



**AN CHÚIRT UACHTARACH**

**THE SUPREME COURT**

**S: AP:IE: 2022:0000 100**

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

**BETWEEN/**

**BRIDGET DELANEY**

**APPLICANT/APPELLANT**

**- AND -**

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

**RESPONDENTS**

**Judgment of Ms. Justice Faherty dated the 9<sup>th</sup> day of April 2024**

1. At the heart of this case is the empowerment of the Judicial Council (hereinafter “the Council”), pursuant to s.7(2)(g) of the Judicial Council Act 2019 (“the 2019 Act”), to adopt guidelines in respect of personal injuries awards, and the question which inevitably arises from such empowerment, namely whether it is constitutionally permissible for the

judiciary to be conferred with a power to adopt guidelines that have normative effect. It is common case that the Council adopted personal injuries guidelines (hereinafter “the Guidelines”) on 6 March 2021 and that, following changes made after the adoption of the Guidelines to the provisions of the Personal Injuries Assessment Board Act 2003 (“the 2003 Act”), the Personal Injuries Assessment Board (“PIAB”) then assessed Ms. Delaney’s application pursuant to the Guidelines. Consequent on that assessment, Ms. Delaney commenced the within proceedings.

2. At the outset I should say that I have had the benefit of reading the judgment of Collins J. in draft and I gratefully adopt the background to these proceedings which he sets out and his comprehensive review of the relevant legislation and case law governing the assessment of damages for personal injuries. Most helpfully, he has categorised the issues arising in this appeal as falling under eight headings, and I also gratefully adopt this methodology. I should say at this juncture that I agree with Collins J.’s conclusions in respect of Issue 3- *“the Legislative Power Issue”*, Issue 4- *“the Vires Issue”* and Issue 5- *“the Judicial Power Issue”*. As regards Issue 2- *“the PIAB Issue”*, I also concur with Collins J.’s reasoning that the requisite assessment in this case, for the purposes of the 2003 Act, was made on 13 May 2021. I would also support his rejection of the alleged failure of PIAB to afford the appellant fair procedures. The remaining issues identified by Collins J., namely Issue 1- *“the Guidelines Issue”*, Issue 6- *“the Judicial Independence”*, Issue 7- *“the Personal Rights Issue”* and Issue 8- *“the Confirmation Issue”* are addressed below.

3. My focus in this judgment is largely on *“the Judicial Independence Issue”*. Of course, any consideration of this issue, and indeed Issue 3- *“the Legislative Power Issue”* and Issue 5- *“the Judicial Power Issue”* (to which I briefly advert in this judgment) must, of necessity, commence with a consideration of the status and effect of the Guidelines.

While I agree with a lot of what Collins J. has to say about the Guidelines, I wish, however, to make some observations on “*the Guidelines Issue*” to emphasise that I take a different view to that of Collins J. on the actual scope that is available to a court or judge to depart from the Guidelines, and to put into context the entirely different view I have taken in respect of Issue 6.

4. I should say at this juncture that I have also had the opportunity of reading the judgment of Haughton J. in draft and I entirely agree with his conclusions (which align with my own) as to the scope to depart from the Guidelines, and on the judicial independence issue.

### **The Guidelines**

5. In his judgment, Haughton J. describes the Guidelines as representing “*a wholesale and systematic change in the substantive assessment of damages for personal injury*” and that “*departure from a Guideline figure will be difficult to justify*”. This, in my view, is an apt distillation of the effect of the Guidelines.

6. In short, with the advent of the Guidelines, what has occurred is a “sea change” from what went before in the assessment of general damages for personal injuries, be that awards as made by the courts, or assessments by PIAB. This is put into stark relief by the present case. Under the old regime, for the injury the appellant, Ms. Delaney, sustained, the Book of Quantum indicated that for “*minor*” fractures of the foot (as defined in the Book of Quantum), the applicable range of general damages was between €18,000 and €34,900. The range for “*moderate*” fractures (again, as defined in the Book of Quantum) was €34,000-€61,200. In contrast to those figures, the assessment made in respect of the appellant on 14 May 2021 by PIAB, having regard to the Guidelines, was in the sum of €3000, which was in fact the outer range of damages identified in the Guidelines for a “*minor*” ankle injury (the range going from €500 to €3000), the PIAB assessors taking the

view that Ms. Delaney had sustained a minor injury with substantial recovery achieved within six months.

7. Of course, it must be remembered that Ms. Delaney has rejected PIAB's assessment, and having obtained the requisite authorisation from PIAB, she has commenced proceedings for damages for personal injuries against the alleged tortfeasor, Waterford City and County Council, which have yet to be heard and determined, including as to whether, in the first instance, Waterford City and County Council bear any liability for the injury Ms. Delaney sustained on 12 April 2019. When those proceedings come on for hearing, and assuming Waterford City and County Council is found to bear liability (either in whole or in part) for the plaintiff's injury, it will then fall to the court to assess the damages to be awarded to Ms. Delaney, including the amount to be awarded for general damages. In assessing general damages, the court, like PIAB, is bound to "*have regard to*" the Guidelines.

8. The "sea-change" to which I have just adverted has normative effect, in my view. This is evidenced, in large part, both by the contents of the Guidelines themselves (of which more anon) and the statutory mechanisms which provided for their ultimate adoption by the Council. The statutory process may be summarised as follows:

- Pursuant to s. 18(1) of the 2019 Act, the Oireachtas mandated the Council to establish "the Personal Injuries Guidelines Committee" ("the Committee") whose mandatory function was to prepare personal injuries guidelines in accordance with s.90 of the 2019 Act. Pursuant to s.90(3)(d), in preparing draft guidelines, the Committee was mandated to have regard to a number of matters, including "*the need to promote consistency in the level of damages awarded for personal injuries*".

- The draft guidelines were then required to be submitted to the Board for review following which, as mandated by s.7(2)(g) of the 2019 Act, they were required to be adopted by the Council. Thus, as the scheme provided for in the 2019 Act envisaged, s.7(2)(g) purports to give legal effect to personal injury guidelines adopted by the Council.
- Once such guidelines were adopted by the Council, s. 99 of the 2019 Act, as originally enacted (but not yet commenced), provided, *inter alia*, for the amendment of s. 22 of the Civil Liability and Court Act 2004 (“the 2004 Act”) so as to provide that a court shall “*have regard to*” the Guidelines and that where a court departs from the Guidelines, it must give reasons (s.99(1)). Section 99(2) of the 2019 Act, as originally enacted, provided that the provisions of s.99(1) “*shall not operate to prohibit a court from having regard to matters other than those personal injuries guidelines when assessing damages in a personal injuries action*”. Section 99(2) was referred to in the appeal as “*the Proviso*”.
- On 6 March 2021, the Council adopted the draft guidelines (the Guidelines) which had been produced by the Committee and which the Board had approved without modification. At this stage, s.99 of the 2019 Act had not yet been commenced.
- On 27 March 2021, the Oireachtas enacted the Family Leave and Miscellaneous Provisions Act 2021 (“the 2021 Act”). Section 30(a) of the 2021 Act amended the as-yet uncommenced s. 99 of the 2019 Act by removing “*the Proviso*” as far as cases covered by the Guidelines were concerned. It provided, however, that in cases which were commenced prior to the coming into force of s.99, a court in assessing damages “*shall have regard to the Book of Quantum*” and that “*the Proviso*” would continue to operate in respect of this finite number of cases.

- Section 30(a) of the 2021 Act came into operation on 24 April 2021 and with it the amended s.99 of the 2019 Act, the result being that s. 22(1) of the 2004 Act now reads as follows:

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

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

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

- Prior to the coming into force of the 2021 Act, s. 22(1) of the 2004 Act, as enacted, obliged a court to “*have regard to the Book of Quantum*”, but there was no statutory obligation on a court to state its reasons for departing from the Book of Quantum.
- The 2021 Act also amended the 2003 Act, so that now, pursuant to s. 20(5) of the 2003 Act, PIAB is also obliged to have regard to the Guidelines and where it departs from the Guidelines, it must also state the reasons for such departure and include those reasons in its assessment in writing.

9. In light of the statutory framework just referred to, the processes provided for thereunder, and the contents of the Guidelines themselves (discussed below), there can, to my mind, be no suggestion that the Guidelines do not have normative character, or that they constitute some sort of “*soft law*” i.e., requiring only cursory attention by a judge, then to be departed from at will once some reason is stated. In effect, it is the making of the

Guidelines by the Council on 6 March 2021 pursuant to s.7(2)(g) that has normative effect, and it is this that effectively changes the law regarding the quantum of damages.

Furthermore, as is clear from s. 22(1) of the 2004 Act as it now reads, the obligation on a court (and indeed PIAB pursuant to s.20(5) of the 2003 Act) is to “*have regard to*” the Guidelines and when departing from the Guidelines to give reasons for so doing. This reinforces the Guidelines’ normative effect.

**10.** As far as a court being bound to “*have regard to*” is concerned, there can be no real argument in this appeal but that the phrase “*have regard to*”, as it appears in s.22(1)(a) of the 2004 Act, must be afforded the meaning which the case law considered by Collins J. in his judgment has ascribed to those words. Therefore, I agree with Collins J.’s conclusion that given the meaning of “*have regard to*” as derived from the relevant case law, it must be taken that the obligation on a court to “*have regard to*” does not mean that a court has to apply the Guidelines in all cases.

**11.** It is also, in my view, uncontroversial to say (subject to certain qualifications, to which I allude below, and when discussing “*the Judicial Independence Issue*”) that, *as a matter of principle*, a court is not obliged to comply with the general damages figures in the Guidelines provided, however, the court has regard to the Guidelines and gives its reasons for departing from the Guidelines. As Collins J. points out, s.22(1) of the 2004 Act does not purport to confer a discretion on the court to depart from the guidelines provided for in s.7 of the 2019 Act, rather, the power of the court to do so is taken as a given (as is clear from the provisions of s. 22(1)(b) of the 2004 Act).

**12.** Therefore, in respect of Issue 3- “*the Judicial Powers Issue*”, for all the reasons Collins J. sets out, I agree with him that imposing a mandatory obligation on judges to “*have regard to*” the Guidelines does not, contrary to the appellant’s contention, amount to an impermissible usurpation of judicial power. Furthermore, for the reasons he sets out,

I agree with the view expressed by Collins J. that the removal or disapplication of “*the Proviso*” has no interpretative significance and has no bearing on the judicial power issue.

**13.** The real debate in this case, insofar as the obligation on a court to “*have regard to*” the Guidelines is concerned, centres not on the power of a judge to depart from the Guidelines, but rather on what might be the identifiable reasons upon which a judge might depart, and the basis upon which his or her reasons for departure from the Guidelines would likely be upheld or set aside by an appellate court in the event of an appeal.

**14.** It is axiomatic, to my mind, that in bringing into force on 24 April 2021 the Guidelines adopted or promulgated by the Council on 6 March 2021, the Oireachtas intended, in respect of an injury covered by the band of general damages provided for in the Guidelines as attributable to that injury, that an award of general damages within the relevant band would be, to borrow phraseology used by Collins J. at para. 128 of his judgment, the “*presumptive*” starting point for a court when assessing damages. Indeed, as Collins J. aptly observes, “[*i*]n many if not most cases, this will be the end point”. This being the case, and notwithstanding, as I have already indicated, that I agree for the reasons Collins J. sets out that the *power* of the judge to depart from the Guidelines has not been fettered by the Oireachtas (the legislation specifying only that the court should “*state the reasons*” for departing from the Guidelines), I am of the view that the actual *scope* available to a court in any given case to look beyond the Guidelines is rather more limited than Collins J. envisages. This limited nature of a court’s scope for departure underpins the normative effect of the Guidelines, in my view.

**15.** As I again emphasise, this is not to say that a court is precluded by law from departing from the Guidelines (subject to the requirement to give reasons), and that a court will not do otherwise but strive to achieve a “*fair decision*” or a “*just result*” (as per Denham J. in *Hanley v. Minister for Defence* [1999] 4 I.R. 392). Nevertheless, in my view,



the combined effect of the recalibration of general damages awards effected by the Guidelines, together with the substantive requirement of s.22(1) of the 2004 Act that a court must “*have regard to*” the Guidelines and if departing from them give reasons, is that the scope for a court to look beyond the Guidelines has been considerably circumscribed.

**16.** As all parties here essentially agreed, general damages awards for personal injuries have been significantly recalibrated by the Guidelines (and, indeed, largely recalibrated downwards from what was previously provided for in the Book of Quantum).

**17.** Whilst I accept entirely that the 2019 Act, when mandating the Council to produce personal injuries guidelines, did not call for a recalibration downwards from the bands of general damages provided for in the Book of Quantum, it must, I believe, be taken to be the case that the Oireachtas has now sanctioned this downward trend by virtue of the fact that when the Guidelines came into force on 24 April 2021, the Oireachtas surely had knowledge of the contents of the Guidelines, they having been adopted by the Council on 6 March 2021. All this serves, in my view, to underscore the “sea-change” in the level of general damages awards in personal injuries actions which the Guidelines have brought about. Indisputably, therefore, the recalibration which has occurred in respect of the various bands of general damages now proscribed in the Guidelines limits the capacity of the courts to look beyond the Guidelines to any significant regard, when assessing general damages.

**18.** As Haughton J. observes in his judgment, “*the Guidelines change the landscape for the assessment of damages*”, thus, there can be no basis for a court “*going backwards in time*” by relying on pre-Guidelines case law given that, as the Report of the Committee shows, the courts’ pre-Guidelines jurisprudence was part of the matters to which the Committee had regard when it prepared draft guidelines. Indeed, the Committee was

mandated pursuant to s.90(3)(b) of the 2019 Act to have regard to “*the level of damages awarded for personal injuries by*” *inter alia* “(i) *courts in the State*”. The Board of the Council were not so mandated, the section providing only that the level of damages which courts in the State have awarded was something to which the Board “*may*” have regard. As we know, the Board approved the draft guidelines prepared by the Committee without modification, prior to their submission to the Council for adoption.

**19.** The upshot of all of this is that since the courts’ pre-Guidelines case law comprised part of the prescribed statutory criteria to which the Committee was to have regard in drafting guidelines it must be presumed that the award amounts prescribed in the various bands as they appear in the Guidelines encapsulate the pre-Guidelines jurisprudence.

**20.** Moreover, the Guidelines are already expressed to encapsulate the principle of proportionality, by dint of the provision made in the Guidelines for, firstly, the scope within the different bands for making different awards, presumably to take account of factors that require a higher or lower award within the relevant band, and, secondly, proportionality by reference to the cap on awards, presently standing at €550,000. Indeed, there is reference in the Introduction to the Guidelines to the necessity for awards to be “*proportionate to the injuries sustained*” and that awards “*must also be proportionate when viewed in the context of awards of damages commonly made in cases involving injuries of a greater or lesser magnitude*”, the Guidelines citing *MN v. SM* [2005] IESC 17, [2005] 4 I.R. 461 and *Morrissey v. HSE* [2020] IESC 6.

**21.** Given that pre-Guidelines awards have already been factored into the figures provided for in the Guidelines, together with the fact that those figures must be read as encapsulating the principle of proportionality, this begs the question, in a case where a judge who has had regard to the Guidelines but who nevertheless is minded to depart from them on the basis that an award within the Guidelines would not be consistent with the

principle of proportionate compensation for the injury sustained, as to what or where a judge is to turn, in order to justify a departure from the Guidelines. This question arises in circumstances where, as I have said, the path upon which a judge would ordinarily have departed has been substantially circumscribed by the incorporation of the pre-existing case law (which presumably includes the award figures discussed in decisions of the Court of Appeal in cases such as *Payne v. Nugent* [2015] IECA 268; *Nolan v. Wirenski* [2016] IECA 56, [2016] 1 I.R. 461 and *Shannon v. O'Sullivan* [2016] IECA 93) into the Guidelines).

22. In my view, there is no easy answer to this question, and it may be that time will tell, by which I mean that in due course, there will be a body of case law in respect of this new personal injuries regime from which established principles will emerge as to what constitutes a reasonable or proportionate basis for departing from the Guidelines.

23. In his judgment, Collins J. opines that in a given case, if a judge were to form a view that there was no reasonable proportion between the award indicated by the Guidelines on the one hand, and, on the other, the award the court would consider appropriate to make, if making that assessment without reference to the Guidelines, then the court would clearly be entitled to depart from the Guidelines. Collins J. opines that a court may look to previous awards by the courts but not those which predate the establishment of the Court of Appeal given that it is commonly accepted that the jurisprudence of that Court has had a downward effect on the level of general damages in personal injuries actions. While there is no doubt about the entitlement of a court to depart from the Guidelines, as already expressed I take a different view to that of Collins J. on the actual scope available to a court to depart from the Guidelines, having regard to the very architecture of the Guidelines themselves, with their already built in bands of damages formulated on the principle of proportionality, both within the relevant bands of damages and by reference to

the cap on general damages. I agree with Haughton J. that it is difficult to conceive how a court could use a greater bandwidth or greater value set out in the Book of Quantum or justify departure by reference to a higher pre-Guidelines court award, in circumstances where pre-Guidelines court awards have already been factored into the Guidelines by dint of the requirement on the Committee to take account of existing Irish case law. It will also be recalled that the Committee pointedly decided not to have regard to the Book of Quantum. For the above reasons, therefore, I share Haughton J.'s view that the Guidelines "*are substantive new norms from which there is very limited scope for departure*".

24. I advert to all of the foregoing for the purposes of reinforcing the extent to which the adoption of the Guidelines by the Council (and their subsequent coming into force on 24 April 2021) has changed the legal landscape as regards the assessment of general damages in personal injuries cases which, in my view, has implications when I come to consider, under "*the Judicial Independence Issue*", the role imposed by the 2019 Act on the judiciary (albeit *qua* Council) in the recalibration of awards of general damages for personal injuries.

25. However, before looking at "*the Judicial Independence Issue*", it is necessary to turn briefly to the subject of Issue 3, namely, whether the relevant provisions of the 2019 Act effect an impermissible delegation of legislative power to the Committee, the Board and/or the Council in light of Article 15.2 of the Constitution.

### **The Legislative Power Issue**

26. The appellant's contention is that certain of the provisions of the 2019 Act involved the delegation of law-making powers to the Committee, the Board and Council and as such is repugnant to Article 15.2 of the Constitution. The State disagrees. It argues, firstly, that Article 15.2.1 was not engaged on the basis that the Guidelines were not the product of any power of a legislative nature. Secondly, it says that even if the Guidelines do constitute

legislation, there were “*ample principles and policies*” set out in the 2019 Act (in particular in s. 90) such that there was no unlawful delegation of a power to legislate.

27. In the first instance, I agree with Collins J. that since the Guidelines have normative effect, they cannot escape review pursuant to Article 15.2.1 of the Constitution. I also agree with his conclusion, following such review, that s. 90(3) of the 2019 Act does not overstep the powers vested in the Oireachtas to legislate given that the subsection contains sufficient “*principles and policies*” such as prevented the delegation of excessive legislative power to the Committee, the Board, and the Council. All of that being said, there are, however, “two sides to the coin” as far as “*the Legislative Power Issue*” is concerned and my conclusion that there was no unlawful delegation of a power to legislate represents only one side of the coin. Thus, the focus must turn to the other side of the coin, which is whether it is constitutionally permissible for s.7(2)(g) of the 2019 Act to designate the Council as the entity to be charged with the adoption of personal injury guidelines which have normative effect.

28. Here, a central tenet of the appellant’s case relates not only to her argument that the Oireachtas unlawfully divested itself of the power of making laws, but that it also breached the separation of powers and/or blurred the requisite divide as between the judiciary and the legislature by imposing on the judiciary (albeit *qua* Council) the function of adopting the Guidelines (in the process turning the Council into a law-making assembly) and, thereby, trespassed impermissibly upon the independence of the judiciary. With this argument in mind, I turn now to “*the Judicial Independence Issue*”.

### **Judicial Independence**

29. Ms. Delaney contends that what the Council was mandated to do pursuant to s.7(2)(g) of the 2019 Act constitutes an interference with the institutional independence of the judiciary. Invoking Articles 15.2.1, Article 34 and Article 35.2 of the Constitution, she

advocates that the key point to take away from a textual analysis of these provisions is that *“the framers [of the Constitution] expressly intended that there should be a bright or at least a clear dividing line between the legislative and judicial powers”*. This, the appellant says, means that the framers intended that the legislative and judicial powers *“should not merge into one another”* and that *“a clear motive was to prevent judges from being politically beholden to the general public”*. The core submission made on behalf of the appellant is that insofar as the 2019 Act requires the adoption of the Guidelines by majority vote of judges, and for the judges to be bound by the result in the exercise of their judicial office, is in direct conflict with the principle of judicial independence. Mr. Murphy SC, for Ms. Delaney, described the process of *“conscripting”* the entire judiciary for the process of adopting personal injuries guidelines as *“unique”* which did not appear *“to find expression elsewhere”* the consequence of which, he submitted, was that *“we immediately have a dissonance of a very unusual nature, with the appearances that judges are being asked to do something which is non-judicial but has a legislative effect, which has an impact on the world in which they operate...”*

**30.** In her written submissions, the appellant describes the 2019 Act as amounting to an unprecedented intermingling of the judiciary with the other branches of Government involving, as it did, the requirement for the judiciary (albeit as members of a corporation i.e. the Council) to deal with political, social and economic issues which, the appellant says, are entirely outside of the normal remit and expertise of the judiciary. Citing Keane C.J. in *T.D. v. Minister for Education* [2001] 4 IR 259 (at p. 288) that *“it is not the function of the courts to make an assessment of the validity of the many competing claims on national resources”*, the appellant submits that by virtue of being mandated to adopt the Guidelines, the Council *“has been adjudicating on the fairness or otherwise of the manner in which courts in the State have been administering the law”*.

31. The State submits that the appellant's reliance on *T.D. v. Minister for Education* is inapposite since what was done by the Council on 6 March 2021 did not involve judges, much less the courts, assessing the "*competing claims on national resources*". While I agree with the State that the context here is different from that which was at issue in *T.D. v. Minister for Education*, there is nevertheless force in the argument being made by the appellant that the judiciary (albeit voting as a corporation) have approved the Guidelines by a simple majority vote and thus are, in the words of the appellant, "*making the law in the expectation all Judges with adhere to it even where they disagree with it*".

32. The State says that the gravamen of the appellant's case in relation to "*the judicial independence issue*" is the proposition that the Constitution somehow prohibits other functions being conferred upon judges apart from the administration of justice, which, the State says, is not the case. To my mind, the State's view of the appellant's argument is unduly restrictive, when one has regard to the mandatory nature of s.7(2)(g) of the 2019 Act.

33. The importance of the principle of judicial independence cannot be overstated. In *Curtin v. Dáil Éireann* [2006] 2 IR 556 (which is relied on by the appellant), this Court invoked Article 6 of the Constitution in stressing the importance of the principle, stating (at para. 96):

*"It is a principle designed to guarantee the right of the people themselves from whom, as Article 6 proclaims, all powers of government are derived, to have justice administered in total independence free from all suspicion of interference, pressure or contamination of any kind".* (emphasis added)

34. Again, in its submissions, the State takes issue with the appellant's reliance on *Curtin* given that the appellant is not asserting that the adoption of the Guidelines amounts to the administration of justice. While the State is undoubtedly correct in its submission that no

case has been (or could be) made that the adoption of the Guidelines amounted to the administration of justice, in my view, the words used by the Court in *Curtin* underscore the necessity for judicial independence (whether that be the independence of the individual judge or the institutional independence of the judiciary) to remain insulated from contamination of any kind, whatever its source, and irrespective of whether such contamination is intentional or otherwise.

**35.** As this Court has said in *Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34:

*“The Court readily accepts that judicial independence is a foundational constitutional requirement, ‘the lynchpin of the constitutional order’ as it was characterised by O’ Donnell J (as he then was) in *Zalewski v Adjudication Officer* [2021] IESC 24, [2022] 1 IR 421 at para. 37.”* (para. 163)

**36.** There, the Court emphasised that judicial independence encompasses and protects internal independence (judicial impartiality) and *“encompasses and protects the independence of judges and courts from external interference”*. As the Court explained,

*“a core element of external independence is that judges should be free to make decisions in individual cases without being subject to actual or perceived external pressures or influence (adjudicative independence).”*

**37.** Importantly, the Court also recognised that *“the principle of judicial independence is broader in scope”* than the principles of judicial impartiality and judicial independence. It quoted the Canadian Supreme Court in *Valente v The Queen* [1985] 2 SCR 673 in emphasising that judicial independence also encompasses *“a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees”* and involves *“the institutional independence of the Court or Tribunal over which [a judge] presides, as reflected in its institutional or administrative*



*relationships to the executive and legislative branches of Government*”, “*an essential condition*” of which is, again as described by the Canadian Supreme Court, “*the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function*”.

**38.** As is well rehearsed in this case, it is the institutional independence of the judiciary which the appellant contends has been impugned by the provisions of the 2019 Act, an argument which, in my view, has considerable force for reasons I will explain in due course.

**39.** Both the appellant and the State rely on *Mistretta v. US* 48 U.S. 361 (1989), in aid of their respective arguments on the judicial independence issue. What was under challenge in *Mistretta* was the Sentencing Reform Act 1984 which established the United States Sentencing Commission (“the Sentencing Commission”) as an independent body “*in the judicial branch*” with powers to promulgate binding sentencing guidelines. The Act made the Sentencing Commission’s guidelines binding on the courts, although it preserved for the judge the discretion to depart from the guidelines applicable to a particular case if the judge found an aggravating or mitigating factor present that the Sentencing Commission did not adequately consider when formulating the guidelines. The argument advanced by the petitioner, *Mistretta*, was that the Sentencing Commission was constituted in violation of the separation-of-powers principle, and that Congress had delegated excessive authority to the Commission to structure the guidelines.

**40.** The Opinion of the Court was delivered by Blackmun J. Addressing first the “*Delegation of Power*” argument, he opined that the non-delegation of powers principle and the non-delegation doctrine did not prevent Congress from obtaining the assistance of its “*coordinate Branches*” (p.372). Moreover, the Court had no doubt that Congress’

delegation of authority to the Sentencing Commission was “*sufficiently specific and detailed to meet constitutional requirements*” (p. 374).

41. Next addressing *Mistretta*’s argument that the Act violated “*the constitutional principle of ‘separation of powers’*” and that the legislation in issue suffered from two dangers which had been identified in earlier jurisprudence, namely (1) “*that the Judicial Branch neither be assigned nor allowed ‘tasks that are more properly accomplished by [other] branches’*” and (2) “*that no provision of law ‘impermissibly threatens the institutional integrity of the Judicial Branch’*” (p.383), the Court discerned “*no separation – of – powers impediment to the placement of the Sentencing Commission within the Judicial Branch*” (p. 390). As the Court noted, “*the sentencing function long has been a peculiarly shared responsibility among the Branches of Government, and has never been thought of as the exclusive constitutional province of any one Branch.*” (p. 390)

42. The Court’s reasoning in *Mistretta* was premised in part on the role that the judiciary had always played in sentencing, and its historical role in formulating court rules. As Blackmun J. put it:

“*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 Acts. Such guidelines, like the Federal Rules of Criminal and Civil Procedure, are court rules - rules, to paraphrase Chief Justice Marshall’s language in Wayman, for carrying into execution judgments that the Judiciary has the 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.*" (p. 391)

43. Blackmun J. did not believe that the significantly political nature of the Sentencing Commission's work rendered unconstitutional its placement within the Judicial Branch. He found that locating the Commission within that Branch did not pose a threat of undermining the integrity of the Branch or of expanding the powers of the judiciary beyond constitutional bounds. Whilst the Commission was located in the Judicial Branch, *"its powers are not united with the powers of the Judiciary in a way that has meaning for separation – of – powers analysis"*. The Sentencing Commission was not a court, did not exercise judicial power and was not controlled by or accountable to members of the Judicial Branch. Moreover, the Commission was fully accountable to Congress.

44. Blackmun J. was also satisfied that the placement of the Sentencing Commission in the Judicial Branch had not increased the Branch's authority. He stated:

*"Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that come before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entire individualized sentencing determinations."* (p. 395)

45. Accordingly, Congress could not be said to have *"aggrandized"* the authority of the Judicial Branch or to have deprived the *"Executive Branch"* of a power it once possessed. That being the case, Blackmun J. considered that what Mistretta's argument came down to

was that the Judicial Branch was inevitably weakened by its participation in policy making. That argument too was rejected. Blackmun J. found that the Sentencing Guidelines, although substantive, did not involve a degree of political authority inappropriate for a non-political Branch. As he put it:

*“Although the Guidelines are intended to have substantive effects on public behaviour (as do the rules of procedure), they do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations - impose sentences within the broad limits established by Congress”.* (p. 396)

46. In *Mistretta*, it was also claimed that requiring at least three federal judges to serve on the Sentencing Commission, and that those judges to share their authority with non-judges, undermined the integrity of the judiciary. This argument too did not find favour with the Court, Blackmun J. noting that the historical practice after ratification of the US Constitution indicated that the framers of the Constitution themselves did not read the Constitution as forbidding extra-judicial service by federal judges. Myriad examples of judges undertaking non-judicial functions at the behest of Government were cited by Blackmun J. and his conclusion was that:

*“In light of the foregoing history and precedent, we conclude that the principle of separation of powers does not absolutely prohibit Article III judges from serving on commissions such as that created by the Act. The judges serve on the Sentencing Commission not pursuant to their status and authority as Article III judges, but solely because of their appointment by the President as the Act directs. Such power as these judges wield as Commissioners is not judicial power; it is administrative power derived from the enabling legislation. ... In other words, the Constitution, at*

*least as a per se matter, does not forbid judges to wear two hats; it merely forbids them to wear both hats at the same time.*” (p. 404)

47. The Court also rejected the argument that the requirement that at least three members of the Sentencing Commission be federal judges diminished the independence of the judiciary, noting that service on the Commission for any particular judge was voluntary. Blackmun J. considered that the service of such judges on the Sentencing Commission would have a constitutionally significant practical effect on the operation of the Judicial Branch. He saw no reason why service on the Commission should result in widespread judicial recusals, stating: *“That federal judges participate in the promulgation of guidelines does not affect their or other judges’ ability impartially to adjudicate sentencing issues.”* (pp. 406-407)

48. The next issue addressed was Mistretta’s argument that the judiciary’s *“entanglement”* in the political work of the Commission *“undermines public confidence in the disinterestedness of the Judicial Branch”*, an argument which troubled the Court. It is easy to see why this was so. As Blackmun J. noted:

*“While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action.”* (p. 407)

49. Having so observed, and that *“it is a judgment that is not without difficulty”*, Blackmun J. nevertheless concluded that the participation of federal judges on the Sentencing Commission *“does not threaten, either in fact or in appearance, the impartiality of the Judicial Branch.”* The Court explained its conclusion, as follows:

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

**50.** Blackmun J. went on to state:

*“Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest. While we have some reservation that Congress required such a dialogue in this case, the Constitution does not prohibit Congress from enlisting federal judges to present a uniquely judicial view on the uniquely judicial subject of sentencing.”* (p. 408)

**51.** Here, the State relies in no small measure on the fact that the subject matter of the function ascribed to the Council under s.7(2)(g) aligns with the day-to-day business of judges. Mr McCullagh SC, for the State, urged on this Court that what was engaged in by the Sentencing Commission in *Mistretta*, which he described as a very similar body to the Council here, “*was thought to pass muster by the U.S. Supreme Court*”. He submitted that that the central point made by the US Supreme Court in *Mistretta* was that the assignment

regarding sentencing carried out by the Sentencing Commission was found not to undermine the integrity of the “*Judicial Branch*” because it was close and proximate to the everyday business of the courts. That, Mr. McCullagh argued, is also the case here. He surmised (in fairness in answer to a question from the Court) that the Oireachtas may have chosen to involve the Council on the basis that the task of adopting the Guidelines should be as closely associated with the judiciary as it reasonably could be given the Guidelines’ association with the day-to-day business of judges. He thus asserted that when one has regard to the various features of the 2019 Act, the requirement of the adoption of the Guidelines by the Council “*clearly put [the judges] on the correct side of any dividing line*” in that the Council were “*performing a function in which it had particular expertise*”, gleaned from the experience of individual judges when performing their day-to-day business as judges.

**52.** However, as indeed acknowledged Mr. McCullagh, there is an obvious (and I would say crucial) difference between the present case and *Mistretta*. The legislation under consideration in *Mistretta* did not involve the participation of the entire judicial body but rather provided for the creation of a Sentencing Commission comprising seven members, three of whom were required to be federal judges.

**53.** Here, the relevant provision of the 2019 involves the entire judiciary: there is a compulsory obligation imposed on the judiciary (*qua* Council) to adopt the Guidelines. For the first time ever, pursuant to the 2019 Act, the judiciary are given a collective “*cloak*”, without any requirement for consultation or consent in the taking on of the task, to adopt personal injuries guidelines which significantly recalibrate the existing law. By way of contrast, in *Mistretta*, participation in the Sentencing Commission was required to be voluntary and indeed as Blackmun J. observed: “*The Act does not conscript judges for the Commission*”. In the present case, the Council’s participation in the statutory process

provided for the adoption of the Guidelines is far from voluntary: in essence, by virtue of the provisions of s.7(2)(g), the Council was, essentially, “conscripted” to adopt the Guidelines. As Mr. McCullagh fairly acknowledged, the voluntary (and I would say entirely necessary) element that permeated the reasoning in *Mistretta* was “*not present in this case*”. Mr. McCullagh in his oral submissions sought to distinguish the voluntary element evident in *Mistretta* (and indeed in Australian jurisprudence that I will come to) on the basis that those cases considered that it would be inappropriate to oblige a *single* judge or a number of judges to perform an individual task, whereas the situation here was different involving as it did “*a collective appointment*”. Frankly, I fail to see the logic of the distinction that is sought to be drawn; if it is inappropriate to statutorily oblige a single judge or a group of judges to perform a non-judicial task, then it must follow that to seek to compel the entire judiciary to engage in such a task is equally inappropriate.

**54.** As Blackmun J. put it in *Mistretta* when reviewing the participation of three federal judges on the Sentencing Commission, “[*t*]he ultimate inquiry remains whether a particular extra judicial assignment undermines the integrity of the Judicial Branch”.

Appropriating that “*ultimate inquiry*” for the purposes of the present case, it seems to me that the mandatory nature of the function imposed on the Council by s.7(2)(b) of the 2019 Act falls to be viewed through the prism where, effectively, the Council, by being required to adopt “*draft personal injuries guidelines*” were making a policy or quasi-policy decision in the context of a wider public debate about the appropriate level of damages to be awarded in personal injury actions. It hardly needs saying that general damages awards in personal injuries cases have engendered considerable public debate in recent years. Effectively, judges, *via* the Council, were required to engage, without their consent, in a legislative or quasi-legislative process against the backdrop of such public debate.



55. Thus, I cannot accept the State's argument that there is no impairment of the institutional independence of the judiciary just because the function imposed on the Council under s.7(2)(g) aligns with the day-to-day business of judges. That, in my view, is not sufficient to counteract what was in effect the non-consensual nature of the judiciary's participation on 6 March 2021 in adopting the Guidelines, or, more pertinently, the statutory mandate imposed on the judiciary as a collective to adopt the Guidelines. At the risk of repetition, *Mistretta*, unlike the situation here, did not involve all the judiciary, or their collective institutional independence.

56. Moreover, in my view, the involvement of the entire judiciary (albeit *qua* Council) in the events of 6 March 2021 has all the look of a *legislating* Council. While, like Collins J., I agree that there were sufficient "*principles and policies*" in the 2019 Act such that there was no delegation of excessive power by the *Oireachtas* to the Committee, Board and Council, as would otherwise have infringed Article 15.2.1 of the Constitution from the perspective of the *legislative* arm of the State, I consider that a constitutional dilemma of a different order arises here, namely that which stems from the blurring of the judicial and legislative functions which, in my view, s.7(2)(g) has brought about by mandating the judiciary (albeit *qua* Council) to "*adopt*" the Guidelines. Looking from the outside in on 6 March 2021, the Council had all the appearance of (and most likely was viewed by the public) as a legislative assembly. As the appellant's counsel, Mr. McDonagh SC, pointed out, the public's reasonable perception of the events of 6 March 2021 was that the Council, *qua* legislative or semi-legislative assembly (albeit cloaked, in Mr. McDonagh's words, with "*a judicial carapace*"), had recalibrated general damages in personal injuries cases. There is, thus, considerable force in the appellant's contention that the mandatory requirement imposed on the Council to adopt the Guidelines has impermissibly blurred the

boundaries between the judiciary and the legislature and has contaminated the “*disinterestedness of the Judicial Branch*” in public affairs.

**57.** The appellant also argues that over and above the crossing of the boundaries between the judiciary and the legislature that had occurred, there was the added concern that many of the judges who (*qua* members of the Council) were obliged to adopt the Guidelines are the very people who, in their individual judicial capacity, will have to decide the quantum of general damages in personal injury actions that come before them. While I do not consider the appellant’s argument in this regard to be as robust as her crossing the boundaries argument given my agreement with the conclusions reached by Collins J. that there has been no infringement or fettering of judicial power, there is, nevertheless, in my view, some force in the argument she makes. As I have previously adverted to, the path upon which a judge assessing general damages would ordinarily have trod prior to the adoption of the Guidelines has been considerably circumscribed by the recalibration of general damages which the adoption of the Guidelines by the Council has brought about.

**58.** Thus, while the Guidelines do not usurp judicial power since they may be departed from subject only to the requirement to give reasons (and which, I accept, respects the ultimate *adjudicative* independence of the judge or court making the assessment), that does not, in my view, abrogate or alleviate what I consider to be an impermissible intermingling of the boundaries between the legislature and the judiciary, by virtue of the mandatory function imposed on all judges under s.7(2)(g) of the 2019 Act. It is also no comfort, in this regard, that s.93 of the 2019 Act provides that nothing in the Act is to be construed as interfering with “(a) *the performance by the courts of their functions, or (b) the exercise by a judge of his or her judicial functions*”. The independence of *individual* judges in the exercise of their day-to-day business as judges is not the issue.

**59.** What is in issue here is the statutory imposition on the judiciary as a collective of the function of adopting personal injuries guidelines. As the US Supreme Court in *Mistretta* opined, the judiciary's reputation for impartiality and non-partisanship "*may not be borrowed by the political Branches to cloak their work in the neutral colours of judicial action*" (p. 407). Again, at the risk of repetition, whilst the Court in *Mistretta* was ultimately satisfied that the judicial contribution to the creating of rules to limit the discretion of sentencing judges did not "*enlist the resources or reputation of the Judicial Branch in either the legislative business of determining what conduct should be criminalised or the executive business of enforcing the law*", to my mind, that conclusion was informed in circumstances where not only was the Court undoubtedly satisfied to uphold the sentencing guidelines on the basis that judicial experience and expertise would inform the promulgation of rules "*for the exercise of the Judicial Branch's own business*", they were also satisfied that the involvement of the Judicial Branch was entirely voluntary and, self-evidently, did not involve the entire judiciary.

**60.** Thus, while I acknowledge that the "*paramount consideration*" for the Court in *Mistretta* in finding that public confidence in the "*disinterestedness of the Judicial Branch*" was not impaired was that the Sentencing Commission was "*devoted exclusively to the development of rules to rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch*", I also consider that the Court regarded as critical the fact that the participation of the federal judges was voluntary. The most that can be said of the present case is that only one of those two factors is present, namely the proximate alignment of the subject matter of the function imposed on the Council by s.7(2)(g) with the day-to-day business of judges.

**61.** In aid of her submission that what was done here was unprecedented, the appellant relied on a series of decisions of the Australian Courts which, she argued, are authority for

the view that there must be vigilance in relation to the delegation of powers to ensure no blurring of the necessary boundaries that require to be maintained between the exercise of judicial functions and those of other organs of government.

**62.** The Australian authorities in question were decided in the wake of a prior Australian decision, namely *R v. Kirby; Ex parte Boilermakers' Society of Australia* (“*Boilermakers' Case*”) [1956] HCA 10. The proposition established by the *Boilermakers' Case* was that it is not permissible, under the Australian Constitution, for the Parliament to confer any non-judicial power on any court established under Ch. III of the Constitution unless the power conferred is merely ancillary or incidental to the exercise of judicial power.

**63.** *Hilton v. Wells* [1986] LRC 146 (relied on by the appellant) concerned, *inter alia*, a challenge to s.20 of the Telecommunications (Interception) Act 1979 on the basis that it was enacted beyond the power of the Australian Parliament. Section 20 provided for a warrant under the section to be issued by a judge if (a) the judge was satisfied by information, on oath, that there were reasonable grounds for suspecting that the telecommunications service was being used by a person who had committed or was suspected of having committed or of being likely to commit a narcotics offence, (b) the interception being sought was likely to assist members of the Australian Federal Police in connection with inquiries being made in respect of the narcotics offence that either had been committed, was suspected of having been committed or likely to be committed. In the case, the applicant was facing a bribery charge which had been proffered against him on the basis of telephone conversations which had been intercepted and recorded by the Australian Federal Police on foot of warrants issued by two judges under s. 20 of the Telecommunications (Interception) Act 1979.

**64.** In their joint judgment, Gibbs C.J., Wilson and Dawson, JJ. proceeded on the basis that the proposition established in the *Boilermakers' Case* was correct. They went on to

hold, however, that while the Constitution of Australia did not permit Parliament to confer a non-judicial power on a court unless it was merely ancillary or incidental to the exercise of judicial power, there was no constitutional impediment preventing it from conferring non-judicial power on a particular individual who happens to be a member of a court, provided the function was not inconsistent with the essence of the judicial function and the proper discharge of the judiciary of its responsibilities as an institution exercising judicial power. They stated:

*“If the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict the proper performance of their judicial functions, the principle underlying the Boilermakers’ case would doubtless render the legislation invalid. But the exercise of the functions conferred by section 20 would not have that result. The section designates the judges as individuals particularly well qualified to fulfil the sensitive role that the section envisages, and confers on them a function which is not incompatible with their status and independence or inconsistent with the exercise of their judicial powers.”* (p. 158)

In the view of Gibbs C.J., Wilson and Dawson, JJ. therefore, s. 20 of the Telecommunications (Interception) Act 1979 did not infringe the rule laid down in the *Boilermakers’ Case*.

**65.** On the other hand, in their joint judgment in *Hilton v. Wells*, Mason and Deane JJ (dissenting) rejected the notion that functions could be entrusted to a person as a judge, but not as a member of the court to which he belongs. They cited, *inter alia*, the decision of Cardozo C.J. in *In re Richardson* (1928) 160 NE 655 speaking of the separation of powers under the Constitution of the State of New York, at p. 657:

*“From the beginnings of our history, the principle has been enforced that there is no inherent power in Executive or Legislature to charge the judiciary with*

*administrative functions except when reasonably incidental to the fulfilment of judicial duties ... The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers. Elasticity has not meant that what is at the essence of the judicial function may be destroyed.”*

**66.** Mason and Deane JJ. considered that “[i]n the United States, as in Australia, it has been recognised that non-judicial functions may be entrusted to judges personally and not in their capacity as judicial officers.” That recognition, however, was “on the footing that a duty of acceptance cannot be imposed: Re Richardson.” (emphasis added) They further stated:

*“This recognition is no doubt subject to the general qualification that what is trusted to a judge in his individual capacity is not inconsistent with the essence of the judicial function and the proper performance by the judiciary of its responsibilities for the exercise of judicial power.”* (p. 166)

**67.** According to Mason and Deane JJ., therefore, there were two necessary conditions for the carrying out of a non-judicial function, such function not being reasonably incidental to the fulfilment of judicial duties:

- (1) That there is consent by the judge.
- (2) That the function is not inconsistent with the essence of the judicial function and the proper discharge of the judiciary of its responsibilities as an institution exercising judicial power.

**68.** These dual requirements were considered in *Grollo v. Commissioner of Australian Federal Police & Ors* 131 ALR 225. The issue which arose in *Grollo* also related to the provisions of the Telecommunications (Interception) Act 1979 and the issuing of warrants

authorising the Australian Federal Police, the National Crime Authority and certain State Authorities to intercept telecommunications. Section 39 of the Act authorised an agency to apply to an “*eligible Judge*” for the issue of an interception warrant. An “*eligible Judge*” was defined in s.60 of the Act to mean a judge of the court created by the parliament who has been declared by the minister to be an eligible Judge and who has consented to be so nominated. As of the relevant time, 30 of the 35 judges of the Federal Court (excluding the Chief Justice) were eligible judges. The case stated for the Australian High Court was whether, *inter alia*, s.6(D) the Act was invalid “*as being beyond the power of the Parliament of the Commonwealth of Australia?*”

**69.** The Court (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ. (McHugh J. dissenting)) answered the question in the negative, holding: (1) the power conferred by the Act to issue interception warrants was not part of the judicial power of the Commonwealth. The issuing of a warrant could be described as a judicial act but not in the sense of an adjudication to determine the rights of parties; (2) the power to issue interception warrants was conferred on each eligible judge as a designated person; (3) the vesting of the power to issue interception warrants was not incompatible either with the judge’s performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power. Hence, the doctrine in the *Boilermakers’ Case* was not undermined.

**70.** With reference to the *Boilermakers’ Case*, *Hilton v. Wells* and US jurisprudence, the majority judgment of Brennan C.J., Deane, Dawson and Toohey JJ. articulated the basis on which a judge could assume the function provided for in the legislation under challenge, in the following terms:

“*The conditions thus expressed on the power to confer non-judicial functions on judges as designated persons are twofold: first, no non-judicial function that is not*

incidental to a judicial function can be conferred without the judge's consent; and, secondly, no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge of its responsibilities as an institution exercising judicial power (the incompatibility condition). These conditions accord with the view of the Supreme Court of the United States in *Mistretta v. United States*.” (p. 235) (emphasis added)

71. The majority also noted that in *Mistretta*, US Supreme Court did not suggest that every kind of extra-judicial service under every circumstance “*necessarily accords with the Constitution*”, nor did the decision in *Mistretta* mean that the US Congress could require a federal judge to assume extra judicial duties even if the judge was being assigned those duties as an individual and not as a judge. In so noting, they quoted the Court in *Mistretta*: “[t]he ultimate inquiry remains whether a particular extra judicial assignment undermines the integrity of the Judicial Branch”.

72. Overall, I find the requirement for consent evident in the Australian authorities just referred to (and in *Mistretta*) extremely persuasive, in light of the recognition in our own jurisprudence on the importance of the independence of the judiciary (including its institutional independence).

73. In his dissenting judgment in *Grollo*, McHugh J. took the view that “*the functions undertaken by Federal Court judges acting as persona designata in accordance with the Act are of such a nature and are exercised in such a manner that public confidence in the ability of the judges to perform their judicial functions in an independent and impartial manner is likely to be jeopardised. That being so, the power to authorise the issue of intercept warrants is incompatible with the exercise of the functions of a judge of a federal court.*” (p. 245) Notwithstanding that the Act in question gave power to the judges of a federal court as “*persona designata*”, McHugh J. (having already opined that “*the*



*appearance of independence and impartiality is as important as its existence”*), was, it seems, troubled by what he perceived as “*the legislative intention*” (by the references in the Act to “*an eligible Judge*’ or simply to ‘*a Judge*”) “*to associate the judicial status of the judge as closely as possible with the process of issuing interception warrants...*”. He feared that even “[s]ophisticated readers of the Act will readily, perhaps inevitably, fail to see the distinction which the Act draws between a federal judge and the person who holds that office”.

74. Albeit not entirely analogous to the fear expressed by McHugh J., the concern I would have in this case is that any reasonably informed member of the public viewing the events of 6 March 2021 would likely associate the judiciary as a whole with the process of effecting what was a not insubstantial change in the law, by dint of the adoption by the Council of the Guidelines.

75. I note that here, following his analysis of *Mistretta* and the Australian jurisprudence in the context of the importance of the appearance and perception of judicial independence, Collins J. (at para. 275 of his judgment) goes on to state why the appellant’s ground of objection must be rejected. I need not rehearse here the myriad factors upon which my learned colleague relies for his conclusion. Suffice it to say that, for the reasons I have already expressed, and for the reasons set out below, I cannot agree with the conclusion reached by Collins J. on “*the Judicial Independence Issue*”.

76. I also note that Collins J. reasons (as a “*crucial consideration*”) that since the assessment of general damages in personal injury cases is a judicial function, the conferring of the function of adopting personal injuries guidelines on the members of the judiciary (albeit acting in a non-judicial capacity), rather than on some other body or agency, would appear to be consistent with the preservation and protection of judicial independence as opposed to being an action undermining such independence. However,

again for the reasons already expressed, I cannot agree that the employment of this rationale meets the exigencies of this case.

77. At para. 275(7), Collins J. cites *Mistretta* in aid of the proposition that the relevant provisions of the 2019 Act are intended to “*rationalize a process that has been and will continue to be performed exclusively by the Judicial Branch*”. While that was undoubtedly a highly relevant factor for the Court’s conclusion in *Mistretta*, it must be borne in mind that that conclusion was arrived at against the backdrop of a vastly different legal landscape to the one that pertains here. As we see, in *Mistretta*, the Sentencing Commission charged with the task of formulating rules on sentencing numbered only three federal judges among its members. Thus, unlike here, the entire resources of the judiciary were not enlisted for the purpose of the task in hand. Moreover, the three judges on the Sentencing Commission had consented to being part of that process. Here, the position is different. Pursuant to s. 7(2)(g) of the 2019 Act, the entire judiciary (albeit *qua* Council and not as individual judges) has been co-opted by statute to adopt the Guidelines, a heretofore unprecedented step in Irish legal history.

78. Collins J. also considers of relevance the fact that beyond identifying the factors to be taken into account in s.90 of the 2019 Act, the Oireachtas has left it entirely to the Committee, the Board and the Council to assess the s.90 factors and to determine the contents of the guidelines. I accept that that is the case, and I accept that the absence in the 2019 Act for legislative supervision or review of the guidelines once adopted is a relevant factor in assessing whether the institutional independence of the judiciary has been impaired. However, in my view, the absence of supervision or oversight by the legislature does not cancel out the shadow cast by s.7(2)(g) over the institutional independence of the judiciary.

**79.** While I accept entirely that the Oireachtas has from time to time legislated to impose non-judicial duties on individual judges, particularly on the Chief Justice and the Presidents of the other courts, and that the imposition of non-judicial duties such as requesting a judge to chair a Tribunal of Inquiry has withstood legal challenge as to its constitutionality (*Haughey v. Moriarty* [1999] 3 I.R. 1), in my opinion, what was legislated for here cannot be compared to the participation of judges in committees such as the Rules Committee, or to their participation in Tribunals of Inquiry (the latter which is always voluntary).

**80.** In my view, it is no answer that there is no requirement placed on individual judges in the 2019 Act to participate in the adoption of personal injuries guidelines, or that the voting is by secret ballot and that, accordingly, individual judges cannot be identified as having voted either in favour or against the Guidelines. That is not the critical issue here. The critical issue is the mandatory nature of s.7(2)(g) and the fact that the entire judiciary (albeit *qua* Council) is being vested with the task of adopting personal injuries guidelines that change the legal landscape as far as the assessment of general damages for personal injuries is concerned.

**81.** In considering the issue in hand, I have taken account of the argument that it is better that the judges themselves formulate the personal injuries guidelines rather than leave it to others who would not be familiar with the day-to-day business of the assessment of general damages in personal injuries actions. To my mind, however, it is no answer to the constitutional dilemma that I consider presents here to say that the function ascribed to the Council under s.7(2)(g) of the 2019 Act, and upon which the Council voted on 6 March 2021, is very closely related to the exercise of assessing damages for personal injuries, which, admittedly, is a judicial function. This rationale is, I repeat, overshadowed by the

fact that the Guidelines were adopted by the effective “*conscriptio*” of the entire judiciary for the task of effecting a change to the substantive law.

**82.** Furthermore, in my view, reliance on the close alignment factor presupposes that if the adoption of the Guidelines was not done in the manner prescribed for in the 2019 Act, then somehow the opportunity for involvement or oversight by the judiciary in preparing of personal injuries guidelines would be lost. That would not of course be the case as there are ways, which I will shortly explain, for the judiciary to be centrally involved in the formulation of personal injuries guidelines, short of the judges themselves being mandated by statute to adopt or promulgate such guidelines, as occurred here.

**83.** Lest there be any doubt, I entirely agree that the expertise and experience of judges should intrinsically inform the formulation of personal injuries guidelines. Judges are the persons who are best placed to impart the benefits of their collective expertise and experience accumulated as these benefits have been by each individual judge’s carrying out of the day-to-day business of the administration of justice.

**84.** For clarity, I wish to say that I perceive no difficulty had the Oireachtas (without more) simply made provision for the establishment of an independent body comprising *representative* members of the judiciary, who would serve on the body on a *consensual* basis, for the purpose of such body formulating recommendations (including draft guidelines on the assessment of general damages for personal injuries). In the above scenario, the body or commission (or whatever it would be called) would be left to its own devices to produce personal injuries guidelines (advisory in nature) for presentation to the judiciary, with the judiciary then to adopt or reject such guidelines as they saw fit, absent of course any element of compellability.

**85.** If it were provided in any such legislation that guidelines as drafted by the body or commission referred to at para. 84 above were to have normative effect, it follows that any

recommended guidelines would then have to be put to the Houses of the Oireachtas for the purposes of debate and enactment.

**86.** In my view, had either, or both, of the scenarios described above been provided for in the 2019 Act, this would have ensured that the requisite boundary between the respective functions of the judiciary and the legislature was preserved and protected. Furthermore, either or both would have ensured the “*disinterestedness*” of the judiciary in matters of public policy and public debate. To that extent, therefore, I consider, *in principle*, that had the issue that arises in this case been based on either of the above scenarios, the involvement of the judicial and legislative branches of government in formulating and promulgating personal injuries guidelines would not impair judicial independence. But I repeat, this is not what occurred here.

**87.** In summary, the fundamental difficulty here is the imposition on the *entire* judiciary, pursuant to s.7(2)(g) of the 2019 Act, of the responsibility of promulgating personal injuries guidelines that have normative effect. Such imposition has led to an impermissible blurring of the boundary that ought constitutionally to be, and to be seen to be, extant as between the judiciary and the legislature. The blurring that has occurred has clearly impaired the institutional independence of the judiciary such that, in my view, s.7(2)(g) of the 2019 Act, as it presently stands, is unconstitutional.

**88.** I should add, in respect of the scenarios I refer to at paras. 84 and 85, that, of course, it goes without saying that any legislation passed by the Oireachtas providing for the first scenario, and/or providing for the enacting personal injuries guidelines under the second scenario, would (just like the present case) be open to challenge in the courts if it was considered that any aspect of the legislation offended against the provisions of the Constitution or was otherwise perceived to be legally infirm.

**Were the Guidelines validated or confirmed by the enactment of the 2021 Act? (“the Confirmation Issue”)**

89. It is undoubtedly the case that after the Council adopted the Guidelines on 6 March 2021, there was legislative intervention by way of the 2021 Act. The relevant provisions of that Act have been referred to earlier in this judgment. In March 2024, the Court, of its own motion, raised with the parties the question whether, in enacting sections 30 and 31 of the 2021 Act there was “...*thereby an effective post-hoc ratification or confirmation, by the Oireachtas, of the personal injuries guidelines which had previously been adopted by the Judicial Council on 6 March 2021?*”. In other words, could it be said that there was subsequent parliamentary confirmation of the Guidelines as adopted by the Council on 6 March 2021 such as to give them statutory effect, thus curing the unconstitutionality otherwise attaching to those Guidelines?

90. The response of the State parties to the Court’s question was that there has been such *post hoc* ratification. Unsurprisingly, the preliminary response of the appellant was that the State was effectively precluded from making any such case not having asserted in their Statement of Grounds of Opposition that there was any question of *post hoc* legislative ratification or confirmation of the Guidelines, a position, the appellant says, which was also reflected in the State’s written submissions. Relying on *A.P. v. the DPP* [2011] 1 IR 729 and *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42, the appellant’s position was that in those circumstances “*there was no ‘live controversy’ between the parties as to whether the personal injuries guidelines were validated on account of post-hoc intervention by the Oireachtas*”. More emphatically, the appellant points to a question posed by the Court on Day 2 of the original hearing and the response thereto by counsel for the State (p. 62 of the transcript):

*“...I mean there’s no formal act of democratic legitimacy in respect of the Guidelines as such. Subject to the PIAB point which we’ve dealt with, but so far as litigation in courts is concerned, the Guidelines take effect without any democratic approval of them?”*

*Mr. McCullough: Sure...you’re correct...I do of course agree, I have to agree that the Guidelines once made are not returned before the legislative body.”*

**91.** As to the question of whether the appellant’s preliminary objection should hold sway, I have had the benefit of reading in draft the judgment of Hogan J. on this issue and I agree with him that the issue is too important to be determined by the scope of the pleadings or indeed, as he puts it, *“the run of the argument before this Court during the original hearing.”* Any unfairness in the Court now turning its mind to whether the Guidelines have been given *post hoc* statutory effect has been addressed by the opportunity afforded to the parties to make submissions on the issue.

**92.** For the reasons he sets out, I also agree with Hogan J. that, based on *Crilly v. Farrington* [2001] 3 IR 251, the State are not entitled to invite the Court, when addressing the question of *post hoc* affirmation, to have regard to Dail Debates. As Hogan J. puts it, *“the meaning of legislation is to be determined by the actual words used by the Oireachtas”*.

**93.** I turn now to the question of whether the 2001 Act had in fact the effect of confirming the Guidelines by giving them force of law. Albeit not without some reservation on my part, I agree with Hogan J., for the reasons he sets out at paras. 71-81 of his judgment, that the effect of the 2021 Act 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...”* (para. 81).

94. Undoubtedly, as Hogan J. says, the Oireachtas has not enacted the Guidelines with the “*pellucid clarity*” (Hogan J.’s words) which the Supreme Court considered was evident in the legal instruments at issue in *McDaid v. Sheehy* [1991] 1 IR 1 and *Leontjava v. DPP* [2004] 1 IR 591. And while I have a great deal of sympathy with Ms. Delaney’s argument that the 2021 Act does not refer in any way to the *content* of the Guidelines, or the processes adopted by the Council, it remains however the case that the Oireachtas *did* legislate in the wake of the adoption by the Council of the Guidelines, and in doing so used language which expressly obligated the courts and PIAB to have regard to the Guidelines. As Keane C.J. stated in *Leontjava*, “[i]t cannot be assumed that, because the incorporated provision is not set out in the text of the Act proper, it was not the subject of the appropriate degree of legislative scrutiny before it was passed”. (p. 637) I have earlier observed in this judgment that in bringing into force on 24 April 2021 guidelines as adopted by the Council on 6 March 2021, the Oireachtas must be taken to have done so in the knowledge that the presumptive starting point for a court assessing damages in a personal injuries action would be the damages specified in the *Guidelines* attributable to the relevant injury described in those Guidelines. In my view, this presumed knowledge must be a relevant factor in considering whether it can be said that in enacting the relevant provisions of the 2021 Act the legislative branch has confirmed the Guidelines. Albeit the requisite confirmation is not expressly alluded to in the legislation, I consider that the 2021 Act requires to be construed as having implicitly affirmed the Guidelines the Council had adopted on 6 March 2021.

95. As Hogan J. says, the fact that the Oireachtas did legislate post the Council’s adoption of the Guidelines must mean something, even if it is the case that giving statutory effect to the Guidelines themselves has only been achieved “*impliedly and indirectly*” (para. 76). I am especially persuaded by Hogan J.’s observation (at para. 77) that “[a]ny



*other conclusion would mean, in effect, that although the guidelines of 6<sup>th</sup> March 2021 had received the (implied) endorsement of post-hoc legislation enacted by the Oireachtas and thereby had been clothed with the mantle of legitimacy, this was all a fruitless endeavour for want of the use of appropriate and express statutory language*". This to me is sufficient reason to endorse Hogan J.'s conclusion that *post hoc* statutory confirmation of the Guidelines has been achieved. If it can be deduced (as I believe it can for the reasons Hogan J. says) that a legislative "*carapace*" (and here I am borrowing terminology used Mr. McDonagh SC in a different context) has been given to the Guidelines, then the doctrine of separation of powers makes it imperative that the indirect confirmatory process which has been engaged in *via* the 2021 Act in relation to the Guidelines is respected even if the process of conferring democratic legitimacy on the Guidelines has been less than ideal.

96. The Guidelines once confirmed by the Oireachtas have legislative status. I agree with Hogan J. that this has the consequence that the Guidelines cannot therefore be changed save by a further Act of the Oireachtas. I am likewise persuaded by the observation he makes (at para. 80) in relation to s.100 of the 2019 Act (as amended). I should also add at this juncture, for clarity, that the confirmation by the Oireachtas of the Guidelines does not of course cure the unconstitutionality inherent in s.7(2)(g) of the 2019 Act, purporting as s.7(2)(g) does to confer legal effect on *any* guidelines adopted by the Council.

**The consequences for Ms. Delaney of legislative approval having been given to the Guidelines ("*the Personal Rights Issue*")**

97. The Oireachtas having given (albeit indirectly) statutory effect to the Guidelines, it follows that PIAB was obliged to treat them as legally binding as and from the date of their entry into force on 24 April 2024. That being the case, the question which now arises is where Ms. Delaney's case fits in this legal regime. It will be recalled that PIAB assessed

Ms. Delaney's application on 13 May 2021, some three weeks or so after the commencement of the by now statutory Guidelines. The assessment issued on 14 May 2021.

**98.** Hogan J. deals with this issue under the heading "*Should the guidelines have been applied retrospectively to Ms. Delaney's case?*". Having had the benefit of reading in draft his analysis and conclusions on this issue (at paras. 82-113), for the reasons he sets out, I agree with Hogan J.'s conclusion that s.22(1A)(b) of the 2004 Act amounts to "*an unconstitutional failure*" (para. 111) to vindicate Ms. Delaney's property right to sue in respect of a justiciable wrong, contrary to Article 40.3.2 when read in conjunction with the guarantee of equality before the law as provided for in Article 40.1. The nub of Hogan J.'s conclusion is the principle, enunciated in *Hamilton v. Hamilton* [1982] IR 466, that "*retrospective legislation, since it necessarily affects vested rights, has always been regarded as being prima facie unjust*" (per O'Higgins C.J. at p. 474). With this core principle in mind, Hogan J.'s observations at para. 91 of his judgment are particularly apt, especially his "*key point*", namely that the Oireachtas enacted the 2001 Act on 27 March 2021 (commenced on 24 April 2021) in a manner which adversely affects Ms. Delaney's pending claim by requiring her claim to be assessed by that new law.

**99.** In my view, it is no answer to what was lost to Ms. Delaney to argue that she still has her right of access to the courts for the purposes of litigating her claim for damages for personal injury. Nor is it sufficient to say that Ms. Delaney does not have a constitutional right to a particular level of general damages. While I do not gainsay either of those propositions, they are not, in my view, the salient considerations given the particular context of this case. The fact of the matter is that it was incumbent on Ms. Delaney, before she could ever process a claim before the courts, to make her application to PIAB. The

provisions of Part 2, Chapter 1 of the 2003 Act make this crystal clear. Ms. Delaney made the requisite application on 29 May 2019.

**100.** At the time her application was lodged, PIAB was statutorily obliged, pursuant to s.20(4) of the 2003 Act (as it then stood), to assess her claim by reference to the same principles governing the assessment of damages as would be applied by a court, with regard also to be had by PIAB to the Book of Quantum as prepared by PIAB pursuant to s.54(1)(b) of the 2003 Act. Ms. Delaney remained within the PIAB process at all relevant times. Thus, on the premise that Ms. Delaney was already within the statutory process (the 2003 Act) that she was required to initiate before she could ever initiate a claim before the courts, I agree with Hogan J. that “*her claim might as well...have been pending before a court*” such that the principle enunciated in *Hamilton* against retrospectivity ought properly to apply in this case, in my view. Anything less would signify a stultification (in the sense considered by Henchy J. in *Hamilton*, at pp.482-483) or impairment (see O’Higgins C.J. at p. 474 of *Hamilton*) of Ms. Delaney’s constitutionally protected right to pursue her already initiated (and by this, I mean her statutory obligation to go through PIAB before she could ever access the courts) claim for damages for personal injuries.

### **Summary**

**101.** For the reasons set out in this judgment, I would:

- (i) Allow the appellant’s appeal on “*the Judicial Independence Issue*” and, thus, grant a declaration that s.7(2)(g) of the 2019 Act (in its present form) is invalid having regard to the provisions of Articles 6, 15.2, 34 and 35 of the Constitution.
- (ii) Grant a declaration to the effect that the unconstitutionality of s.7(2)(g) *vis a vis* the Guidelines adopted on 6 March 2021 was cured by the enactment and subsequent entry into force of the 2021 Act.

- (iii) Grant a declaration that the provisions of s.22(1A)(b) of the 2004 Act (as substituted by s.30 of the 2021 Act) are unconstitutional insofar as they require a court (and by extension, PIAB) to apply the Guidelines to Ms. Delaney's pending claim.
- (iv) Quash the decision of PIAB of 14 May 2021, with an order remitting Ms. Delaney's application to PIAB for a fresh assessment of her claim by reference to the pre-2021 Act law and the Book of Quantum.