provide a prototype in respect of the powers vested in - and membership of — the Council.

**24.** There are, at the same time, important differences. First, while it is true that the power to regulate court procedure may be regarded as closely related to the judicial power (as decisions of the US Supreme Court ranging from *Wayman v. Southard* 10 Wheat 1. (1825) to *Mistretta v. United States* 488 US 361 (1989) appear to recognise), it should be noted that Article 36.iii of the Constitution dealing with the jurisdiction of the courts also provides that "the following matters *shall* be regulated in accordance with law…all matters of procedure". (Emphasis supplied). To this one must add Article 38.3.2º which provides that the procedure of the Special Criminal Court "shall be prescribed by law." The text of the Constitution accordingly itself acknowledges that the regulation of court procedure is unambiguously a legislative power committed to the Oireachtas in the first instance and which itself is obliged to legislate in respect of these matters. If that is true

of procedural court rules, this must be true *a fortiori in* the cases of matters of substantive law such as personal injury awards.

**25.** It follows that there must therefore be a law or laws enacted by the Oireachtas regulating or providing for the regulation of court procedure. The text of the Constitution itself clearly states that the regulation of court procedure is a legislative – and not a judicial – power which is accordingly for the Oireachtas to determine. This is in fact done through a variety of Courts Acts and the details are often delegated to the Rules Committee to formulate. The Rules of the Superior Courts themselves reflect the accretion of statute-law ranging from the Common Law Procedure Acts of the 1850s, the Supreme Court of Judicature (Ireland) Act 1877 right through to the changes effected in respect of the practice and procedure of claims in personal injury cases found in ss. 8 to 21 of the Civil Liability and Courts Act 2004. The Rules of Court are all published statutory instruments and consent of the Minister for Justice is required: see, e.g., ss. 65 and 66 of the Courts of Justice Act 1936 (in the case of the Superior Courts Rules Committee).

**26.** Just as importantly, the Rules themselves must, in the words of s. 14(2) of the Courts (Supplemental Provisions) Act 1961, concern only matters of "pleading, practice and procedure". Any attempt to change the substantive law by rules of court will be held to be ultra vires: see, *e.g.*, decisions of this Court such as *The State (O'Flaherty) v. O'Floinn* [1954] IR 295; *The State (Lynch) v. Ballagh* [1986] IR 203 and *Director of Public Prosecutions v. McGrath* [2021] IESC 66, [2021] 3 IR 785. So, for example, "fundamental part[s] of the substantive law of the State" cannot be "swept aside by rules of court": see *The People (Director of Public Prosecutions) v. Quilligan (No.2)* [1989] IR 46 at 54, per Henchy J. Likewise, the power to provide for alternative verdicts in criminal cases "is not, even on the widest possible interpretation of the term

'practice and procedure', part of the practice and procedure…It is a matter of substantive jurisdiction": *The People v. Rice* [1979] IR 15 at 19, per Henchy J. In much the same vein this Court has held that the jurisdiction of the Superior Court Rules Committee does not extend to a "power to make rules which are, in truth and in substance, an absolute limitation period" see *MOS v. Residential Institutions Redress Board* [2018] IESC 61, [2019] 1 ILRM 149 at 179, per Finlay Geoghegan J.

**27.** There is accordingly a clear legislative standard by which the vires of the Rules can be – and are - regularly judged. That, however, is *not* true of the s. 90 powers given to the Council. While the Council is enjoined to have regard to a wide variety of matters (including personal injury awards in other countries), it has, on at least one view of this section, been given a wide power to re-make the law in relation to the applicable quantum in respect of personal injuries awards.

**Comparisons of Rules Committee with Judicial Council powers**

**28.** General damages in personal injuries are, in contrast, a matter of substantive law and, unlike the various Rules of Court, are not simply a form of procedural law. I agree, of course, that the awards in personal injuries cases are inherently more subjective and discretionary in character in comparison with, say, most (albeit not all) damages awards in contract cases where the awards are more akin to a type of special damages award. To that extent they are clearly within the everyday knowledge, expertise and experience of judges. Yet the fundamental question which remains is whether the Judicial Council was really voting to effect a change in the substantive law in relation to personal injuries awards. *If* it was, then I struggle to see how this was not in effect an unconstitutional attempt to confer a form of primary law-making power on judges.

**29.** Other than saying that the guidelines have to be about personal injuries, one might therefore ask what the standards by which the vires of the guidelines could be

challenged actually are? If there are no or very few standards, that itself suggests that what is involved is a form of law-making.

**30.** It is clear from the structure of the Constitution that the Oireachtas cannot constitutionally confer direct law-making powers on the judiciary which would enable them to change the substantive law. As I have already indicated, the Judicial Council could not, for example, be given the power to adopt binding guidelines in respect of other areas of tort law the effect of which would have been to change the substantive law in respect of, say, occupiers' liability or the rule in *Rylands v. Fletcher*, even though these were originally judge-made rules to begin with. In the area of sentencing, guidelines could not be adopted which, for example, purported in practice *to require* judges to impose, say, a minimum of 10 years for offence Z. And if – let us suppose – the Court of Appeal had previously held that the minimum punishment for offence X was Y years, any such sentencing guidelines could not (in practice) purport to *oblige* trial judges to impose a sentence of Y plus 5 years.

**31.** It is true that, to date, at least, the Oireachtas has generally refrained from legislating in the area of personal injuries. Yet as this Court has recently stressed in the *Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34, subject only to certain specific and express constitutional limitations, the Oireachtas enjoys a universal and general jurisdiction to legislate by virtue of Article 15.2.1°, so that it certainly could do so. And it has in fact done so in certain respects, so that, for example, the Oireachtas has in fact prescribed what and can and cannot be taken into account in assessing damages in personal injury cases: see, e.g., s. 24 (regulations as to the discount rate) and s. 27 (what constitutes a collateral benefit) of the 2004 Act.

**<u>The decision in *Mistretta v. United States*</u>**

**32.** Much reliance was placed by the State defendants on the decision of the US Supreme Court in *Mistretta v. United States* 488 US 361 (1989). In 1984 the US Congress enacted the Sentencing Reform Act 1984. This legislation provided for the creation of a Sentencing Commission which was *expressly* invested with the power to promulgate *binding* — and not simply advisory — sentencing guidelines for the federal judiciary across a range of federal offences: see 488 US 361, at 367, per Blackmun J. The Court also noted that the Commission enjoyed a "significant discretion to determine which crimes have been punished too leniently, and which too severely": 488 US 361, at 367. In all of these respects the functions ascribed to the Commission resembled the guideline powers vested in the Council by s. 90 of the 2019 Act as respects both personal injury awards and sentencing, save that our legislation studiously refrains from describing the status of the guidelines.

**33.** The Commission had been established "as an independent commission in the judicial branch of the United States." It consisted of seven members, three of whom were judges. The members were appointed by the President, subject to confirmation by the US Senate. The members served – subject to good behaviour – for a maximum of twelve years. The Commission was nonetheless "fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit." The members of the Commission were "subject to the President's limited power of removal". The Commission's rulemaking was, moreover, subject to the "notice and comment" requirements of the (US) Administrative Procedure Act 1946 (this very roughly corresponds to the publication requirements contained in the Statutory Instruments Act 1947 and the laying requirements contained in Houses of the Oireachtas (Laying of Documents) Act 1966 and Part 13 of the Houses of the Oireachtas (Inquiries, Privileges and Procedures) Act 2013). A majority of the US Supreme Court upheld the

constitutionality of this legislation and the validity of the sentencing guidelines. Scalia J. alone dissented from this majority conclusion.

**34.** Two things may immediately be said about the potential applicability of *Mistretta* in this jurisdiction. First, none of the safeguards contained in the US legislation apply here, so that in contrast to the US Sentencing Commission (which was accountable to Congress), the Council is not answerable to the Oireachtas. There is thus no power on the part of the Houses of the Oireachtas to revoke or amend some or all of the personal injury guidelines. Nor is the Council obliged to abide by the formal publication requirements of the 1947 Act or the "laying" requirements provided for by the 1966 Act (as amended and supplemented) in respect of the Guidelines. Nor can the members of the Council be removed as such, since they can only be removed from judicial office by the means of the operation of the impeachment procedure provided for by Article 35.4.1° (or, in the case of the judges of the Circuit Court or the District Court, by statutory provisions which incorporate this constitutional procedure by reference).

**35.** Second, the decision in *Mistretta* appears (at least in part) to be premised on the basis that these are functions clearly aligned with the judicial power and it is therefore appropriate that these functions be given to judges. As Blackmun J. put it (386 US 361 at 391):

> "Given the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress, we find that the role of the Commission in promulgating guidelines for the exercise of that judicial function bears considerable similarity to the role of this Court in establishing rules of procedure under the various enabling rules. Such guidelines…are court rules – rules, to paraphrase Chief Justice Marshall's language in *Wayman*, for carrying into execution judgments that the Judiciary has power to pronounce. Just as the

rules of procedure bind judges and courts in the proper management of the cases before them, so the Guidelines bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases. In other words, the Commission's functions, like this Court's function in promulgating procedural rules, are clearly attendant to a central element of the historically acknowledged mission of the Judicial Branch."

**36.** There is no doubt at all but that the making of procedural rules, sentencing and (I would add) the making of personal injury awards in individual cases with precedential effect are equally part of the fabric of judicial business so far as this State is concerned. But that is not the same thing as saying that the making of binding or quasi-binding rules by the Judicial Council regulating the awards in personal injury cases amounts to the exercise of a judicial power or is otherwise in some way encompassed within the scope of the Article 34.1 judicial power. It could not be so because if (as it does) the very text of the Constitution makes it clear that court procedure is a matter to be regulated by law by the Oireachtas, the same must necessarily be true *a fortiori* in respect of substantive law such as awards in personal injury cases. So while the US courts have determined that court procedural rules are within the provenance of the judicial branch, the text of the Constitution (Article 36.iii) makes it clear that the making of such rules is a matter in respect of which the Oireachtas is obliged itself to legislate.

**37.** These two factors combine to undermine the status of *Mistretta* as a guiding precedent so far as the constitutional law of this State is concerned. And nor can I, in any event, accept, with respect, what appears to be an underlying premise of *Mistretta,* namely, that judges can be invested with *primary* legislative functions in the shape of the power to make *binding* guidelines of this nature. This sort of primary rulemaking power is quintessentially a legislative power which must be exercised only by the Oireachtas. It

is quite different in nature from the task assigned to the various Rules Committees. These Committees make rules within an overall statutory framework prescribed by the Oireachtas and are, as we have regularly seen, confined to making rules which truly regulate practice and procedure, and which do not alter the substantive law.

**38.** As this Court has frequently stressed in recent times – such as *Costello v. Ireland* [2022] IESC 44 and *Re Article 26 and the Judicial Appointments Commission Bill* [2023] IESC 34 - the concepts of democracy and democratic accountability are inviolable features of the constitutional identity of the State as described by Article 5 of the Constitution. All of this means that the making of any guidelines which have the effect of changing the substantive law in respect of personal injuries must receive democratic approval by the Oireachtas in the manner contemplated by Article 15.2.1°. (There is, of course, a long line of authority to the effect that the substantive law cannot be changed by guidelines: see, *e.g., Crawford v. Centime Ltd.* [2005] IEHC 328, [2006] 2 IR 106**.)** Anything else would not be a democratic procedure and would, apart from anything else, violate Article 5.

**39.** This point was well expressed by Simons J. in *Ryanair DAC v. An Taoiseach* [2020] IEHC 461, [2021] 3 IR 355 a case concerning the question of whether Government guidelines in respect of travel advice issued in the course of the Covid-19 pandemic were legally binding. Simons J. held that they were not so binding, because if they were, they would have the effect of conferring law-making power on the Government in breach of Article 15.2.1°. In my view his reasoning on this point ([2021] 3 IR 355 at 372) is compelling:

> "Without presuming to offer an exhaustive definition of a "law" for the purposes of the "power of making laws for the State" under Article 15.2.1°, the purported introduction by the executive of a unilateral and nonconsensual restriction of

general application which affects the rights of individuals, and which is asserted to be enforceable would approximate to "law" making."

**40.** Much the same could be said here. If by their *en banc* vote in the Judicial Council the judiciary had introduced a nonconsensual restriction of general application affecting the substantive entitlements of a tort victim to recover damages for personal injuries and which was binding – as would in substance will be the case if the Guidelines were determined to have the form of "hard" law — this could only be regarded as a form of law-making reserved to the Oireachtas by Article 15.2.1°.

**Whether the guidelines amounted to a violation of one key aspect of judicial independence**

**41.** A related aspect to this challenge is whether the content of the guidelines amounted to an infringement of one key aspect of judicial independence by requiring the courts to take particular steps or make particular orders in certain situations. The short answer to this is that the Oireachtas legislates in this fashion all the time. In the sphere of criminal law, mandatory sentences are not, for example, *as such*, unconstitutional: see, *e.g., Deaton v. Attorney General* [1963] IR 170; *Osmanovic v. Director of Public Prosecutions* [2006] IESC 50, [2006] 3 IR 504; *Lynch and Whelan v. Minister for Justice* [2010] IESC 34, [2012] 1 IR 1. Rather such sentences are only regarded as being unconstitutional when they amount in substance to a disguised attempt to usurp the sentencing functions of the courts: see, *e.g., Ellis v. Minister for Justice* [2019] IESC 30, [2019] 3 IR 511.

**42.** To my mind it could not be said that the *content* of these guidelines amounts to an endeavour to usurp the judicial function. Even if (contrary to my view) they amounted to a form of "hard law", they still in any event contain sufficient flexibility such that the guidelines could legitimately be departed from by a court for stated cause. This is

not like a case such as *The State (McEldowney) v. Kelliher* [1983] IR 289 where the effect of s. 13(4) of the Street and House to House Collections Act 1962 was to *oblige* the Court to decide the case in a particular way *once* certain evidence had been given by the Garda officer, irrespective of the merits of that, or, for that matter, any other, evidence which was given before the Court.

**43.** In my view, in this respect these guidelines fall squarely within the following well known passage contained in the judgment of Ó Dálaigh C.J. in *Deaton* ([1963] IR 170 at 182-183):

> "The Legislature does not prescribe the penalty to be imposed in an individual citizen's case: it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty, then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstances of the particular case, then a choice or selection of penalty falls to be made. At that point the matter has passed from the legislative [to the judicial] domain."

**44.** There could not, accordingly, be a separation of powers objection to the enactment of legislation which simply gave force of law to the guidelines along the lines (for example) of s. 8(3) of the Restrictive Practices Act 1972 and the Restrictive Practices (Confirmation of Order) Act 1987, even if these guidelines had been drafted or prepared in the first instance by the Judicial Council.

**45.** If force of law were to be given to these guidelines – and I stress that this is entirely a matter for the Oireachtas to determine – then, of course, the judiciary would, in principle, be bound to apply them as a form of "hard law" and they would cease to have a purely advisory (or "soft law") character. There is no question of the guidelines

vesting either the Oireachtas or, for that matter, the Executive with the power to select or determine the appropriate level of compensation in any given personal injuries claim.

**46.** What cannot, however, be done is to provide that the personal injury guidelines promulgated by the Council have, without more, the force of law in the sense that the judges (and, for that matter, PIAB) are in effect obliged to follow and apply these guidelines as a species of hard law, save, perhaps, in special circumstances. If s. 7(2)(g) of the 2019 Act – and, by extension, s. 90 of the 2019 Act and/or s. 22(1) of the 2003 Act (as inserted by s. 99 of the 2019 Act) - had this effect, then these provisions would be, to that extent, unconstitutional in that they would have bestowed primary lawmaking powers on the judiciary. It would have, in essence, transferred a power which the Constitution assigns to the elected representatives of the Oireachtas to an unelected judiciary: It would thus be contrary to the express language of Article 15.2.1° read in conjunction with Article 34.1. It would also amount to a breach of the State's commitment to democracy contained in Article 5 as an inviolable constitutional fundamental. Any such legislation would be unconstitutional on its face as violating an express provision of the Constitution and so that to that extent the presumption of constitutionality would no longer apply: see, e*.g., M v. An Bord Uchtála* [1975] IR 81 at 86, per Pringle J. and *Re Article 26 and the Equal Status Bill* [1997] 2 IR 321 at 402 per Hamilton C.J.

**47.** I might add in passing that the pre-1922 examples sometimes cited of *en banc* extra-judicial pronouncements following the summoning of judges by Parliament are, I suggest, really not in point. The most prominent example here, of course, is *M'Naghten's* case (1843) 10 Cl & F. 200 where the judges were summoned by the House of Lords to give advice on a series of hypothetical questions following the acquittal of M'Naghten on a charge of murder by reason of insanity. Apart from the

fact that this practice is now virtually obsolete even in England and Wales, the practice itself derives from the fact that "English King was regarded as the source of all justice", so that the "evolution of the national courts from the *curia regis* in no way deprived the sovereign of his power, when acting in his judicial capacity, to consult the judges": see Note, "The Advisory Opinion and the United State Supreme Court" (1936) 5 *Fordham Law Review* 94 at 97.

**48.** These pre-1922 examples belong to a completely different and long-vanished constitutional regime so far as this State is concerned. The idea that the judiciary could be "summoned" to give advice to the Oireachtas on a series of hypothetical legal questions would be totally at odds with the judicial role and the status of an independent judiciary envisaged in Article 34 and Article 35. While these pre-1922 examples are of historical interest, they have, I suggest, little bearing on whether the judiciary can be given powers to make guidelines of the kind at issue in the present appeal.

**Part III - The status of the guidelines**

**49.** In sum, therefore, everything turns on the status of the guidelines and the extent to which they bind the courts. If they have been given the status by law of "hard law" (or something approximating to this status) and they thereby impose an obligation on the courts strictly to follow these guidelines and thereby changing the substantive law in the process, then the power would be unconstitutional. While, as I have already noted, the Oireachtas has refrained from specifying what the precise legal status of these guidelines was to be, I agree that there is much in the 2019 Act which might suggest that they were intended to have a normative or substantive effect. The obligation on each court to give reasons for departing from the guidelines together with the fact that the 2019 Act expressly favours the internal coherence and overall consistency of the guidelines might all suggest this. These are clear indicators which point in the direction

of these guidelines having normative effects, as the value of this entire guidelines exercise would otherwise have been greatly reduced. As Noonan J. observed in *Griffin v. Hoare* [2021] IECA 232 (at paragraph 62):

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

**50.** There is, nevertheless, another construction of the s. 90/s. 22(1) power which is also reasonably open, namely, that the guidelines have simply been given the status of "soft" law, so that these guidelines are simply advisory in character and do not have a mandatory or prescriptive status. After all, the Oireachtas is perfectly capable of providing in other contexts that certain guidelines have a clearly binding status: thus, for example, the specific planning policy requirements guidelines issued by the Minister for Housing, Local Government and Heritage under s. 28(1C) of the Planning and Development Act 2000 (as inserted by s. 2 of the Planning and Development (Amendment) Act 2015) are expressed to be legally binding: see s. 34(2)(ba) of the 2000 Act.

**51.** The use of the "have regard to" standard is, in any event, by now well established and this statutory formula has to date been held simply to impose an obligation on the decision-maker simply to do just that, i.e., take them into account. As Quirke J. said of such guidelines in *McEvoy v. Meath County Council* [2003] 1 IR 208 at 224, the decision-maker is "not bound to comply with the guidelines and may depart from them

for bona fide reasons consistent with the proper planning and development of the areas for which they have planning responsibility." This Court has already held that the "have regard to"-style guidelines are not binding in law and must not be treated as such by decision-makers: see *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 ILRM 367 at 387, per O'Donnell J..

**52.** It might also be said that in view of the standard presumption against unclear changes in the law, if the Oireachtas had indeed intended that these guidelines would have this legally binding status, it would – and should - have said so in express terms given that this would represent a profound change in the law with far-reaching consequences. If guidelines are to be made binding, then it could fairly be said that the language of the 2019 Act "would have been expressed in very different terms": see *Tristor Ltd. v. Minister for Environment* [2010] IEHC 397, per Clarke J. (at paragraph 6.14).

**53.** There is, in any event, an abundance of case-law to the effect that the use of the term "guidelines" on its own suggests that they are not intended to be binding see, e.g., *Cork County Council v. Minister for Housing, Local Government and Heritage* [2021] IEHC 683. As Baker J. observed in *Brophy v. An Bord Pleanála* [2015] IEHC 433 (at para. 36) while guidelines "cannot by statute be ignored, and indeed while the obligation to have regard to them is one stated in positive terms, they are not prescriptive or mandatory."

**54.** Applying, therefore, the standard double construction test as adumbrated in classic decisions such *McDonald v. Bord na gCon (No.2)* [1965] IR 217, *Re Haughey* [1971] IR 217 and (more recently) *The People (Director of Public Prosecutions) v. Quirke* [2023] IESC 20, [2023] 1 ILRM 445, then, speaking for myself, I would therefore reject a possible interpretation of s. 90 of the 2019 Act and s. 22(1) of the 2003 Act which would be unconstitutional (i.e., if these provisions had created "hard law" binding

guidelines). I would rather opt instead for a constitutional interpretation of these provisions as such an interpretation of these provisions is reasonably open. This leads to the conclusion that the guidelines are, in truth, a species of "soft" law which are merely of an advisory and non-binding character.

**55.** It follows, therefore, that while a court is obliged to have regard to the guidelines and, indeed, to state reasons for any departure from the guidelines in giving its decision (s. 22(1)(b) of the 2003 Act, as inserted by s. 99 of the 2019 Act) (and as in turn inserted by s. 30 of the 2021 Act) when adjudicating on a personal injuries case, I consider that the courts cannot properly be regarded as being *bound* by these guidelines. They have instead a form of advisory status. To repeat, therefore, in the light of this application of the double construction test, the guidelines simply have the status of "soft" law which normally must yield to the "hard" law of existing case-law and precedent. If, for example, the Court of Appeal has already determined in a particular case that a personal injuries award in respect of a fractured ankle should be between X thousand Euro and Y thousand Euro, the precedential status of that decision could not be changed by guidelines of this nature.

**56.** If the Oireachtas wishes to convert these guidelines into a form of "hard" law which binds the courts, PIAB and the public at large, then legislation to give effect to them would be required. In view of the provisions of Article 5 and Article 15.2.1° of the Constitution the judiciary do not enjoy – and, as unelected personages, in a democratic society cannot be given – the power effectively to change the law of the State by a majority vote of the Judicial Council. Legislation of this kind enacted by the Oireachtas which gave such statutory effect to the guidelines would not in principle infringe the separation of powers in general or the administration of justice provisions of Article 34.1 and the judicial independence provisions of Article 35.2 in particular.

**57.** What, then, is the consequence of this conclusion that the guidelines have a form of "soft" law status so far as the present appeal is concerned? It is hard to avoid the impression from the affidavits filed on behalf of PIAB that its assessors considered that the entry into force of the new guidelines meant that these guidelines had a binding effect, i.e., that the guidelines were a form of "hard" law which were then binding, albeit that they could be departed from. The two PIAB assessors dealing with her case concluded that Ms. Delaney's injury came within the ambit of "minor ankle injuries" identified in the guidelines. The guidelines further indicate that the range of awards where there is "a substantial recovery is made within six months" is between €500 and €3,000. Given that the assessors considered that Ms. Delaney's injuries came at the top of that range, they made an assessment of €3,000.

**58.** The assessors also considered "whether to depart from the guidelines and determined that it was not necessary to do so." As I have just indicated, while the affidavits do not quite say so in as many words, there is nothing here to suggest that they considered that the guidelines were other than prima facie binding, i.e., a form of "hard" law, albeit that they could be departed from. In this respect, the assessors fell into error in not treating the guidelines as purely advisory in character, albeit that there was a statutory obligation to explain any departure from these guidelines by virtue of the provisions of s. 20(5). In many respects this case is not dissimilar to that of *Balz* where the grant of planning permission by the Board was quashed by this Court on the ground that it had wrongly considered itself bound by certain guidelines which were held not to be binding in law: [2020] 1 ILRM 367 at 387 per O'Donnell J. Much the same could be said in respect of the reasoning and conclusions of Clarke J. in *Tristor*.

**59.** For all the reasons set out in this judgment, I consider that the guidelines at issue in the present appeal did not have – could not constitutionally have been given – this status,

absent a decision of the Oireachtas to do so by means of subsequently-enacted legislation investing them with such status. (This is a question to which I will have to return for reasons which will presently become clear.) Subject only to this, then for the reasons I have just expressed, I am obliged to conclude that as the assessors – and, by extension, PIAB - thereby fell into legal error by in effect treating the guidelines as prima facie binding when they were simply advisory. I would therefore allow the appeal, quash the latter's formal assessment of 14th May 2021 and remit the matter to the Board in accordance with Ord. 84, r. 27(4) RSC so that the assessment of Ms. Delaney's claim can now be conducted in accordance with law.

**Part IV – Conclusions on the status of the guidelines and the constitutional issue**

**60.** The foregoing paragraphs represent how I would have originally decided this appeal. Since first preparing this judgment, however, it has subsequently become clear that a majority of the Court is of the view that the guidelines have a normative effect and enjoy a prima facie binding status. As Haughton J. observes (at para. 44) in the judgment he is about to deliver, the guidelines "change the landscape for assessment of damages for personal injury" and that the "entire premise behind them is that there is no going backward in time since such reliance on pre-guidelines caselaw can no longer be a basis for departure." I should stress that it is this particular conclusion which entirely informs and governs the remainder of this judgment, including the ratification issue and the questions regarding the effect of the 2021 Act.

**61.** Given that a majority of the Court takes this view, it follows that there is now an authoritative decision from this Court that the guidelines are not simply advisory but are rather normative in character. The potential application of the double construction test has thus been overtaken by this decision, since in view of the conclusions of the majority there is no longer any room for its potential application.

**62.** This conclusion has, however, implications for the wider constitutional question. A recurring theme of this judgment has been that the Oireachtas cannot give power to an unelected judiciary to remake the entire system of the level of damages in personal injuries cases by means of a vote in the Judicial Council. As I have already emphasised elsewhere in this judgment, the grant of such a power would be undemocratic and would thus offend Article 5. It would also be a clear breach of Article 15.2.1º when read in conjunction with Article 34.1. The judicial role under Article 34.1 is to administer justice and not to exercise law-making functions by reforming a key aspect of personal injuries law, however desirable such a change might be thought to be.

**63.** There is no question here of simply filling in the details of a power whose parameters have been clearly defined by legislation (such as was held to be the case in cases such as *City View Press Ltd. v. An Comhairle Oiliúna* [1980] IR 381 and *Bederev v. Ireland* [2016] IESC 34. [2016] 3 IR 1). (I acknowledge, of course, that the law on Article 15.2.1º has moved on somewhat in the light of recent authority such as *NECI v. Labour Court* [2021] IESC 36, [2022] 3 IR 515, so that while the *City View Press* "principles and policies" test remains helpful, it "cannot be considered an infallible guide": see *Director of Public Prosecutions v. McGrath* [2021] IESC 66, [2021] 3 IR 785 at 818, per O'Donnell J.). Nevertheless, on any view the present guidelines necessarily proceed from policy premises regarding the necessity to re-fashion the system of personal injuries awards, both express and implied. The Council was in effect required to make a wide range of policy choices regarding the existing level of personal injuries awards and their range.

**64.** A decision of this kind goes well beyond the parameters of the conventional judicial function applying the standard incremental common law method. It involves making generalised policy choices of a kind that are the hallmark of legislative power. This was

well expressed by O'Donnell J. in *McGrath*. Here this Court held that a District Court rule which purported to exclude the making of an award of costs against members of An Garda Síochána was ultra vires. As O'Donnell J. explained ([2021] 3 IR 785 at 852):

> "…the underlying choice here goes beyond any question properly consigned to the rule-making authority as to practice and procedure including costs and involves a broad-ranging policy decision which lies within the function of the Oireachtas under Article 15.2.1º. It might be said that the reason why law-making for the State is reserved to the Oireachtas is that there are decisions which must be made by the representatives of the people, and this decision, to exempt one class of prosecutor from the possibility of an award of costs in summary prosecutions is one that requires democratic justification rather than technocratic expertise."

**65.** If the guidelines represent "hard" law and they in fact entirely re-cast the personal injuries landscape in the manner found by the majority, then it is clear from *McGrath* that this would represent the making of a whole range of policy choices in the sphere of personal injuries law and adjudication which can only be made by the elected representatives of the People and which, to repeat, cannot be given to an unelected judiciary. Anything else would simply be undemocratic.

**66.** Here I also agree with the judgments that Faherty J. and Haughton J. are about to deliver in which they find that the vesting of such "hard" law powers in the judiciary would violate Article 35.2 and its guarantee of judicial independence. The essential neutrality of judicial adjudication and the disinterested application of the law is irrevocably compromised if judges are seen to have been involved in the making of laws affecting the substantive law which they are then called upon to apply.

**67.** In summary, therefore, if the guidelines are indeed "hard" law in the manner determined by the majority, then I agree with both Faherty J. and Haughton J. that the statutory foundation for the making of such guidelines, namely, s. 7(2)(g) of the 2019 Act, must be found to be unconstitutional *in its present form* as infringing Article 35.2 and, I would add, Article 5, of the Constitution. I say "in its present form" advisedly: there could be no objection *as such* to the Council having the power to issue guidelines. The constitutional objection is rather to the Council being given the power to issue *legally binding guidelines* which have normative effects.

## Part V – Whether the enactment of the 2021 Act had the effect of validating or confirming the guidelines

**68.** Following, therefore, the conclusion that s. 7(2)(g) of the 2019 Act is unconstitutional then it is clear that the guidelines can have no normative status *unless* they have been separately and independently given legal effect by legislation enacted *after* the 6th of March 2021, the date of their adoption by the Judicial Council. It was against this context that the Court decided to raise of its own motion the question of whether the 2021 Act (which, as we have seen was signed by the President on 27th March 2021 and was later commenced by ministerial order on 24th April 2021) might have had this effect. To this end the Court decided to put certain questions to the parties and to re-open the oral hearing for this purpose.

**69.** At the resumed hearing counsel for the appellant, Ms. Delaney, not unreasonably made the point that this particular argument had never previously been advanced by the State as a possible legal justification for the guidelines and that it was now too late to do so. While not at all unsympathetic to this objection, the fact remains that the issue here is far too important to be determined by the scope of the pleadings or the run of the argument before this Court during the original hearing. Given the

implications of this decision for the constitutionality of an important item of legislation for the Oireachtas and the wider public, I do not think that in these circumstances the State should be precluded from advancing this argument.

**70.** I now propose to examine whether the 2021 Act had the effect of confirming or validating the guidelines. Before doing so, I should record that counsel for the State also invited us to look at the Oireachtas debates on the 2021 Act in order to assist us in our deliberations. In *Crilly v. Farrington Ltd*. [2001] 3 IR 251 this Court held that recourse to Oireachtas debates was, generally speaking, an impermissible aid to legislative interpretation. It is, I think, unnecessary to re-open this issue at least so far as the present case is concerned. The meaning of legislation is to be determined by the actual words used by the Oireachtas. These words are construed objectively with the aid of well-established principles of statutory interpretation and the subjective intentions and beliefs of the Oireachtas members reflected in the parliamentary debates as to the effect or objectives of the legislation in question are really not in point. Apart from anything else, the use of such material would tend to undermine the cardinal rule of statutory interpretation, namely, that the Oireachtas speaks through the words used in the legislation at issue. Any relaxation of this rule would tend to promote subjectivity at the expense of the objective meaning of the language contained in the statute.

**71.** This is perhaps especially true in the present case. We are not here concerned with the subjective beliefs of the relevant Ministers or, for that matter, the members of the Oireachtas who participated in the relevant parliamentary debates as to the meaning or effect of these proposed changes. Our task is rather to assess whether the subsequently enacted 2021 Act had the effect in law of confirming or validating the guidelines by giving them the force of law. The Oireachtas does not, of course, have

to use any particular form of words for this purpose. The starting point, however, is that the Oireachtas must generally have used statutory language which shows an unequivocal intention "that particular instruments should have the force of law in the State" (see *Leontjava v. Director of Public Prosecutions* [2004] 1 IR 591 at 636, per Keane C.J.) or that there was an "intention" that the guidelines "should be part of the law of the State": see *McDaid v. Sheehy* [1991] 1 IR 1 at 11 per Blayney J..

**72.** Here it is important to note that if the guidelines have been subsequently confirmed by legislation and have been given the force of law, then they enjoy the status of legislation and they cannot be changed save by a further Act of the Oireachtas: see *Quinn v. Ireland* [2007] 3 IR 395 at 412, per Denham J. One must also stress that nothing short of subsequently enacted confirmatory legislation which actually gives the guidelines the force of law will suffice in order to cure the unconstitutionality attaching to the manner in which the guidelines were promulgated which I have already identified earlier in this judgment. This is because the guidelines cannot otherwise have the force of law *unless* they are so confirmed by legislation of this kind.

**73.** So stated, the question accordingly reduces itself as to whether the 2021 Act manifests a clear intention that the guidelines should be given this statutory effect? Counsel for Ms. Delaney argued forcefully that this intention was simply not present. He pointed to the fact that the new version of s. 22(1) of the 2004 Act (as substituted by s. 30 of the 2021 Act) simply spoke of the personal injury guidelines "in force" at the time the court came to determine question of liability and quantum. This, it was said, suggested that the Oireachtas was not purporting to ratify any particular version of the guidelines, but rather that it was simply imposing an obligation on the courts to have regard to any guidelines that happened to be in force the relevant time. Counsel

also pointed to s. 100 of the 2019 Act (as inserted by s. 30(b) of the 2021 Act) which, he contended, also envisaged that the guidelines could be amended at some future stage by the Judicial Council. This, on one view, seems quite inconsistent with the idea of confirming the March 2021 guidelines and giving them the force of law because, as this Court made clear in *Quinn*, if they had been so given the force of law they could only have been amended at some future stage by the enactment of new legislation. Likewise, it might be said that the legislation from late March 2021 would have spoken definitively of *one* set of guidelines only (i.e., those of 6th March 2021) and not in terms of the guidelines which happened to be "in force" at any given time (which term might or might not include the guidelines of 6th March 2021) if it were sought to give these particular guidelines the force of law.

**74.** There is much force in these arguments. It must nonetheless be recalled that the gravamen of the objection to the constitutionality of s. 7(2)(g) of the 2019 Act was that it compelled the judiciary to take part in the adoption of legally binding guidelines in the absence of any subsequent parliamentary confirmation of these guidelines. Had the Oireachtas subsequently enacted legislation which had - unambiguously - sought to confirm these guidelines and independently gave them statutory effect, then it is clear that such would, so to speak, have broken the chain of unconstitutional causation and served to cure the unconstitutionality which I have identified in s. 7(2)(g) of the 2019 Act, namely, the want of ultimate democratic legitimacy by means of subsequent legislative approval.

**75.** One may readily acknowledge that the Oireachtas has not enacted such legislation with the pellucid clarity regarding the legal status of the instrument in question which was a feature of the items of legislation at issue in *McDaid v. Sheehy* and *Leontjava*. At the same time, there is the inescapable fact that the Oireachtas legislated within

weeks of the adoption of the guidelines by the Judicial Council and that such legislation expressly obliged the courts to have regard to those guidelines. The very fact that the Oireachtas legislated in this fashion *after* the promulgation of the guidelines of 6th March 2021 by the Judicial Council must be taken to have some legal consequences.

**76.** Not without considerable hesitation, I have come to the conclusion that in order to give these provisions of the 2021 Act real meaning it is possible to infer that the Oireachtas has thereby approved the guidelines and that it has accordingly given them statutory effect. It has, admittedly, only done so impliedly and indirectly. Yet it has nonetheless done so and I thereby feel obliged to conclude that in this respect it has done so as if it had legislated with the directness and clarity which were the hallmarks of the confirming provisions which were at issue in both *McDaid* and *Leontjava.*

**77.** Any other conclusion would mean, in effect, that although the guidelines of 6th March 2021 had received the (implied) endorsement of post-hoc legislation enacted by the Oireachtas and thereby had been clothed by the mantle of democratic legitimacy, this was all a fruitless endeavour for want of the use of the appropriate and express statutory language. The Oireachtas was doubtless fully cognisant of the existence of the guidelines of 6th March 2021 (and their content) when it enacted the 2021 Act. After all, the Long Title to the 2021 Act recites that one of its objectives is "to make further provision in relation to the operation of personal injuries guidelines adopted by the Judicial Council" and this can only realistically be read as a legislative acknowledgment that such guidelines had in fact been adopted by the Judicial Council just a few weeks earlier. The Oireachtas must thereby be taken in the circumstances to have approved of the contents of the guidelines and to have directed that they had the force of law.

**78.** What, then, are the consequences of this conclusion? In the first place, the subsequent enactment of the 2021 Act legislation must be taken to have cured the original unconstitutionality attaching to the manner in which the guidelines were purportedly given by the force of law by the provisions of s. 7(2)(g) of the 2019 Act by providing for a separate and independent *post-hoc* confirmation of the guidelines by the Oireachtas which served to give them the force of law. By contrast, the unconstitutionality identified with respect to s. 7(2)(g) of the 2019 Act was that (as this sub-section was construed by a majority of the Court) it gave any guidelines which were approved by the Judicial Council the immediate force of law without the necessity for any subsequent legislative approval.

**79.** Second, it is clear from the decision of this Court in *Quinn* that once a legal instrument has subsequently been given statutory confirmation in this fashion it enjoys statutory effect. This means that while the legal instrument in question is not, of course, a statute, the instrument as so confirmed nonetheless enjoys the same general legal attributes of a statute. This in turn means that the guidelines cannot now be amended save by further legislation enacted by the Oireachtas.

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

**81.** Third, given that I have held that the effect of the 2021 legislation was to cure the unconstitutionality infecting the manner in which the guidelines had purportedly been given legal effect and the legal gap left in the wake of the finding that s. 7(2)(g) was

unconstitutional, it follows in turn that the existing guidelines of 6th March 2021 are legally binding and have the force of law, such status having been independently conferred on them by the subsequent enactment of the 2021 Act. Given that the guidelines have now been given this "hard law" status, it follows further in turn that PIAB was obliged to treat them as legally binding as and from the date of their entry into force on 24th April 2021.

**Part VI - Should the guidelines have been applied retrospectively to Ms. Delaney's case?**

**82.** There remains one further matter for resolution, namely, whether these guidelines could properly have been applied to Ms. Delaney's case in May 2021. It is true that s. 22(1A)(b) of the 2004 Act (as substituted by s. 99 of the 2019 Act and in turn substituted by the 2021 Act and commenced with effect from 24th April 2021) expressly provides that the old book of quantum now applies *only* where a personal injuries action has been commenced before the date on which s. 99 of the 2019 Act comes into operation or where PIAB have *already* made an assessment. This provides:

> "(1A) The court shall have regard to the Book of Quantum in assessing damages in a personal injuries action where the action is commenced –
>
> (a) before the date on which section 99 of the Act of 2019 comes into operation, or
>
> (b) on after the date on which that section comes into operation in relation to a relevant claim where –
>
> (i) an assessment was made under section 20 of the Act of the 2003 in relation to that claim before the date of such coming into operation, and

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

**83.** It is true that this sub-section is addressed to a court. Since, however, PIAB is obliged to make an its assessment on the same basis as a court, it is not disputed but that this sub-section governed the assessment of Ms. Delaney's claim. As we have noted, PIAB made the assessment in Ms. Delaney's case on 13th May 2021. The applicant contends that insofar as these provisions of the 2021 Act mandate and require the retrospective effect of the guidelines to her pending claim, they are to that extent unconstitutional.

**84.** In order to put this claim into perspective, one may, however, ask what exactly has happened here? Ms. Delaney made her application to PIAB in June 2019. She was debarred by statute from launching her personal injuries action pending the grant of authorisation by PIAB. This in turn depended on the making of an assessment by PIAB. And, as I have already noted, for various reasons associated to some extent with the restrictions imposed by reason of the Covid-19 pandemic and but perhaps more particularly because of the delayed transmission of the appellant's X-rays to PIAB – the details of which are not really germane to this issue – her claim before PIAB still had not been resolved by the 24th April 2021. She was not free to issue her proceedings against Waterford County Council until PIAB had made the assessment on 13th May 2021. As I have already noted, she subsequently obtained the letter of authorisation pursuant to s. 32 of the 2003 Act on 3rd June 2021 enabling her to commence proceedings following her earlier rejection of that PIAB offer.

**85.** In the meantime, of course, the Judicial Council had made its guidelines on 6th March 2021. As we now know, these guidelines were legally inoperable as of that date because inasmuch as s. 7(2)(g) of the 2019 Act purported to give them legal effect,

this sub-section was itself unconstitutional. We have just seen how the guidelines were then subsequently confirmed and validated by the commencement on 24th April 2021 of the provisions of the 2021 Act, (an entirely separate item of legislation) which had themselves been enacted *after* the making of those guidelines. It was the commencement of the relevant provisions of s. 30 of the 2021 Act on 24th April 2021 which served to give those guidelines a binding "hard law" legal status.

**86.** The effect of this veritable cascade of complex legal changes was that the Oireachtas sought to apply a new law (which had new binding legal effects) to a pending claim in a manner which was – as Meenan J. expressly found in his judgment in the High Court – adverse to any assessment of the quantum of that claim. It did this by means of the enactment of s. 22(1A)(b) of the 2004 Act (as substituted by s. 99 of the 2019 Act)(and in turn substituted by s. 30 of the 2021 Act). These new legislative changes clearly adversely affected the appellant's pending claim. It is not really in dispute – and, at all events, Meenan J. so found in his judgment – that she was likely to have obtained an award which was somewhere between €15,000 to €31,000 extra by reference to the book of quantum had it not been for these statutory changes.

**87.** In the High Court Meenan J. rejected the argument that this retrospective application of the provisions of the 2021 Act was unconstitutional saying (at paragraph 46) that for the applicant to succeed that she would "have to establish that she had a constitutional right to be awarded a sum between €18,000 and €34,000 under the Book of Quantum current at the time of her accident." For my part, I respectfully disagree. I think instead that the appellant had a general entitlement to have had her claim assessed under the old law at the time her claim was being assessed by PIAB.

**88.** It is perhaps not necessary to go further than to point to the leading decision of this Court in *Hamilton v. Hamilton* [1982] IR 466 as authority for the proposition that the Oireachtas cannot, generally speaking at least, legislate with retrospective effect in a manner which adversely affects a pending claim. In that case the High Court had granted specific performance of a contract of sale of a family home. The putative vendor then claimed that the contract was rendered void by the subsequent enactment of the Family Home Protection Act 1976.

**89.** This Court rejected the argument that the 1976 Act did have – or could constitutionally have had – this effect. As Henchy J. put it ([1982] IR 466 at 482):

> "…if the Act of 1976 was to extinguish or stultify [the purchaser's] constitutional right to pursue his pending claim for specific performance (a claim which the High Court, after a plenary hearing has formally declared to be good in law), the Act of 1976 would be unconstitutional to that extent."

***90.*** In his judgment O'Higgins C.J. observed ([1982] IR 466 at 474) that "retrospective legislation, since it necessarily affects vested rights, has always been regarded as being prima facie unjust". He went on to say that if the 1976 Act had the effect contended for, it would ([1982] IR 466 at 477) "constitute an unjust attack upon and a failure by the State to vindicate the property rights of [the purchaser] …and would constitute a clear infringement of the provisions of Article 40.3.2º of the Constitution." The other members of the majority, Griffin and Hederman JJ., both delivered short concurring judgments in which they stressed that their conclusion that the 1976 Act did not have retrospective effects was not simply based on the fact that the purchaser had already obtained an order for specific performance.

***91.*** It is true that Ms. Delaney's claim was at this point pending only before PIAB - as distinct from a court - and that it did not have some of the special features (such as the

order for specific performance) which had been present in *Hamilton*. But for the purposes of this analysis her claim might as well as have been pending before a court. The key point is that the Oireachtas enacted legislation on 27th March 2021 (which provisions were commenced on 24th April 2021) in a manner which adversely affected a pending claim in a material fashion by requiring that claim now to be assessed exclusively by reference to that new law. As this Court observed in *Hamilton* retrospective legislation of this kind is generally perceived as unfair, not least because of its potentially arbitrary effects. The appellant had, for example, no way of knowing when – or even if – the Minister would decide to commence the relevant provisions of the 2021 Act. Nor did she have any way of knowing the precise date when her claim would come to be assessed by PIAB. For example, had her claim been assessed by PIAB on 23rd April 2021 she would still have been assessed under the old pre-2021 Act law.

**92.** There is no doubt but that Ms. Delaney's right to sue in respect of a justiciable wrong is itself a chose in action and a species of property rights for the purposes of Article 40.3.2º: see generally the decision of this Court in *Re Article 26 and Health (Amendment)(No.2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 at 196, per Murray C.J. It is true that the claims which were at issue here were restitution-style claims in the nature of actions for debt in order to recover payments made in respect of unlawfully imposed nursing home charges. Likewise, the claims at issue in the two other leading authorities in this general area concerned either a claim in respect of the proceeds of a trust fund (as in *Buckley v. Attorney General* [1950] IR 67) or a contractual claim arising from a property transaction (as in *Hamilton*). It is likewise correct to say that an action for personal injuries is personal to the victim and, in all probability, cannot be assigned. In this respect it is different from other forms of choses in action.

**93.** For my part, however, I do not see that this makes any material difference to the nature of the constitutionally protected right at issue here, at least so far as the issue of retrospectivity is concerned. It is said that the claim here is a contingent one. So it is. But the same could have been said of the plaintiff's claim in *Buckley* and the claims of potential claimants in the *Health (Amendment) Bill.* It must be recalled that the plaintiff in *Buckley* ultimately lost her claim to the ownership of the funds: see the judgment of Kingsmill Moore J. in *Buckley v. Attorney General (No.2)* (1950) 84 ILTR 9. And so far as the pool of claimants in the *Health (Amendment) Bill* were concerned, the vast majority of them had yet to issue any form of proceedings and, in any event, s. 1(6) of the 2004 Bill contained a saver in respect of civil claims already in being as of the date of publication of the Bill.

**94.** Save for the obiter remarks of O'Higgins C.J. in *Moynihan v. Greensmyth* [1977] IR 55 doubting this, there is in any event a long line of authority from the decision of this Court in *O'Brien v. Keogh* [1972] IR 144 onwards to the effect that a cause of action in tort is to be regarded as a species of property rights. So, for example, in *O'Brien v. Personal Injuries Assessment Board* [2008] IESC 71, [2009] 3 IR 243 at 260 Denham J. spoke the applicant's constitutional right "of property in his personal injuries action."

**95.** Even if I am wrong in this and the plaintiff's chose in action is not to be regarded as a species of property right for the purposes of Article 40.3.2º, it clearly nonetheless enjoys constitutional protection as part of the derivative personal right to litigate for the purposes of Article 40.3.1º. As this Court has previously pointed out in cases such *Tuohy v. Courtney* [1994] 3 IR 1 (concerning an action for professional negligence) and *White v. Dublin City Council* [2004] IESC 35, [2004] 1 IR 545 (concerning the right to apply for judicial review), nothing material would seem to turn on this difference. It could scarcely be suggested that the constitutional validity of the sub-section should

turn depending on whether the right in question was protected by Article 40.3.1º on the one hand or by Article 40.3.2º on the other. The underlying principle is substantially the same. It would be surprising if the Oireachtas was generally debarred from legislating with retrospective effect in a manner which affected adversely an action for debt or in contract but was nonetheless quite free to do so where the claim concerned injuries to the person. Is it to be said that an action in contract is more or less inviolable as against retrospective legislation of this kind which materially alters the substantive law, whereas an action to recover damages for what might be severe personal injuries is not?

**96.** I do not think that this conclusion is affected by the decision of this Court in *Re Camillo's Application* [1988] IR 104. This was a case-stated from the Circuit Court to this Court concerning the status of an appeal against the refusal to grant a gaming licence in respect of an amusement hall under Part III of the Gaming and Lotteries Act 1956 which was then pending before the Circuit Court. While that appeal was pending the relevant local authority, Dublin Corporation, had rescinded a previous resolution which had adopted Part III of the 1956 Act. In the absence of a subsisting Part III resolution, no licence could be granted.

**97.** In the first part of the judgment Griffin J. pointed out that the applicant's original gaming licence had expired in 1983 so that he was not actually the holder of a subsisting licence at the time of the recission of the Part III resolution in January 1986. Griffin J. then went on to hold that the rescission of the Part III resolution was not invalid: it did not infringe the principle in *Buckley* by reason of the fact that the recission resolution applied indistinctly to all licence holders and, moreover, it did not seek to pre-determine the result of a particular appeal.

**98.** As Professor Gwynn Morgan has observed (*The Separation of Powers in Irish Constitutional Law*, Dublin, 1997) (at 141), the decision in *Camillo* is in some ways a singular one. In addition to the absence of the *Buckley* features (i.e., there was no attempt to direct the result of a particular case), the case seems really to turn on the fact that, absent the existence of a valid Part III resolution, the courts would have had no jurisdiction to grant a gaming licence. The applicant moreover had no fundamental legal entitlement to a licence: it was ultimately a form of legal privilege granted by the 1956 Act which was in turn subject to the existence of a Part III resolution remaining in force for the relevant local authority area. Once the Part III resolution was no longer in force, the courts could not then grant a licence.

**99.** As Griffin J. put it ([1988] IR 104 at 109):

> "The question in issue here is whether the passing of the resolution for rescission, which applied to the entire community in the whole of the County Borough, can be regarded as an intervention by the City Council in a particular application then before the Circuit Court on appeal from the refusal of the District Court. In my view, it cannot, and I would reject this submission.
>
> Before any certificate can be granted by the District Court the Court must be satisfied that the local authority has by resolution adopted Part III and that at that time the Local Authority has by resolution adopted Part III and that at the time when the application is made the resolution is still in force in respect of the area in which the premises are situate. Unless the resolution is still in force, neither the District Court nor the Circuit Court on appeal has jurisdiction to grant a certificate."

**100.** There was, in any event, no challenge in *Camillo* to the constitutionality of the resolution or the underlying legislation. If there had been such a challenge, a case could well have been on public policy grounds to justify any issues concerning the retrospective application of the resolution to this pending case: the guarantees contained in Article 40.3 are, after all, not absolute and the elected members of local authority had clearly decided that it was no longer in the public interest that amusement halls of this kind should be permitted.

**101.** The decision of McWilliam J. in *Condon v. Minister for Labour (No.2),* High Court, 10th June 1980 is, incidentally, a decision which is possibly along these lines. At a time of very high inflation, the Oireachtas had passed legislation which prevented banks from awarding large pay increases to their employees. Although McWilliam J. accepted that the legislation had retrospective effects on property rights, he concluded that the Oireachtas was entitled to take the view that these restrictions were justified in the public interest. The general economic outlook and the need to contain (then very high) inflation meant that the Oireachtas could justifiably consider that retrospective legislation of this kind was necessary to ensure that workers in particular sectors should be debarred from receiving excessively generous wage settlements.

**102.** The present case is completely different to *Camillo*, since it concerns a fundamental legal right to sue and to recover damages in respect of a justiciable wrong and in respect of which the courts always have had jurisdiction. Besides, unlike the local authority resolution at issue in *Camillo* – which applied indistinctly to *all* licence holders within the relevant local authority – s.22(1(A)(b) is a transitory provision which expressly applies only to a *specified* category of litigants, namely, those whose personal injuries claims just happened to be pending before PIAB on the date on which that sub-section happened to be commenced, namely, 24th April 2021.

**103.** Considerations of equal justice; the constitutional order's aversion to the arbitrary and its dislike of the general unfairness inherent in the retrospective application of a new law affecting the substantive entitlements of a person with a pending claim all suggest that the retrospective application of a new law in this fashion to a pending claim amounts to an attack on either the applicant's property right in respect of such a claim (Article 40.3.2º) or her derivative personal right to litigate (Article 40.3.1º). Ms. Delaney's claim belonged to a (relatively) confined cohort of outstanding claims then pending in April 2021 and, reasons of administrative and legal convenience aside, it is hard to see how such a legislative interference with this identifiable and confined category of pending cases could otherwise be objectively justified.

**104.** It may be recalled that in *Article 26 and the Health (Amendment)(No.2) Bill* the legislation had proposed retrospectively to extinguish the right of a (relatively) substantial category of affected persons to sue for recovery of illegal charges. Murray C.J. stated ([2005] 1 IR 105 at 206 that:

> "Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective measure for the purpose of avoiding an extreme financial crisis or a fundamental disequilibrium in public finances."

**105.** It is true that the effect of the application of the new law to the applicant's case is nothing as drastic as was at issue in *Health (Amendment) Bill*. This Court nevertheless endorsed what was said in *Hamilton* regarding the *prima facie* unjust nature of

retrospective legislation affecting vested rights such as a chose in action: see the comments of Murray C.J, [2005] 1 IR 105 at 196.

**106.** One could equally make a similar contention that retrospective application of this new law only to those claims which had not yet been disposed of by PIAB as of 24th April 2021 had an arbitrary quality to it. The applicant is entitled to ask why the happenstance of the date upon which her pending claim came to be determined by PIAB should be treated by the 2021 Act as essentially dispositive of her entitlement to be dealt with under the old law. To my mind, therefore, this materially different treatment required by s. 22(1A)(b) of similarly situated *old claims which had been then pending before PIAB* but whose claims were then *thereafter* subsequently assessed very differently depending on the one hand on whether that assessment had been concluded either *just before* the operative date of 24th April 2021 or *just afterwards* on the other amounts to a clear lack of equality before the law in the manner required by Article 40.1.

**107.** After all, one need look no further than to the decision of this Court in *McMahon v. Leahy* [1985] ILRM 422 for the principle that Article 40.1 is engaged by the differing legislative treatment on temporal grounds of similarly situated litigants. It is, after all, a key feature of Article 40.1 that, in the words of Henchy J., "like persons must be treated alike by the law": see [1985] ILRM 422 at 426. Here it may be recalled that the differentiation here has been introduced by legislation enacted by the Oireachtas.

**108.** Admittedly here may well have been certain litigants who felt that the then prevailing pre-guidelines levels of claim had been adversely affected by judicial decisions such as *Nolan v. Wirenski* [2016] IECA 56. They might well have contended that it was in a sense unfair that this new change in judicial attitudes to the calibration of damages for personal injuries presented by cases such as *Nolan v. Wirenski* was then applied retrospectively to their own then pending claims.

**109.** All of this is true, but it fails to take account of the fundamental difference between the common law incremental case-law method on the one hand and changes brought about by legislation on the other. One of the key limiting features of the case-law method is that under the declaratory theory of the common law, courts generally cannot hold that their decisions will have prospective effect only: see, for example, the analysis of this issue by Lord Nicholls in *National Westminster Bank plc v. Spectrum Plus* [2005] UKHL 41, [2005] 2 AC 680. Whatever about the Holmesian debate in respect of the limits of the common law method, the guidelines exercise at issue here could never have been performed by a court exercising the judicial power of the State under Article 34.1 using the common law method. To that extent there is a significant difference between incremental changes brought about by judicial decisions such as *Nolan v. Wirenski* on the one hand and the wholescale revision of personal injuries damages regime brought about by the Judicial Council's guidelines on the other. In any event, the distinction drawn here between pre- and post-24th April 2021 claimants was one drawn by a legislative provision and not by court decision.

**110.** Accordingly, as Lord Nicholls observed in *Spectrum Plus*, under the common law incremental method there will from time to time be significant changes in the law as a result of court decisions, which decisions are then applied retrospectively to all other similar pending cases. Thus, for example, the important decision of this Court on occupier's liability, *McNamara v. Electricity Supply Board* [1975] IR 1, naturally applied to all similar pending cases. Even though that decision expanded (at least to some degree) the duty of care owed by occupiers to trespassers, it was (in theory at least) simply declaratory of the law, even if the decision had also overruled earlier case-law in the process.

**111.** It is, however, different in the case of legislation which actively changes and re-moulds the law where normally at least the legislation is expressed to be prospective in character: see, e.g., s. 2(2) of the Occupiers' Liability Act 1995.This is because the Oireachtas is not, in general at least, in any sense restricted in its law-making changes. It comes back once again to the difference which we have discussed earlier in this judgment between a court decision "making" the law on the one hand and the type of law-making which is the prerogative of the Oireachtas on the other. Unlike a court, the Oireachtas is not confined simply to declaring what the law was always supposed to be. It is rather actively changing and introducing new rules. This is why, generally speaking at least, new legislation potentially affecting vested rights or the substantive law affecting pending litigation applies with prospective effect only. As cases such as *Hamilton* make clear, there is a strong presumption against such legislation and where the constitutionality of such legislation is at issue one would normally look for compelling reasons to justify such retrospectivity.

**112.** It follows, therefore, for all of these reasons and applying the principles in *Hamilton* and the *Health (Amendment) Bill*, s. 22(1A)(b) may be said to amount to an unconstitutional failure to vindicate the applicant's property right to sue in respect of a justiciable wrong, contrary to Article 40.3.2º when read in conjunction with the guarantee of equality before the law in Article 40.1. This is retrospective legislation which materially affects the applicant's existing chose in action and, factors such as administrative convenience aside, there would not appear to be any compelling reasons to justify such legislation. I would accordingly declare that sub-section to be unconstitutional.

**113.** It follows in turn that in the wake of this finding of unconstitutionality in respect of this transitional provision the applicant was entitled to have her claim assessed by reference

to the old law as it existed prior to the 24th April 2021 and that the PIAB assessment of 13th May 2021 (which applied the new law to that claim) cannot therefore be allowed to stand. The case should accordingly be remitted to PIAB pursuant to Ord. 84, r. 27(4) so that her claim may now be assessed by reference to old, pre-2021 Act law.

**Part VII – Ultimate Disposition of the Appeal**

**114.** It follows from the foregoing that I would allow the appeal. If (as I personally consider) the guidelines are simply "soft" law, then the formal assessment made by PIAB of 14th May 2021 must be quashed for all the reasons I have already stated.

**115.** If, however, the guidelines are to be regarded as a form of "hard" law in the manner determined by the majority of the Court, then I find myself compelled in these circumstances to hold that s. 7(2)(g) of the 2019 Act authorising the making of such guidelines with binding legal consequences is unconstitutional in its present form for the reasons I have just stated.

**116.** This unconstitutionality with regard to the guidelines was, however, cured by the enactment and subsequent entry into force of the 2021 Act. This legislation can only be seen as implied legislative validation of the making of the original guidelines a few weeks earlier by the Judicial Council. The guidelines have thereby been given a legally binding status and are now clothed with the mantle of democratic legitimacy which heretofore had been absent.

**117.** While the effect of the 2021 Act is to confirm and give legal effect to the existing PIAB guidelines, the transitional provisions of s. 22(1A)(b) of the 2004 Act (as substituted by s.30 of the 2021 Act) are, however, unconstitutional insofar as they require a court and, by extension, PIAB, to apply the new legally binding guidelines to the then pending (but unresolved) claim of Ms. Delaney. The application of the new legislation in this retrospective fashion to the old claim represented a material interference with her right

to sue and to recover damages in respect of a justiciable issue (itself as a chose in action and a species of property rights for the purposes of Article 40.3.2º) which has not been objectively justified. The sub-section represents an unconstitutional attack on that right within the meaning of Article 40.3.2º when read in conjunction with Article 40.1.

**118.** In these circumstances I consider that the decision of PIAB of 14th May 2021 should be quashed and the case remitted to PIAB pursuant to Ord. 84, r. 27(4) for a fresh assessment of her claim measured by reference to the old pre-2021 Act law and the pre-existing book of quantum. I would also grant a declaration formally declaring that s. 7(2)(g) of the 2019 Act is unconstitutional in its present form.

**119.** I am authorised to state that Whelan J. is in full agreement with this judgment and with the orders which are thereby proposed.